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Court File No.: _____

OTTAWA, ONT.

#3

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34 (the “**Act**”);

AND IN THE MATTER OF an application by 8X Labs Inc. for an order pursuant to Section 103.1 of the Act granting leave to bring an application under Sections 75, 76, 77 and 79 of the Act.

AND IN THE MATTER OF an application by 8X Labs Inc. for one or more orders pursuant to ss. 75, 76, 77 and 79 of the Act.

BETWEEN:

8X LABS INC.

Applicant

-and-

VISTAR MEDIA INC.

Respondent

BOOK OF AUTHORITIES OF THE APPLICANT,

8X LABS INC.

Dated at Montreal this 27th day of November, 2025

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TAB 1

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF certain conduct of Google Canada Corporation and Google LLC relating to the supply of online advertising technology services in Canada;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

NOTICE OF APPLICATION

TAKE NOTICE that the Applicant, the Commissioner of Competition (the “**Commissioner**”), will make an application to the Competition Tribunal (the “**Tribunal**”) pursuant to section 79 of the *Competition Act* (the “**Act**”) for an order pursuant to subsection 79 of the Act for:

- a) an order pursuant to subsections 79(1), 79(2) and 79(3.1) of the Act:
 - a. requiring Google Canada Corporation and Google LLC (collectively, “**Google**”) to divest Google’s publisher ad server, DFP, and Google’s ad exchange, AdX, along with any additional structural relief as needed to restore competition and overcome the effects of Google’s anti-competitive practice in Canada;
 - b. otherwise, prohibiting Google from continuing to engage in the anti-competitive practice described herein and from engaging in any other practices with the same purpose and effect in Canada; and
 - c. directing Google to pay an administrative monetary penalty equal to three times the value of the benefit derived from Google’s anti-competitive practice, or if that amount cannot be reasonably determined, 3% of Google’s worldwide gross revenues;
- b) directing Google to pay costs; and
- c) such other relief as the Tribunal may consider appropriate.

AND TAKE NOTICE that the timing and place of hearing of this matter shall be fixed in accordance with the practice of the Tribunal;

AND TAKE FURTHER NOTICE that the Applicant has attached hereto as Schedule “A” a concise statement of the economic theory of the case.

THE ADDRESSES FOR SERVICE ARE:

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Department of Justice Canada
Competition Bureau Legal Services (CBLS)
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Donald Houston
John Syme
Ian Clarke
Katherine Rydel
Adam Rossiter

The Applicant proposes that the hearing of this matter be held in Ottawa, Ontario and that it be heard in English and French.

STATEMENT OF GROUNDS AND MATERIAL FACTS

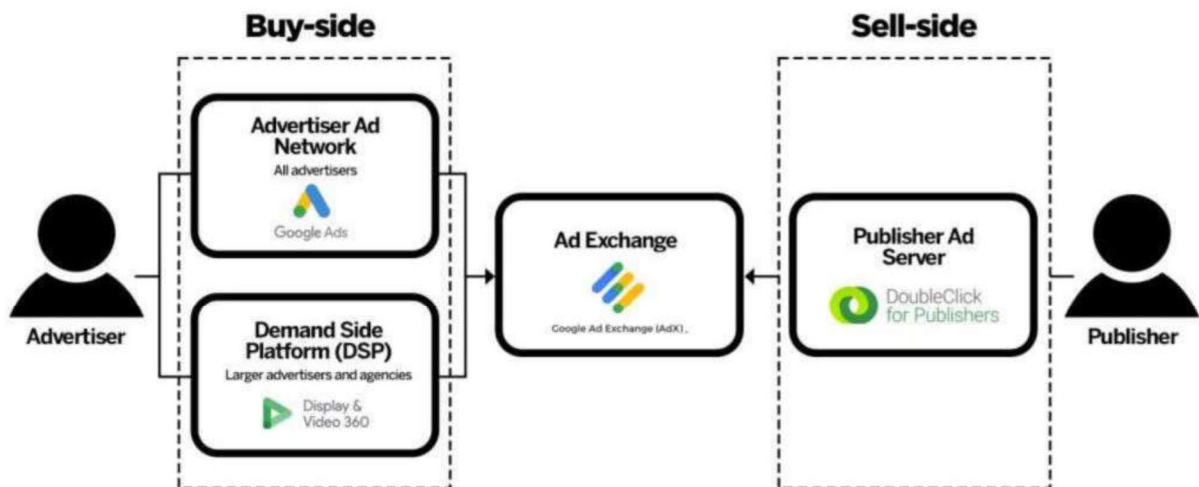
I. OVERVIEW

1. Google claims its mission is “to organize the world’s information and make it universally accessible and useful.” Previously, it embraced an even simpler ethos: “Don’t be evil.” But the choices Google has made in building its digital advertising technology business reveal a more self-serving agenda. Through a series of calculated decisions, taken over the course of multiple years, Google has excluded competitors and entrenched itself at the center of online advertising — establishing and reinforcing its dominance by controlling the main tools used both by online publishers who sell digital ad space and advertisers who buy it (“**ad tech**”).
2. The Commissioner brings this application for an order that will restore competition in Canada, wresting away from Google some of the pervasive market power that it has used to improperly funnel transactions through its own ad tech products and thereby subvert rivals’ ability to gain scale and otherwise compete with Google’s products. Specifically, the Commissioner seeks an order from the Tribunal requiring Google to divest its publisher ad server and ad exchange (along with any additional structural relief needed to remedy the anti-competitive harm) and an administrative monetary penalty. The Commissioner asserts that this order is minimally necessary to restore competition and to promote Google’s conformity with the law in the future.
3. Over the past decade, publishers have increasingly relied on digital ad revenue to support their publications. The viability of virtually all online publishers, big and small, rests in their ability to monetize their content. To help drive this revenue stream, many publishers create and design their websites with dedicated space set aside where ads can be placed. The ads in these spaces can take different forms, but one common and distinct type is “**web**” ads — which

refers to the ads that appear above, alongside or beneath the content on a publisher’s webpage.

4. Unlike print, radio, and television advertising, where the purchase and sale of advertising space can be a tedious, manual process, web ad inventory is increasingly bought and sold “**programmatically**” in enormous volumes and at near instantaneous speeds through a series of automated auctions involving sophisticated software platforms (informally “**ad tech tools**”), collectively referred to as the “**ad tech stack.**”

5. At a high-level, the ad tech stack is generally understood to be comprised of sell-side tools (i.e., “**publisher ad servers**”), used by publishers to manage their ad inventory and online advertising sales; buy-side tools (i.e., “**advertiser ad networks**” and “**demand-side platforms**”), used by advertisers to buy available ad space; and the tools that serve as the intermediary between the sell- and buy-side tools (i.e., “**ad exchanges**”), allowing publisher ad servers to offer available ad space and advertiser ad networks and demand-side platforms (“**DSPs**”) to bid on that inventory through automated auctions.



6. Google is the largest provider of ad tech tools across the ad tech stack for web advertising in Canada, having positioned its products to be the “go to” tools used by both publishers and advertisers alike. Google is dominant in the publisher ad server and advertiser ad network markets in Canada. In the publisher ad server market, measured by web impressions transacted, Google’s DoubleClick for Publishers (“**DFP**”)¹ holds an over 90% market share. In the advertiser ad network market, Google Ads² commands an over 70% share. Google is also the largest provider of DSP and ad exchange services in Canada. In the DSP market, Google’s Display & Video 360 (“**DV360**”)³ commands an over 60% share. In the ad exchange market, Google’s AdX is the largest ad exchange with a market share of over 50% (the closest competing ad exchange has a 6% market share). No other single ad tech provider has Google’s scale or reach across the ad tech stack, with over 200 billion Canadian web ad transactions flowing through its ad tech tools in 2022.

7. Google’s near-total control of the ad tech stack is a function of premeditated design and conduct, rather than superior competitive performance or happenstance. Through a series of interrelated and interdependent actions, which have had cumulative and synergistic anti-competitive effects, Google has unlawfully tied together its different ad tech products, hamstrung rivals’ ability to compete on the merits, and purposely restrained and deprecated innovative technologies that stood to threaten its market power. In particular, Google has:
 - a) made its advertiser ad network’s unique, must-have advertiser demand (originating from its pre-existing relationship with advertisers that purchase search advertising) available only to its own ad exchange, and in turn, compelled publishers to use its publisher ad server in order to access that demand by means of real-

¹ Also sometimes referred to as “**DRX**”.

² Also sometimes referred to as Google Display Network “**GDN**”, Google Content Network “**GCN**” or AdWords.

³ Also sometimes referred to as DoubleClick Bid Manager or “**DBM**”.

time bids from its ad exchange. Put differently, Google has tied its different ad tech products (i.e., Google Ads, AdX, and DFP) together to increase and maintain its market dominance; and

- b) used its dominant position across the ad tech stack to distort auction dynamics by (i) giving its own ad exchange preferential access to valuable ad inventory, (ii) taking negative margins to win more transactions, and (iii) dictating the terms on which its own publisher-customers could transact with rival ad exchanges.

8. By implementing these anti-competitive policies and practices, Google has been able to maintain, entrench and increase its market power by raising barriers to entry and expansion, suppressing innovation and excluding rivals, thus insulating itself from competition. Google's conduct has had serious consequences for publishers and advertisers — manifesting in a substantial prevention and lessening of competition, the magnitude, duration and scope of which is compounded by the economies of scale and network effects endemic to digital platforms. But for Google's conduct, publishers and advertisers would have benefitted from greater choice, more innovation and lower prices.
9. The Commissioner brings this application to put a decisive end to Google's structural dominance and anti-competitive practice, restore competition to important digital advertising markets, and safeguard against further harm to competition in the future. Absent an order from this Tribunal, Google will continue to engage in the anti-competitive practice and conduct that has facilitated its exercise of new or increased market power and preserved its existing market power. Google will thus be able to continue, unchecked, to reduce the rivalry between it and those competitors who remain in the relevant markets, as well as prevent new competition from materializing. Competition in the markets in question will continue to be substantially lessened and prevented, thereby raising costs, reducing choice, and stifling innovation, to the detriment of publishers, advertisers and Canadians more generally.

II. MATERIAL FACTS

A. THE PARTIES

10. The Commissioner is an officer appointed by the Governor in Council under section 7 of the Act and is responsible for the administration and enforcement of the Act.
11. Google LLC is a multinational limited liability company incorporated under the laws of the State of Delaware. It is a wholly owned subsidiary of Alphabet Inc., a publicly traded company also incorporated under the laws of the State of Delaware. Google LLC has a Canadian subsidiary, Google Canada Corporation, which is incorporated in the province of Nova Scotia and facilitates its business in Canada.
12. Google offers various internet-related services and products, including services and products used by online publishers and advertisers to buy and sell digital ads (i.e., ad tech tools). Google's offerings of ad tech tools are remarkably extensive, encompassing a range of software platforms that extend beyond the immediate focus of this application (e.g., Google AdMob, Google AdSense, and Google Marketing Platform).
13. This application focuses on three of Google's ad tech tools: its publisher ad server, DFP; its advertiser ad network, Google Ads; and its ad exchange, AdX. Taken together, these ad tech tools are essential elements of the ad tech stack and are tools that publishers and advertisers use to buy and sell web ads, described below, and the exchange on which the ads trade. Google markets these tools in Canada, North America, and globally.
14. In 2023, Google reported \$307.4 billion USD in revenue, \$31.3 billion USD of which was derived from its ad tech tools' revenue, which include DFP, Google Ads and AdX.

B. INDUSTRY BACKGROUND

15. This application addresses Google’s conduct that has harmed (and continues to harm) competition in the markets for ad tech tools used to programmatically buy and sell web ads through open channels (or “open web ads”). This section provides important background information to assist in understanding how Google’s actions over the years have adversely affected competition. In particular, this section introduces several key concepts, including the differences between web ads and other forms of digital advertising; the contrast between advertising sold through closed channels and open channels; and the difference between buying and selling ads *via* direct deals versus programmatically.
16. For additional context, this section also provides a description of the three ad tech tools that are at issue in this application (i.e., publisher ad servers, ad exchanges and advertiser ad networks), with reference to the products offered by Google and its rivals, and describes how the sale of web ads has changed over time.

1. What is digital advertising?

17. As consumers have shifted their attention from traditional to digital media, advertisers have responded by increasing their budgets for digital advertising. Beyond simply following their audience, advertisers embracing digital advertising have learned of its unique benefits. These benefits include more immediate engagement with consumers (e.g., allowing users to click on an ad and be redirected to the advertiser’s website), highly specific audience targeting, and enhanced tracking that allows for quick adjustments based on real-time campaign performance. For most advertisers, digital advertising has become an essential part of any ad campaign, complementary to their non-digital or offline efforts.

18. For online publishers, digital advertising serves a different (albeit no less important) role. Like traditional publishers, online publishers can monetize their content by displaying ads to their audiences. For many online publishers, digital advertising represents a vital source of revenue for sustaining their operations and providing valuable content to their users. In some instances, it can be the difference between consumers being able to access freely available content and content locked behind paywalls.

a) *There are different types of digital ads*

19. Digital ads can be broadly categorized into the following main types:⁴

- a) **Search ads:** are ads that are shown alongside search results from a user query using a general or specialized search engine;
- b) **Web ads:** are ads that appear above, alongside or beneath the content of a webpage;
- c) **In-stream video ads:** are video ads that play before or during online video content;
- d) **In-app ads:** are ads that appear within a mobile app; and
- e) **Social ads:** are ads that appear within a user’s social media feed.

20. Each type of ad is meaningfully distinct from the others, from both the perspective of a publisher and advertiser. For publishers, the distinction can be as simple as the ad space being offered for sale based on the type of online content they produce. For example, a search engine (e.g., Google) can sell search ads linked to a certain word or phrase to appear as “sponsored” links at the top or side of search results; a publisher of online videos (e.g., a content creator on YouTube) can sell in-stream video ad space to play before, during, or after their online video content; an app developer (e.g., a gaming app like

⁴ Ads that are not linked to a search are commonly referred to as “display ads”.

Candy Crush) can sell in-app ad space to appear within their mobile app; a social media platform (e.g., Meta) can sell social ad space to appear within a user's social media feed; and a website publisher (e.g., a news publisher like the Toronto Star) can sell web ad space to appear alongside the content on its website.

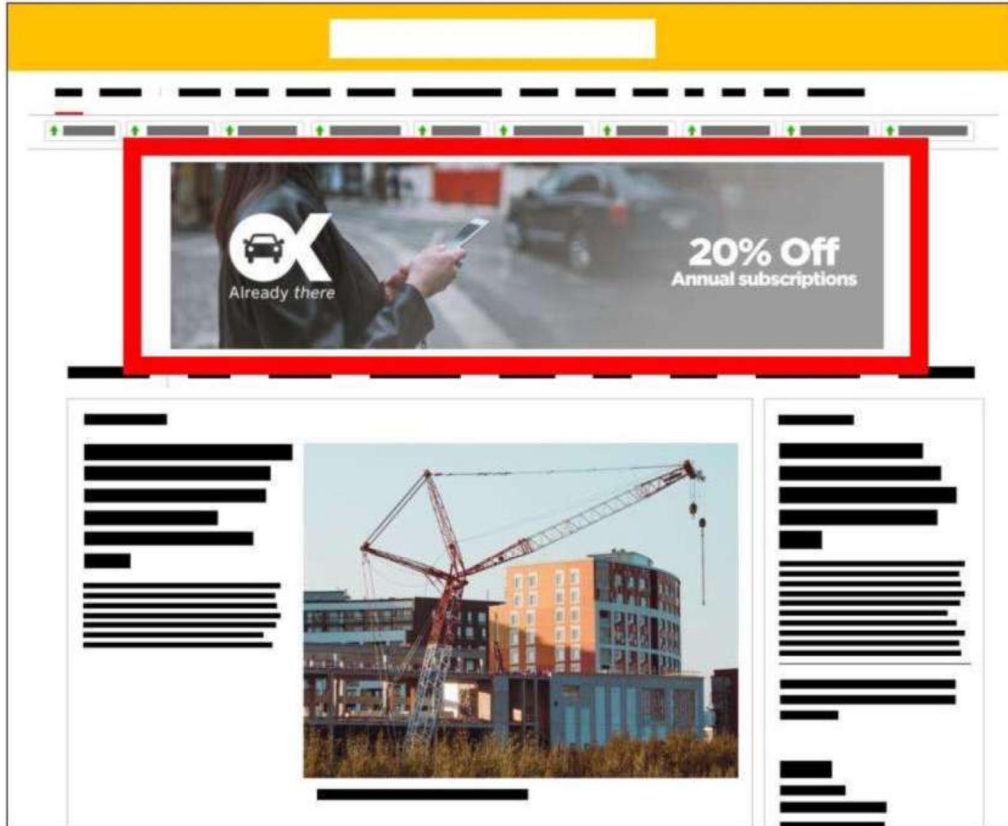
21. For advertisers, the distinction might be owing to a myriad of reasons: e.g., the goals of their ad campaign, their target demographics, budget considerations, desired return on investment, key performance indicators, creative assets (i.e., the media elements of the ad), and the availability of specific ad tech tools.
22. Where they can, online advertisers typically run digital ad campaigns that incorporate a diverse array of digital ad formats. This allows them to leverage the strengths of each ad type, reach a broader audience, enhance brand engagement, and fulfill a broader variety of campaign objectives. In fact, for most advertisers, each of the different ad types are often considered to be important complements to their overall marketing strategies and are therefore often used together as part of a holistic effort to maximize advertising performance.

b) Our focus is on “web” ads

23. Web ads are ads that internet users see when they visit a website. This subset of ads is comprised of banner ads (image or text-based ads appearing at the top, bottom, and down the sides of webpages) and outstream video ads (video ads shown outside a traditional video player, such as in a popup or embedded within a banner ad of an online article) shown on websites.⁵
24. Web ads, which often come in a set of predetermined formats and sizes, are distinguishable from other types of digital ads by the unique features of the associated creative assets and placement strategies. For example, web ads are

⁵ Outstream ads are not embedded in other video content like in-stream video ads (e.g. an ad which plays on YouTube before or in the middle of a YouTube video).

typically recognizable by virtue of their eye-catching visuals, placements in high-visibility areas, and standardized sizing. An example of a web ad as it would appear to a reader of an online publication is included below:



25. An advertiser might choose web ads as part of their marketing campaign as a complement to other digital ad formats for several reasons. The characteristics of web ads make them particularly good for raising brand awareness, increasing reach (i.e., the number of people who see the ad) and getting user engagement (*via* clickable links). Web ads often accomplish this at a lower cost than other types of digital ads and are more amenable to integration or placement across multiple websites.
26. Google and other market participants, including publishers and advertisers, track the sale of web ads as a distinct inventory category in the ordinary course. The underlying technological requirements for serving web ads are distinct from other types of digital advertising, as is the competitive landscape for the

provision of ad tech tools. For example, unlike web ads, in-app ads are often served using what are known as software develop kits (“**SDKs**”), and Google (Google AdMob) and other market participants offer tools specifically designed to sell in-apps ads.

2. *Marketing channels for web advertising*

a) *Our focus is on web ads traded through open channels*

27. The way advertisers buy digital ad space depends on how a publisher chooses to sell its inventory: through closed channels or open channels.
28. “Closed channel” publishers, often referred to as “walled gardens”, are so-called because advertising on their properties is sold directly to advertisers through their own systems. Typically, advertising inventory on large social media platforms (e.g., Meta, LinkedIn, and TikTok) can only be bought and sold through their own integrated, internally supplied advertising software. These tools cannot be used to buy or sell advertising on any other publisher’s platform or website.
29. In contrast, “open channel” publishers monetize their ad inventory through third-party ad tech tools — i.e., software they do not own themselves. This model, which most online publishers use, allows publishers to avoid developing their own tools or otherwise arduously managing their ad inventory, which for all but the largest publishers would be impractical. For advertisers, buying ad inventory through open channels affords a diverse range of ad space across various websites, and is therefore an important source of ad inventory for campaign strategies not tied to a single website or platform (e.g., ad campaigns that extend beyond the walls of Facebook).

b) Our focus is on open web ads traded programmatically

30. Publishers and advertisers have two primary options for buying and selling digital ad inventory: direct deals and programmatic trading. Direct deals involve negotiating agreements directly for the purchase of ad inventory on the publishers' websites. These agreements typically cover key elements such as campaign start and end dates, ad types, frequency, rates, and fees. Direct deals are typically more resource intensive for both advertisers and publishers in that they require, among other things, sales teams and administrative support. Direct deals are more commonly used for large volumes of inventory, making them suitable for publishers of websites that have large audiences, a particular brand image, or that attract an audience specifically targeted by advertisers.
31. Almost no publisher (big or small) can practicably sell their entire ad inventory *via* pre-negotiated direct deals. Remaining inventory (i.e., ad space not allocated to an advertiser by way of a direct deal) is usually bought and sold indirectly — through a set of automated processes designed to buy and sell ad inventory on an impression-by-impression basis. Indirect transactions happen during the split seconds when a user loads a website and typically occur through high-speed auctions (known as “programmatic” trading) facilitated by ad tech tools.
32. While most programmatic ad sales take place in an auction setting, some transactions are the result of ad tech tools automating the terms of negotiated direct deals. Referred to as programmatic guaranteed sales, this manner of buying and selling ads allows advertisers to maintain greater control and more effectively target specific audiences, while publishers benefit from filling premium inventory at negotiated prices.

3. *The ad tech tools used to buy and sell open web ads programmatically*

a) *Publisher ad servers*

33. Web publishers wanting to monetize their websites use software known as a “publisher ad server” to manage and track the sale of their ad inventory across different demand sources (e.g., ad exchanges) and transaction types (e.g., direct and indirect deals). Publisher ad servers connect publishers to the broader ad tech stack and most importantly make real-time decisions about what ads to show on their websites. From the publisher perspective, a publisher ad server would typically allow the publisher to set rules, including regarding what ad will be served on its site, as well as regarding through which exchanges (i.e., marketplaces) their ad space would be offered for sale.
34. In addition to their core function (managing ad inventory in real-time), publisher ad servers offer valuable monitoring and reporting features to help publishers track their monetization performance through metrics such as impressions, clicks, and payout rates.
35. Most publishers opt to use a single publisher ad server to manage their web inventory (referred to as “single homing”). This, in part, simplifies the sale (and coordination) of inventory across multiple websites and demand sources, reduces training time for sales teams, and lessens the technical and resource-intensive integration demands associated with publisher ad servers.
36. Switching between publisher ad servers is time-consuming and burdensome. This is for several reasons, including the technical complexity of integrating a new publisher ad server with a publisher’s webpages and back-end billing systems; the financial implications of migration (including potential downtime and new software licenses); the need to invest in training of staff on new software; and, challenges in transferring historical data and ensuring continuity in reporting. Internally, Google describes publisher ad servers as “sticky”.

37. Publisher ad servers for programmatic open web advertising in Canada include Google’s DFP, Equativ, Monetize (Microsoft) and Kevel. As of 2022, Google’s market share of the publisher ad server market exceeded 90% of web impressions for Canadian publishers.

b) Advertiser buying tools

38. Advertisers wanting to buy web ad inventory from publishers programmatically use software products known as advertiser ad networks, or products known as DSPs. Both tools can be used by advertisers to transact in the ad tech stack and buy ads programmatically in “real-time” (i.e., per impression). That said, there are important differences between advertiser ad networks and DSPs.
39. Advertiser ad networks typically offer a more automated (less complex) ad buying experience for advertisers who either lack the technical proficiency or resources to utilize more complex tools (i.e., DSPs) or simply want a more “hands-off” solution. Smaller advertisers tend to use advertiser ad networks exclusively.
40. Some larger advertisers might also (or alternatively) use enterprise buying tools known as DSPs. Compared to the self-serve advertiser ad networks used by smaller advertisers, DSPs provide advertisers with a wider array of user targeting options (i.e., technically advanced and highly customizable features) that can require significant technical expertise to manage effectively. Unlike advertiser ad networks, DSPs often require advertisers to commit to a minimum monthly spend.
41. Examples of advertiser ad networks for programmatic open web advertising include Google Ads and Criteo, and examples of DSPs for programmatic open web advertising include Google’s DV360 and The Trade Desk. In 2022, based on web impressions shown to Canadian users, Google Ads’ share of the advertiser ad network market was at least 70% and DV360’s share of the DSP market was 60%.

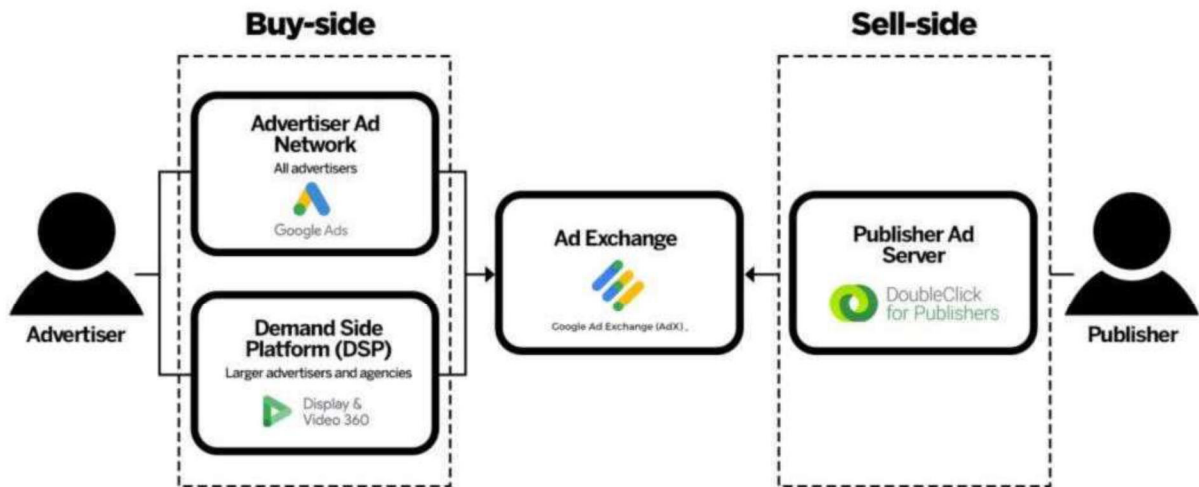
c) Ad exchanges

42. Ad exchanges (also referred to as supply-side platforms or “SSPs”) are the software intermediaries that run real-time auctions for web ad inventory in response to bid requests received from publisher ad servers. To that end, ad exchanges stand between publisher ad servers and advertiser buying tools, serving as the digital auction-driven marketplace where advertisers can bid in real-time on ad inventory made available by publishers.
43. In addition to their marketplace function, ad exchanges also permit some degree of control to both publishers and advertisers: publishers can set price floors for their inventory and manage which advertisers are allowed to purchase the inventory; and advertisers can target particular publisher and consumer characteristics at a specific per-impression price.
44. A key feature of an ad exchange is that it facilitates real-time auctions (known as real-time bidding or “RTB”). RTB involves buying and selling ad inventory in real-time, on a per-impression basis and at a variable price. RTB allows for faster and more efficient buying by advertisers. RTB makes it possible to leverage real-time user data in the auction process, allowing advertisers to have more control over when, where and to whom an ad is shown. This increases the efficiency of an advertiser’s ad spend and return on investment. For publishers, RTB can increase the value of their ad inventory, improve their sell-through rate and generate more revenue.
45. Many publishers connect with multiple ad exchanges through their publisher ad server, and advertisers typically value advertiser ad networks and DSPs that can connect to (or bid into) as many ad exchanges as possible. Publishers and advertisers that are limited in their ability to connect with or benefit from interoperability between multiple ad tech tools are disadvantaged.
46. Examples of ad exchanges for programmatic open web advertising include Google’s AdX, Magnite, Index Exchange, and PubMatic. As of 2022, Google’s

market share of the ad exchange market was over 50% of web impressions shown to Canadian users, roughly 6 times that of its next closest ad exchange competitor.

4. Understanding the mechanics of a programmatic auction

47. Website publishers use the ad tech stack to programmatically sell their remaining (i.e., unsold through direct sales) ad inventory, while advertisers depend on the same stack to buy it. The exact ad tech tools and steps involved in any given programmatic trade of web ads can differ from one transaction to another. Alongside the previously mentioned ad tech tools, publishers and advertisers might also choose to use other ancillary tools such as data management platforms, creative management platforms, ad verification tools, attribution tools, to name a few. That said, and despite the idiosyncrasies of any particular trade, the basic steps in the programmatic trading of web ads involve, minimally, the engagement of a publisher ad server, one or more ad exchanges, and one or more advertiser buying tools (i.e., advertiser ad networks and DSPs), as depicted in the simplified illustration below:



48. The process begins when a user visits a webpage where there is web ad inventory available to be filled. The user’s visit causes the webpage to load the publisher ad server’s “tag” which triggers the publisher ad server to identify the

user and route any available web ad space on the webpage to one or more pre-selected ad exchanges (an “**ad request**”). An ad request generally contains information about the ad inventory (e.g., what size or format the inventory is, or what type of page is being viewed) and any information that the publisher might have about the user who is visiting the webpage.

49. On receipt of an ad request, the ad exchange will send its own request to any and all ad buying tools (e.g., advertiser ad networks and DSPs) qualified to bid on the inventory, soliciting them to return a bid for the space (a “**bid request**”). As part of its bid request, the ad exchange will include information about the ad space (e.g., size, location), the page address, and any additional information available about the user visiting the webpage.
50. Each buying tool that receives a bid request will undertake an automated process of assessing potential bid responses based on pre-configured parameters set by its advertiser users. Once the tool identifies which of its advertisers is willing to pay the most for the impression, it will return the bid back to the ad exchange (a “**bid response**”).
51. Each ad exchange then evaluates all of the bid responses it receives against eligibility criteria set by the publisher, holds an auction in real-time to select the highest eligible bid response received, picks the winning bid, and then returns it to the publisher ad server. The publisher ad server picks a winning bid and sends the ad creative to the publisher’s webpage to be displayed to the user.
52. At each step of the process, the different ad tech tools deduct from advertiser bids the fees associated with using the ad tech tool. By the time the winning ad is served (displayed) to the user, the publisher receives the value of the winning bid less fees paid to each ad tech intermediary used to facilitate the transaction. Advertiser ad network, DSP and ad exchange fees are often based on a percentage of the price of the winning bid and are referred to as the “revenue share” or “take rate”, which is only charged if the advertiser wins the

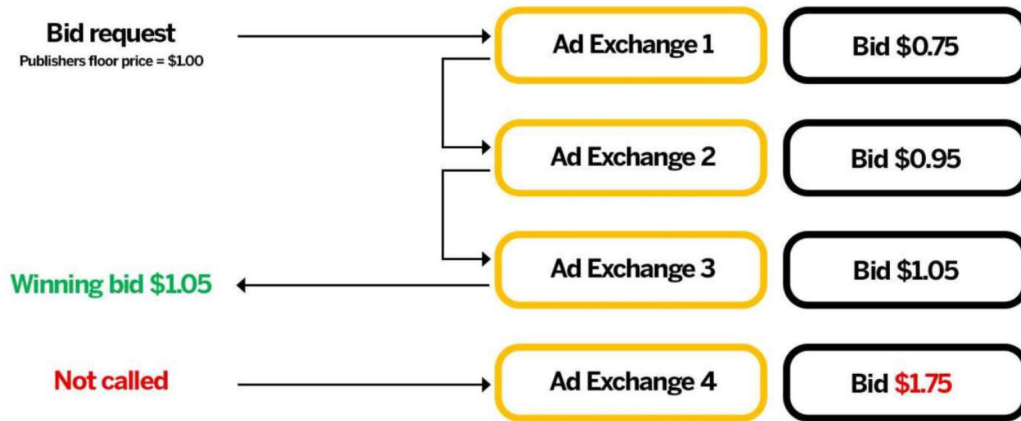
impression. Publisher ad servers generally offer publishers licence-based pricing, or charge a fee based on impressions served.

53. The entire process happens in a fraction of a second, without the user's knowledge and before the webpage loads.

a) Evolution of the auction process: a brief overview

54. In the earliest inceptions of the auction process, publishers used their publisher ad servers to sell ad inventory by requesting bids from ad exchanges or other demand sources sequentially, one at a time — a process called a “waterfall”. When an impression became available, the publisher ad server would call the first ad exchange in the waterfall to solicit bids from advertisers on that exchange. If no bid from an advertiser on that exchange met the publisher's price floor (i.e., the minimum price the publisher was willing to accept) the publisher ad server would then proceed to the next exchange. This cycle would continue until either a qualifying bid was found or all the sequenced exchanges had been canvassed. If, at some point, the publisher ad server received a bid matching or exceeding the publisher's floor price, the waterfall process would end.
55. Typically, publishers sequenced demand sources in the waterfall based on a measure of the ad exchange's past performance and payment (i.e., historical average price offered for impressions by the exchange). So, for example, if a particular ad exchange historically generated a higher average price for impressions, it would be given priority in the waterfall ahead of the ad exchanges that historically generated a lower average price for impressions.
56. The waterfall process was inefficient and could result in a publisher receiving less for a given impression than the market was willing to pay. In particular, it was possible for an ad exchange called by the publisher ad server to win the available inventory based on its historical pricing, even though another ad exchange further down the waterfall would have been able to offer a higher

price for the same ad space. By way of example, the illustration below depicts that the ad exchange with the highest bid (ad exchange 4) was never called, resulting in the publisher missing out on an additional \$0.70 in revenue:



57. When Google relaunched AdX in 2009 (internally referred to as “AdX 2.0”), it introduced Dynamic Allocation, which allowed AdX (and only AdX) to bypass competition in the waterfall process by giving AdX a right of first refusal (or “First Look”) ahead of all other ad exchanges in the waterfall.⁶ In other words, Google gave its own ad exchange preferential treatment whereby it would always be first in line, regardless of where it would have ranked based on the price it historically generated relative to other ad exchanges. Therefore, even if under the old waterfall process AdX would have ranked *lower* than one or more other ad exchanges, with Dynamic Allocation, as gatekeeper, Google moved AdX to the front of the line. That meant that AdX could (and did) win impressions that without First Look it would have lost. AdX (and Google’s) gain was other ad exchanges’ loss.

⁶ In 2014, Google launched “Enhanced Dynamic Allocation”, a new version of Dynamic Allocation with additional functionalities. Despite this change, Google’s advantageous First Look remained a defining feature of Enhanced Dynamic Allocation.

58. Partly to circumvent Google's restrictions (i.e., Dynamic Allocation/ First Look advantage) and to generate real-time competition among multiple demand sources, in or around 2015, publishers began adopting a technology called "header bidding." Header bidding allowed ad exchanges to compete against each other at the same time (in real-time), as opposed to being relegated to a waterfall and/ or subjected to Google's First Look advantage.
59. In technical terms, header bidding worked by publishers inserting a piece of JavaScript code into the header sections of their website. As soon as a user visited the website, the JavaScript code would route the website's ad space to a publisher-selected set of ad exchanges simultaneously, *before* Google's publisher ad server initiated the waterfall process (with Google's First Look advantage).
60. In practice, header bidding worked as follows: an internet user would click on and begin to load a publisher's website and, as the page was loading, the user's browser would send out bid requests to pre-selected ad exchanges, which would submit real-time bids in return. The browser would then select the best bid from among those made and send it to the publisher's ad server for consideration.
61. Adoption of header bidding by publishers was widespread and swift. By 2016 publishers were reporting 20-40% increases in revenue because of header bidding. Google employees themselves recognized the competitive significance and threat that header bidding represented: "[h]eader tag and [h]eader [w]rapper technology and adoption has grown rapidly in the past 12 months, representing an existential threat to our business, and necessitating a response that maintains DRX's "[m]ust [c]all" status in the ecosystem".
62. When header bidding emerged, Google's First Look advantage under Dynamic Allocation was, in effect, transformed into a "Last Look" advantage. Under Last Look, AdX was able to use the winning bid from the header bidding auction as a floor price in its own auction, effectively enabling it to compete against other

exchanges and secure impressions after rival bids from those other exchanges had already been submitted (i.e., AdX had the opportunity to bid on inventory after having full access to the bids submitted by rivals through the header bidding auction). Thus, while header bidding expanded competition somewhat, it did not undo the competitive advantage that Google had created for AdX (and itself) with Dynamic Allocation. In short, AdX continued to enjoy a preferred position, albeit via Last Look, rather than First Look.

63. With its widespread adoption by publishers, Google saw header bidding as an “existential threat” to its businesses — despite its Last Look advantage. Google responded in 2018 by co-opting header bidding technology and introducing its Open Bidding (also referred to as Exchange Bidding) product as a header bidding alternative. Open Bidding incorporated aspects of header bidding (e.g., allowing pre-approved rival ad exchanges to bid simultaneously for ad inventory), and removed Google’s Last Look advantage, but only for ad exchanges that used Google’s Open Bidding product, not for those that continued to use conventional header bidding. This meant that only rival ad exchanges using Open Bidding could compete simultaneously alongside AdX, but those that chose to use header bidding would continue to be subject to Last Look.
64. Bids from rival ad exchanges that opted to participate in Open Bidding were (and are) subject to a 5% fee for web ads, borne by the publisher. That same fee is not levied against AdX bids. This means that, to be competitive, bids from rival ad exchanges must be 5% higher than bids from AdX, all else being equal. For example, a bid from an advertiser using an ad exchange other than AdX who was willing to pay \$1.00 for an impression, would lose to a bid from an advertiser using AdX who bid 96 cents for that same impression. In other words, the impression would be won by an advertiser who valued that impression less, because of the fee imposed by Google.

65. In 2019, Google removed its Last Look advantage in response to competition/regulatory concerns. Simultaneously with giving up its Last Look advantage, Google launched its Unified First Price Auction (“UFPA”). Prior to 2019, all AdX auctions were run as second-price auctions, whereby the highest bidder would win the auction but only pay one cent more than the higher of the second-highest bidder’s bid or the publisher’s reserve (floor) price. Under UFPA, AdX auctions are run as first-price auctions where the highest bid pays the price of its bid. With the knowledge that this would be a welcomed (and long-overdue) change from the perspective of market participants, Google took the opportunity to simultaneously push through other changes to its ad tech products. Chief among them was the introduction of Unified Pricing Rules (“UPR”), which prohibited publishers from setting different floor prices for different ad exchanges. Prior to UPR, publishers would often set higher price floors for AdX than other ad exchanges, in order to, among other things, reduce their dependence on AdX. This led to rival exchanges winning more impressions. Under UPR, Google’s AdX would be guaranteed to receive a floor price no higher than any other ad exchange being called. Publishers thus became more dependent on AdX and rival exchanges lost opportunities to win more impressions.
66. The size and scale of AdX increases the value of the platform to advertisers and publishers, relative to other ad exchanges. By implementing programs intended to advantage AdX, while disadvantaging its rivals, Google ensured that AdX was able to maintain its scale advantage. Predictably, these programs created “network effects”, where the increased number of people or participants making use of a digital platform increases its value to users on both sides of the platform. As discussed below, very few publishers and advertisers could afford not to rely on Google’s ad tech tools.

b) Network effects in ad tech

67. One of the core characteristics of ad tech, like other platforms that connect buyers and sellers, is the presence of network effects. Network effects occur where a user's value of a given platform depends on the number of other users on the platform. Network effects can be either positive or negative, direct or indirect.
68. Network effects are positive when additional users of a platform bring a positive benefit to existing users. This occurs, for example, in a social network platform such as Meta. In this instance, users value being able to access the posts of other users such that the more users there are, the more content and connections that a person can initiate and experience. Network effects are negative when additional users of a platform reduce the benefit of the platform to existing users. This may occur, for example, in the case of dating or employment platforms where users looking for a good match (in mates or jobs) find it harder when other users similar to them join the platform and compete for these matches.
69. Network effects are direct when the effect occurs among users on the same side of a platform. Both examples provided above are examples of direct network effects; positive for the case of a social media platform and negative for the case of a dating (or job matching) platform. Network effects are indirect when the effect occurs among users on different sides of the platform. This occurs, for example, in an ad exchange that connects advertisers with website publishers. In this instance, advertisers value the ad exchange more as the number of publishers selling inventory on the ad exchange increases. More inventory makes it more likely that an advertiser will find opportunities to serve its ads to viewers who are disposed to purchasing its products or services. Similarly, publishers value the ad exchange increasingly as the number of advertisers that are looking to buy advertising space on websites increases. As the number of

advertisers increases, demand for a publisher's inventory is likely to increase and prices for that inventory are likely to be bid up.

70. The existence of positive network effects makes it important for a digital platform to grow its number of users as this increases the value of the platform for its customers. In addition to increasing its absolute number of users, from a competitive perspective, network effects also make it highly desirable for a platform to be larger (i.e., have more users) than rival platforms. Everything else equal, greater size relative to rivals means that a platform will more likely be chosen by users since the largest platform brings the most benefits. Because of the importance of scale (absolute and relative), an important objective for a platform is to grow by both: (i) encouraging new customers to adopt it over rivals, and (ii) inducing users of rival platforms to switch.
71. The significance of network effects (both direct and indirect) on a platform can be reduced if users on one or both sides are able to “multi-home”. Users multi-home when they use multiple platforms rather than just one. For this to be the case, the cost⁷ to the user of moving from one platform to another must be low. The ability to move seamlessly across platforms allows a user to benefit from the network effects created by all platforms. (e.g., all riders and drivers on all ride sharing apps being able to move without cost from one platform to another). In this instance, the user can experience network effects at the market level, i.e., each user can benefit from all users who are using platforms collectively, rather than those on any one platform. In competition among platforms, all else being equal, platforms of smaller relative size value having their users be able to multi-home or interoperate with larger platforms as this diminishes the competitive disadvantage they face from their smaller size. Conversely, platforms of larger relative size benefit from preventing

⁷ In this context, costs include financial expenditures as well as the time and effort of the user to use more than one platform.

interoperability since this allows them to experience the competitive benefits from their larger size.

72. Of particular importance to digital platforms is the collection of data from internet users, such as their past browsing behaviour, their demographic information and their interests. More users generate more data, which enables digital platforms to offer better customer targeting as well as better optimize their algorithms to improve the quality of their products. This creates a flywheel effect, where more users lead to more data, which leads to better performance, which in turn attracts more users through network effects.
73. In addition to higher user value through network effects, a platform with more users also benefits from economies of scale. It is typical for digital platforms to face high fixed costs and low marginal costs. Fixed costs include things such as the costs to set-up the platform, write computer code for algorithms and invest in digital infrastructure. Marginal costs are the incremental costs to a platform to serve one additional customer or complete one extra transaction. Given this cost structure, a platform has incentives to increase its number of users as this lowers its average costs. The combination of lower average costs and higher user value from positive network effects gives greater scope for a platform to earn greater profits. If these two effects are of sufficient magnitude, absent the ability of users to multi-home, over time markets can “tip”, such that a single platform comes to dominate the market. In such an instance, competition among platforms is time limited, with the market in time becoming dominated by one platform, with the attendant substantial negative effects on competition.
74. As discussed below, the effects of Google’s practice of anti-competitive acts are exacerbated by network effects, which serve to raise barriers to entry and fortify Google’s dominance.

III. GOOGLE'S ABUSE OF ITS DOMINANT POSITION IN AD TECH MARKETS

75. Google is the largest provider of ad tech across the entire ad tech stack. No other provider has comparable scale or reach. Google has substantial market power in the publisher ad server and advertiser ad network markets for open web advertising in Canada, with an estimated 90%+ and 70%+ market share (as measured by impressions transacted) in Canada, respectively. In the comparatively “less” concentrated ad exchange and DSP markets, Google still holds a 50%+ share and a 60%+ share respectively, and its next closest rivals are only a fraction of Google’s size.
76. Google’s dominance in each market is exacerbated by the different markets’ interconnectedness within the ad tech ecosystem, and the compounding effects of scale and network effects. In other words, Google’s substantial market power in each relevant market is mutually reinforcing of its position across the other ad tech markets, such that its power in any given market is stronger than if it were only dominant in a single market.
77. Google’s market position is not simply due to superior products or competition on the merits; instead, it stems from years of deliberate and purposefully opaque actions, designed to seize control of the essential ad tech tools used by publishers and advertisers. Moreover, Google’s dominant positions across the ad tech stack over time have allowed it, and continue to allow it to gather huge amounts of enormously valuable data, which provide it with a significant competitive advantage over rivals and potential rivals.
78. Through its conduct, Google has positioned itself at the centre of the ad tech ecosystem and used its control across the ad tech stack to unlawfully leverage its market power with one product to strengthen its position with its others, creating a self-reinforcing cycle of dominance. Specifically, Google has engaged in conduct that reduces demand (i.e., advertiser spend) and supply (i.e.,

publisher ad inventory) for rival ad tech products, thereby limiting the competitiveness of its rivals and the likelihood of entry of new ones.

79. There is no legitimate justification for Google's conduct. Yet the harm of Google's conduct is clear: competition on the merits is reduced, publishers earn less, advertisers pay more, and Canadians are likely faced with higher subscription fees and lower quality content.

A. THE RELEVANT MARKETS

80. Market definition is a tool for analyzing competition concerns. This can include helping to identify any market power a firm might have or exercise over a product or range of products, as well as the real or potential effects of any exclusionary conduct. To accomplish this, market definition involves assessing whether (in an otherwise competitive environment) a firm is constrained by its competitors or potential competitors, because consumers can switch to alternative products.
81. This application implicates three relevant product markets relating to the sale of programmatic open web advertising: publisher ad servers, advertiser ad networks, and ad exchanges. Canada, or alternatively North America or the world, is the relevant geographic market for all three product markets. For each of these products, there are no reasonable alternatives that could impose a competitive constraint on a hypothetical monopolist in response to a small but significant and non-transitory increase in price (or degradation of quality) above competitive levels.

1. Programmatic open web display advertising properly defines the boundaries of the relevant product markets

82. Web ads traded programmatically through open channels are an important and distinct form of advertising for publishers and advertisers. For the reasons described above at paragraphs 20-22, publishers and advertisers that rely on

programmatic open web advertising are limited in their ability to switch away to other forms of advertising. They are therefore limited to using ad tech products that are capable of transacting programmatic open web ads, and cannot readily substitute to products that lack that functionality.

83. For publishers seeking to monetize their web content, tools for buying and selling non-web ad space or ad space in walled gardens are not substitutable products. For example, ad tech tools designed to only sell and serve in-stream video ads or in-app ads, cannot be used as alternatives for publishers to serve web ads on their websites (regardless of whether web ads tools became no longer available or unreasonably priced). Similarly, proprietary tools for selling and serving ad space in walled gardens, like Facebook, are also not alternatives.
84. For advertisers, different types of digital ads are complements. Advertisers typically adopt a multi-channel approach when incorporating digital advertising into their campaigns. Each type of ad (e.g., search ad, web ad, in-stream video ad, in-app ad, social ad) serves distinct purposes and targets audiences in various contexts, making them complementary rather than substitutable. For example, web ads are particularly effective for raising brand awareness, increasing reach (i.e., the number of people who see the ad) and getting user engagement (via clickable links), often at a lower cost than other types of digital ads. Alternatively, in-stream video ads are more costly than web ads but tend to be more effective at capturing a viewer's attention; in-app ads are particularly relevant to gaming and at driving app downloads; search ads are ideal for reaching users who are already searching for a product or service; and social ads allow for two-way communication and engagement between businesses and their audiences. While they contribute significantly to an overall campaign, web ads are not readily substitutable for other formats as each brings unique strengths that enhance an overall marketing strategy. For advertisers looking to incorporate web ads into their campaign, ad tech tools not designed to transact web ads are not a viable alternative.

85. Considering the foregoing, it follows that only ad tech tools that support trading web ads are viable alternatives for publishers or advertisers wanting to buy and sell web ads through open channels. Similarly, sales of non-web ads on ad tech tools that transact other ad formats, in addition to web ads, are excluded from the markets for the above-mentioned reasons.

2. Publisher ad servers are a relevant product market

86. Publisher ad servers used in the programmatic sale of web ads through open channels are a relevant product market for purposes of this application (hereafter, the “**Publisher Ad Server market**”). Google offers DFP as a product in this market.

87. Publisher ad servers serve a unique and important function for open channel web publishers: they are the primary means by which publishers manage, sell and track their ad inventory. Publishers use publisher ad servers to select ads to fill their inventory spaces in real-time. The evaluation and decision-making functions of publisher ad servers (sometimes referred to as the “decision engine”) allow publishers to automate and manage their direct and programmatic ad sales. For the latter, the publisher ad server is responsible for sending ad requests to various ad exchanges, receiving back bids, and comparing those bids to decide which ad to serve the website user.

88. Publisher ad servers also typically (and uniquely) have functionality that allows publishers to collect and use targeting information, engage in inventory forecasting, and track ad performance and monetization across multiple exchanges.

89. Other ad tech tools (e.g., publisher ad networks and header bidding) are not reasonable substitutes for publisher ad servers as they do not offer the same functionality, and, to a significant degree, serve different needs for publishers. A sole profit-maximizing publisher ad server seller (i.e., a hypothetical monopolist) could profitably impose and sustain a small but significant and

non-transitory increase in price above competitive levels (or degradation in service) in the sale or supply of publisher ad server services.

90. Since 2019, Google has degraded the functionality of its publisher ad server, DFP, by adopting UPR and prohibiting publishers from setting different floor prices for different ad exchanges. Despite significant protest by publishers over the imposed change, Google’s publisher ad server has continued to maintain a market share of more than 90%.
91. Google, and industry participants consider publisher ad servers to be differentiated products from other ad tech tools. For example, DFP is marketed by Google as being separate and distinct from its publisher ad network offering, Google AdSense. Though Google introduced Google Ad Manager (“**GAM**”) in 2018, which contains both its DFP and AdX products, it still internally identifies its publisher ad server as a separate product and prices the DFP component of GAM separately.
92. Publisher ad servers are designed as a single service to organize and manage a publisher’s entire advertising inventory. Owing to practicality and operational efficiency, publishers generally only use one publisher ad server at a time and rarely incur the high costs to switch from one to another due to engineering integration costs and significant disruptions caused by switching. In-house alternatives to publisher ad servers are equally not feasible options for most publishers because of the associated costs and technological requirements.

3. Advertiser ad networks are a relevant product market

93. Advertiser ad networks used in the programmatic buying of web ads through open channels are another relevant product market for the purpose of this application (hereafter, the “**Advertiser Ad Network market**”). Google offers Google Ads as a product in this market.

94. Advertiser ad networks are simple ad tech buying tools used by advertisers to buy available ad inventory. They serve to aggregate ad inventory (i.e., available ad inventory) from various supply-side sources, and provide advertisers with a means of automating their bidding on the inventory (based on terms set by the advertiser, such as targeting, budget, etc.) as it becomes available.
95. Compared to other ad buying tools (e.g., DSPs), advertiser ad networks generally provide a more easy-to-use, turnkey or automated experience. This distinction is reflected in their different cost-structures, with advertiser ad networks typically charging advertisers on a cost-per-click (“CPC”) basis rather than on a cost-per-mille (“CPM” or cost per thousand impressions) basis. Consequently, advertiser ad networks are most often the exclusive ad buying tool used by smaller, less-sophisticated advertisers who, for example, might have less technical expertise and/or a smaller advertising budget. For larger advertisers, advertiser ad networks are a distinct and complementary ad buying tool (often used in conjunction with DSPs).
96. Many advertisers that use advertiser ad networks as their ad buying tool for web advertising are limited in their ability to switch to alternative ad tech products. DSPs, the other major ad buying tool, require buyers to directly manage their ad campaigns using complex interfaces, often require buyers to use their own proprietary data to bid effectively on inventory, and can require minimum monthly spend levels. This makes these tools not reasonably accessible to smaller and less-sophisticated advertisers.
97. A sole profit-maximizing seller could profitably impose and sustain a small but significant and non-transitory increase in price (or degradation in service) above competitive levels in the sale or supply of the services provided by advertiser ad networks. In 2014, Google experimented with increasing Google Ads’ fee from 14 to 15% (a 7% increase⁸) and found that this would increase Google

⁸ $[(15 - 14) \div 14] \times 100 = 7$

Ads' profit by 5.3%. Google then implemented this price increase. And in 2018, Google performed simulations that altered Google Ads' fee and found that it could profitably increase its take rate from 15% up to 20% (a 33% increase). However, it ultimately decided not to impose the increase due to reputational and legal concerns.

98. To the detriment of its advertiser customers, Google, through Google Ads, has severely restricted advertisers' ability to bid on third party ad exchanges (i.e., ad exchanges other than AdX), where they could access additional publisher inventory. In fact, until 2016, Google Ads routed its advertisers' bids *only* to AdX and today 85% of the ad impressions it purchases on behalf of advertisers, are purchased through AdX. In short, Google has deliberately curtailed the functionality of Google Ads (to the benefit of AdX) by restricting the publisher inventory available for its advertisers to bid on. In spite of this, Google has been able to maintain its "captive" advertiser base without a significant number of advertisers substituting away to other products.
99. Google recognizes advertiser ad networks as a distinct product market as compared to other ad tech tools (e.g., DSPs), with distinct competitors. In marketing its Google Ads and DV360 products, Google notes that the two tools "serve distinctly different customer sets". In describing the distinct customer segmentation of its ad buying tools, Google describes Google Ads users as "[t]ypically smaller and mid-sized marketers who are able to satisfy their display needs with a simple, low-touch solution with minimal customization" and DV360 users as "[l]arge display buyers interested in consolidating their display buying across channels and deploying a strategy with a single view of a customer".

4. Ad Exchanges are a relevant product market

100. Ad exchanges used in the programmatic trading of web ads through open channels are another relevant product market for the purpose of this application.

(hereafter, the “**Ad Exchange market**”) Google offers AdX as a product in this market.

101. Ad exchanges are the ad tech products that facilitate the programmatic selling of ad inventory by connecting publisher ad servers with demand sources, including advertiser ad networks. Ad exchanges provide publishers with a way to offer their ad inventory for sale to a large number of advertisers in real-time (impression by impression), and in so doing access real-time bids from multiple demand sources. Similarly, ad exchanges provide advertisers (through their buying tools) with real-time access to a large supply of ad inventory on which they can bid.
102. Within the ad tech stack, the ad exchange is *the* intermediary layer between publishers and advertisers (i.e., the trading platform) for indirect ad sales. A sole profit-maximizing seller could profitably impose and sustain a small but significant and non-transitory increase in price (or degradation in service) above competitive levels in the sale or supply of ad exchange services.
103. Google’s AdX has been able to charge a take rate of 20%, which it recognizes as being significantly above competitive levels (reflecting the lack of reasonable substitutes). Google has characterized its take rates, which have been at or around the same level since 2012, as being “not long term defensible” and “double the price” as compared with competitors.
104. While there are some limited ways in which publisher ad servers can connect directly with advertiser buying tools (ostensibly obviating the need for an ad exchange), these mechanisms are limited in nature and not reasonable alternatives to the functionality offered by ad exchanges.
105. Direct deals between publishers and advertisers are not a reasonable alternative to indirect programmatic sales. Publishers and advertisers cannot reasonably substitute away from ad exchanges by increasing their reliance on direct deals. Publishers and advertisers view direct deals as complements to auction-based

programmatic sales. Direct deals require significant resources from all parties to negotiate agreements and are therefore used by larger publishers and advertisers mainly for high-volume or high-value impressions. Moreover, it is impractical for publishers to sell all of their ad inventory directly, without the use of programmatic auctions (which rely on ad exchanges).

106. Google, and industry participants consider ad exchanges to be differentiated products from other ad tech tools.

5. The relevant geographic market is Canada, North America, or global

107. The relevant geographic market for the purpose of this application is Canada, or in the alternative North America, or in the further alternative, the world. Google is dominant under any approach to geographic market.
108. Indicia of a Canadian specific market include the following. First, ad tech tools operating within Canada are subject to Canadian regulatory requirements, including language, privacy and data sharing laws. These requirements are reflected in the tools themselves, which have been developed to enable full compliance with Canadian laws. Second, a successful ad tech firm requires the ability to market its products and services to its customers. To meet the unique needs of their Canadian customers, ad tech providers must have access to Canadian inventory and targeting data. Google and other market participants employ Canadian sales teams, track Canada-specific performance and sales targets, and compete based on unique competitive dynamics in the Canadian market.
109. A sole profit-maximizing seller of the relevant products (i.e., publisher ad servers, advertiser ad networks, or ad exchanges) to customers in Canada could profitably impose and sustain a small but significant and non-transitory increase in price (or degradation in service) above competitive levels, and would not be

constrained by prices charged by ad tech tools available only to customers located outside of Canada.

110. For publisher ad servers, Google can charge different prices to publishers located in different countries, including in Canada. And for advertiser ad networks and ad exchanges, Google can dynamically adjust the fees collected by its Google Ads and AdX products across publishers. This ability to charge different prices to different customers without constraint implies that Google, or a hypothetical monopolist, could likewise charge supra-competitive prices within a more limited geographic region (i.e., Canada).
111. Certain elements of the relevant products suggest a geographic market that is global, excluding countries and regions where the competitive dynamics are materially different because of laws, sanctions, or other similar factors (e.g., China, North Korea, Russia). Publishers and advertiser users of ad tech are in countries around the world and transact across national and regional boundaries. Publishers can use ad tech to sell ad inventory around the world and advertisers can use ad tech to buy impressions around the world.
112. The main ad tech providers in each relevant product market are present in multiple geographic regions, and benefit from network effects and scale that are not limited to any one country or region. Many of these providers, including Google, report on their ad tech performance metrics across regions broader than a single-country (e.g., North America, Europe and Asia-Pacific).

B. GOOGLE SUBSTANTIALLY OR COMPLETELY CONTROLS THE PUBLISHER AD SERVER AND ADVERTISER AD NETWORK MARKETS

113. By any measure, Google is the largest provider of ad tech services across the entirety of the ad tech stack, and has a substantial degree of market power in the Publisher Ad Server and Advertiser Ad Network markets. Indeed, Google's pervasive and persistent market power has enabled it to implement programs and policies that have distorted competition within the relevant markets by,

among other things: steering users to its own ad tech tools through an improper tie; impeding its customers from working with rivals; and, otherwise denying rivals scale necessary to compete effectively.

114. Google's dominance in each market is exacerbated by the different markets' interconnectedness within the ad tech ecosystem, and the compounding effects of scale and network effects. In other words, Google's substantial market power in each relevant market is mutually reinforcing of its position across the other ad tech markets, such that its power in any given market is stronger than if it were only dominant in a single market.
115. To date, Google's ability to exercise its market power has not been meaningfully constrained by either existing or potential competition. Barriers to entry and expansion are high across the ad tech stack. Though the costs of offering an ad tech service vary depending on the tool and the circumstances, there are certain associated costs that are generally understood to always be high. These include the costs for housing any requisite data centres, internet and cloud computing costs, research and development costs, regulatory and compliance costs, partnership and integration fees, maintenance costs, marketing and user acquisition costs, and staffing costs.
116. Additionally, there are several common structural barriers that have and are likely to impede any meaningful entry or expansion. These include access to a sufficient volume of first- or third-party consumer data, which established firms use to optimize auctions and improve targeting and campaign effectiveness on behalf of their advertiser and publisher customers, creating a competitive advantage. It also includes access to sufficient scale and diversity to make it possible to integrate with other ad tech services and meet a minimum value proposition for potential advertisers and publishers.
117. Lastly, Google's tie across the ad tech stack further deters entry. Google's substantial market power has enabled it to engage in conduct that has imposed

barriers to effective competition. Industry participants recognize that Google has made it near impossible, under current conditions, to gain sufficient scale to compete meaningfully or pose a serious competitive constraint on Google.

1. Google is dominant in the Publisher Ad Server market

118. Direct and indirect indicia of Google’s substantial market power demonstrates that Google substantially or completely controls the Publisher Ad Server market in Canada.

a) Direct indicia of substantial market power

119. Google itself considers DFP dominant, internally describing it as: “the *de facto*, preferred ad server of choice for 90% of publishers”, “must call” for publishers, and having a “monopoly on the ad server”.

120. Google is generally able to dictate the terms upon which it sells or supplies its DFP product and services. Google’s 2019 introduction of UPR is an illustrative example. This change degraded a highly valued functionality of DFP by impairing publishers’ ability to set lower price floors for rival (i.e., non-Google) ad exchanges compared to AdX. Internally, Google acknowledged that this feature was valuable to publishers who were “willing to tolerate some revenue loss in exchange for reduced dependence on Google as a whole” and appreciated that its removal would not be well-received. Nevertheless, Google implemented UPR. Though unhappy, publishers did not switch away to another publisher ad server, largely because there are simply no viable alternatives.

121. Further, in a 2019 internal analysis, Google concluded that DFP could profitably impose a price increase of “10% or more”, further reflecting its position of dominance in this market.

b) Indirect indicia of substantial market power

122. Google's DFP has an estimated 90%+ share of the Publisher Ad Server market in Canada, as measured by impressions transacted. This share is stable, having been above 90% since at least 2019.
123. Google faces weak competitive constraints due to high barriers to entry, high switching costs, and the prevalence of publishers who "single home" (i.e., use only one publisher ad server). Google's market power is evidenced by, and persists despite, its intentional degradation of its publisher ad server services.
124. Google's market power in the Publisher Ad Server market is enhanced by the tie it has created and maintained between Google Ads, AdX and DFP. DFP is the only publisher ad server that provides unrestricted access to real-time bids from AdX, which in turn is the near-exclusive source of Google Ads' unique, must-have advertiser demand. The Google Ads/AdX tie gives DFP a unique advantage over all other publisher ad servers, and (by necessity) makes it the default publisher ad server for publishers. DFP has a 100% adoption rate amongst large publishers in Canada.
125. Google's position in this market is further reinforced by DFP being the industry-leading "full stack" ad server. Web publishers with a range of ad format inventory for sale will prioritize a publisher ad server that is able to serve different ad types.
126. Publishers lack countervailing power against Google's market dominance, as no single publisher or group constitutes a significant portion of Google's revenues.
127. As described above at paragraph 115, there are significant barriers to entry and expansion in ad tech markets, including the Publisher Ad Server market. Among other things, these barriers include the costs and time of building the

requisite infrastructure, developing and maintaining publisher relationships, accessing ad exchanges and advertiser demand and scale. Google states that DFP’s “global footprint across ad serving and access to inventory is the largest by far”.

128. The prevalence of single-homing publisher ad servers and high switching costs create additional barriers to entry and expansion, and thereby further maintain Google’s market power. In the words of a former Google executive, “[n]othing has such high switching costs. [...] Switching platforms is a nightmare. Takes an act of God to do it.” Due to the central role played by a publisher ad server, multi-homing or migrating ad servers is impracticable. In terms of switching, Google and publishers recognize that the process is complex, disruptive, lengthy and expensive.
129. The Publisher Ad Server market has seen no significant entry or expansion by rivals in several years. To the contrary, there has been considerable exit and consolidation. The few remaining rival publisher ad servers survive by competing on the market’s periphery and do not constrain Google’s unbridled ability to exercise substantial market power.

2. Google is dominant in the Advertiser Ad Network market

130. Direct and indirect indicia of Google’s substantial market power demonstrates that Google substantially or completely controls the Advertiser Ad Network market in Canada.

a) Direct indicia of substantial market power

131. Google Ads can dictate the terms upon which it sells its services, and has itself described its advertiser demand as “captive” and acknowledged that it has “virtually no margin or inventory sourcing constraints”.
132. Google targets a 15% margin for its Google Ads product when it bids into an AdX auction. In 2014, Google Ads profitably imposed a fee increase of more

than 5% without meaningful constraint from advertisers switching to alternative products. On several occasions, Google has experimented or simulated material fee increases (e.g., 15% raised to 20%) and concluded that raising its margins would increase profits. For example, in 2018 Google performed simulations demonstrating Google's ability to profitably increase margins on AdX from 15% to 20%. However, it ultimately decided not to impose the increase, not because it was concerned about advertisers switching away from Google Ads, but rather due to reputational and legal concerns.

133. Google's market power is further evidenced by the fact that it can offer advertisers an inferior quality advertiser ad network, without losing a meaningful number of advertisers. For example, Google has long restricted Google Ads' ability to bid into rival ad exchanges, at a cost to advertisers in the form of inferior matches, but at a benefit to AdX (and Google) – as one Google executive described it: “artificially handicapping our buy-side (GDN) to boost the attractiveness of our sell-side (AdX)”.

b) Indirect indicia of substantial market power

134. Google Ads has a market share of at least 70% in the Advertiser Ad Network market in Canada, as measured by impressions.
135. As with the Publisher Ad Server market, Google faces weak competitive constraints in the Advertiser Ad Network market due to high barriers to entry, high switching costs, and the prevalence of advertisers who “single-home” (i.e., use one ad buying tool). Google's market power is evidenced by, and persists despite, its intentional degradation of its advertiser ad network.
136. Google's market power in the Advertiser Ad Network market originates from its pre-existing relationship with advertisers that purchase search advertising. At Google Ads' inception, Google was able to leverage its significant position in general internet search to convert its largest-in-the-world, unique source of advertiser demand over to its web advertising business. Today, Google's search

advertising service is provided through Google Ads. This means any advertiser purchasing search advertising through Google Ads can readily and easily also purchase web advertising through the same tool.

137. This scale and diversity in demand, in turn, has given Google Ads significant advantages over its competitors, and made entry or expansion into this market difficult, bordering on impossible. It has also had the resulting effect of further driving publisher supply towards Google Ads. As Google describes, Google Ads “reaches over 95% of global internet users and is the world’s largest ad network”.
138. Many advertisers (and most small advertisers) only use one ad buying tool (e.g., advertiser ad network) for their web advertising needs. Using one advertiser ad network is less costly than multi-homing and simplifies any needed or desired ad management functionality. Consequently, for single-homing advertisers who advertise on Google search and also want to transact in web ads, there are no realistic alternatives to Google Ads. The scale and diversity of Google’s integrated ad tech products means that Google can offer these advertisers (large and small) unparalleled advantages in the form of publisher supply and access to data.
139. As described above, there are significant barriers to entry and expansion in ad tech markets, including the Advertiser Ad Network market. Among other things, these barriers include access to publisher inventory — necessary for attracting advertisers and compelling them to connect to a new buying tool — and sufficient access to data to facilitate optimal matches for their advertising customers.
140. For web publishers, Google Ads represents a unique, “must have” source of advertising demand without which they would face a significant drop in revenue. Internal analysis conducted by Google in 2014 found that publishers would lose over 60% in revenue from AdX without Google Ads. As one Google

executive described, Google Ads demand is: “a substantial source of diversified demand in the Canadian market, and on its own larger than the sum of all demand on other exchanges. AdWords is incredibly successful in driving auction intensity, which equates to higher bids and yield for publisher inventory”.

141. The Advertiser Ad Network market has seen minimal entry or expansion over the past decade. To the contrary, there has been considerable consolidation, as well as exit by large tech firms like Meta.⁹ The few rival advertiser ad networks that remain do so by competing on the market’s periphery and do not constrain Google’s ability to exercise market power.

C. GOOGLE HAS ENGAGED IN A PRACTICE OF ANTI-COMPETITIVE ACTS

142. For over a decade, Google has pursued a systematic campaign of interrelated and interdependent anti-competitive actions, designed to and with the effect of facilitating the exercise of new or increased market power and entrenching and enhancing its existing market power in the relevant markets. By leveraging its market power in one market to strengthen its position in others, Google has been able to purposefully and effectively reduce advertiser demand and publisher inventory supply available for rivals in the targeted markets. This not only diminishes the competitiveness of its rivals but also discourages new entrants from entering the market. Additionally, due to indirect network effects and the benefits to users for different ad tech products to interoperate, weakening competitors in one market also reduces the appeal of non-Google alternatives in other ad tech markets.

143. Though Google has taken various anti-competitive actions and implemented a number of anti-competitive programs, which changed and evolved over time, all these actions and programs have a unifying quality: they were all intended

⁹ In 2020, Meta’s advertiser ad network (Facebook Audience Network or “FAN”) stopped bidding on open web ad inventory, but continues to bid on in-app ad inventory.

to exclude Google's rivals and potential rivals across the ad tech stack and, more generally, to have an adverse effect on competition.

144. Google began to leverage its position across markets soon after it acquired DoubleClick in 2008, which included DFP and AdX. Almost immediately, Google began tying those products to Google's advertiser ad network, Google Ads. By conditioning effective access to any one of its ad tech tools on the use of its other tools, Google began locking-in publishers.

145. Subsequent to the tie being put in place, Google undertook a series of actions designed to further distort competition and entrench its dominance across the ad tech stack. Using DFP's market power, Google undertook to systematically advantage its ad tech tools and steer transactions away from rivals. Google did this in several ways including:

- a) DFP granting AdX advantageous access to its ad inventory over rival exchanges through its Dynamic Allocation feature, which gave AdX an exclusive "first look" and later "last look" bid advantage;
- b) using negative take rates to steer impressions towards Google Ads and away from other AdX buyers through a program Google internally called Project Bernanke (as detailed below, at paragraphs 179-185); and
- c) implementing Unified Pricing Rules, which restricted publishers' ability to price AdX differently from rival ad exchanges.

146. Along the way, Google purposely identified, restrained, and deprecated innovative technologies that stood to benefit publishers and advertisers, but threatened its dominance.

147. Google's conduct has had (and is having) the intended effect of distorting competition and foreclosing to rival ad tech providers important access to transactions, scale and customers necessary to mount effective competition

against Google's dominance. Each of DFP, AdX, and Google Ads have as a result become the default tools for publishers and advertisers — not because the tools are superior to those of Google's rivals, but because Google has been able to leverage its market power in each market such that using its suite of tools became the only viable option for a significant majority of publishers and advertisers.

148. The conduct described herein constitutes a practice of anti-competitive acts that Google has and continues to engage in to preserve and enhance its dominant position across the ad tech stack.

1. Google locks publishers into its ad tech tools

149. Before its acquisition of DoubleClick in 2008, Google already had a large captive base of advertiser demand through its position in search advertising. With the acquisition of DoubleClick, Google added DFP and its sizeable pool of publishers to its customer base, and AdX, a then-nascent ad exchange. Not long thereafter Google began taking steps to lock publishers into its publisher ad server, DFP. This was done to secure its position not only in the Publisher Ad Server market, but also to cement its place in the Ad Exchange market.

150. Google knew that by leveraging its market power in the Publisher Ad Server market, it could strengthen its position in the Ad Exchange market. In effect, Google left publishers and advertisers with no choice but to transact through Google's own ad tech stack, and not with its rivals. The actions taken by Google to tie its products together manifested in two ways, as described below.

a) Google conditions access to Google Ads demand on the use of AdX

151. Since 2008, Google has substantially restricted advertisers using Google Ads from bidding on rival ad exchanges' inventory. If publishers want access to the millions of advertisers who use Google Ads' to purchase web advertising, they

have no choice but to auction their inventory through AdX. Google thereby coerces publishers into using AdX, not because it is the superior product, but because failing to do so means losing access to essential advertiser demand.

152. Google possesses the technology to enable Google Ads to bid on rival exchanges. However, Google understood that denying access to its unique advertiser demand would hinder its rivals' ability to compete on the merits. Without this access, publisher payouts on rival exchanges would dwindle, making those platforms less attractive to publishers. By conditioning access to Google Ads' demand on the use of AdX, Google deprived rival ad exchanges of the necessary transactions and scale to compete meaningfully and also raised barriers to entry. As one Google executive described: "I believe if we keep AdWords [Google Ads] demand to ourselves, it will be hard for another marketplace to develop even if they have lower margins".
153. Without the tie between Google Ads and AdX, Google understood that publishers would avail themselves of rival ad tech tools. In 2011, Google conducted an experiment to assess what would happen if it allowed its advertisers to bid freely into rival ad exchanges (i.e., if Google had to compete on the merits). The outcome revealed that AdX would "lose 20 to 30% of its publishers", and DFP would "lose 20% of its publishers". Google understood that "if publishers can gain the same AdWords RTB demand from any yield management/exchange partner, there is a risk that many publishers would terminate their AdX relationship in favor of their preferred alternate vendor".
154. Google has maintained this tie, despite recognizing that its Google Ads advertisers have unspent advertising budgets and that opening up bidding to other ad exchanges could increase their access to inventory (and increase Google's revenue). Despite this clear benefit to advertisers (and revenue boost for Google), Google instead prioritized a long-term strategy of consolidating its market power across the ad tech stack by excluding rivals, which it knew would have an adverse effect on competition, and position Google for greater profits

in a less competitive environment at the expense of its advertisers. The buy-side of Google's business which runs Google Ads was unhappy with this strategy. As one buy-side Google executive said: "[m]ore importantly, we do not like the idea of AdWords being given a disadvantage compared to the other buyers in order to strengthen the publisher pitch (e.g. uphold the 20% margin)".

155. Google recognized that by allowing Google Ads advertisers to bid freely on other ad exchanges, AdX would be forced to compete on the merits and be unable to sustain its supra-competitive fees. As one Google executive stated: "we are NOT seeing pressure on the AdX 20%, but I am making a statement that it is because it provides nearly exclusive access to GDN demand. If GDN bought liberally through all 3PEs [third party exchanges], I think the 20% would crater. What I am suggesting is that 'comparing two bids and running an auction' is proven to not be worth 20%".
156. In 2016, Google began allowing a limited portion of its advertiser demand to bid outside of AdX. This initiative, known as AWBid, offered some marginal benefit to Google Ads advertisers by allowing them to (minimally) access inventory outside of AdX. However, Google implemented measures to disadvantage bids originating from Google Ads made on rival ad exchanges. Google Ads charges take rates between 32-50% on rival ad exchanges compared to 15% on AdX, effectively lowering bids on rival ad exchanges relative to AdX, to the detriment of its advertisers. Google knows that this asymmetrical fee structure will result in bids made to rival exchanges being less competitive, resulting in those exchanges winning fewer auctions, and consequently being less attractive to advertisers and publishers.
157. Despite the introduction of AWBid, Google continues to tell publishers that the only way to access the majority of Google Ads' demand is through AdX. Today, nearly 90% of Google Ads impressions are transacted on AdX.

b) Google conditions access to AdX on the use of DFP

158. The second part of the tie involves Google conditioning real-time bids from AdX on the use of DFP. Specifically, if publishers want to receive real-time bids from AdX (and critical access to Google Ads' unique advertiser demand) they must use DFP. Publishers using other publisher ad servers are effectively locked out of accessing real-time bids from AdX. This restriction effectively forces publishers into adopting DFP as their publisher ad server, undermining rival publisher ad servers' ability to attract publisher customers and thereby gain scale and meaningfully compete. In essence, publishers are compelled to use DFP not because it offers superior functionality, but because publishers require the must-have advertiser demand on Google Ads that is accessible through real-time bidding from AdX. By doing so, Google has leveraged its market power throughout the ad tech ecosystem to maintain, entrench and enhance its dominance.
159. The ability to receive and compare real-time bids from ad exchanges is crucial for publishers. Real-time bidding enhances revenue by allowing publishers to sell ad inventory at variable prices as it becomes available. Recognizing this, Google tied DFP to real-time bidding from AdX, effectively "locking in" publishers to DFP. By restricting real-time bidding from AdX, Google discourages the use of rival publisher ad servers, harming their competitiveness and ability to attract and retain customers.
160. Google has technology to enable real-time bids from AdX to rival publisher ad servers with "minimal effort", which would have resulted in increased revenue for AdX, but chose not to use it in order to maintain DFP's market position. In the words of one Google executive, enabling real-time bids from AdX to rival publisher ad servers would "delete one of the major arguments to use [DFP]".
161. In 2017, Google further solidified this approach by requiring publishers to sign a combined contract for both AdX and DFP. Google has maintained a

superficial method for publishers to access AdX through other publisher ad servers (referred to as “AdX Direct”), which Google internally acknowledges is simply a “concept for antitrust”. However, Google, publishers and other market participants all agree that AdX Direct tags, which do not provide real-time bids from AdX, are not a viable option for publishers. Today, over 99% of AdX impressions are transacted via DFP.

c) Google’s tie is intentional

162. Google has unlawfully tied its three distinct ad tech products together: its unique, must-have advertiser demand (on Google Ads) is accessible only through its ad exchange (AdX), while real-time bidding from its ad exchange is contingent upon using DFP, its publisher ad server. In other words, publishers must use both AdX and DFP or risk losing effective access to this must-have advertiser demand.
163. This tie was neither accidental nor designed to benefit its customers. It was intended to lock publishers and advertisers into Google’s tools within the ad tech stack, and thereby create barriers to entry and expansion for rivals and potential rivals.
164. With this tie, publishers are deprived of the opportunity to access and compare real-time bids from multiple ad exchanges; and advertisers of the ability to bid into rival ad exchanges due to restrictions on Google Ads, which could lead to higher-quality matches. Google’s actions are part of a coordinated and deliberate effort to compel both publishers and advertisers to use AdX and DFP, leaving them with no choice but to use only Google’s ad tech products. As one Google executive put it: “they should realize that AdX is still the only source to get access to all of GDNs demand. If they chose another monetization partner they loose [sic] access to all of GDN.”

165. Google’s true intentions have been exemplified through its deliberate stalling, stifling and deprecating of innovative technologies that stood to benefit publishers and advertisers, to maintain its tie. In 2011, Google acquired AdMeld and deprecated technology that could have facilitated real-time bids from AdX to other publisher ad servers, which it viewed as a “disintermediation” risk. In 2016, Google undertook to suppress the growth of header bidding technology, which stood to benefit advertisers and publishers. Google viewed the growth of header bidding as an existential threat to the “must call” status of AdX and DFP, because it had the potential to weaken the effects of Google’s tie by aggregating enough advertiser demand and thereby diminish the need for publishers to use AdX and DFP. Google sought to protect its tie and remain the “only way to get Google demand” by not supporting header bidding or real-time bids from AdX to rivals’ publisher ad servers.
166. By conditioning publishers and advertisers to transact through its ad tech tools, Google has stifled competition among publisher ad servers and ad exchanges. Rivals in these markets are denied scale/transactions (i.e., customers), making them less desirable alternatives to Google and less able to meaningfully compete. Publishers who use rival ad exchanges are unable to access Google’s advertiser demand; as a result, these publishers are diverted away from rival ad exchanges and steered towards AdX. Similarly, the inability for publishers using competing publisher ad servers to access real-time bids from AdX corralled publishers away from rival publisher ad servers and towards DFP. Google’s success was due to its anti-competitive tie, rather than the inherent merits of its products. As one Google executive described: “unlike our competitors, pubs have been viewing us as a necessary evil, instead of a responsive, innovative partner”.

2. Google gives AdX a “First Look” and “Last Look” advantage

167. Since 2009, through a “feature” called Dynamic Allocation, Google leveraged DFP’s substantial market power to funnel transactions to AdX, thereby further

strengthening the position of its ad exchange, relative to other exchanges. This feature required publishers to offer their ad inventory to AdX before offering it to rival ad exchanges. In effect, AdX was given a right of first refusal on all inventory, allowing it to “cherry pick” high value queries (i.e., inventory that advertisers were willing to bid more for), while leaving competitors with fewer and less desirable impressions, ultimately reducing publishers’ and advertisers’ incentives to work with rival exchanges.

168. Historically, publishers wanting to auction ad inventory to multiple ad exchanges used a method known as the “waterfall.” Under this approach, publisher ad servers sent ad requests to exchanges sequentially, typically based on their average historical performance, until an exchange met the publisher’s price floor.
169. Through Dynamic Allocation, AdX was given a “First Look” advantage. First Look gave AdX the right of first refusal on ad inventory by putting it at the top of the waterfall, regardless of where it would have ranked in the waterfall based on historical prices. Consequently, AdX could secure impressions even if there were other exchanges that were able to generate higher bids than AdX. As one Google executive indicated, that meant that “[p]ublishers lose every time the third-party exchange has higher payout than the average”.
170. Google recognized that First Look would deprive rival ad exchanges of valuable inventory, adversely affecting their performance. This, in turn, would lead publishers to rank those rivals lower in the waterfall, resulting in a self-reinforcing cycle of diminished inventory for Google’s competitors.
171. Partly to circumvent First Look, in or around 2015, publishers began adopting a technology called “header bidding.” Header bidding allowed publishers to send ad requests and receive real-time bids from multiple ad exchanges outside of Google’s DFP (and Dynamic Allocation). Header bidding involved embedding JavaScript in a website’s code that, once a user visited the site,

routed information about the website's ad space pre-selected ad exchanges simultaneously, before DFP was engaged and First Look executed. By bypassing Google's First Look, publishers significantly increased participation in the market by third party ad exchanges. This led to a substantial increase in publisher ad revenue. As one Google executive described "[p]ublishers felt locked-in by dynamic allocation in DFP, which only gave AdX ability to compete, so HB [header bidding] was born. HB [header bidding] gives many publishers better yield, so it's a no-brainer for a publisher to adopt it".

172. With the introduction of header bidding, Google's First Look advantage became a "Last Look" advantage. Through Last Look, AdX was given a right of last refusal in respect of bids from rival exchanges. During the header bidding process, third-party ad exchanges submitted bids simultaneously and did not know what their rivals were bidding. But Google, through DFP, disclosed the highest real-time bid from the header-bidding exchanges to AdX, allowing AdX to use that bid as the price floor in its own auction. That way, Last Look enabled AdX to outbid competitors, only requiring a minimal increased margin. As described internally at Google: "AdX can observe all the other exchange bids, and can strategically lower its bid to be the smallest amount sufficient to win... This is referred to as the last-look advantage for AdX: Essentially, it can determine its bid after looking at the bids of other auction candidates".
173. Last Look allowed AdX to win inventory by bidding one penny more than the highest bid from rival ad exchanges. As a result, Last Look had no material benefit to publishers and publishers could not opt-out. As one Google executive described "last look...only benefits us [Google]". In fact, the removal of Last Look was one of the "biggest requests" Google got from the publisher community.
174. In 2014, Google introduced a program known as Sell-Side Dynamic Revenue Share ("SSDRS") to further bolster AdX's ability to win auctions by dynamically adjusting its 20% take rate. SSDRS, coupled with Last Look,

allowed AdX to adjust its 20% take rate after seeing the highest competing bid from rival ad exchanges. For example, AdX could reduce its take rate (e.g., 10%) to win an impression and increase its take rate (e.g., 30%) on another impression and maintain an average 20% take rate.

175. Rival exchanges could not compete with AdX because they did not have AdX's Last Look advantage and the ability to thereafter adjust their take rates through a program such as SSDRS. As a result, Google's AdX was able to win more auctions at the expense of its rivals, not because AdX was a better product, but because it was able to leverage its market power to deprive rival exchanges of critical transactions, scale, and customers, as well as distort competition. Google internally acknowledged that SSDRS was "just yet another way for AdX to exploit the last look advantage", which other ad exchanges could not replicate because, unlike AdX, they could not see bids from other ad exchanges.
176. Google understood that Last Look conferred an unfair advantage to AdX and was met with criticism from publishers. Nevertheless, Google recognized that in a header bidding environment, Last Look gave AdX "a significant informational advantage". Through Dynamic Allocation and the related First and Last Look features, Google restricted publishers' ability to multi-home and denied rivals essential revenue and scale, thereby reinforcing its market power across the ad tech stack — regardless of the impact these "features" had on ad matching quality for its customers.
177. As previously described at paragraph 165, Google also intentionally suppressed and deprecated innovative technologies that stood to benefit publishers and advertisers, including those aimed at facilitating real-time competition between ad exchanges, such as AdMeld's RTB technology, and later header bidding. Header bidding increased publisher revenue by as much as 20-40% by enabling real-time competition between ad exchanges. Yet, instead of embracing this innovative technology from which their publisher customers stood to gain,

Google took steps to stall and suppress the growth of header bidding to protect the unfair advantages Dynamic Allocation bestowed on AdX.

178. In 2019, Google moved to a unified first price auction and got rid of its Last Look advantage. Internally, Google acknowledged that this was done proactively and bundled with other beneficial changes for Google (e.g., Unified Pricing Rules, described below beginning at paragraph 186) to avoid being forced by regulators to remove Last Look under disadvantageous terms.

3. Google uses negative take rates to win more auctions

179. In 2013, Google realized that other ad buying tools were lowering their take rates to win more impressions, resulting in a “worrisome” trend of other ad buying tools on AdX growing at the expense of Google Ads.
180. In response, Google introduced a program it referred to internally as Project Bernanke,¹⁰ which adjusted Google Ads’ fixed take rate of 14% to win more ad impressions, while maintaining an average take rate of 14% per publisher.¹¹ This secret program allowed Google Ads to bid such that it earned a lower margin (including using negative take rates) in certain competitive auctions, and a higher margin in non-competitive auctions.
181. Google’s manipulation of its bids was done covertly and with the intention of reinforcing its dominant position in the relevant markets. Through Project Bernanke, Google steered more ad spend towards Google Ads and AdX, and away from rival buying tools and ad exchanges. In instances where Google took a negative take rate to boost its bid above the advertiser’s maximum willingness to pay, Google’s advertisers were winning impressions that another advertiser,

¹⁰ Project Bernanke was named after former US Federal Reserve Chairman Ben Bernanke, because it allowed Google to win more impressions through “quantitative easing” on AdX.

¹¹ As a precursor to Project Bernanke, Google ran Dynamic Revenue Share (“**DRS**”), which also adjusted Google Ads’ fixed take rate of 14% per impression to win more ad impressions, while still maintaining an average take rate of 14% per publisher. With DRS, Google would lower its take rate to zero in some instances but, in contrast to Project Bernanke, never lower than zero.

using a different ad buying tool, might have valued more highly and but for Google's take rate manipulation, would have won. In some instances, Google Ads lowered its take rate by as much as -300% to inflate bids on AdX relative to other ad exchanges. It also meant that publishers were being given distorted market signals in that in some cases the prices that they were receiving for their inventory did not reflect advertisers' willingness to pay.

182. Internally, Google initially estimated that Project Bernanke would reduce the number of auctions rival ad buying tools won on AdX by 18% and rival spend on AdX by 8%. In practice, Google later realized that Project Bernanke was exceeding its expectations and had resulted in boosting Google Ads win rate by 20% (at the expense of rival buying tools).
183. Google Ads' use of negative take rates reduced price competition and the ability of rival ad buying tools to compete for and win ad impressions, making them less attractive to advertisers. By allowing Google Ads to win more high value impressions than it would have otherwise won, Project Bernanke reinforced Google Ads' market power and by extension, the market power of AdX and DFP.
184. Under the initial version of Project Bernanke, Google Ads targeted an average take rate on a per publisher basis. In a later version, called Global Bernanke, Google Ads began to target an average take rate across all AdX publishers, creating pools of "winning" publishers on whose inventory Google would charge a less than average a take rate and "losing" publishers on whose inventory Google would charge a more than average take rate. Through Global Bernanke, Google exploited captive publishers it deemed to be "non-competitive" due to their lower quality inventory by charging them take rates above average and using those funds to subsidize "competitive" publishers with higher quality inventory.

185. In 2019, the mechanics of Project Bernanke were adjusted to function in a first-price auction. Today, this updated form of Project Bernanke is referred to as The Alchemist. The Alchemist continues to target an average take rate and continues to use negative take rates to advantage Google Ads relative to rival ad buying tools.

4. Google restricts publishers' ability to transact with rival exchanges on their own terms

186. In 2019, Google began leveraging its market power in the Publisher Ad Server market to reinforce its position in the Ad Exchange market by removing publishers' ability to set lower price floors for rival (i.e., non-Google) ad exchanges compared to AdX through a program called UPR. Google came to the realization that for the reasons set out below, publishers were setting higher price floors for AdX, which led to rival exchanges winning more impressions. To thwart their publisher customers initiative, Google unilaterally imposed UPR, forcing publishers to set the same price floor across all exchanges for any given impression.

187. Prior to UPR, DFP had offered functionality that allowed publishers to set different price floors for different ad exchanges and demand sources. Publishers valued and used this functionality for a number of reasons, including to adjust for ad quality, revenue diversity (i.e., not being overly reliant on Google) and to increase yield.

188. To limit the number of low-quality ads showing up on their websites, publishers could set a high price floor for certain exchanges associated with lower quality ads. Google was aware that publishers used high floors on AdX to reduce the risk of lower quality ads coming from Google Ads. As one Google executive described: “[a] publisher might set a lower floor for HB [header bidding] knowing that the risk of low-quality creatives coming through that channel is

much lower than the risk of similar creatives coming through AdX (mostly because of AdWords)”.

189. Google was also aware of publishers using price floors to diversify their revenue streams, promote competition and reduce their reliance on AdX. In explaining why some publishers choose to place higher floors in AdX, one Google executive described: “[p]ubs are also rationale [sic] when they decide to diversify their source of revenues. It help [sic] them to keep Google at bay and put pressure on us (similar to any industry).”
190. Google adopted UPR knowing that it would be viewed as a loss of functionality by publishers and that it could negatively impact publisher revenue. Realizing this, Google decided to bundle its launch of UPR with other changes to make it more “stomachable” and mask the negative effects. Google was aware that the removal of its Last Look advantage was going to have a negative impact on AdX, so it bundled it with the launch of UPR to offset the effects.
191. As expected, publishers were unhappy with the loss of control resulting from UPR, but had little recourse as they could not afford to lose access to Google Ads demand and had no viable alternatives to DFP. Despite complaints from publishers – for example, due to an increase in bad ads (i.e., fraudulent and/or spam ads) – Google did not afford publishers the option to opt-out of UPR. Publishers were captive and Google knew it.
192. Through UPR, Google has abused its market power in the Publisher Ad Server market by degrading the quality of DFP and taking away a feature that publishers valued. Google did not improve AdX or reduce its take rate to better compete with rival ad exchanges. Google unilaterally restricted the ability for publishers using DFP to set different price floors for ad exchanges for its own gain.

193. UPR denies publishers the ability to prioritize their preferred ad exchanges and deprives rival ad exchanges of the ability to differentiate their services on non-price dimensions and gain scale. Google's internal analysis confirmed that UPR had a negative effect on rival ad exchanges, which began losing share, and led to more spend flowing through AdX.

**D. GOOGLE'S PRACTICE LESSENS AND PREVENTS COMPETITION
SUBSTANTIALLY**

194. Google's practice of anti-competitive acts, as described above, has had, is having and is likely to have the effect of preventing and lessening competition substantially in the Publisher Ad Server, Ad Exchange and Advertiser Ad Network markets in Canada. But for Google's practice of anti-competitive acts, the Publisher Ad Server, Ad Exchange and Advertiser Ad Network markets would be substantially more competitive, including by way of lower prices, enhanced innovation and higher service quality.
195. In the absence of Google's practice, significant new entry and expansion into the Publisher Ad Server, Ad Exchange and Advertiser Ad Network markets would likely have occurred or would likely occur in the future. Google's conduct has raised barriers to entry and expansion, deprived rivals of scale and insulated it from competition, enabling it to exercise a materially greater degree of market power, through materially higher prices and materially lower levels of service quality, than would otherwise prevail in the absence of Google's practice.
196. Enhanced rivalry from new entry and/or expansion would likely have resulted and would in the future result, in substantially more competitive Publisher Ad server, Ad Exchange and Advertiser Ad Network markets in Canada. The ability of publishers and advertisers to seek publisher ad server, ad exchange and advertiser ad network alternatives to DFP, AdX and Google Ads respectively would likely have resulted and would in the future result in

materially lower prices and materially greater service, product quality and innovation.

197. Google's conduct has undermined the ability for publishers and advertisers to make informed choices and exacerbates problems of adverse selection in the auction process, leading to lower quality matches.
198. But for Google's practice, publishers and advertisers would benefit from greater choice, more innovation and lower prices. Google's conduct restricts the ability of publishers and advertisers to effectively multi-home, limiting their ability to take advantage of higher-quality and/or lower-priced services. Because of Google's conduct, advertisers pay more for advertising and publishers receive less. Google's practice has intentionally stalled, stifled and deprecated innovative technologies that stood to benefit publishers and advertisers to preserve and enhance its market power.

1. Publisher Ad Server market

199. But for Google's practice of anti-competitive acts, barriers to entry and expansion in the Publisher Ad Server market would have been lower and significant entry and expansion, or the threat of significant entry and expansion, would likely have occurred. New entry would lead to more vigorous competition in the Publisher Ad Server market, offering publishers higher-quality and more innovative services, including better functionality and controls.
200. Google's practice has virtually eliminated the ability of rival publisher ad servers to attract and retain publishers — allowing DFP to entrench its market power, leaving few viable competitors. The Publisher Ad Server market has seen no meaningful entry and several exits in the past decade. Those firms that have exited found that publishers wanted to use their publisher ad server, but could not forgo access to AdX due to, among other things, the commercial imperative to have access to Google Ads demand and the data-rich environment

created by AdX's scale. Those firms which remain in the market today are small and struggle to gain and maintain publisher customers without effective access to AdX and Google Ads demand.

201. But for Google's conduct, barriers to switching in the Publisher Ad Server market would have been substantially lower and publishers would have availed themselves of higher-quality or lower-priced alternatives. Google's tie increases barriers to publishers switching away from DFP as publishers are unable to forgo access to AdX. As a result, rates of switching in Canada are very low.
202. Google is not forced to compete through new, improved and innovative products and services. Publishers have been faced with reduced product quality and functionality in the Publisher Ad Server market, for example through the elimination of the ability to set price floors to manage their inventory the way they prefer, with no recourse. Publishers view Google not as an innovative partner, but instead as a "necessary evil".

2. Ad Exchange market

203. But for Google's practice of anti-competitive acts, barriers to entry and expansion in the Ad Exchange market would have been substantially lower, allowing rival ad exchanges to gain the scale necessary to effectively compete and offer publishers and advertisers lower-priced and higher-quality services. Publishers and advertisers, who have been subject to higher take rates, poorer quality matches and lower levels of innovation, would have gained the ability to effectively multi-home ad exchanges and realize the benefits of doing so.
204. Google's practice has restricted the ability of publishers to effectively multi-home ad exchanges and forced more ad sales to flow through AdX than would have otherwise prevailed in a competitive market. This has deprived rival ad exchanges of the ability to gain sufficient scale to meaningfully compete and collect data, which is critical to optimizing and improving their auctions. Over

time, the impact of that reduced volume has been compounded by indirect network effects, making rival ad exchanges less attractive to both advertisers and publishers.

205. AdX has benefitted from the preferential treatment which Google has afforded it, at the centre of Google's ad stack between Google Ads and DFP, which has artificially suppressed the competitive process, depriving rival ad exchanges of scale and publishers of revenue.
206. In 2019, when Google finally got rid of its Last Look advantage, Google's internal analysis found that the elimination of Last Look would create a more competitive environment with third parties, whose share of ad spend would increase while AdX's share of spend would decrease, and increase publisher yield. For example, one internal analysis conducted by Google found that the removal of Last Look would result in a 7% decrease in impressions for AdX. However, the implementation of UPR together with the elimination of Last Look led to *more* ad impressions being diverted from other ad exchanges to AdX, all without AdX having to compete harder on price, quality or innovation and without the support of publishers. One internal analysis estimated a 32% increase in impressions won by AdX as a result of UPR.
207. Google's anti-competitive practice has resulted in price competition in the Ad Exchange market being significantly diminished. Despite efforts from rival ad exchanges to gain share by differentiating their services and/or lowering their take rates, AdX has been able to maintain a supra-competitive take rate all while continuing to gain share. Over time, as ad exchanges that reduce their take rate and/or innovate in order to win more impressions are unsuccessful in doing so, their incentive to continue to reduce their take rate and/or innovate is diminished, to the detriment of publishers and advertisers.

208. But for Google's practice, prices in the Ad Exchange market would be substantially lower and publishers and advertisers would be free to avail themselves of higher-quality or lower-priced alternatives.
209. Google's distortion of the competitive process via Dynamic Allocation, Project Bernanke and UPR has had and continues to have the effect of forcing more transactions through AdX than would otherwise prevail in a competitive market. Those transactions are then subject to AdX's supra-competitive take rate, which means that advertisers pay more, and publishers receive less.
210. Google's internal predictions that header bidding would challenge the "must call" status of AdX and DFP (flowing from the tie with Google Ads) and drive down ad exchange fees to between 5-15% have not materialized because of actions taken by Google to blunt the competitive threat header bidding represented. AdX's take rate for open auction ad sales has remained remarkably stable at 20% and AdX continues to gain share. In 2022, AdX's market share was nearly 6 times higher than its next closest competitor. Google describes being at a "comfortable point when it comes to HB [Header Bidding]".
211. Google executives consistently describe AdX's take rate as significantly higher than its rivals and not justified based on AdX's functionality, with one Google executive describing that they are "continuing to extract irrationally high rent from the AdX". But for its exclusive access to Google Ads demand and ownership of the publisher ad server, AdX could not sustain a 20% take rate and publishers would shift spend to other ad exchanges. Internally, as Google acknowledges, AdX is more difficult to do business with than other ad exchanges and that without its exclusive access to Google Ads and privileged position within Google's ad stack, it would be forced to compete on service and would likely lose.

3. *Advertiser Ad Network market*

212. But for Google's practice of anti-competitive acts, barriers to entry and expansion in the Advertiser Ad Network market would have been lower, allowing new rival advertiser ad networks to enter the market and existing rivals to expand and gain the scale necessary to effectively compete and offer advertisers lower-priced and higher-quality services.
213. Google's practice has allowed Google Ads to entrench its dominance, making rival advertiser ad networks less attractive to advertisers.
214. Given that Google Ads is one of the largest buyers on AdX, the advantages enjoyed by AdX, such as First Look, Last Look and UPR, have also accrued to Google Ads. For example, the implementation of UPR resulted in the average price floor for Google Ads decreasing from over \$3.00 to just over \$1.00, thereby increasing the number of ad impressions Google Ads is eligible to bid on. This deprived rival advertiser ad networks of the ability to differentiate their services on non-price dimensions and gain scale, and restricted publishers' ability to use price floors to avoid low quality ads from Google Ads.
215. Project Bernanke, and particularly Google Ads' use of negative take rates, reinforced Google Ads' dominant market position. Google's distortion of the competitive process excluded rivals by reducing price competition with other advertiser buying tools. Google's use of negative take rates has allowed it to boost bids from Google Ads above its advertisers' maximum willingness to pay, allowing a Google Ads advertiser to win an impression that another advertiser, using a different advertiser buying tool, might value more highly. Google's records show that Project Bernanke increased Google Ads' win rate and "starved out some AdX buyers of growth". Google found that Bernanke would lead to a 23% reduction in impressions won by other buyers on AdX and a 10% reduction in spend.

E. CONCLUSION

216. An order of the Tribunal is necessary and appropriate in the circumstances, including for the following reasons:

- a) Google's practice has had, is having and is likely to have the effect of preventing or lessening competition substantially in the Advertiser Ad Network, Ad Exchange and Publisher Ad Server markets in Canada;
- b) an order, and more particularly, the relief sought by the Commissioner herein, is reasonable and necessary to overcome the anti-competitive effects of Google's practice in the Advertiser Ad Network, Ad Exchange and Publisher Ad Server markets in Canada and to restore competition in the market;
- c) an enforceable mechanism is necessary to prevent Google from engaging in the same or similar conduct likely to have the effect of preventing or lessening competition substantially in the Advertiser Ad Network, Ad Exchange and Publisher Ad Server markets in Canada; and
- d) an order will indicate to the Canadian marketplace more broadly that the actions described by the Commissioner herein are anti-competitive.

F. RELIEF SOUGHT

217. For all the reasons provided above, the Commissioner seeks an order from this Tribunal:

- a) pursuant to subsections 79(1), 79(2) and 79(3.1) of the Act:

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- i. requiring Google to divest Google’s publisher ad server, DFP, and Google’s ad exchange, AdX, along with any additional structural relief as needed to restore competition and overcome the effects of Google’s anti-competitive practice in Canada;
 - ii. otherwise, prohibiting Google from continuing to engage in the anti-competitive practice described herein and from engaging in any other practices with the same purpose and effect in Canada; and
 - iii. directing Google to pay an administrative monetary penalty equal to three times the value of the benefit derived from Google’s anti-competitive practice, or if that amount cannot be reasonably determined, 3% of Google’s worldwide gross revenues;
- a. directing Google to pay costs; and
 - b. such other relief as the Tribunal may consider appropriate.

DATED AT Gatineau, Quebec, this 28th day of November 2024.

**Boswell,
Matthew**

Digitally signed by
Boswell, Matthew
Date: 2024.11.28 09:53:19
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Matthew Boswell
Commissioner of Competition
Competition Bureau
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50 Victoria Street
Gatineau, QC K1A 0C9

SCHEDULE “A”

CONCISE STATEMENT OF ECONOMIC THEORY

1. Google is dominant in two markets: the market for the supply of publisher ad servers used by publishers to sell programmatic open web advertising (the “**Publisher Ad Server market**”), and the market for the supply of advertiser ad networks used by advertisers to buy programmatic open web advertising (the “**Advertiser Ad Network market**”). Google also holds a strong market position in other markets for the supply of ad tech tools used by both advertisers and publishers for programmatic open web advertising, including in the market for the tools that serve as the intermediary between the sell- and buy-side tools (the “**Ad Exchange market**”).
2. Through a series of interrelated and interdependent anti-competitive actions, which have had cumulative and synergistic anti-competitive effects, Google has unlawfully tied together its different ad tech products and hamstrung rivals’ ability to compete on the merits. In particular, Google has:
 - a) Made its advertiser ad network’s unique, must-have advertiser demand available only to its own ad exchange, and in turn, compelled publishers to use its publisher ad server in order to access real-time bidding through its ad exchange;
 - b) Used its dominant position within the Publisher Ad Server market to: (i) provide its own ad exchange preferential access to valuable ad inventory, and (ii) deny publishers the ability to shift ad inventory sales to non-Google ad exchanges to foster greater competition in the Ad Exchange market; and
 - c) Artificially increased Google Ads’ win rate on AdX by incurring losses on certain transactions which deprived rival ad-buying tools of scale, hindering their ability to compete.

3. In implementing these anti-competitive interrelated and interdependent actions, Google has been able to entrench its dominance, deprive rivals of scale, decrease incentives for innovation, insulate itself from competition, inflate advertising costs, and reduce revenues for publishers. Google's conduct, in whole or in part, has had (and, if left unchecked, will continue to have) serious consequences for publishers, advertisers, rivals, and ultimately consumers — manifesting in a substantial preventing and lessening of competition, the magnitude, duration and scope of which is compounded by the economies of scale and network effects endemic to ad tech.
4. Google Ads' advertising demand is comprised of many small- and medium-sized advertisers that value the advertiser ad network's ease of use, its data that Google provides to target audiences, and its ability to conduct effective search advertising. For many Google Ads advertisers, Google Ads is the only ad-buying tool they use to buy programmatic open web advertising. Given this fact, Google's advertiser ad network serves as a bottleneck — in order to access the total advertising demand from these advertisers, publishers need to ensure that their inventory is accessible to Google Ads.
5. The value that publishers place on this collective block of advertising demand provides Google with the ability and incentive to leverage its market power in the Advertiser Ad Network market into other areas of the ad stack such as the Ad Exchange and Publisher Ad Server markets. Google has done this through its tie: (i) providing full access to Google Ads' demand only to its ad exchange, AdX, and (ii) only permitting its publisher ad server, DFP, the ability to receive real-time bids from AdX. Because of the importance of the revenue realized from real-time bidding from the mass of advertisers that are only available from Google Ads, the tie strongly incentivizes publishers to adopt DFP to access AdX.
6. An ad tech tool's scale is a crucial factor in its ability to compete effectively with rivals. By strongly incentivizing publishers to use DFP and AdX to get

access to Google Ads' advertising demand, Google has deprived ad exchange and publisher ad server rivals of the ability to generate scale and become more effective competitors. In fact, given that publishers typically use only one publisher ad server to manage their inventory, Google's conduct has effectively made DFP the only publisher ad server that Canadian publishers use.

7. By leveraging its market power from the Advertiser Ad Network market into the markets for Ad Exchanges and Publisher Ad Servers, Google has increased barriers for firms wanting to enter or expand by providing programmatic web advertising services in these markets. To effectively compete, a firm would need to provide publishers access to a collective block of advertising demand that is comparable to that of Google Ads to induce them to adopt its ad exchange or publisher ad server. Establishing such a collective block of advertising presents a sizable barrier to entry.
8. Google's tie involving Google Ads, AdX and DFP, has allowed it to dominate the Publisher Ad Server market. The publisher ad server acts as the key piece of software that determines the winning advertiser for a particular publisher's impression. It therefore serves a critical decision-making role in the sale of a publisher's inventory. Google has used its dominance in the Publisher Ad Server market to favour AdX over rival ad exchanges. In particular, Google provided AdX with the opportunity of a "first-look" at a publisher's inventory when publishers were using a "waterfall" system to access exchanges. With a "first-look" at a publisher's inventory, combined with knowledge of the average value of bids that a publisher used to rank exchanges in its waterfall, Google was able to ensure that AdX won valuable impressions for prices no higher than needed to beat bid rival exchanges.
9. When publishers began transitioning from the "waterfall" system to "header bidding", Google used DFP to provide AdX a "last look" advantage over other ad exchanges. Header bidding provided a publisher the ability to receive real-time bids from competition among ad exchanges other than AdX. Google did

not participate in header bidding but instead used DFP to call AdX to fill a publisher's impression after it had sought real-time bids from rival exchanges through the header bidding process. AdX, aware of the highest bid from rival exchanges, was then able to win the impression with a slightly higher bid. Again, Google's use of DFP provided AdX with a clear advantage over rival exchanges in the ability to compete in buying publisher ad inventory.

10. Google also abused its market power in the Publisher Ad Server market by making technological changes to DFP so it no longer offered publishers the ability to set separate price floors for different ad exchanges. Publishers value the ability to set different price floors because this allows them the ability to shift sales to exchanges that provided volume rebates or provided other advantages such as superior ad quality. Because AdX is the largest ad exchange, it offers the "thickest" market for ad inventory as the number of ad buyers on AdX typically exceeds those on any other ad exchange for any given impression. This means that AdX typically offers higher prices for publisher impressions. By eliminating differential price floors (instituting what was known as Unified Pricing Rules), Google no longer allowed publishers to trade-off the ability to forego an immediate high price for selling inventory on AdX versus the benefits of shifting sales to other exchanges to promote longer term competition among ad exchanges. This clearly is to the advantage of Google, as it allows it to benefit from its scale advantage that it currently enjoys and prevents the ability of rival exchanges to gain scale through the actions of publishers.

11. In addition to its abuse of its dominance using DFP, Google also artificially inflates Google Ads' rate of successfully winning auctions on AdX by paying publishers more for their inventory than the maximum amount that Google Ads' advertisers are willing to pay. Google does this for impressions where it expects heavy competition from rival ad-buying tools. By paying publishers amounts exceeding advertisers' maximum willingness to pay, Google creates inefficiency due to impressions being served by advertisers who do not value

the impression the highest – something that auction mechanisms are typically designed to do. Furthermore, by increasing the number of impressions won by Google Ads, Google reduces the win rate, and hence scale, of other ad-buying tools which negatively impacts their ability to compete over time. Enhancing Google Ads' win rate on AdX may also shift sales that would otherwise have occurred on rival exchanges. This too, would serve to reduce the scale of competitor exchanges and negatively impact their ability to compete.

12. In summary, Google's interrelated and interdependent actions have had, are having, and are likely to have the effect of preventing and lessening competition substantially in the Publisher Ad Server, Ad Exchange and Advertiser Ad Network markets in Canada. But for Google's practice of anti-competitive acts, the Publisher Ad Server, Ad Exchange and Advertiser Ad Network markets would be substantially more competitive, including by way of lower prices, enhanced innovation, higher service quality and more efficient allocation of impressions.

TAB 2

A-39-04
2004 FCA 339

A-39-04
2004 CAF 339

Symbol Technologies Canada ULC (*Appellant*)
(*Respondent*)

Symbol Technologies Canada ULC (*appelante*)
(*défenderesse*)

v.

c.

Barcode Systems Inc. (*Respondent*) (*Applicant*)

Barcode Systems Inc. (*intimée*) (*demanderesse*)

INDEXED AS: SYMBOL TECHNOLOGIES CANADA ULC v. BARCODE SYSTEMS INC. (F.C.A.)

RÉPERTORIÉ: SYMBOL TECHNOLOGIES CANADA ULC c. BARCODE SYSTEMS INC. (C.A.F.)

Federal Court of Appeal, Richard C.J., Létourneau and Rothstein J.J.A.—Winnipeg, September 28; Ottawa, October 7, 2004.

Cour d'appel fédérale, juge en chef Richard, juges Létourneau et Rothstein, J.C.A.—Winnipeg, 28 septembre; Ottawa, 7 octobre 2004.

Competition — Appeal from Competition Tribunal decision granting respondent leave to make Competition Act, s. 75 application for order requiring appellant to accept respondent as customer against appellant — Appellant, Canadian subsidiary of bar code equipment manufacturer, sells, distributes products in Canada — Respondent taking over distribution in Western Canada in about 1994 — Since 2003, appellant refusing to deal with respondent — Respondent bringing leave application pursuant to Act, s. 103.1(1), alleging appellant engaged in restrictive trade practice of “refusal to deal” within meaning of Act, s. 75 — Tribunal granting leave under Act, s. 103.1(7) — Appellant arguing Tribunal erred in granting leave because not taking into account all elements of refusal to deal set out in Act, s. 75(1) — As question of law not engaging particular expertise of Tribunal, correctness appropriate standard of review — Test for granting leave in s. 103.1(7) application set out in National Capital News Canada v. Canada (Speaker of the House of Commons) applied: whether sufficient credible evidence of what is alleged to give rise to bona fide belief by Tribunal that applicant directly, substantially affected in its business by reviewable restrictive trade practice that could be subject of Tribunal order under Act, s. 75 or 77 — That threshold for obtaining leave lower than balance of probabilities — All elements of reviewable practice of refusal to deal, set out in Act, s. 75(1), need to be addressed by Tribunal on leave application in order for it to reach conclusion as to whether practice alleged could be subject to order — Court resolving matter without remitting it to Tribunal — Evidence that respondent substantially affected in its business — Real controversy whether evidence refusal to deal likely to have adverse effect on competition in market (Act, s. 75(1)(e)) — Leave application not appropriate occasion to interpret Act, s. 75(1)(e) for first time — Benefit of any doubt working in favour of granting leave — Sufficient

Concurrence — Appel d'une décision du Tribunal de la concurrence accordant à l'intimée la permission de présenter contre l'appelante une demande fondée sur l'art. 75 de la Loi sur la concurrence en vue d'obtenir une ordonnance enjoignant à celle-ci de l'accepter comme cliente — L'appelante, filiale canadienne d'un fabricant de lecteurs de codes à barres, vend et distribue des produits au Canada — Vers 1994, l'intimée a pris en charge la distribution dans l'Ouest canadien — Depuis 2003, l'appelante refuse de traiter avec l'intimée — L'intimée a présenté une demande de permission en vertu de l'art. 103.1(1) de la Loi, alléguant que l'appelante se livrait à une pratique restrictive du commerce, à savoir le refus de vendre au sens de l'art. 75 de la Loi — Le Tribunal a accordé la permission en vertu de l'art. 103.1(7) de la Loi — L'appelante soutient que le Tribunal a commis une erreur en accordant la permission parce qu'il n'a pas pris en considération tous les éléments du refus de vendre énoncés à l'art. 75(1) de la Loi — Comme les questions de droit ne font appel à aucune expertise particulière du Tribunal, la norme applicable est celle de la décision correcte — Le critère applicable pour faire droit à la demande de permission en vertu de l'art. 103.1(7), énoncé dans la décision National Capital News Canada c. Canada (Président de la Chambre des communes), s'appliquait: il faut se demander s'il existe suffisamment d'éléments de preuve crédibles établissant le bien-fondé des allégations pour que le Tribunal puisse croire de bonne foi que le demandeur a été directement et sensiblement gêné dans son entreprise à cause d'une pratique restrictive susceptible d'examen et que cette pratique pourrait faire l'objet d'une ordonnance du Tribunal en vertu des art. 75 ou 77 — Cette charge qui incombe à l'auteur de la demande de permission est moins lourde que celle imposée par la norme de la prépondérance de la preuve — Tous les éléments de la pratique susceptible d'examen que constitue le refus de vendre, énoncés à l'art. 75(1), doivent être considérés

evidence constituting reasonable grounds for believing refusal to deal could be subject to order under Act — Appeal dismissed.

This was an appeal from a decision of the Competition Tribunal granting leave to the respondent to make an application against the appellant. The appellant is the Canadian subsidiary of Symbol Technologies Inc. (Symbol US), the largest single manufacturer of bar code equipment in the world. The appellant sells and distributes Symbol US products in Canada. In or about 1994, the respondent took over the appellant's distribution in Western Canada. Since May 1, 2003, the appellant refused to deal with the respondent. The respondent's application for leave to apply for an order under *Competition Act* subsection 75(1) requiring Symbol to accept Barcode as a customer before the Tribunal (brought pursuant to subsection 103.1(1) of the Act) alleged that Symbol was engaging in the reviewable restrictive trade practice of "refusal to deal" within the meaning of section 75 of the Act. Leave was granted and the present appeal ensued. The appellant argued that the Tribunal member who granted leave erred in law by refusing to take into account all of the elements of the reviewable practice of refusal to deal set out in subsection 75(1) and that the decision to grant leave should be quashed.

Held, the appeal should be dismissed.

Subsection 103.1(7) of the Act provides that to grant leave, the Tribunal must have reason to believe that the applicant is directly and substantially affected in its business by a reviewable restrictive trade practice that could be the subject of a Tribunal order under section 75 or 77 of the Act. The decision to grant leave is a discretionary one. However, the question at issue here whether the Tribunal is required to consider all the elements of the restrictive trade practice of refusal to deal was one of law. This question of statutory interpretation does not engage any particular expertise of the Tribunal. Thus, the standard of review was correctness.

par le Tribunal qui se penche sur une demande de permission pour que celui-ci puisse se prononcer sur la question de savoir si la pratique alléguée pourrait faire l'objet d'une ordonnance — La Cour a tranché l'affaire sans la renvoyer au Tribunal — Preuve a été faite que l'intimée est sensiblement gênée dans son entreprise — Le point véritablement controversé est de savoir s'il y a preuve que le refus de vendre aura vraisemblablement pour effet de nuire à la concurrence dans un marché (art. 75(1)e) de la Loi) — La demande de permission n'est pas l'occasion appropriée pour interpréter l'art. 75(1)e) de la Loi pour la première fois — Le bénéfice du doute devrait jouer en faveur de l'octroi de la permission — La preuve est suffisante pour fonder des motifs raisonnables de croire que le refus de vendre pourrait faire l'objet d'une ordonnance en vertu de la Loi — Appel rejeté.

Il s'agissait de l'appel d'une décision du Tribunal de la concurrence accordant à l'intimée la permission de présenter une demande à l'encontre de l'appelante. L'appelante est la filiale canadienne de Symbol Technologies Inc. (Symbol US), le principal fabricant de lecteurs de codes à barres au monde. L'appelante vend et distribue les produits Symbol US au Canada. Vers 1994, l'intimée a pris en charge le service de distribution de l'appelante dans l'Ouest canadien. Depuis le 1^{er} mai 2003, l'appelante a refusé de traiter avec l'intimée. Dans sa demande présentée au Tribunal (en vertu du paragraphe 103.1(1) de la *Loi sur la concurrence*) en vue d'obtenir la permission de demander que soit prononcée, en vertu du paragraphe 75(1) de la Loi, une ordonnance enjoignant à Symbol de l'accepter comme cliente, l'intimée a allégué que Symbol se livrait à une pratique restrictive du commerce susceptible d'examen, à savoir le refus de vendre au sens de l'article 75 de la Loi. La permission a été accordée et le présent appel a été interjeté. L'appelante a soutenu que le membre du Tribunal qui a fait droit à la demande de permission a commis une erreur de droit en refusant de tenir compte de tous les éléments de la pratique susceptible d'examen que constitue le refus de vendre, énoncés au paragraphe 75(1) de la Loi, et que la décision d'accorder l'autorisation devrait être annulée.

Arrêt: l'appel doit être rejeté.

Le paragraphe 103.1(7) de la Loi prévoit que pour faire droit à la demande, le Tribunal doit avoir des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise par une pratique restrictive du commerce susceptible d'examen et pouvant faire l'objet d'une ordonnance en vertu des articles 75 ou 77 de la Loi. La décision de faire droit ou non à la demande de permission est discrétionnaire. Toutefois, la question en litige en l'espèce, qui consistait à savoir si, dans l'exercice de son pouvoir discrétionnaire, le Tribunal devait considérer tous les éléments de la pratique commerciale restrictive que constitue le refus de vendre, énoncés au paragraphe 75(1), en était une de droit.

The test for granting leave in an application under subsection 103.1(7) found in *National Capital News Canada v. Canada (Speaker of the House of Commons)* was adopted. The application must be supported by sufficient credible evidence to give rise to a *bona fide* belief by the Tribunal that the applicant may have been directly and substantially affected in its business by a reviewable practice, and that the practice in question could be subject to an order. This threshold is lower than proof on a balance of probabilities. That said, the elements of the reviewable trade practice of refusal to deal set out in subsection 75(1) must all be shown and addressed by the Tribunal before it may make an order, not only the merits of the application, but also on an application for leave under subsection 103.1(7). As long as each element is considered, even summarily, the Tribunal's decision to grant or refuse leave will be treated with deference.

Use of essentially the same words in subsection 103.1(7) and paragraph 75(1)(a) "that the applicant is directly and substantially affected in the applicants' business", while there are no such similar words in paragraphs 75(1)(b) to (e) in subsection 103.1(7), does not imply that the statutory elements in paragraphs 75(1)(b) to (e) need not be considered on a leave application. To determine the leave application, the Tribunal must consider whether the practice that is alleged could be subject to an order under subsection 75(1); and it cannot reach such a conclusion without considering all the elements of refusal to deal set out in that subsection. Also, the purpose of the Act is to maintain and encourage competition in Canada, and so at the leave stage, there must be some evidence by the applicant and some consideration by the Tribunal of the effect of the refusal to deal on competition in a market (paragraph 75(1)(e) of Act).

It was deemed appropriate for the Court to resolve the matter instead of remitting the matter to the Tribunal for redetermination as leave applications were intended to be dealt with summarily. There was evidence that the respondent was substantially affected in its business due to its inability to obtain the appellant's products. The only real controversy was whether there was evidence that the appellant's refusal to deal was likely to have an adverse effect on competition in a

Cette question d'interprétation législative ne fait appel à aucune expertise particulière du Tribunal. La norme applicable était donc celle de la décision correcte.

Le critère applicable pour faire droit à la demande de permission en vertu du paragraphe 103.1(7), énoncé dans la décision *National Capital News Canada c. Canada (Président de la Chambre des communes)*, a été adopté. La demande doit être appuyée par des éléments de preuve crédibles suffisants pour que le Tribunal puisse croire de bonne foi que le demandeur a pu être directement et sensiblement gêné dans son entreprise à cause d'une pratique susceptible d'examen et que cette pratique pourrait faire l'objet d'une ordonnance. Cette norme de preuve est moins élevée que la norme de la prépondérance de la preuve. Cela dit, les éléments de la pratique commerciale susceptible d'examen que constitue le refus de vendre, énoncés au paragraphe 75(1), doivent tous être prouvés et considérés par le Tribunal pour que celui-ci puisse rendre une ordonnance et ce, non seulement lorsqu'il examine l'affaire au fond, mais aussi lorsqu'il se penche sur une demande de permission selon le paragraphe 103.1(7). Pourvu que chaque élément soit pris en considération, même brièvement, la décision du Tribunal de faire droit ou non à la demande de permission sera traitée avec déférence.

Le fait que les termes employés au paragraphe 103.1(7), à savoir «que l'auteur de la demande est directement et sensiblement gêné dans son entreprise», soient essentiellement les mêmes que ceux utilisés à l'alinéa 75(1)a), alors que ce paragraphe ne comporte pas de termes similaires à ceux employés aux alinéas 75(1)b) à e), ne signifie pas que les éléments énoncés aux alinéas 75(1)b) à e) n'ont pas à être considérés au stade de la demande de permission. Pour se prononcer sur la demande de permission, le Tribunal doit se demander si la pratique alléguée pourrait faire l'objet d'une ordonnance en vertu du paragraphe 75(1); et il ne peut tirer pareille conclusion sans considérer tous les éléments du refus de vendre, énoncés à ce même paragraphe. De plus, comme l'objet fondamental de la Loi est de préserver et de favoriser la concurrence au Canada, l'auteur de la demande doit, au stade de la demande de permission, fournir certains éléments de preuve concernant l'effet du refus de vendre sur la concurrence dans un marché (alinéa 75(1)e) de la Loi), et le Tribunal doit prendre ces éléments en considération.

On a jugé qu'il était approprié pour la Cour de trancher l'affaire plutôt que de la renvoyer au Tribunal pour qu'il rende une nouvelle décision puisque les demandes de permission sont censées revêtir un caractère sommaire. Preuve a été faite que l'intimée a été sensiblement gênée dans son entreprise en raison de son incapacité à obtenir les produits de l'appelante. Le seul point véritablement controversé était de savoir s'il y avait preuve que le refus de vendre de l'appelante aurait

market. The relevant provision, paragraph 75(1)(e), has not been interpreted by the Tribunal or this Court, and a leave application was not considered the appropriate occasion to do so. Therefore, if there were facts in the respondent's affidavit that might meet the requirements of paragraph 75(1)(e), the benefit of any doubt was to work in favour of granting leave. Here, there was sufficient evidence to constitute reasonable grounds to believe that the appellant's alleged refusal to deal could be the subject of an order under subsection 75(1): the respondent had somewhat of a presence in the Western Canadian market, and its difficult financial situation could be likely to impede its ability to be an effective competitor in that market.

vraisemblablement pour effet de nuire à la concurrence dans un marché. La disposition pertinente, l'alinéa 75(1)e), n'a jamais été interprétée par le Tribunal ou par la Cour, et une demande de permission n'était pas l'occasion appropriée pour le faire. Conséquemment, s'il y avait des faits énoncés dans la déclaration sous serment de l'intimée qui pouvaient satisfaire aux exigences de l'alinéa 75(1)e), le bénéfice du doute devait jouer en sa faveur. En l'espèce, la preuve était suffisante pour fonder des motifs raisonnables de croire que le refus de vendre allégué de l'appelante pourrait faire l'objet d'une ordonnance en vertu du paragraphe 75(1): l'intimée avait une certaine présence dans le marché de l'Ouest canadien, et sa situation financière difficile pouvait vraisemblablement gêner sa capacité à se positionner comme un concurrent dynamique dans ce marché.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Competition Act, R.S.C., 1985, c. C-34, ss. 1 (as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 19), 1.1 (as enacted *idem*), 75 (as am. *idem*, s. 45; 2002, c. 16, s. 11.1), 77 (as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 45; S.C. 1999, c. 2, s. 23; 2002, c. 16, ss. 11.2, 11.3), 103.1 (as enacted *idem*, s. 12).
Competition Tribunal Act, R.S.C., 1985 (2nd Supp.), c. 19, s. 13(1) (as am. by S.C. 2002, c. 8, s. 130), (2).

CASES JUDICIALLY CONSIDERED

APPLIED:

National Capital News Canada v. Canada (Speaker of the House of Commons) (2002), 23 C.P.R. (4th) 77 (Comp. Trib.).

REFERRED TO:

Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3; (2002), 208 D.L.R. (4th) 1; 37 Admin. L.R. (3d) 152; 90 C.R.R. (2d) 1; 18 Imm. L.R. (3d) 1; 281 N.R. 1.

APPEAL from a decision of the Competition Tribunal ([2004] C.C.T.D. No. 1 (Comp. Trib.) (QL)) granting leave to the respondent to make an application against the appellant. Appeal dismissed.

APPEARANCES:

Steven E. Field and *David G. Hill* for appellant (respondent).
Lindy J. R. Choy for respondent (applicant).

LOIS ET RÈGLEMENTS CITÉS

Loi sur la concurrence, L.R.C. (1985), ch. C-34, art. 1 (mod. par L.R.C. (1985) (2^e suppl.), ch. 19, art. 19), 1.1 (édicte, *idem*), 75 (mod., *idem*, art. 45; 2002, ch. 16, art. 11.1), 77 (mod. par L.R.C. (1985) (2^e suppl.), ch. 19, art. 45; L.C. 1999, ch. 2, art. 23; ch. 31, art. 52; 2002, ch. 16, art. 11.2, 11.3), 103.1 (édicte, *idem*, art. 12).
Loi sur le Tribunal de la concurrence, L.R.C. (1985) (2^e suppl.), ch. 19, art. 13(1) (mod. par L.C. 2002, ch. 8, art. 130), (2).

JURISPRUDENCE CITÉE

DÉCISION APPLIQUÉE:

National Capital News Canada c. Canada (Président de la Chambre des communes) (2002), 23 C.P.R. (4th) 77 (Trib. conc.).

DÉCISION EXAMINÉE:

Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration), [2002] 1 R.C.S. 3; (2002), 208 D.L.R. (4th) 1; 37 Admin. L.R. (3d) 152; 90 C.R.R. (2d) 1; 18 Imm. L.R. (3d) 1; 281 N.R. 1.

APPEL d'une décision du Tribunal de la concurrence ([2004] D.T.C.C. n° 1 (Trib. conc.) (QL)) accordant à l'intimée la permission de présenter une demande à l'encontre de l'appelante. Appel rejeté.

ONT COMPARU:

Steven E. Field et *David G. Hill* pour l'appelante (défenderesse).
Lindy J. R. Choy pour l'intimée (demanderesse).

SOLICITORS OF RECORD:

Hill Abra Dewar, Winnipeg, for appellant (respondent).
Thompson Dorfman Sweatman LLP, Winnipeg, for respondent (applicant).

The following are the reasons for judgment rendered in English by

ROTHSTEIN J.A.:

INTRODUCTION

[1] This is an appeal by Symbol Technologies Canada ULC (Symbol) from a decision of the Competition Tribunal [*Barcode Systems Inc. v. Symbol Technologies Canada ULC*, [2004] C.C.T.D. No. 1 (QL)] under subsection 103.1(7) [as enacted by S.C. 2002, c. 16, s. 12] of the *Competition Act*, R.S.C., 1985, c. C-34 [s. 1 (as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 19)] granting leave to the respondent Barcode Systems Inc. (Barcode) to make an application to the Tribunal against Symbol. In its leave application to the Tribunal, Barcode alleged that Symbol was engaging in the reviewable restrictive trade practice of “refusal to deal” within the meaning of section 75 [as am. *idem*, c. 19, s. 45; S.C. 2002, c. 16, s. 11.1] of the Act.

[2] Barcode’s application before the Tribunal is for an order under subsection 75(1) of the *Competition Act* requiring Symbol to accept Barcode as a customer.

[3] In this appeal, Symbol says that the Tribunal member who granted leave erred in law by refusing to take into account statutory requirements and that the decision to grant leave should be quashed by this Court.

FACTS

[4] The facts are taken from the affidavit of David Sokolow, the President of Barcode. There has been no cross-examination on that affidavit. Symbol is the

AVOCATS INSCRITS AU DOSSIER:

Hill Abra Dewar, Winnipeg, pour l’appelante (défenderesse).
Thompson Dorfman Sweatman LLP, Winnipeg, pour l’intimée (demanderesse).

Ce qui suit est la version française des motifs du jugement rendu par

LE JUGE ROTHSTEIN, J.C.A.:

INTRODUCTION

[1] Symbol Technologies Canada ULC (Symbol) interjette appel d’une décision du Tribunal de la concurrence [*Barcode Systems Inc. c. Symbol Technologies Canada ULC*, [2004] D.T.C.C. n° 1 (QL)] accordant à l’intimée Barcode Systems Inc. (Barcode), suivant le paragraphe 103.1(7) [édicte par L.C. 2002, ch. 16, art. 12] de la *Loi sur la concurrence*, L.R.C. (1985), ch. C-34 [art. 1 (mod. par L.R.C. (1985) (2° suppl.), ch. 19, art. 19)], la permission de présenter une demande au Tribunal à l’encontre de Symbol. Dans sa demande de permission, Barcode a allégué que Symbol se livrait à une pratique restrictive du commerce susceptible d’examen, à savoir le refus de vendre au sens de l’article 75 [mod. *idem*, ch. 19, art. 45; L.C. 2002, ch. 16, art. 11.1] de la Loi.

[2] Dans sa demande présentée au Tribunal, Barcode demandait que soit prononcée, en vertu du paragraphe 75(1) de la *Loi sur la concurrence*, une ordonnance enjoignant à Symbol de l’accepter comme cliente.

[3] Dans le présent appel, Symbol déclare que le membre du Tribunal qui a fait droit à la demande de permission a commis une erreur de droit en refusant de tenir compte des exigences de la loi, et que la décision d’accorder l’autorisation devrait être annulée par la Cour.

FAITS

[4] Les faits sont tirés de l’affidavit de David Sokolow, président de Barcode. Il n’y a pas eu de contre-interrogatoire relativement à cet affidavit. Symbol est la

Canadian subsidiary of Symbol Technologies Inc. (Symbol US). Symbol US is the largest single manufacturer of bar code equipment in the world. Symbol sells and distributes Symbol US products in Canada. In or about 1994, Barcode took over Symbol's distribution in Western Canada.

[5] In or about January 2003, Symbol informed Barcode that it could no longer buy parts for Symbol products. In April 2003, Symbol informed Barcode that it would not accept purchase orders from Barcode. Barcode says that since May 1, 2003, Symbol has refused to deal with Barcode.

RELEVANT STATUTORY PROVISIONS

[6] Until 2002, only the Commissioner of Competition could bring an application before the Competition Tribunal in respect of reviewable restrictive trade practices described in Part VIII of the *Competition Act*, e.g. refusal to deal (section 75) and tied selling (section 77 [as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 45; S.C. 1999, c. 2, s. 23; 2002, c. 16, ss. 11.2, 11.3]). By amendments to the *Competition Act*, S.C. 2002, c. 16, ss. 11.1 to 11.3, private applicants were given the opportunity to bring applications to the Tribunal, subject to the Tribunal granting them leave to do so. Subsection 103.1(1) [as enacted *idem*, s. 12] of the *Competition Act* provides:

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under section 75 or 77.

[7] The considerations the Tribunal is to take into account in determining a leave application are set out in subsection 103.1(7). To grant leave, the Tribunal must have reason to believe that the applicant is directly and substantially affected in its business by a reviewable restrictive trade practice that could be the subject of a Tribunal order under section 75 or 77 of the *Competition Act*. Subsection 103.1(7) provides:

103.1

filiale canadienne de Symbol Technologies Inc. (Symbol US). Symbol US est le principal fabricant de lecteurs de codes à barres au monde. Symbol vend et distribue les produits Symbol US au Canada. Vers 1994, Barcode a pris en charge le service de distribution de Symbol dans l'Ouest canadien.

[5] Vers janvier 2003, Symbol a informé Barcode qu'elle ne pourrait plus acheter les pièces destinées aux produits Symbol. En avril 2003, Symbol a informé Barcode qu'elle n'accepterait pas ses bons de commande. Barcode affirme que depuis le 1^{er} mai 2003, Symbol a refusé de traiter avec elle.

DISPOSITIONS LÉGISLATIVES PERTINENTES

[6] Jusqu'en 2002, seul le Commissaire de la concurrence pouvait présenter une demande au Tribunal en ce qui concerne les pratiques restrictives du commerce susceptibles d'examen, définies à la Partie VIII de la *Loi sur la concurrence*, tels le refus de vendre (article 75) et les ventes liées (article 77 [mod. par L.R.C. (1985) (2^e suppl.), ch. 19, art. 45; L.C. 1999, ch. 2, art. 23; ch. 31, art. 52; 2002, ch. 16, art. 11.2, 11.3]). À la suite de modifications à la *Loi sur la concurrence*, L.C. 2002, ch. 16, art. 11.1 à 11.3, les particuliers se sont vus accorder la possibilité de présenter des demandes au Tribunal à condition d'en obtenir la permission. Le paragraphe 103.1(1) [édicte, *idem*, art. 12] de la *Loi sur la concurrence* dispose:

103.1 (1) Toute personne peut demander au Tribunal la permission de présenter une demande en vertu des articles 75 ou 77. La demande doit être accompagnée d'une déclaration sous serment faisant état des faits sur lesquels elle se fonde.

[7] Le paragraphe 103.1(7) énonce les éléments que le Tribunal doit prendre en considération pour se prononcer sur une demande de permission. Pour faire droit à la demande, le Tribunal doit avoir des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise par une pratique restrictive du commerce susceptible d'examen et pouvant faire l'objet d'une ordonnance en vertu des articles 75 ou 77 de la *Loi sur la concurrence*. Le paragraphe 103.1(7) prévoit:

103.1 [. . .]

(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.

[8] The reviewable restrictive trade practice relied on by Barcode is refusal to deal. Subsection 75(1) provides:

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

(a) a 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,

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,

(d) the product is in ample supply, and

(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

THE ALLEGED ERROR OF LAW

[9] Symbol submits that the Competition Tribunal member who granted leave refused to take account of all the elements of the reviewable practice of refusal to deal set out in subsection 75(1) and therefore erred in law by

(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

[8] La pratique commerciale restrictive d'examen sur laquelle se fonde Barcode est le refus de vendre. Le paragraphe 75(1) est ainsi rédigé:

75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut:

a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;

b) que la personne mentionnée à l'alinéa a) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;

c) que la personne mentionnée à l'alinéa a) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;

d) que le produit est disponible en quantité amplement suffisante;

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

L'ERREUR DE DROIT ALLÉGUÉE

[9] Symbol soutient que le membre du Tribunal qui a fait droit à la demande a refusé de prendre en considération tous les éléments du refus de vendre susceptible d'examen, énoncés au paragraphe 75(1), et

not taking account of statutory requirements. Symbol's main argument is that the member refused to consider whether Symbol's alleged refusal to deal was likely to have an adverse effect on competition in a market as required by paragraph 75(1)(e).

[10] Indeed, in his reasons, the member specifically finds that on an application for leave, the Tribunal is not to have regard to whether the refusal to deal is likely to have an adverse effect on competition in a market. At paragraphs 8 and 10, the member states:

What the Tribunal must have reason to believe is that Barcode is directly and substantially affected in its business by Symbol's refusal to sell. The Tribunal is not required to have reason to believe that Symbol's refusal to deal has or is likely to have an adverse effect on competition in a market at this stage.

...

As I read the Act, adverse effect on competition in a market is a necessary element to the Tribunal finding a breach of section 75 and a necessary condition in order that the Tribunal make a remedial order under that section. It is not, however, part of the test for the Tribunal's granting leave or not.

STANDARD OF REVIEW

[11] Subsection 13(1) [as am. by S.C. 2002, c. 8, s. 130] of the *Competition Tribunal Act*, R.S.C., 1985, (2nd Supp.), c. 19, provides for a statutory right of appeal to the Federal Court of Appeal from any decision or order whether final, interlocutory or interim of the Competition Tribunal as if it were a judgment of the Federal Court. The unrestricted right of appeal (except in the case of appeals on questions of fact under subsection 13(2)) is an indication of a correctness standard of review.

[12] Whether to grant leave under subsection 103.1(7) is a discretionary decision of the Tribunal. However, the

qu'il a donc commis une erreur de droit en ne tenant pas compte des exigences de la loi. Symbol soutient essentiellement que le membre a refusé de considérer la question de savoir si le refus de vendre reproché à Symbol aurait vraisemblablement pour effet de nuire à la concurrence dans un marché, comme l'exige l'alinéa 75(1)e).

[10] De fait, dans ses motifs, le membre conclut précisément que, saisi d'une demande de permission, le Tribunal n'a pas à considérer la question de savoir si le refus de vendre aura vraisemblablement pour effet de nuire à la concurrence dans un marché. Aux paragraphes 8 et 10, le membre affirme:

Le Tribunal doit avoir des raisons de croire que Barcode est directement et sensiblement gênée dans son entreprise par le refus de vendre de Symbol. À ce stade, il n'est pas nécessaire que le Tribunal ait des raisons de croire que ce refus a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché.

[...]

Selon mon interprétation de la Loi, il doit y avoir atteinte à la concurrence dans un marché pour que le Tribunal conclue à l'existence d'une contravention à l'article 75 et prononce l'ordonnance corrective prévue par cette disposition. Cette atteinte, toutefois n'est pas une exigence du critère appliqué par le Tribunal pour déterminer s'il accordera ou non une permission.

NORME DE CONTRÔLE

[11] Le paragraphe 13(1) [mod. par L.C. 2002, ch. 8, art. 130] de la *Loi sur le Tribunal de la concurrence*, L.R.C. (1985) (2^e suppl.), ch. 19, prévoit que les décisions ou ordonnances du Tribunal, que celles-ci soient définitives, interlocutoires ou provisoires, sont susceptibles d'appel devant la Cour d'appel fédérale tout comme s'il s'agissait de jugements de la Cour fédérale. Le droit d'appel absolu (sauf en cas d'appels sur des questions de fait suivant le paragraphe 13(2)) est une indication que la norme de contrôle applicable est celle de la décision correcte.

[12] La décision de faire droit ou non à la demande de permission en vertu du paragraphe 103.1(7) relève du

question at issue here is whether, in exercising its discretion, the Tribunal is required to consider all the elements of the restrictive trade practice of refusal to deal set out in subsection 75(1). That is a question of law, a straight question of statutory interpretation. It is the task of the Court to determine whether the Tribunal has exercised its discretionary power within the constraints imposed by Parliament. See *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at paragraph 38.

[13] This question of statutory interpretation does not engage any particular expertise of the Tribunal. Economic and commercial considerations are not part of the analysis of whether, on a leave application, all the elements listed in subsection 75(1) must be considered. That expertise is not engaged on the question of statutory interpretation at issue here therefore points to the correctness standard.

[14] The basic purpose of the *Competition Act* as described in section 1.1 [as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 19] is “to maintain and encourage competition in Canada” and the purpose of section 75 is in furtherance of that objective. When economic and commercial considerations are being considered, deference may be called for. But these considerations are not at issue in the present appeal.

[15] Weighing these pragmatic and functional considerations, I conclude that the standard of review in this appeal is correctness.

ANALYSIS

The legal test in an application under subsection 103.1(7)

[16] In *National Capital News Canada v. Canada (Speaker of the House of Commons)* (2002), 23 C.P.R. (4th) 77 (Comp. Trib.), Dawson J., in her capacity as a member of the Competition Tribunal, reviewed the test

pouvoir discrétionnaire du Tribunal. Toutefois, la question en litige en l'espèce est de savoir si, dans l'exercice de son pouvoir discrétionnaire, le Tribunal doit considérer tous les éléments de la pratique commerciale restrictive que constitue le refus de vendre, énoncés au paragraphe 75(1). Il s'agit là d'une question de droit, d'une question classique d'interprétation législative. Il appartient à la Cour de décider si le Tribunal a exercé son pouvoir discrétionnaire à l'intérieur des limites imposées par le législateur. Voir *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, au paragraphe 38.

[13] Cette question d'interprétation législative ne fait appel à aucune expertise particulière du Tribunal. Les considérations économiques et commerciales ne font pas partie de l'analyse quant à savoir si, s'agissant d'une demande de permission, tous les éléments énumérés au paragraphe 75(1) doivent être examinés. Qu'il ne soit pas nécessaire de faire appel à une expertise pour résoudre la question d'interprétation législative en litige en l'espèce indique que la norme applicable est celle de la décision correcte.

[14] L'objet fondamental de la *Loi sur la concurrence*, tel qu'il est défini à l'article 1.1 [édicé par L.R.C. (1985) (2^o suppl.), ch. 19, art. 19], est «de préserver et de favoriser la concurrence au Canada», et l'objet de l'article 75 confirme cette intention. Lorsque des considérations économiques et commerciales entrent en jeu, la déférence peut être de mise. Mais tel n'est pas le cas en l'espèce.

[15] Après avoir soupesé ces considérations pragmatiques et fonctionnelles, je conclus que la norme de contrôle applicable au présent appel est celle de la décision correcte.

ANALYSE

Le critère juridique applicable à une demande suivant le paragraphe 103.1(7)

[16] Dans la décision *National Capital News Canada c. Canada (Président de la Chambre des communes)* (2002), 23 C.P.R. (4th) 77 (Trib. conc.), la juge Dawson, à titre de membre du Tribunal de la concurrence, a

for the granting of leave under subsection 103.1(7). After citing authorities on the term “reasonable grounds to believe” she stated at paragraph 14 of her reasons:

Accordingly on the basis of the plain meaning of the wording used in s. 103.1(7) of the Act and the jurisprudence referred to above, I conclude that the appropriate standard under s. 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in the applicant’s business by a reviewable practice, and that the practice in question could be subject to an order.

I agree with Dawson J. and adopt her analysis and conclusion as to the test for granting leave under subsection 103.1(7).

[17] The threshold for an applicant obtaining leave is not a difficult one to meet. It need only provide sufficient credible evidence of what is alleged to give rise to a *bona fide* belief by the Tribunal. This is a lower standard of proof than proof on a balance of probabilities which will be the standard applicable to the decision on the merits.

[18] However, it is important not to conflate the low standard of proof on a leave application with what evidence must be before the Tribunal and what the Tribunal must consider on that application. For purposes of obtaining an order under subsection 75(1), a refusal to deal is not simply the refusal by a supplier to sell a product to a willing customer. The elements of the reviewable trade practice of refusal to deal that must be shown before the Tribunal may make an order are those set out in subsection 75(1). These elements are conjunctive and must all be addressed by the Tribunal, not only when it considers the merits of the application, but also on an application for leave under subsection 103.1(7). That is because, unless the Tribunal considers all the elements of the practice set out in subsection 75(1) on the leave application, it could not conclude, as required by paragraph 103.1(7), that there was reason to believe that an alleged practice could be subject to an

examiné le critère applicable à l’octroi d’une demande de permission en application du paragraphe 103.1(7). Après avoir cité des précédents portant sur l’interprétation de l’expression «motifs raisonnables de croire», elle a déclaré au paragraphe 14 de ses motifs:

Par conséquent, me fondant sur le sens ordinaire des termes utilisés au paragraphe 103.1(7) de la Loi et sur la jurisprudence à laquelle je me suis reportée, je conclus que la norme appropriée en vertu du paragraphe 103.1(7) consiste à se demander si la demande de permission est appuyée par des éléments de preuve crédibles suffisants pour qu’on puisse croire de bonne foi que le demandeur a pu être directement et sensiblement gêné dans son entreprise à cause d’une pratique susceptible d’examen et que cette pratique pourrait faire l’objet d’une ordonnance.

Je suis du même avis que la juge Dawson, et j’endors son analyse et sa conclusion quant au critère applicable pour faire droit à la demande de permission en vertu du paragraphe 103.1(7).

[17] La charge qui incombe à l’auteur de la demande de permission n’est pas très lourde. Il n’a qu’à fournir une preuve crédible suffisante de ce qui est allégué pour faire naître une croyance légitime dans l’esprit du Tribunal. Il s’agit là d’une norme de preuve moins élevée que la norme de la prépondérance de la preuve, laquelle s’appliquera à la décision sur le fond.

[18] Toutefois, il est important de ne pas confondre la norme de preuve peu élevée applicable à la demande de permission avec le type de preuve devant être présenté au Tribunal et considéré par lui pour trancher cette demande. Pour obtenir une ordonnance suivant le paragraphe 75(1), le refus de vendre n’est pas simplement le refus d’un fournisseur de vendre un produit à un client intéressé. Les éléments de la pratique commerciale susceptible d’examen que constitue le refus de vendre, éléments devant être prouvés pour que le Tribunal puisse rendre une ordonnance, sont ceux qui sont énoncés au paragraphe 75(1). Ces éléments se combinent et doivent tous être considérés par le Tribunal et ce, non seulement lorsqu’il examine l’affaire au fond, mais aussi lorsqu’il se penche sur une demande de permission selon le paragraphe 103.1(7). Cela s’explique du fait que, s’il ne considérait pas tous les éléments de la pratique énoncés au paragraphe 75(1) pour trancher la

order under subsection 75(1).

[19] The Tribunal may address each element summarily in keeping with the expeditious nature of the leave proceeding under section 103.1. As long as it is apparent that each element is considered, the Tribunal's discretionary decision to grant or refuse leave will be treated with deference by this Court. But the Tribunal's discretion to grant leave is not unfettered. The Tribunal must consider all the elements in subsection 75(1).

[20] The words of subsection 103.1(1) support this interpretation of the requirements of subsection 103.1(7). Subsection 103.1(1) requires that the application for leave be accompanied by an affidavit setting out the facts in support of the application under subsection 75(1). That affidavit must therefore contain the facts relevant to the elements of the reviewable trade practice of refusal to deal set out in subsection 75(1). It is that affidavit which the Tribunal will consider in determining a leave application under subsection 103.1(7). While the standard of proof on the leave application is lower than when the case is considered on its merits, nonetheless, the same considerations are relevant to both and must be taken into account at both stages.

[21] The respondent says that the words in subsection 103.1(7) "that the applicant is directly and substantially affected in the applicants' business" are essentially the words in paragraph 75(1)(a) and because there are no words similar to those in paragraphs 75(1)(b) to (e) in subsection 103.1(7), Parliament did not intend that each element in paragraphs 75(1)(b) to (e) need be taken into account on a leave application.

[22] I do not think that is correct. Because subsection 103.1(1) says that "any person may apply", it is

demande de permission, le Tribunal ne pourrait conclure, comme le prescrit le paragraphe 103.1(7), qu'il existait des motifs de croire qu'une pratique alléguée pourrait faire l'objet d'une ordonnance en vertu du paragraphe 75(1).

[19] Le Tribunal peut examiner chaque élément brièvement pour respecter la nature expéditive de la procédure de permission prévue à l'article 103.1. Pourvu que chaque élément paraisse être pris en considération, la décision discrétionnaire du Tribunal de faire droit ou non à la demande de permission sera traitée avec déférence par la Cour. Mais le pouvoir discrétionnaire du Tribunal n'est pas absolu. Il doit prendre en considération tous les éléments énoncés au paragraphe 75(1).

[20] Les termes utilisés au paragraphe 103.1(1) confortent cette interprétation des conditions prescrites au paragraphe 103.1(7). Le paragraphe 103.1(1) exige que la demande de permission soit accompagnée d'une déclaration sous serment faisant état des faits. Cette déclaration sous serment doit donc contenir les faits pertinents par rapport aux éléments de la pratique commerciale susceptible d'examen que constitue le refus de vendre, énoncés au paragraphe 75(1). C'est cette déclaration qu'examinera le Tribunal pour trancher une demande de permission en vertu du paragraphe 103.1(7). Bien que la norme de preuve soit moins élevée au stade de la demande de permission qu'à celui de l'examen au fond, il demeure que les mêmes considérations sont pertinentes et doivent être examinées aux deux stades.

[21] L'intimée affirme que les termes employés au paragraphe 103.1(7), à savoir «que l'auteur de la demande est directement et sensiblement gêné dans son entreprise», sont essentiellement les mêmes que ceux utilisés à l'alinéa 75(1)a), alors que ce paragraphe ne comporte pas de termes similaires à ceux employés aux alinéas 75(1)b) à e). Il s'ensuit, dit-il, que le législateur n'entendait pas obliger le Tribunal à prendre en considération chaque élément des alinéas 75(1)b) à e) au stade de la demande de permission.

[22] Je ne crois pas que cette affirmation soit juste. Étant donné que le paragraphe 103.1(1) dit que «[t]oute

theoretically possible for someone other than a person substantially and directly affected to bring a private application. However, Parliament clearly intended to limit private applications to persons who themselves are directly and substantially affected in their businesses by the alleged reviewable practice. I think that is the reason for the use of words in subsection 103.1(7) that are substantially similar to those in paragraph 75(1)(a). However, the use of these words does not imply that the statutory elements in paragraphs 75(1)(b) to (e) need not be considered on a leave application. That is because, on a leave application, the Tribunal must consider whether the practice that is alleged could be subject to an order under subsection 75(1); and it cannot reach that conclusion without considering all the elements of refusal to deal set out in that subsection.

[23] Counsel for Symbol argued that on a purposive interpretation, it should be clear that on a leave application, the Tribunal must have regard to all the statutory elements in subsection 75(1). I agree. The purpose of the *Competition Act* is to maintain and encourage competition in Canada. It is not to provide a statutory cause of action for the resolution of a dispute between a supplier and a customer that has no bearing on the maintenance or encouragement of competition. That is the obvious reason for paragraph 75(1)(e). The threshold at the leave stage is low, but there must be some evidence by the applicant and some consideration by the Tribunal of the effect of the refusal to deal on competition in a market.

Application of the test for leave to the facts

[24] Having determined the correct legal test on an application seeking leave to apply for an order under subsection 75(1), the question is whether this matter should be remitted to the Tribunal for redetermination or whether this Court should dispose of it. Barcode has pointed out that a leave application is intended to be a summary screening process. There is no right of cross-examination on the affidavit filed in support of the application for leave, there is no provision for the respondent to file affidavit evidence and the time limits

personne peut demander», il est théoriquement possible pour quelqu'un d'autre qu'une personne directement et sensiblement gêné de présenter une demande au Tribunal. Cependant, le législateur voulait clairement limiter les demandes des particuliers aux personnes qui sont elles-mêmes directement et sensiblement gênées dans leur entreprise par la pratique alléguée. Je crois que cela explique pourquoi les mots employés au paragraphe 103.1(7) sont substantiellement les mêmes que ceux choisis par le législateur à l'alinéa 75(1)a). Toutefois, l'emploi de ces termes ne signifie pas que les éléments énoncés aux alinéas 75(1)b) à e) n'ont pas à être considérés au stade de la demande de permission, parce qu'à ce stade, le Tribunal doit se demander si la pratique alléguée pourrait faire l'objet d'une ordonnance en vertu du paragraphe 75(1); et il ne peut tirer pareille conclusion sans considérer tous les éléments du refus de vendre, énoncés à ce même paragraphe.

[23] L'avocat de Symbol a fait valoir que, selon une interprétation téléologique, il devrait être clair que pour trancher une demande de permission, le Tribunal doit considérer tous les éléments prévus au paragraphe 75(1). J'endosse ce point de vue. L'objet de la *Loi sur la concurrence* est de préserver et de favoriser la concurrence au Canada, et non d'offrir un recours pour régler un différend entre un fournisseur et un client qui n'a aucune incidence sur la préservation ou l'encouragement de la concurrence. C'est là l'objet manifeste de l'alinéa 75(1)e). La charge à ce stade est légère, mais l'auteur de la demande doit fournir certains éléments de preuve concernant l'effet du refus de vendre sur la concurrence dans un marché, et le Tribunal doit prendre ces éléments en considération.

Application du critère aux faits de l'espèce

[24] Ayant établi le critère juridique approprié à une demande de permission de présenter une demande d'ordonnance en vertu du paragraphe 75(1), il reste à se demander si cette affaire devrait être renvoyée au Tribunal pour qu'il rende une nouvelle décision, ou si la Cour devrait trancher elle-même le litige. Barcode fait valoir que la demande de permission se veut un processus sommaire d'examen préalable. Il n'y a pas de droit au contre-interrogatoire sur la déclaration déposée au soutien de la demande, aucune disposition ne permet

in section 103.1 are short, consistent with leave applications being dealt with summarily. For these reasons, I think the appropriate course of action in this case would be for this Court to resolve the matter without further delay.

[25] Is there credible evidence to support a finding that there are reasonable grounds to believe that Symbol's refusal to supply Barcode could be subject to an order under subsection 75(1)? There is evidence that Barcode is substantially affected in its business due to its inability to obtain Symbol's products. Barcode's evidence is that it cannot obtain these products either directly from Symbol or from other Symbol distributors. Barcode says it is willing and able to meet Symbol's usual trade terms and that Symbol's products are in ample supply.

[26] The only real controversy is whether there is evidence that Symbol's refusal to deal is likely to have an adverse effect on competition in a market.

[27] On this point, paragraph 75(1)(e) has not been interpreted by the Tribunal or this Court and a leave application is not the appropriate occasion to do so. Therefore, if there are any facts in its affidavit that might meet the requirements of paragraph 75(1)(e), the benefit of any doubt should work in favour of granting leave in order not to finally preclude Barcode from its day before the Tribunal.

[28] The evidence of Barcode is that in or about 1994, it took over Symbol's distribution in Western Canada and that by 2002 its annual revenues were in excess of \$20 million. Symbol US is the largest single manufacturer of bar code equipment in the world. Barcode's evidence is that if Symbol continues to refuse to supply, Barcode will be forced into receivership, and indeed, the Tribunal member found that on December 19, 2003, Barcode was petitioned into receivership.

[29] From Barcode's evidence, I think it may be inferred, for leave to apply purposes, that there are

à l'intimée de produire une preuve par affidavit et les délais prévus à l'article 103.1 sont courts, toutes choses qui tendent à confirmer le caractère sommaire de cette procédure. Pour ces motifs, j'estime qu'il conviendrait en l'espèce que la Cour tranche l'affaire sans délai.

[25] Y a-t-il une preuve crédible pour étayer la conclusion voulant qu'il y ait des motifs raisonnables de croire que le refus de Symbol d'approvisionner Barcode pourrait faire l'objet d'une ordonnance en vertu du paragraphe 75(1)? Preuve a été faite que Barcode est sensiblement gênée dans son entreprise en raison de son incapacité à obtenir les produits de Symbol. La preuve de Barcode veut qu'elle ne puisse obtenir ces produits directement de Symbol ou par l'intermédiaire d'un de ses distributeurs. Barcode affirme vouloir se conformer aux conditions commerciales habituelles de Symbol et être en mesure de le faire, et dit que les produits de Symbol sont en quantité amplement suffisante.

[26] Le seul point véritablement controversé est de savoir s'il y a preuve que le refus de vendre de Symbol aura vraisemblablement pour effet de nuire à la concurrence dans un marché.

[27] L'alinéa 75(1)e n'a jamais été interprété sur ce point par le Tribunal ou par la Cour, et une demande de permission n'est pas l'occasion appropriée pour le faire. Conséquemment, s'il y a des faits énoncés dans la déclaration sous serment de Barcode qui pourraient satisfaire aux exigences de l'alinéa 75(1)e, le bénéfice du doute devrait jouer en sa faveur afin de ne pas lui interdire définitivement l'accès au Tribunal.

[28] La preuve de Barcode veut que, vers 1994, elle se soit chargée de la distribution de Symbol dans l'Ouest canadien, et qu'en 2002 ses profits dépassaient 20 millions de dollars. Symbol US est le plus grand fabricant au monde de lecteurs de codes à barres. Si Symbol continue à refuser de l'approvisionner, Barcode se verra acculée à la faillite, et, de fait, le membre du Tribunal a constaté que, le 19 décembre 2003, Barcode a été mise sous séquestre.

[29] En me fondant sur la preuve soumise par Barcode, je crois que l'on peut inférer, aux fins de la

reasonable grounds to believe that Barcode had somewhat of a presence in the Western Canadian market for the supply and servicing of Symbol's products. Its difficult financial situation reflected by its receivership could be likely to impede its ability to be an effective competitor in that market, thereby having an adverse effect on competition in that market. The evidence may not be strong but I think it is sufficient to constitute reasonable grounds to believe that Symbol's alleged refusal to deal could be the subject of an order under subsection 75(1).

CONCLUSION

[30] For these reasons I would dismiss the appeal with costs.

RICHARD C.J.: I agree.

LÉTOURNEAU J.A.: I agree.

permission de présenter une demande, qu'il existe des motifs raisonnables de croire que Barcode avait une certaine présence dans le marché de l'Ouest canadien pour fournir et réparer les produits Symbol. Sa situation financière difficile, dont témoigne sa mise sous séquestre, pourrait vraisemblablement gêner sa capacité à se positionner comme un concurrent dynamique dans ce marché, ayant ainsi pour effet de nuire à la concurrence dans ce marché. La preuve n'est peut-être pas très forte, mais j'estime qu'elle est suffisante pour fonder des motifs raisonnables de croire que le refus de vendre allégué de Symbol pourrait faire l'objet d'une ordonnance en vertu du paragraphe 75(1).

CONCLUSION

[30] Pour ces motifs, je rejeterais l'appel avec dépens.

LE JUGE EN CHEF RICHARD: Je souscris aux présents motifs.

LE JUGE LÉTOURNEAU, J.C.A.: Je souscris aux présents motifs.

TAB 3

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Used Car Dealers Association of Ontario v. Insurance Bureau of Canada*,
2011 Comp. Trib. 10
File No.: CT-2011-06
Registry Document No.: 29

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER of an Application by the Used Car Dealers Association of Ontario for
an Order pursuant to section 103.1 granting leave to make application under sections 75 and 76
of the *Competition Act*.

B E T W E E N:

Used Car Dealers Association of Ontario
(applicant)

and

Insurance Bureau of Canada
(respondent)



Decided on the basis of the written record
Before Judicial Member: Simpson J. (Chairperson)
Date of Reasons and Order: September 9, 2011
Reasons and Order signed by: Madam Justice Sandra J. Simpson

**REASONS FOR ORDER AND ORDER GRANTING THE APPLICANT LEAVE TO
FILE AN APPLICATION PURSUANT TO SECTION 75 OF THE COMPETITION ACT**

THE APPLICATION

[1] The Used Car Dealers Association of Ontario (the “UCDA”) seeks leave from the Competition Tribunal (the “Tribunal”) to commence an application pursuant to section 75 and subparagraph 76(1)(a)(ii) of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”). The proposed application names the Insurance Bureau of Canada as the respondent.

THE DECISION

[2] For the following reasons leave has been granted to commence an application under section 75 of the Act. However, leave to proceed under section 76 has been denied.

THE APPLICANT

[3] The UCDA was founded in 1984. It is a not-for-profit trade association which represents more than 4500 motor vehicle dealers in Ontario. The UCDA provides a variety of services to its members including one called Auto Check™ (“Auto Check”). It provides dealers who are selling used cars with information about the accident history of the vehicles they intend to sell. Using a vehicle’s VIN number, a dealer who is a member of the UCDA pays a fee of \$7.00 (before taxes) to conduct an Auto Check vehicle accident history search.

[4] The UCDA’s evidence for this application is found in an affidavit sworn by Robert G. Beattie on June 29, 2011 (the “Beattie Affidavit”). Mr. Beattie is the UCDA’s Executive Director.

THE RESPONDENT AND ITS DATABASES

[5] The Insurance Bureau of Canada (the “IBC”) is a national not-for-profit industry association which represents home, vehicle and business insurers. The IBC is, according to the UCDA, the only source of integrated industry wide data collected from all insurers who sell auto insurance as well as from independent adjusters and investigators. The data are located on a database which IBC describes as its Web Claims Search Application. However, that database does not include information about the dollar value of claims made when vehicles are in accidents. Those values are found in information provided to IBC by its members and collected in a second IBC database called the Automotive Statistical Plan (“ASP Database”).

THE BACKGROUND

[6] In 1998, the UCDA became an Associate Member of the IBC primarily to gain access to the information in IBC’s Web Claims Search Application. That information is a critical input into UCDA’s Auto Check business.

OTHER PROVIDERS OF VEHICLE ACCIDENT SEARCHES

[7] 3823202 Canada Inc., carrying on business as CarProof (“CarProof”), began to provide vehicle accident searches in 2005. It is now the market leader and its searches cost \$34.95 (Cdn) before taxes.

[8] In 2008, CARFAX, Inc. (“Carfax”), an American based provider of vehicle accident histories, began to sell them in Ontario. It charges \$34.99 (U.S.) before taxes.

[9] Both CarProof and Carfax purchase IBC’s data for their accident history searches and, according to the Beattie Affidavit, they are both able to provide the dollar value of claims as part of their search results.

[10] The relationship between Auto Check and CarProof has, from the UCDA’s perspective, been troubled. The UCDA took CarProof to court to prevent it from misrepresenting the services offered by Auto Check. In the end, a settlement achieved Auto Check’s objective. CarProof has also twice (in 2009 & 2010) tried to persuade the UCDA to enter into a partnership in which the Auto Check service would be terminated and CarProof would supply vehicle accident histories to UCDA’s members. The UCDA refused to entertain these proposals because it believes that its members place a high value on their ability to purchase inexpensive vehicle accident histories through Auto Check.

REGULATORY CHANGES

[11] On January 1, 2010, changes to the regulations under the Ontario *Motor Vehicle Dealers Act, 2002*, S.O. 2002, c. 30, Schedule B, required motor vehicle dealers to disclose to potential purchasers whether a used vehicle had ever suffered damage which cost more than \$3000.00 to repair.

[12] To assist its members to meet this new obligation, the UCDA decided to try to obtain additional information from IBC about the dollar value of insurance claims. IBC has that information on its ASP Database. The Beattie Affidavit describes the UCDA’s early efforts to secure this information in paragraphs 21 and 25-28:

In early June 2009, in anticipation of these [Regulatory] changes, Robert Pierce, the UCDA's Director of Member Services, contacted Marti Pehar, Manager, Business Partnerships, of IBC by telephone and requested that IBC expand the scope of the information it provided to Auto Check™ to include dollar value claims information.

I understand from Mr. Pierce that he met with Ms. Pehar on June 16, 2009 to discuss Auto Check™’s request for dollar value claims information. Although UCDA had indicated its willingness to compensate IBC for the provision of this additional information, on June 24, 2009, Ms. Pehar informed Mr. Pierce that IBC had refused UCDA's request. I understand and believe that at that time IBC

provided, and presently continues to provide, similar information directly or indirectly to CarProof.

On May 17, 2010 Warren Barnard, UCDA's Legal Services Director, and I met with Ralph Palumbo, IBC Vice-President - Ontario, and Randall Bundus, IBC Vice-President -Operations and General Counsel, and renewed Auto Check™'s request for dollar value claims information. Mr. Palumbo stated that he did not see any reason why IBC would not provide this information to UCDA. Mr. Bundus indicated that IBC would need to obtain authorization from its member insurers in order to provide the ASP information to UCDA.

The requirement to obtain insurer consents in respect of dollar claims data came as a surprise to UCDA because this has never been an issue with the Web Claims Search application. Nevertheless, on May 20, 2010, I wrote to Mr. Palumbo and formally requested that IBC seek the requisite authorization from its member insurers to provide the ASP dollar value claims information to Auto Check™.

In a letter dated May 26, 2010, Mr. Bundus wrote to me to state that IBC would not seek the authorization UCDA had requested to supply dollar claims data from its insurer members. Instead, Mr. Bundus indicated that UCDA should contact each insurer member of IBC in order to obtain individual consents for provision of dollar claims information.

[The emphasis is mine]

THE TERMINATION OF THE UCDA'S ACCESS TO IBC'S WEB CLAIMS SEARCH APPLICATION

[13] The Beattie Affidavit deals with this subject and the UDCA's ongoing efforts to secure consents in paragraphs 28-37. There he says:

[In a letter dated May 26, 2010] ..., without any prior warning, Mr. Bundus informed me that IBC was terminating UCDA's Associate Membership, thereby ending the 12-year relationship between the parties and Auto Check™'s ability to continue to obtain the claims data from the Web Claims Search application.

On June 2, 2010, my colleague Warren Barnard wrote to Mr. Bundus expressing the UCDA's shock over the unexplained and unforeseen termination of its Associate Membership, and requesting that the IBC reconsider its decision. In the alternative, Mr. Barnard requested an extension of the termination notice period to six months (i.e., to November 26,2010) in order to (i) allow the UCDA a reasonable opportunity to contact the individual insurers whose authorization would be required for UCDA to obtain ASP information from IBC, and (ii) continue using the Web Claims Search application.

In the absence of a reply to Mr. Barnard's letter, on June 9, 2010, McMillan LLP, external counsel to UCDA, wrote to Mr. Bundus expressing UCDA's concerns that IBC's conduct raised issues under the *Competition Act* and reiterating UCDA's request that IBC reconsider the termination of UCDA's membership and its ability to source vehicle claims data (or, alternatively, extend the notice period to six months).

On June 23, 2010, McMillan LLP again wrote to Mr. Bundus, requesting that IBC grant the six-month extension and, in the meantime, provide UCDA with further particulars as to the form and content of the insurer authorizations required by IBC in order to supply the ASP information to Auto Check™. Mr. Bundus replied on June 28, 2010 providing information about the form of authorization required, but refusing to reconsider IBC's termination of UCDA's membership and provision of the Web Claims Search application, or UCDA's request for an extension of the notice period.

After further discussions and emails, IBC reinstated UCDA's Associate Membership and ability to use the Web Claims Search application until November 26, 2010. UCDA also began a process of contacting numerous insurers to obtain consent for IBC to provide ASP information to UCDA, something that has never been required to use the Web Claims Search application.

Between July 2010 and May 2011, UCDA obtained consents from insurers in respect of ASP information, and was also dealing with IBC on a range of contractual, technical and logistical issues related to ASP information. UCDA's Associate Membership has continued on a month to month basis as did its ability to use the Web Claims Search application.

On April 18, 2011, UCDA signed a Service Provider Agreement with IBC for the provision of ASP information from consenting insurers. UCDA was then in a position to seek consent from three insurers who had apparently withdrawn their earlier consents. However, UCDA was not made aware until May 30, in an email from James Fordham, Director of Customer Service at IBC, to Neil Elgar, UCDA's Manager of Administrative Services, that several other insurers had withdrawn their consents in the period from January to March, 2011. Mr. Fordham did not explain how the withdrawals occurred or why UCDA was not informed about them many months earlier when the withdrawals took place.

On June 7, 2011, Mr. Fordham informed Mr. Elgar by email that IBC would be terminating use of the Web Claims Search application. IBC gave notice that termination would take place on June 10, 2011, although after subsequent correspondence between Messrs. Elgar and Fordham, the date was extended to June 17, 2011. Mr. Fordham did not give a reason for the termination or for the briefness of the notice period.

On June 9, 2011, Mr. Barnard communicated with Mr. Bundus and requested continuing provision of the Web Claims Search application, for which insurer consents had never been required, while UCDA pursued consents from insurers for supply of the ASP information. On June 16, 2011, McMillan LLP reiterated Mr. Barnard's request in voicemail and email messages to Mr. Bundus.

On June 16, 2011, UCDA advised its members that the Auto Check™ searches would be suspended effective June 17, 2011 until further notice due to the inability to obtain supply of sufficient data to provide vehicle accident history searches. On June 17, 2011 at 5:00 pm IBC terminated supply of the Web Claims Search application to UCDA.

[The emphasis is mine]

THE EFFECT OF THE TERMINATION

[14] The termination on June 17, 2011 (the “Termination”) ended a 13 year arrangement which had cost the UCDA \$65,000.00 in annual dues plus \$16,000.00 which the UCDA provided to IBC in June of 2007 to help finance upgrades to IBC’s database. As well, in 2010, IBC added a fee for the information supplied to the UCDA from the Web Claims Search Application. The UCDA has always paid IBC as required.

[15] The Termination also caused the UCDA to suspend its Auto Check business.

THE FUTURE OF AUTO CHECK

[16] The UCDA takes the position that its Auto Check service would again be viable if it had the data from the Web Claims Search Application. In other words, although it would have been helpful, the UCDA’s members do not need the dollar value claims information from the ASP Database because, according to the Beattie Affidavit, approximately 2/3 of the searches show that vehicles have not been in accidents. Further, where accidents have occurred, the UCDA’s member dealers are free to exercise judgment about whether the damage would have cost below or above \$3000.00 to repair. In other words, dealers don’t usually need the dollar value of the claims. However, the Beattie Affidavit concedes that, in the small number of situations in which a precise dollar value is needed, dealers can purchase the more costly searches from CarProof or Carfax which include the dollar amounts.

PART I – SECTION 75 – REFUSAL TO SUPPLY

[17] Subsection 103.1(7) sets out the test for granting leave under section 75 of the Act. It reads:

103.1 (7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the

103.1 (7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s’il a des raisons de croire que l’auteur de la

applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.

demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

[18] The law is clear that there must be sufficient credible evidence to give rise to a *bona fide* belief (i) that an applicant is directly and substantially affected by the refusal to supply and (ii) that an order could be made under subsection 75(1)(a-e) of the Act (*Symbol Technologies Canada ULC v. Barcode Systems Inc.*, 2004 FCA 339, at paragraph 16, and *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41, at paragraphs 14-15).

THE PRODUCT

[19] The UCDA says that the product is IBC's Web Claims Search Application and notes that it has the following distinguishing features:

- The data are available to the UCDA without the need to secure consents from the parties who provide the data.
- It includes integrated industry wide claims data.
- It is offered through IBC's web portal.
- It does not include information about the dollar value of claims.

[20] The UCDA says that the Web Claims Search Application is the product that has been refused, and that, for the reasons described above in paragraph 16, it is a viable product which meets the needs of the UCDA's members in almost all situations.

[21] The IBC takes a different view and says that the product at issue is the right to access IBC's Web Claims Search Application and that the product is therefore properly characterized as a license. IBC says that, because the Tribunal held in *Canada (Director of Investigation and Research) v. Warner Music Canada Ltd.*, 78 C.P.R. (3d) 321, that licenses are not products for the purpose of section 75 of the Act, an order could not be made.

[22] However, I have not been persuaded by this submission. There is no evidence to suggest that IBC ever characterized its arrangements with the UCDA as a license. The evidence is that access to the Web Claims Search Application data was incidental to the UCDA's Associate Membership in IBC.

[23] In the alternative, IBC submits that the proper product market is "vehicle insurance claims data" and that data of that kind is available in both IBC's Web Claims Search Application and in its ASP Database.

[24] Evidence about the contents and attributes of the ASP Database is sparse but it does appear that the UCDA could use the ASP data to operate Auto Check if it were available. In this regard, the Beattie Affidavit says at paragraph 40:

The Web Claims Search application will remain critical to the Auto Check™ business unless and until UCDA is able to obtain consents from individual insurers to access sufficient ASP information to offer a viable vehicle accident history search service.

[25] As noted above, the Beattie Affidavit shows that the UCDA initially approached IBC asking only for the dollar values of claims on the ASP Database and IBC refused. However, UCDA's request appears to have changed over time into one for access to all the ASP data. This change may have been motivated by IBC's first decision to terminate UCDA's access to the Web Claims Search Application in May 2010. In any event, IBC subsequently agreed to give the UCDA access to the ASP Database but said that consents were required from the insurance companies whose data are found therein (the "Consent(s)"). IBC initially offered to secure the Consents from its members.

[26] However, IBC changed its mind and, instead of providing the Consents itself, required the UCDA to approach each insurance company for its Consent. The UCDA undertook this exercise and, over a period of almost one year, from July 2010 to May 2011 it secured many Consents. On April 18, 2011, the UCDA signed a Service Provider Agreement with IBC for the provision of ASP information from consenting insurers. When the agreement was signed, the UCDA knew that three insurers who had consented had withdrawn their earlier Consents. However, it was not until the end of May 2011 that IBC told the UCDA that several other Consents had also been withdrawn earlier in the year. No reasons were provided. Without those Consents, the UCDA does not have access to sufficient ASP data to make the ASP Database a viable alternative for the data on IBC's Web Claims Search Application.

[27] Given these facts, I find that the Tribunal could conclude that the fact that access to the ASP Database requires Consents, which are not readily available, means that it is not in the same product market as the Web Claims Search Application data for which no Consents are required.

[28] For this reason, I have decided that the Tribunal could conclude that the vehicle insurance claims data from IBC's Web Claims Search Application is the product at issue in this application.

[29] IBC also says that, even if the data on the Web Claims Search Application is the product, leave should be denied because the UCDA fails to consistently describe the product it says is at issue. IBC notes that the data the UCDA received before the Termination is variously described as:

- Web Search claims data.
- Vehicle Insurance claims data
- Supply from the IBC Web Claims Search Application
- Vehicle Insurance Claims data

[30] In my view, there is no lack of clarity. In spite of the various descriptions provided, it is clear that the UCDA is speaking of the data it has received since 1998 using IBC's Web Claims Search Application.

DIRECTLY AND SUBSTANTIALLY AFFECTED – SUBSECTION 103.1(7)

[31] The Beattie Affidavit shows that Auto Check's business accounted for more than 50% of the UCDA's net income in the year ended December 31, 2010. As well, Mr. Beattie says that Auto Check is a service which the UCDA's members consider to be "critical" and that it has been suspended as a consequence of the Termination. In my view, this evidence is sufficient to show that, as a result of the Termination, the UCDA is directly and substantially affected in its business. While it may be useful to consider earnings over time as the Tribunal suggested in *Nadeau Poultry Farm Ltd v. Groupe Westco Inc.*, 2009 Comp. Trib. 6, aff'd 2011 FCA 188, I do not accept IBC's submission that such data is required. Further, it is noteworthy that subsection 103.1(7) reads in the present tense and that the UCDA has provided current information.

THE MEANING OF "COULD"

[32] I now turn to the question of whether an order could be made under section 75 and I think it useful at this juncture to reflect on the meaning of the word "could". The context is important. The question of whether an order "could" be made is being considered in an application for leave which is not supported by a full evidentiary record. Parliament decreed that an applicant would file an affidavit and a respondent would file representations. This means that there will inevitably be incomplete information on some topics. As well, the process is to be expeditious and the burden of proof is lower than the ordinary civil burden which is "a balance of probabilities".

[33] In my view, the lower threshold means that the question is whether an order is "possible" and "could" is used in that sense.

[34] In deciding whether an order is possible the Tribunal must assess whether there is sufficient credible evidence to give rise to a *bona fide* belief that an order is possible. However, given the context described above, it is not reasonable to conclude that hard and fast evidence is required on every point. In my view, reasonable inferences may be drawn where the supporting grounds are given and circumstantial evidence may be considered.

THE UCDA'S INABILITY TO OBTAIN ADEQUATE SUPPLIES OF A PRODUCT ANYWHERE IN A MARKET ON USUAL TRADE TERMS 75(1)(a)

[35] The UCDA says that IBC is the only supplier of integrated insurance claims data. IBC disputes this saying that the UCDA could acquire the information it needs for its Auto Check business from CarProof and Carfax. However, in my view, the Tribunal could not conclude that the phrase "anywhere in a market" is intended to require the UCDA to purchase the data it needs from Auto Check's competitors.

[36] IBC also says that the UCDA has failed to define the geographic market. However, since the UCDA's members are in Ontario and, since the used vehicle accident histories are sought for

their use, it is reasonable to conclude Ontario is the geographic market and that an order could therefore be made.

[37] Finally, with respect to usual trade terms, the evidence shows that the UCDA is willing to continue to pay IBC and since the Web Claims Search Application data is only available from IBC, this aspect of the test is met and an order could be made.

INSUFFICIENT COMPETITION AMONG SUPPLIERS – 75(1)(b)

[38] In my view, because IBC is the sole supplier, the Tribunal could conclude that the UCDA's inability to secure the data on IBC's Web Claims Search Application is due to insufficient competition.

THE PERSON REFERRED TO IN PARAGRAPH (A) IS WILLING AND ABLE TO MEET THE USUAL TRADE TERMS OF THE SUPPLIER OR SUPPLIERS OF THE PRODUCT – 75(1)(c)

[39] There is no question that the UCDA is prepared to continue to pay for the Web Claims Search Application data. In these circumstances, I find that the Tribunal could conclude that this test has been met.

THE PRODUCT IS IN AMPLE SUPPLY – 75(1)(d)

[40] The Beattie Affidavit shows that IBC was able to reinstate the UCDA's associate membership and its access to the Web Claims Search Application after the initial termination of the UCDA's membership on May 26, 2010. Thereafter, it continued supplying the data on a month to month basis until the Termination. Based on this evidence, the Tribunal could conclude that the product is in ample supply.

THE REFUSAL TO DEAL IS HAVING OR IS LIKE TO HAVE AN ADVERSE EFFECT ON COMPETITION IN A MARKET – 75(1)(e)

[41] In my view, the Tribunal could find that IBC's refusal to supply the Web Claims Search Application has caused Auto Check's exit from the market. Since Auto Check was the low cost provider of accident claims searches to approximately 4500 used car dealers and, since it is reasonable to conclude that these dealers will now be forced to purchase more expensive searches from CarProof or Carfax, the Tribunal could find that the test is met.

PART II – PRICE MAINTENANCE – 76(1)(a)(ii)

[42] The test for leave to bring applications under section 76 of the Act is found in subsection 103.1(7.1). It says that the Tribunal must have reason to believe that an applicant is directly affected by any conduct that could be the subject of an order.

[43] For the reasons given in paragraph 31 above, I have concluded that the UCDA is directly affected by the closure of its Auto Check business.

[44] The more difficult question is whether I can conclude that an order “could” be made under subparagraph 76(1)(a)(ii) in the absence of any direct evidence in the Beattie Affidavit showing that IBC’s refusal to supply its Web Claims Search Application data to the UCDA is a result of Auto Check’s low pricing. The only evidence before the Tribunal is circumstantial.

[45] Some of the circumstantial evidence described below relates to the actions and affiliations of two companies called CGI Group Inc. (“CGI”) and i2iQ Inc. (“i2iQ”)

[46] In its submissions the UCDA says at paragraph 25:

UCDA is unable to establish definitively, without discovery pursuant to the Tribunal’s rules, whether IBC’s refusal to supply occurred because of concerns about Auto Check™’s low pricing policy. However, there is significant circumstantial evidence related to the large difference between Auto Check™ and CarProof prices, the actions of CarProof, connections between CarProof and i2iQ and communications between i2iQ and IBC, that provides reason to believe that IBC’s refusal to supply occurred because of Auto Check™’s low pricing policy.

[47] Further in its reply submissions the UCDA said at paragraph 39:

In this situation, the circumstantial evidence that IBC was acting to benefit CGI, with whom it has a preferred business relationship, and which in turn has a close business relationship with i2iQ and CarProof, is the only evidence on the record related to the reasons for IBC’s refusal to supply. It is noteworthy that, as Mr. Beattie indicated in his affidavit, IBC did not provide reasons when it terminated supply to UCDA, and again in its Representations IBC has remained silent about any other reasons for the termination. UCDA submits that in such a situation an adverse inference should be drawn from IBC’s silence and/or the “sufficient credible evidence” test should be applied in a manner which allows potentially viable claims to proceed and be tested on the merits rather than be frustrated by the Applicant’s inability to access relevant evidence in the possession of the Respondent during the leave stage.

[48] While I accept that circumstantial evidence and reasonable inferences may be relied on, the question is whether the circumstantial evidence in this case meets the requirement that there be sufficient credible evidence to give rise to a *bona fide* belief that the conduct could be subject to an order.

[49] The UCDA relies on four pieces of circumstantial evidence to show that the Termination was because of UCDA’s \$7.00 price contrasted with CarProof’s price of \$34.95. I will deal with each in turn.

(i) The Price Difference

[50] The evidence shows that CarProof has twice approached the UCDA with a view to acquiring its dealers as its customers. These approaches failed because the UCDA believes that

its members prefer Auto Check's low priced searches. Accordingly, CarProof's searches will only be attractive to the UCDA's members if Auto Check's low cost searches are no longer available.

[51] The evidence, which is said to suggest that the Termination was due to Auto Check's low price, is as follows:

- CarProof doesn't deal directly with IBC to obtain its ASP data. It deals through an intermediate company. Mr. Beattie speculates that that company is either i2iQ or CGI or perhaps both. CGI is contractually linked to IBC because CGI operates the ASP Database for IBC and provides other data services to IBC members. One service is called Auto Plus and it provides information to assist insurers when making decisions about coverages and premiums. Another service is Enhanced Auto Plus. It includes vehicle claim histories from CarProof.
- I2iQ's website also offers CarProof's vehicle claim history searches and says that i2iQ has a partnership or strategic alliances with CarProof and with a division of CGI called CGI Insurance Information Services. However, there is no evidence about whether i2iQ has a contractual relationship with IBC.

[52] If CGI is the intermediary between CarProof and IBC, the Tribunal is asked to speculate that, because CGI provides important data services to IBC, IBC will be inclined to do a favour for CGI by helping its customer, CarProof. This would be accomplished by refusing to supply data to its low cost competitor Auto Check.

[53] Regarding i2iQ, the evidence shows (i) that i2iQ's CEO is able to say to IBC that UCDA's dealers could purchase data from CarProof, (ii) that i2iQ and IBC were in prompt telephone contact about the UCDA's request for dollar claims information and (iii) that i2iQ has a partnership or strategic alliance with a division of CGI. This information suggests to me that i2iQ has a degree of control over CarProof and that i2iQ has a close relationship with IBC and may be the intermediary selling IBC's data to CarProof. If those facts were true, I must infer that IBC would be inclined to do a favour for i2iQ by, in turn, helping its customer CarProof. Again, this would involve refusing to supply the Web Claims Application Search data to Auto Check.

(ii) CarProof's Actions

[54] These are described in the following paragraphs taken from paragraphs 13-15 of the Beattie Affidavit:

CarProof has grown substantially and is the market leader in the supply of vehicle accident history searches in Ontario. In 2004, CarProof began distributing false and misleading promotional materials to motor vehicle dealers in Canada, which misrepresented the nature and scope of UCDA's lien search and other services. Following written warnings from UCDA's legal counsel, CarProof abandoned this negative campaign. It again began distributing false and misleading promotional material in 2007 in connection with UCDA's services including its Auto Check™ service. I believe that this may have been motivated in whole or in

part by UCDA's position as the low-price supplier in the market. UCDA's efforts to resolve the situation out of court were unsuccessful, leading it to commence litigation against CarProof. That litigation was ultimately settled in 2009, with CarProof and UCDA issuing a joint statement in which CarProof acknowledged that UCDA provides accident claim information through its Auto Check™ service and undertook not to make misleading statements in the future.

In early 2009, representatives of CarProof approached UCDA and proposed that UCDA partner with CarProof to provide CarProof vehicle accident histories to UCDA members rather than doing so directly through the Auto Check™ business. Such a proposal, if adopted, would have meant the end of the Auto Check™ business. Bearing in mind CarProof's aggressive business tactics and the significantly higher prices at which it provides vehicle accident history searches, UCDA concluded that a relationship with CarProof was not in the best interests of its members and declined the CarProof proposal.

In early 2010, representatives of CarProof again approached UCDA and requested that UCDA partner with CarProof to provide CarProof vehicle accident histories to UCDA members, rather than doing so directly through the Auto Check™ business. UCDA's views on such a relationship had not changed, and we again rejected CarProof's overtures.

[55] In sum, the evidence indicates that CarProof appears to have misrepresented Auto Check's business and has suggested closing it down. However, these efforts have failed because of Auto Check's low price.

(iii) Connections Between CarProof and i2iQ

[56] This topic is dealt with above in paragraphs 51 and 53.

(iv) Communications Between i2iQ and IBC

[57] In June 2009, the UCDA contacted Ms. Pehar of IBC to ask for access to the dollar value claims information in the ASP Database. Shortly thereafter, the CEO of i2iQ spoke to Ms. Pehar and advised her that UCDA could purchase CarProof vehicle history reports and confirmed that he could be contacted if the UCDA wanted to pursue the idea. In the alternative, he suggested that the UCDA could speak directly to CarProof.

[58] The Beattie Affidavit speculates that IBC must have told i2iQ or CarProof of UCDA's request and that the only reason IBC, CarProof and i2iQ were in contact, after the UCDA asked for access to the dollar value claims information, was because they were concerned that, with this information, Auto Check would be a more effective low cost competitor.

CONCLUSIONS

[59] Against this background, it is clear that IBC has a close direct relationship with CGI (through its provision of services and maintenance of the ASP Database) and with i2iQ (it spoke to it about the UCDA's request for dollar value claims data). It is also clear that CGI and i2iQ have close ties to CarProof. Its searches are provided to IBC's members through CGI, and i2iQ appears to have some control over CarProof's operations and sells its searches through its website.

[60] Finally, it is reasonable to conclude based on its past conduct, that CarProof would like to see Auto Check's low cost business closed so that the UCDA's dealers could become potential customers for CarProof's searches.

[61] However, while I can conclude that it is possible that the Termination occurred as a result of IBC's wish to support CarProof's business objectives as a favour to either CGI or i2iQ, I cannot conclude that there is sufficient credible evidence to show the possibility that the Termination by IBC was due to Auto Check's low pricing policy. In these circumstances, an order could not be made.

ORDER

[62] The UCDA is hereby granted leave, pursuant to subsection 103.1(7) of the Act, to commence an application under section 75 of the Act. However, leave to apply under section 76 of the Act is denied.

[63] The UCDA is to have its costs fixed as a lump sum amount payable forthwith based on Column III of Tariff B of the *Federal Courts Rules*, SOR/98-106. The UCDA is to prepare a bill of costs for review by IBC and, if an amount cannot be agreed, the Registry may be contacted and I will fix the amount once a procedure has been agreed.

DIRECTION

[64] The parties are to consult to see if they can agree about whether an interim supply order can be made and, if so, on what terms. Failing agreement, the Registry may be contacted to discuss arrangements for the hearing of the UCDA's application for interim relief.

DATED at Ottawa, this 9th day of September, 2011

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Sandra J. Simpson

COUNSEL:

For the applicant:

Used Car Dealers Association of Ontario

A. Neil Campbell
Casey W. Halladay

For the respondent:

Insurance Bureau of Canada

Peter Glossop
Graham Reynolds
Geoffrey Grove

TAB 4

Competition Tribunal



Tribunal de la Concurrence

Reference: *CarGurus, Inc v Trader Corporation*, 2016 Comp. Trib. 15

File No.: CT-2016-003

Registry Document No.: 41

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34 as amended;

AND IN THE MATTER OF an application by CarGurus, Inc. for an Order pursuant to section 103.1 granting leave to make application under sections 75, 76 and 77 of the *Competition Act*.

BETWEEN:

CarGurus, Inc.
(applicant)

and

Trader Corporation
(respondent)



Decided on the basis of the written record.

Before Judicial Member: D. Gascon J. (Chairperson)

Date of Reasons for Order and Order: October 14, 2016

REASONS FOR ORDER AND ORDER DISMISSING AN APPLICATION FOR LEAVE

I. OVERVIEW

[1] On April 15, 2016, CarGurus, Inc. (“**CarGurus**”) applied to the Competition Tribunal, pursuant to section 103.1 of the *Competition Act*, RSC 1985, c C-34 (the “**Act**”), for leave to bring an application under sections 75, 76 and 77 of the Act dealing respectively with refusal to deal, price maintenance and exclusive dealing. If leave is granted, CarGurus seeks an order directing Trader Corporation (“**Trader**”) to accept CarGurus as a customer and to supply certain vehicle listings data to it on standard trade terms, and prohibiting Trader from continuing to engage in the practices forming the basis of CarGurus’ application.

[2] On May 4, 2016, Trader submitted a request by letter for leave to file affidavit evidence as part of its representations in writing in response (the “**Response**”) to CarGurus’ application for leave. On June 9, 2016, the Tribunal partially granted Trader’s request to file certain affidavit evidence as part of its Response. On June 23, 2016, Trader filed its Response and CarGurus subsequently filed its reply (the “**Reply**”) on June 30, 2016.

[3] In support of its application for leave, CarGurus submitted an affidavit sworn on April 14, 2016 by Ms. Martha Blue, the Senior Vice-President Business Development for CarGurus (the “**Blue Affidavit**”). As an exhibit attached to the Blue Affidavit, CarGurus submitted another affidavit of Ms. Blue sworn on March 3, 2016 (the “**Blue Copyright Affidavit**”) which had been filed in the context of an on-going copyright litigation between CarGurus and Trader before the Ontario Superior Court of Justice (the “**Copyright Proceeding**”).

[4] In its Response, Trader submitted an affidavit sworn on June 23, 2016 by Mr. Roger Dunbar, Vice President of Marketing for Trader (the “**Dunbar Affidavit**”). Trader also relied on several affidavits filed in the Copyright Proceeding, and which were included by CarGurus as attachments to the Blue Affidavit, notably an affidavit of Mr. Dunbar sworn December 22, 2015 (the “**Dunbar Copyright Affidavit**”).

[5] Pursuant to subsections 103.1(1) and (6) of the Act, the Tribunal has relied on these affidavits and the written representations of the parties in deciding this application for leave.

[6] CarGurus claims that it has provided sufficient credible evidence to satisfy the Tribunal that there is a reasonable possibility that its business is directly and substantially affected by Trader’s practices, and that such practices could be the subject of an order under either section 75, 76 or 77 of the Act. Trader opposes CarGurus’ application for leave and seeks an order denying it, with costs. Trader argues that CarGurus has failed to provide sufficient credible evidence for each of the requirements set out in sections 75, 76 or 77 as well as subsections 103.1(7) and 103.1(7.1) of the Act.

[7] For the reasons that follow, I am not satisfied that CarGurus has met its burden under subsection 103.1(7) to apply for relief under the refusal to deal and exclusive dealing provisions

of the Act, nor under subsection 103.1(7.1) with respect to the relief sought under the price maintenance provision.¹

II. BACKGROUND

A. THE PARTIES

a. CarGurus

[8] CarGurus owns and operates websites that enable potential purchasers of automobiles to research and compare vehicle listings for used and new automobiles within a geographic area, and to contact the sellers of those vehicles. In the context of this application, CarGurus refers to such websites as “**Digital Marketplaces**”. CarGurus launched its website in the United States (known as cargurus.com) in 2007 and announced the launch of its Canadian website (i.e., cargurus.ca) on May 26, 2015.

[9] CarGurus asserts that it provides its vehicle listings services to dealers for free and operates on a lower-cost subscription model. It generates the leads to dealers and then follows up with those dealers to offer them additional services. CarGurus argues that it is this low-cost offering that has made it a very successful competitor in the United States.

b. Trader

[10] Trader operates a Digital Marketplace for vehicles in Canada and also offers other related services. Through its websites autotrader.ca and autohebdo.net, Trader advertises an inventory of new and used vehicles for sale in Canada. It sources its inventory of vehicle listings from private sellers and vehicle dealers. It does not buy or sell vehicles, but acts as an intermediary between buyers and sellers.

[11] In addition to offering its listing services, Trader also offers “capture services”. If a dealer subscribes to Trader’s capture service, Trader has one of its employees, or a contractor who has assigned his or her intellectual property rights to Trader, visit the dealership, consult with and gather information from the dealer and take photographs of the vehicles. The Trader representative then organizes this vehicle information and photographs and uploads all this data for display on one or more of Trader’s and the dealer’s websites (the “**Trader Vehicle Listings**”).

[12] Trader makes its Trader Vehicle Listings available to other competing Digital Marketplaces through a licensing process known in the industry as a “**Syndication Agreement**”.

[13] Access to the supply of the Trader Vehicle Listings is the core issue raised by this application for leave filed by CarGurus.

¹ The Tribunal wishes to indicate that its decision was ready to be released in mid-September but that, further to Directions issued on September 14 and October 4, 2016, it had agreed to temporarily hold off releasing its decision in light of the parties’ settlement discussions.

B. THE RELEVANT FACTS

a. The Industry

[14] CarGurus and Trader both carry on business in the online marketing of automobiles. They compete by offering Digital Marketplaces that allow consumers to search vehicle listings from automobile dealers and private sellers for new and used vehicles for sale. Consumers use the Digital Marketplaces to acquire information about vehicle availability, features and prices in the search and evaluation process leading to the purchase of a vehicle. However, although consumers conduct their search online, the actual purchase of vehicles still typically takes place when consumers visit the physical premises of automobile dealers or the private sellers.

[15] The vehicle listing information available on Digital Marketplaces normally includes, for each vehicle, the make, model, year, vehicle information number, mileage, price, photographs and other details. It is uncommon to market a vehicle without a photograph.

[16] Online marketing of vehicles involves the downstream market where Digital Marketplaces such as CarGurus and Trader offer their services as well as an upstream market for the supply of vehicle listing data (the “**Vehicle Listings**”) used by those Digital Marketplaces to deliver their services. CarGurus describes Digital Marketplaces as a two-sided platform connecting sellers of vehicles and potential buyers of vehicles, where both sides benefit from the increase in the size of the group sitting on the opposite side of the platform.

[17] Vehicle Listings are commonly provided by original equipment manufacturers (i.e., the car manufacturers), automobile dealers, private sellers and Digital Marketplaces themselves. Entities known in the industry as feed providers (the “**Feed Providers**”) also receive Vehicle Listings from dealers and provide data feeds of such Vehicle Listings to Digital Marketplaces.

[18] CarGurus, Trader and the other operators of Digital Marketplaces aggregate Vehicle Listings information from car manufacturers, automobile dealers and private sellers and make it accessible to consumers through search engines on their respective websites.

[19] CarGurus estimates that there are approximately 10 businesses in Canada operating Digital Marketplaces, including Trader. CarGurus further claims that Trader is the dominant supplier of Vehicle Listings to Digital Marketplaces. While CarGurus does not include Kijiji as a competitor in Digital Marketplaces, Kijiji represents itself as the largest automotive Digital Marketplace in Canada in its advertising materials.

[20] Given that consumers want to have access to comprehensive vehicle information when they are shopping for a vehicle, there is a direct correlation between Vehicle Listings, website traffic, specific inquiries from consumers to dealers about a vehicle (known as “leads” to dealers), and resulting revenues for the Digital Marketplaces. According to CarGurus, the ability to generate leads to dealers is the basis of its revenue model.

b. Relationship between CarGurus and Trader

[21] Trader claims that it owns copyright in the vehicle photographs that are included in its inventory of Vehicle Listings and more specifically in the Trader Vehicle Listings.

[22] In May 2015, Trader found that its vehicle photographs contained in the Trader Vehicle Listings appeared on CarGurus' website and advised CarGurus that it held the copyright on these photographs. In July 2015, Trader sent CarGurus a draft Syndication Agreement relating to the potential future supply of the Trader Vehicle Listings to CarGurus. CarGurus did not accept the terms of the Syndication Agreement proposed by Trader, as CarGurus claims that a number of its provisions would have prevented it from effectively competing with Trader in the Canadian marketplace.

[23] There were no further communications between the parties between July and December 2015.

[24] In December 2015, Trader commenced the Copyright Proceeding seeking declarations that CarGurus had infringed Trader's copyright in relation to some 217,856 photographs added to a website administered by Trader, as well as statutory damages in respect of those infringements.

[25] On December 8, 2015, CarGurus removed over 1 million photographs from its website for Vehicle Listings that were not obtained from Feed Providers.

[26] The litigation between CarGurus and Trader remains pending and the central issue to be determined in that contested Copyright Proceeding is whether the vehicle photographs contained in the Trader Vehicle Listings do actually enjoy copyright protection.

C. THE PARTIES' ARGUMENTS

a. CarGurus

[27] In its application for leave, CarGurus argues that Trader is engaged in the following anticompetitive conduct in order to exclude or impede CarGurus' expansion in the downstream market for Digital Marketplaces in Canada (the "**Trader Conduct**"):

- Trader discriminates against CarGurus in respect of the Trader Vehicle Listings that Trader administers by refusing to syndicate those vehicle listings on the usual trade terms made available to other Digital Marketplaces;
- Trader refuses to syndicate to CarGurus Vehicle Listings from dealers who request that Trader does so;
- Trader instructs third parties not to syndicate to CarGurus by threatening to otherwise cut off its syndication to these third parties; and

- Trader improperly asserts copyright and has commenced litigation over thousands of non-copyrightable photographs, in an attempt to litigate CarGurus out of the market for Digital Marketplaces.

[28] On this final point, CarGurus adds that, even if Trader’s copyright assertions are upheld, Trader’s refusal to supply its copyrighted photographs is also violating the Act since such a refusal is more than a mere exercise of copyright because of its cumulative effect on Trader’s market power in the provision of Digital Marketplaces.

[29] CarGurus contends that as a result of the Trader Conduct, it has been directly and substantially affected in its business through a significant decrease in leads generated for dealers, a reduced conversion rate (i.e., the percentage of visitors to the CarGurus website who contacted at least one dealer about a car for sale) and a drop in detailed views of CarGurus pages leading to a corresponding drop in advertising revenue. CarGurus estimates that the Trader Conduct has reduced CarGurus’ revenue by 39% or \$75,000 USD to date and that its forgone revenue through the end of 2017 is expected to be \$3.7 million USD.

[30] CarGurus further argues that the Trader Conduct could be the subject of an order by the Tribunal under each of sections 75, 76 and 77 of the Act.

i. Section 75

[31] CarGurus first asserts that the five elements of section 75 on refusals to deal have been met in the following manner:

- CarGurus is substantially affected in its business and precluded from carrying on business due to its inability to obtain the Trader Vehicle Listings for inclusion on its website on usual trade terms (through a Syndication Agreement);
- CarGurus is unable to obtain adequate supply of Vehicle Listings because the Trader Vehicle Listings are in Trader’s sole control and Trader controls at least 42.5% of all Vehicle Listings supplied in Canada;
- CarGurus is willing to meet the usual trade terms of Trader for the syndication of the Trader Vehicle Listings through a commercially reasonable agreement based on Trader’s standard trade terms with other Digital Marketplaces;
- Vehicle Listings, and more specifically the Trader Vehicle Listings, are not in limited supply and are regularly supplied by Trader to Digital Marketplaces as a matter of course; and,
- Trader’s refusal to deal is having an adverse effect on competition in the downstream market for Digital Marketplaces as Trader Conduct denies the expansion of CarGurus’ innovative, consumer-focused website in the market.

ii. Section 76

[32] Turning to section 76 on price maintenance, CarGurus argues that the Trader Conduct could be caught under paragraph 76(3)(a) since Trader is engaged in the business of supplying a “product” (i.e., Vehicle Listings). Additionally, CarGurus pleads that if it is accepted that Trader holds copyright in the photographs appearing in the Trader Vehicle Listings, the Trader Conduct could also be caught under paragraph 76(3)(c) as Trader would have the exclusive rights and privileges conferred by the copyright.

[33] CarGurus contends that Trader Conduct breaches subparagraph 76(1)(a)(ii) since Trader has refused to supply the Trader Vehicle Listings to CarGurus in an attempt to keep CarGurus from competing in the downstream market for Digital Marketplaces. CarGurus alleges that Trader is doing so because of CarGurus’ low pricing policy for various services, including the “Instant Market Value” produced by CarGurus’ mathematical algorithms, and other innovative features.

[34] Furthermore, CarGurus argues that the Trader Conduct also falls within subparagraph 76(1)(a)(ii) because it has “otherwise discriminated” against CarGurus by denying it access to the Trader Vehicle Listings and by refusing to deal with it on the standard trade terms granted by Trader to other Digital Marketplaces.

[35] CarGurus also alleges that Trader has induced Dealer Dot Com (“DDC”) and other Feed Providers not to syndicate the Trader Vehicle Listings to CarGurus as a condition of doing business with Trader, thus also contravening subsection 76(8) of the Act.

[36] Finally, CarGurus submits that the Trader Conduct has impeded its entry and expansion into the downstream market for Digital Marketplaces in Canada, thereby resulting, or likely to result, in a substantial lessening or prevention of competition.

iii. Section 77

[37] With respect to section 77 on exclusive dealing, CarGurus argues that, as a threshold element, Trader is a “major supplier” of Vehicle Listings in Canada since it is the sole supplier of the Trader Vehicle Listings. It also claims that the exclusivity provisions found in Trader’s agreements with dealers and Feed Providers preclude those dealers and other Feed Providers from syndicating their inventory of Vehicle Listings to CarGurus without Trader’s consent – which Trader refuses to grant.

[38] CarGurus submits that, as a consequence, Trader’s exclusive dealing has impeded CarGurus’ entry and expansion in the downstream market for Digital Marketplaces in Canada. It claims that this has resulted, and is likely to result, in a substantial lessening of competition in the market.

b. Trader

[39] Trader opposes CarGurus’ application for leave. It argues that CarGurus has failed to provide sufficient credible evidence to give rise to a *bona fide* belief that it has been directly and

substantially affected in its business by Trader's actions, or that Trader has engaged in conduct that could be subject to an order under sections 75, 76 or 77 of the Act.

i. Section 75

[40] Regarding refusal to deal, Trader submits that, in evaluating paragraph 75(1)(a), it is proper to query whether the applicant has "other options in terms of supply" and argues that where the applicant has access to an alternative source of supply which the applicant chooses not to pursue, it cannot be said that insufficient competition among suppliers is the "overriding reason" for the refusal. In terms of alternative source of supply, Trader argues that CarGurus can obtain Vehicle Listings from other Feed Providers and/or generate its own content (including photographs). By way of example, it refers to Kijiji as a company that has competed and grown by obtaining Vehicle Listings information from other Feed Providers. It also argues that there is no impediment to CarGurus replicating Trader's capture services.

[41] Trader also notes that CarGurus has experienced exponential growth even after Trader asserted its copyright on photographs and launched its Copyright Proceeding.

[42] Trader interprets paragraph 75(1)(b) to require that an applicant's inability to "obtain adequate supplies of the product" be causally linked to the "insufficient competition among suppliers of the product in the market". It argues that this provision requires the "insufficient competition among suppliers" be the "overriding reason" why the applicant is unable to obtain adequate supplies of the product. Trader further cites *B-Filer Inc v Bank of Nova Scotia*, 2006 Comp Trib 42 ("**B-Filer**") as stating that "any inference that insufficient competition led to a refusal to deal may be rebutted by evidence that shows an objectively justifiable business reason" that explains the respondent's conduct. In this regard, Trader submits CarGurus' blatant infringement of Trader's copyright is its objectively justifiable business reason.

[43] With respect to the criteria under paragraph 75(1)(c), Trader argues that it is customary for Trader and a potential syndication partner to negotiate the terms of their syndication agreement. It emphasized that it is willing to syndicate its copyright content to other competing Digital Marketplaces and does so regularly. It submits that, by choosing copyright infringement over negotiation, CarGurus is not willing to meet Trader's usual and customary trade terms.

[44] Trader relies on the Tribunal's decision in *Stargrove Entertainment Inc v Universal Music Publishing Group Canada*, 2015 Comp Trib 26 ("**Stargrove**") in support for its position that relief under paragraph 75(1)(d) is simply not available to CarGurus as the impugned conduct involves the refusal to grant a licence over copyrighted materials.

[45] Trader finally argues that CarGurus has failed to provide sufficient credible evidence that the alleged Trader Conduct is likely to have an adverse effect on competition, as required by paragraph 75(1)(e). It submits that the relevant market is (at its narrowest) the downstream market for Digital Marketplaces, which includes numerous websites such as Kijiji, eBay Motors U.S, Edmunds, Canadian Black Book, Cars.com, Wheels.ca, Auto123.com and AutoExpert. It notes that Trader and CarGurus are but two of many competitors in this market.

ii. Section 76

[46] With respect to price maintenance, Trader argues that CarGurus has failed to meet its burden under both subsections 76(1) and 76(8) of the Act.

[47] Trader submits that, given the decision in *Commissioner of Competition v Visa Canada Corporation*, 2013 Comp Trib 10 (“*Visa*”), subsection 76(1) requires a “resale” of a product that is “identical or substantially similar” to the product for which price is being allegedly maintained. In this regard, it pleads that CarGurus will oftentimes alter the Trader content before repackaging it and that section 76 does not cover the supply of an “input product”.

[48] Trader adds that CarGurus has not presented any evidence beyond bald, unsubstantiated allegations that Trader has induced any supplier to refuse supply to CarGurus as required by subsection 76(8).

[49] With respect to CarGurus’ argument that Trader had “otherwise discriminated” against it, Trader notes that the *Stargrove* decision interpreted that phrase to mean “treating a person differently than another without proper justification”. Trader claims that it has not treated CarGurus any differently than any other competitor since it provided CarGurus with their standard form of Syndication Agreement and was anticipating a negotiation. To the extent it has treated CarGurus differently, it is solely because CarGurus had “scraped” Trader’s copyrighted content.

[50] Trader also contends that CarGurus’ application presents no evidence demonstrating that Trader has been motivated by a low pricing policy of CarGurus. Additionally, it denies being motivated by any alleged low pricing policy since it believes that CarGurus’ price structure is simply different and not actually “low cost” as compared to Trader’s model.

iii. Section 77

[51] With respect to exclusive dealing, Trader argues that CarGurus has failed to provide evidence to support a claim under either paragraph (a) or (b) to the statutory definition of “exclusive dealing” contained in subsection 77(1) of the Act.

[52] Trader asserts that it does not have exclusive control over Vehicle Listings and that many of its customers (i.e., automobile dealers) list their vehicles with Trader as well as with other Digital Marketplaces. Trader does not require dealers to deal exclusively or primarily with it. Furthermore, Trader does not preclude CarGurus from developing its own equivalent to Trader’s data feed information in partnership with dealers.

[53] Trader submits that CarGurus’ application contains no evidence, and provides no reasonable inference to suggest, that Trader has induced dealers to meet exclusivity conditions by offering to supply information on more favourable terms or conditions as a result. It argues that there is no evidence that dealers receive a financial benefit in return for dealing exclusively with Trader.

[54] Similar to its argument under section 75, Trader also submits that relief under section 77 is simply not available where the alleged exclusivity pertains to a refusal to licence intellectual property.

[55] Regarding the issue of the direct and substantial impact on CarGurus' business, Trader submits that CarGurus has not raised more than a mere speculation that its business has been substantially affected and has based its analysis on its own non-certified projections of revenue without providing a basis for those projections and whether they were commercially reasonable. It also claims that the measurements relied on by CarGurus assumes that they would be infringing Trader's copyright as a baseline.

[56] Finally, Trader submits that should the Tribunal find that CarGurus has met the leave requirements, the Tribunal should nonetheless decline to exercise its discretion to grant leave. In this regard, it argues that it is not commercially reasonable for CarGurus' infringement of Trader's copyright to be rewarded by an order of the Tribunal that would be tantamount to a compulsory licence.

III. ANALYSIS

A. The Leave Test

[57] Subsection 103.1(7) of the Act sets out the test for leave on an application under section 75 and 77 of the Act, whereas subsection 103.1(7.1) does the same for section 76 of the Act. They read as follows:

103.1(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicant's business by any practice referred to in one of those sections that could be subject to an order under that section.

103.1(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

103.1(7.1) The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section.

103.1(7.1) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu de l'article 76 s'il a des raisons de croire que l'auteur de la demande est directement gêné en raison d'un comportement qui pourrait faire l'objet d'une ordonnance en vertu du même article

[58] Subsection 103.1(7) provides that leave may be granted under sections 75 or 77 if the Tribunal “has reason to believe that an applicant is directly and substantially affected in the applicant’s business by any practice referred to in one of those sections that could be subject to an order under that section”. Subsection 103.1(7.1) is similar but does not include the word “substantially”.

[59] The approach to the granting of leave for relief under section 75 was recently set out in detail in *Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 28 (“*Audatex*”) at paras 42-47. The Tribunal also summarized that approach in *Stargrove* at paras 17-21, in respect of an application relating to sections 75, 76 and 77. I adopt these principles for the purpose of this application for leave.

[60] As indicated in those decisions, leave applications under section 103.1 of the Act require the Tribunal to determine whether the application is supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly (and substantially in the case of sections 75 and 77) affected in its business by the alleged practice, and that the alleged practice could be subject to an order. While the Tribunal’s role at the leave stage is to perform a screening function and the evidence is assessed on a standard that is less than the balance of probabilities, the evidence must nonetheless show more than a mere possibility that the business may be directly and substantially affected (*Symbol Technologies Canada ULC v Barcode Systems Inc*, 2004 FCA 339 (“*Barcode FCA*”) at para 19).

[61] With respect to the first part of the test under subsection 103.1(7) (i.e., being “directly and substantially affected”), it is worth citing the *Audatex* decision at para 45:

For the “substantial” component, terms such as “important” are acceptable synonyms to considering whether there has been a “substantial” impact, which is ultimately assessed by reviewing the circumstances at issue (*Canada (Director of Investigation and Research) v Chrysler Canada Ltd* (1989), 27 CPR (3d) 1 (Comp. Trib.), aff’d 38 CPR (3d) 25 (FCA) at para 64). In the *Nadeau* decision on the merits, Mr. Justice Blanchard specified that “the Applicant need not demonstrate that it is affected by the refusal to the point of it being unable to carry on its business. Rather, it is required to establish on a balance of probabilities that it is affected in an important or significant way” (*Nadeau Poultry Farm Limited v Groupe Westco Inc et al*, 2009 Comp. Trib. 6 (“*Nadeau Final Order*”) at para 131, aff’d 2011 FCA 188).

[62] Turning to the second part of the test (whether the conduct “could be the object of an order”), all the elements of the practice must be addressed (*Barcode FCA* at para 19) and the Tribunal must be satisfied that “each of the elements set out in subsection 75(1) could be met when the application is heard on the merits” (*B-Filer Inc v The Bank of Nova Scotia*, 2005 Comp Trib 38 (“*B-Filer Leave*”) at para 53). At the leave stage, it is understood that the question of whether the reviewable conduct “could” be subject to an order is being considered in an application which is not supported by a full evidentiary record (*The Used Car Dealers Association of Ontario v Insurance Bureau of Canada*, 2011 Comp Trib 10 (“*Used Car Dealers*”) at para 32).

[63] Since the current application for leave filed by CarGurus relates not only to section 75 but also to section 76 on price maintenance and section 77 on exclusive dealing, I would simply add that the specific evidence which could be justified under these two other provisions similarly has to focus on the particular elements to be determined by the Tribunal under these restrictive trade practices. The approach under those provisions remains guided by the principles established in *Audatex* and *B-Filer Leave*.

B. CarGurus' Application under Sections 75 and 77

[64] For the reasons that follow, I am not satisfied that CarGurus has met its burden for leave to apply for relief under either section 75 or section 77, as it has not demonstrated that there is reason to believe that it has met the first part of the leave test, namely, that it has been or could be substantially affected in its business by the Trader Conduct. I instead find that CarGurus has failed to submit sufficient, non-speculative and cogent evidence to give me reasonable grounds to believe that the impact of the Trader Conduct on its business could reasonably be considered to constitute a “substantial” effect.

[65] It is well-established that the business to be considered on a leave application pursuant to section 75 of the Act is the entire business of the applicant, not simply the product line affected by the refusal to supply (*Sears Canada Inc v Parfums Christian Dior Canada Inc*, 2007 Comp Trib 6 at para 21). The substantiality of the effect must therefore be measured against that whole business. In addition, the case law developed by the Tribunal in applications for leave requires that the effect to be looked at and considered is the impact attributable or linked to those entities whose supply is being refused. Indeed, subsection 103.1(7) refers to the applicant being directly and substantially affected “by the practice”.

[66] I have assumed, for the purpose of this decision, that CarGurus is “directly” affected in its business by the Trader Conduct.

a. CarGurus' Evidence on Substantiality

[67] CarGurus' argument relating to this first part of the leave test is found at paragraphs 84 to 93 of its Memorandum of Fact and Law and at paragraph 27 of its Reply Memorandum. The evidence in support of that argument is set forth at paragraphs 46 to 54 of the Blue Affidavit and at paragraphs 120 to 124 of the Blue Copyright Affidavit.

[68] CarGurus submits that the removal of the Trader photographs and its inability to display the Trader Vehicle Listings has led to less traffic and is generating less leads to dealers, which has negatively affected its revenue realization. It submits that it is substantially affected in the following manner:

- The number of multiple leads CarGurus can generate for dealers has diminished significantly;
- CarGurus has lost 60% of leads for dealers whose Vehicle Listings are related to Trader;
- CarGurus has lost approximately 25% of its overall lead volume;

- CarGurus' conversion rate (i.e., the percentage of visitors to the CarGurus website who contacted at least one dealer about a car for sale) has decreased by 16%; and
- Detailed views of CarGurus' pages have dropped by 31%, leading to a corresponding 31% drop in advertising revenue.

[69] CarGurus estimates that, further to those reduced leads, conversion rates and page views, the Trader Conduct has reduced CarGurus' revenues by \$75,000 USD or 39% up to the end of March 2016, and that its forgone revenues through the end of 2017 are expected to be \$3.7 million USD.

[70] It appears that CarGurus assumes a direct (and linear) correlation between the lead volume, number of leads generated by CarGurus' website, the page views and its revenue realization generated through these indicators.

b. Shortcomings of CarGurus' Evidence

[71] There are five major problems with the evidence of substantial effect provided by CarGurus.

[72] First, there is no reliable evidence on the proportion of CarGurus' total inventory of Vehicle Listings which is represented by the Trader Vehicle Listings that were deleted from CarGurus' website and that Trader allegedly refuses to supply.

[73] The Blue Affidavit (at paragraphs 33, 34, 49 and 56) and the Blue Copyright Affidavit (at paragraphs 67 and 71) refer to Trader as being dominant and having a 42.5 % market share, but there is no clear explanation of how this figure is arrived at and what it actually represents.

[74] A review of the record leads the Tribunal to conclude that the 42.5% figure represents Trader's estimated market share in the downstream market where Digital Marketplaces offer their services. It appears that, in its assessment of the substantial effect attributed to the Trader Conduct, CarGurus assumes that this 42.5% market share of Trader in the downstream market can be used as a proxy for Trader's market share in the supply of Vehicle Listings in the upstream market. However, there is no evidence on the overall supply of Vehicle Listings which would allow the Tribunal to verify whether this assumption can be supported, or on the proportion of the overall supply of Vehicle Listings in the online marketing of automobile business that is accounted for by Trader. Nor is there evidence of the proportion of Vehicle Listings supplied to CarGurus that was actually accounted for by Trader and its Trader Vehicle Listings.

[75] In other words, the Blue Affidavit does not provide information on the actual supply of Vehicle Listings lost by CarGurus further to Trader's refusal to supply the Trader Vehicle Listings, or on the proportion of CarGurus' total inventory of vehicle listings data represented by Trader. The Blue Affidavit only states that Trader has a dominant 42.5% market share. The Blue Affidavit does not describe the volume of Trader Vehicle Listings that is available or that was supplied by Trader (before CarGurus decided to delete the Trader photographs from its website).

[76] I appreciate that there will inevitably be incomplete information on some topics at the application for leave stage (*Used Car Dealers* at para 32). However, sufficient and credible information on the magnitude of the supply of the product at stake and on the proportion represented by the supplier refusing to supply are fundamental and basic elements needed by the Tribunal in order to be able to make a determination on whether the evidence provides the basis for the Tribunal to form a *bona fide* belief of a direct and substantial effect pursuant to subsection 103.1(7) of the Act (*Audatex* at para 68). As indicated in *Audatex*, this type of evidence was typically available to the Tribunal in those cases where it decided to grant an application for leave under section 103.1 of the Act. In *Nadeau Poultry Farm Limited v Groupe Westco Inc et al*, 2008 Comp Trib 7 (“**Nadeau Leave Order**”) for example, the evidence of substantial effect was found sufficient by the Tribunal, as the applicant had provided figures showing that the exact supply held by the respondents represented 48% of the overall chicken processing business of Nadeau. This allowed the Tribunal to have a reliable measure of the impact of the intended cut-off in supply, which had not yet occurred in that case.

[77] In the current case, the evidence does not clearly indicate to the Tribunal the proportion of the supply represented by Trader in CarGurus’ business, or in the upstream market as a whole. As indicated, the principal evidence adduced on this point is with respect to the market share that Trader allegedly represents in the downstream market for Digital Marketplaces where Trader and CarGurus compete.

[78] I pause to underline that even the 42.5% market share figure used by CarGurus raises significant concerns, as it appears to be based on a market estimate in which the competitor Kijiji has not been taken into account. Yet, the evidence on the record suggests that Kijiji may be, by far, the largest player in the Digital Marketplaces in Canada. According to CarGurus’ own data contained in Exhibit 10 to the Blue Affidavit, Kijiji appears to be the most significant player in the supply of online automotive listings, being 2.5 times as large as Trader in terms of total unique visitors and even much larger if indicators such as total views or total visits are used. Other evidence indicates that Kijiji describes itself as the largest supplier of Vehicle Listings in Canada. Neither the Blue Affidavit nor the Blue Copyright Affidavit provides a satisfactory explanation for excluding that entity from CarGurus’ market share estimate. If Kijiji were included in the downstream market for Digital Marketplaces, Trader’s estimated market share of 42.5% would drop, by at least half. It remains puzzling to the Tribunal how Kijiji could have been entirely excluded from CarGurus’ market share calculations and estimates without a more detailed explanation on its reasons for doing so.

[79] The second problem with CarGurus’ evidence relates to the actual and expected “reduced revenues” identified by CarGurus, which do not represent an actual drop in existing or anticipated revenues of CarGurus. CarGurus is a new entrant in the Digital Marketplace business in Canada and its evidence on reduced revenues essentially reflects reductions compared to business *projections* it had initially made for its emerging business.

[80] The only financial evidence provided by CarGurus is found at Exhibit 11 of the Blue Affidavit. Exhibit 11 does not contain actual profit and loss statements but rather reproduces two different sets of monthly projections of revenues. Exhibit 11 first provides the original “Canada 2015-2017” monthly projections of revenues of CarGurus established in December 2015 and covering the period until December 2017 (the “**Initial Projections**”). It also includes revised

monthly projections made in April 2016, covering the same time period and allegedly reflecting the impact of the refusal to supply of the Trader Vehicle Listings (the “**Revised Projections**”). Finally, Exhibit 11 provides the actual revenues generated by CarGurus’ Digital Marketplaces business for a period of six months, up to the month of March 2016.

[81] The \$75,000 USD reduction in actual revenues as of March 2016 and the estimated anticipated loss of \$3.7 million USD up to end of 2017 reflect the difference between actual and projected revenues, or between the two sets of projections made by CarGurus. These are not actual or real reductions in revenues. The reduced revenues claimed by CarGurus to be evidence of “substantial effect” on its business essentially portray projections which are not of the same magnitude as what was initially contemplated and expected.

[82] I further note that no support was provided to the Tribunal by CarGurus for these projections of anticipated sales. Indeed, neither Exhibit 11 nor the rest of the Blue Affidavit offer background or explanation on how CarGurus’ projections were established, the basis for these projections and how the supply of Vehicle Listings by Trader was factored into these projections.

[83] I agree with CarGurus that it is only required to provide “sufficient credible evidence” to satisfy the Tribunal that there is a reasonable possibility that its business may be directly and substantially affected by a refusal to deal. I am also mindful of the fact that CarGurus does not have to wait until harm actually occurs before bringing an application under subsection 103.1 of the Act (*Nadeau Leave Order* at para 25). But sufficient, cogent evidence is needed, even for anticipated harm. Relying on projections to establish a substantial impact on a business under subsection 103.1(7) still requires support in the form of clear and convincing evidence, which CarGurus has not provided. A party relying on projections has the onus to at least provide a basis for those projections.

[84] This case is quite different from the situation in *Nadeau Leave Order* where the evidence of substantial effect was found sufficient by the Tribunal. In *Nadeau Leave Order*, supply had not yet ceased, but there was nonetheless sufficient and measurable evidence of the anticipated effects of the refusal. Nadeau had provided figures showing the exact supply held by the respondents, as well as solid financial evidence of the proportion of Nadeau’s supply actually represented by the suppliers of chicken who intended to terminate supply. This allowed the Tribunal to find reliable evidence regarding the substantiality of the upcoming refusal on Nadeau’s business.

[85] This type of evidence has not been offered by CarGurus in this case.

[86] In *Mrs. O’s Pharmacy v Pfizer Canada Inc*, 2004 Comp Trib 24 (“*Mrs. O’s Pharmacy*”), the Tribunal indicated that simple projections and forecasts are not enough to constitute convincing and credible evidence of substantial effect on an applicant’s business. Similarly, CarGurus has not provided hard data on the supply of Vehicle Listings actually accounted for by Trader in the upstream market, nor any hard data on its own lost sales or reduced revenues, save for Exhibit 11 to the Blue Affidavit.

[87] It bears underscoring that, at the leave application stage, there must be credible evidence to give the Tribunal a reason to believe that a causal relationship exists between the action of the

supplier and the business consequences for the applicant. When only unsupported projections or forecasts are used, causality becomes speculative as several factors could have an impact on the growth a new business (*Mrs. O's Pharmacy* at para 25). I find that the “projections” evidence adduced by CarGurus only amounts to a mere possibility of substantial effect and is speculative. In a situation like this where the contemplated detrimental effect of the Trader Conduct is through a series of projections for which the assumptions are unknown, I am not satisfied that CarGurus’ evidence can be considered as sufficient.

[88] The third problem with CarGurus’ evidence of substantial effect is that it is alleged to be occurring or to be likely to occur in a context in which CarGurus expects and forecasts its revenues to continuously *increase* until the end of December 2017. As a practical matter, this renders more difficult the Tribunal’s assessment of the alleged substantial adverse effects.

[89] Whether one looks at the Initial Projections or at the Revised Projections contained in Exhibit 11 to the Blue Affidavit, CarGurus’ revenues are projected to increase steadily, every single month, until December 2017. This is true even for the Revised Projections of revenues where the alleged refusal to supply the Trader Vehicle Listings and more generally the Trader Conduct are taken into account. The evidence provided by CarGurus indicates that, under the Initial Projections, monthly revenues were expected to increase from \$22,000 in December 2015 to \$301,000 in December 2016, and then to \$762,000 in December 2017. The Revised Projections represent 50% to 60% of the initial forecast, but CarGurus’ revenues are nonetheless projected to increase to \$192,000 in December 2016, and to \$392,000 in December 2017. Even under those projections which allegedly reflect the impact of the refusal to supply the Trader Vehicle Listings, the revenues generated by CarGurus’ Digital Marketplace business are expected to increase every single month throughout the period, though at a slower pace than the initial December 2015 forecast.

[90] I appreciate that it is of course more difficult to demonstrate that a refusal to supply or other practice substantially affects a business when the applicant has not been historically supplied by the respondent. But some credible basis for assertions in this regard must nevertheless be provided. I underline that this is not a situation where supported projections of increased revenues did not eventually materialize because of a refusal to supply. CarGurus’ case is about revised projections which have not yet been confirmed and have not yet happened.

[91] I agree with CarGurus and acknowledge that, in its assessment of the substantial effect, the Tribunal is essentially conducting a “but for” analysis. As the Tribunal recently elaborated in detail in *The Commissioner of Competition v The Toronto Real Estate Board, 2016 Comp Trib 7 (“TREB”)* at paras 477-483, a “but for” approach involves comparing a situation in the presence of the impugned conduct with a scenario that likely would have prevailed in the absence of such conduct. Therefore, the fact that CarGurus has or would have managed to increase revenues despite the Trader Conduct, or is projecting increasing revenues, does not, in and of itself, act as a bar to CarGurus’ case. However, even using a “but for” approach, I am not convinced that there is sufficient credible evidence to conclude that a “substantial effect” exists in this case.

[92] The test is not simply whether CarGurus’ business would have substantially grown but for the Trader Conduct. The Tribunal must also determine whether the reduced projections attributable to the Trader Conduct are enough to conclude that CarGurus’ business could be

negatively affected in an important or significant way. Given the uncertainty about those projections and the lack of support on their basis, and in light of expected increased revenues, I am not persuaded that there is non-speculative evidence supporting such a finding. I am not convinced that CarGurus' evidence showing projections of continuing increasing revenues for a new entrant in the business, despite the refusal to deal or exclusive dealing being complained of, gives rise to a reasonable belief that it is substantially affected in its business.

[93] The fourth problem with CarGurus' evidence of substantial effect relates to the actual revenues posted by CarGurus since it entered the Digital Marketplace business in Canada. The limited data provided by CarGurus does not show an adverse effect caused by the Trader Conduct so far.

[94] While CarGurus claims in the Blue Affidavit that the 31% drop in detailed page views in December 2015 attributable to the loss of the Trader photographs corresponds to a 31 % decrease in advertising revenues, this is not what the actual revenues reported by CarGurus show. Quite the contrary.

[95] There was instead an *increase* in advertising revenues in the months following the termination of the supply of the Trader Vehicle Listings. Exhibit 11 to the Blue Affidavit indicates that CarGurus' monthly revenues coming from the dealer subscription revenues in fact grew from \$2,602 in October 2015 to \$10,471 in December 2015, and up to \$43,895 in March 2016. It is also striking to note that those revenues have increased in each of January, February and March 2016 compared to the previous month, and that they were four times as large in March 2016 as they were in December 2015.

[96] In addition to Exhibit 11 to the Blue Affidavit, other evidence provided by CarGurus also suggests that, even after Trader's refusal to supply in December 2015, CarGurus' monthly revenues have continued to increase. The Blue Affidavit reports that CarGurus' monthly advertising revenues have increased from \$16,000 in December 2015 to \$80,000 in March 2016, despite the Trader Conduct. In the same four-month period, the number of Canadian dealers with advertising packages with CarGurus increased from 39 to 137, and the average amount paid by dealers went from \$400/month to \$500/month.

[97] So, the actual revenues show continuous growth over the first six months of CarGurus' entry in this new line of business.

[98] I acknowledge that this evidence is limited to only a few months, but this suggests that other sources of supply of Vehicle Listings have remained and will remain available to CarGurus from Feed Providers and other potential sources. It also illustrates that, even without the Trader Vehicle Listings, CarGurus continued to post growing revenues. This undermines CarGurus' assertion that it has been or is likely to be substantially affected in its business. Furthermore, even the financial projections revised in April 2016 that apparently factor in the Trader Conduct which is the subject of this leave application show continuous growth in sales and revenues, month after month, between now and the end of 2017.

[99] It may be that the Revised Projections are not as optimistic as the Initial Projections made prior to December 2015, but such expected growing revenues make it much more difficult for me

to form a *bona fide* belief that CarGurus' business is or may be being substantially affected by the Trader Conduct. As the financial evidence provided by CarGurus shows that actual revenues have been growing month after month since the inception of its business, and have continued to grow since the alleged refusal to deal and exclusive dealing practices are supposed to have affected its business, I am unable to find that the "substantially affected" requirement has been met.

[100] Finally, CarGurus claims that the difference between its Revised Projections and the Initial Projections reflects the impact of the Trader Conduct. The problem is that, when the limited evidence on CarGurus' actual revenues is looked at, it shows that the difference between the Initial Projections and the actual revenues posted until the end of March 2016 was of the same magnitude as the difference between the two sets of projections, even before the claimed effect of the Trader Conduct came into play. Looking at the November 2015 data reported by CarGurus (when CarGurus still enjoyed access to the Trader Vehicle Listings), actual revenues represented only 68% of CarGurus' Initial Projections, and that figure was 47% for the December 2015 revenues. It then stood at between 62% and 65% for the first three months of 2016. In other words, the gap between CarGurus' actual revenues and its Initial Projections is in the same range, before and after the Trader Conduct and the refusal to supply the Trader Vehicle Listings.

[101] This suggests that the differential (or claimed reduction in revenues) identified by CarGurus may well originate from inaccurate projections of its revenue stream rather than from a decrease attributable to the loss of the Trader Vehicle Listings. This evidence also undermines CarGurus' assertion that the drop in anticipated revenues (and the alleged substantial effect on CarGurus' business) could be attributed to the Trader Conduct. Stated otherwise, the difference between the actual revenues and the forecast appears to be independent from the supply of the Trader Vehicle Listings or absence thereof.

c. Conclusion regarding Sections 75 and 77

[102] In light of the foregoing, I am not persuaded that, when all the evidence adduced by CarGurus is considered, it constitutes sufficient credible evidence to allow the Tribunal to reasonably believe that CarGurus may be directly and substantially affected in its business by the Trader Conduct. It is not sufficient that the evidence shows a mere possibility that the business may be substantially affected. The standard of proof requires the "existence of reasonable grounds for a belief" (*National Capital News Canada v Milliken*, 2002 Comp Trib 41 at paras 9-10). A baldly asserted decrease in the anticipated growth of revenues, compared to an earlier unsupported projection, does not rise to the level of providing the basis for a *bona fide* belief of an actual or likely substantial effect in the assessment of applications for leave under subsection 103.1(7) (*Audatex* at paras 80-84).

[103] In addition, on the particular facts of this case, the fact that CarGurus' own projections show a continuous growth in its business notwithstanding its revised figures attributable to the Trader Conduct instead suggests that CarGurus expects to be able to find supplies of Vehicle Listings from sources other than Trader.

[104] This finding is fatal to CarGurus' application under both sections 75 and 77 and is dispositive of the leave application with respect to those two provisions of the Act. Since CarGurus has failed to meet the requirement of "directly and substantially affected in the applicant's business", it is not necessary to consider whether CarGurus has adduced sufficient evidence to meet the second part of the test for leave, namely whether each of the elements of subsection 75(1) or section 77 could be met and an order could be issued under the refusal to deal or exclusive dealing provisions.

C. CarGurus' Application under Section 76

[105] Turning to section 76 on price maintenance, subsection 103(7.1) governing applications for leave under that provision only requires that a party has been "directly affected" by the alleged reviewable conduct. For purposes of this application for leave, that requirement is clearly met.

[106] I must now turn to the second part of the leave test, which requires that I be satisfied that each of the elements of the price maintenance provision could be met. For the following reasons, I find that CarGurus has not made the case for leave to seek relief under section 76. In brief, I am not persuaded, based on the evidence before me, that all elements set out in section 76 could be met if the application is heard on the merits.

a. The Section 76 Elements

[107] The primary purpose of the price maintenance provisions contained in section 76 of the Act is to allow greater price competition among retailers/dealers by freeing them from pricing restraints which would otherwise be imposed by their suppliers. Section 76 sets out three distinct reviewable trade practices. The first is resale price maintenance (paragraph 76(1)(a)(i)). The second is refusal to supply because of a low pricing policy (paragraph 76(1)(a)(ii)). The third is inducing a supplier to refuse to supply because of a low pricing policy (subsection 76(8)). In all three cases, the conduct can only be subject to an order if it has had, is having or is likely to have, an "adverse effect" on competition in a market.

[108] CarGurus' application relates to the second and third trade practices covered by section 76. These each essentially contain five basic requirements. In order to constitute reviewable conduct, there needs to be: 1) a person engaged in the business of producing or supplying a product in Canada (or a person described in paragraphs 76(3)(b) or (c)); 2) a direct or indirect refusal to supply the product, or other discrimination, by such person; 3) a low pricing policy by the person being denied supply; 4) a refusal to supply or other discrimination which is motivated, at least primarily, by such low pricing policy; and 5) and an actual or likely adverse effect on competition in a market. In the case of subsection 76(8), there also needs to be an inducement to another supplier.

[109] Under the leave test, CarGurus carries the burden of demonstrating that each of these elements of the price maintenance practice could be met if the application were heard on the merits. The words "could be" connotes a probability, and not only a mere possibility (*Barcode Systems Inc v Symbol Technologies Canada ULC*, 2004 Comp Trib 1 ("**Barcode**") at para 13).

[110] I am not satisfied that CarGurus has met the threshold for leave under section 76 of the Act on at least three of the elements of section 76: the requirement that CarGurus has a low pricing policy, the requirement that the refusal to supply the Trader Vehicle Listings is due to CarGurus' low pricing policy, and the actual or likely adverse effect on competition in the downstream market for Digital Marketplaces where CarGurus compete.

b. The Low Pricing Policy

[111] First, I find that there is insufficient credible evidence of CarGurus' alleged low pricing policy and of CarGurus being a low-cost competitor.

[112] In order to support an application under section 76(1)(a)(ii) or 76(8), CarGurus must first provide evidence on its own low pricing policy. In this case, the evidence offered in that respect is limited, at best unclear and uncertain, and not convincing. CarGurus simply states in the Blue Affidavit and the Blue Copyright Affidavit that it offers its services either for free or for a lower cost than Trader. Surprisingly, no material evidence has been provided on the actual pricing offered by CarGurus, despite the fact that the existence of a low pricing policy is a key element of its application under section 76.

[113] Information regarding CarGurus' pricing is found in paragraphs 27 and 28 of the Blue Affidavit and at paragraphs 55 to 60 of the Blue Copyright Affidavit. At paragraph 27, Ms. Blue indicates that the amount charged by CarGurus varies based on the dealership size, the number the listings and the size of the market. In the following paragraph, Ms. Blue indicates that CarGurus had 39 customers and that their cost per month was "an average of \$400".

[114] The low pricing policy contemplated by section 76 requires, at the very least, evidence of "low pricing" and of a "policy". Since subparagraph 76(1)(a)(ii) and subsection 76(8) refer to a "policy" rather than a "practice", I accept that an applicant's stated intent with respect to a future course of low pricing conduct may constitute a low pricing policy, even where that person has not yet engaged in the conduct. However, the "low pricing" element must be supported by evidence showing, for example, that an applicant's price is below a supplier's pricing suggestions, that it is less than the price the applicant charges for similar products elsewhere, or that it is lower than the price that other retailers typically charge for similar products. CarGurus has not provided such evidence.

[115] The only material evidence of pricing was in fact provided in the Dunbar Affidavit where Mr. Dunbar offered figures indicating that CarGurus' pricing was not lower than many of its competitors in the Digital Marketplaces business.

[116] This is a situation quite different from *Used Car Dealers* or *Stargrove* where the evidence provided clearly showed that the applicants in those cases were undoubtedly offering their respective products at a price lower than their competitors (\$7 by listing in *Used Car Dealers*, and \$5 per CD in the case of *Stargrove*).

[117] I am not persuaded that the evidence before me on the alleged low pricing policy of CarGurus constitutes sufficient credible evidence to allow the Tribunal to reasonably believe that CarGurus could meet this element of section 76 and that an order could be issued under that provision. It was CarGurus' burden to provide evidence on this element of section 76, and in fact

CarGurus was best positioned to demonstrate the existence of its own low pricing policy. It has failed to do so.

c. The Causation Element

[118] Second, I do not find that there is sufficient credible evidence that the alleged refusal by Trader to supply the Trader Vehicle Listings is due to or motivated by any low pricing on the part of CarGurus.

[119] Paragraph 76(1)(a)(ii) only applies to refusals to supply imposed “because of the low pricing policy” of a person or class of persons. There must therefore be a causal connection between the low pricing policy and the refusal to supply or the discrimination. Historically, in decisions issued under the former criminal price maintenance provision contained in the old section 61 of the Act, Courts have held that the sole and effective reason for the refusal to supply had to be the retailer’s low pricing policy (*R v Griffith Saddlery & Leather Ltd.* (1986), 14 CPR (3d) 389 (Ont Prov Ct) at para 24; *R v Andico Manufacturing Ltd* (1983), 4 CPR (3d) 476 (MBQB) at para 47). However, some later decisions moved away from the requirement that the low pricing policy be the only real driving concern. Two decisions involving the real estate industry indeed suggested that the person’s low pricing policy could be the main reason behind the refusal to supply or one reason incidental to it, or one of many reasons regardless of priority (*R v 41813 Alberta Ltd* (February 4, 1994), No 9201-13366 (ABQB); *R v Royal LePage Real Estate Services Ltd* (October 28, 1994), No 9201-14125 (ABQB)). In other words, the low pricing policy had to be a proximate cause of the refusal to supply, but other proximate causes could exist. This approach appears to have been retained by the Competition Bureau in its *Price Maintenance Guidelines* issued in 2014 (Canada, Competition Bureau, *Price Maintenance (Section 76 of the Competition Act)* (September 15, 2014) (the “**Guidelines**”) at section 3.1.3).

[120] This is the first time that the Tribunal has to interpret the terms “because of” the low pricing policy in the context of the new civil price maintenance provision now described at section 76 of the Act. I note that the words “because of” are also used in section 75 on refusal to deal, where relief can be granted if a person is unable to obtain adequate supplies of a product “because of” insufficient competition among suppliers. In the context of section 75, these words have been interpreted by the Tribunal as meaning that insufficient competition needs to be the “overriding reason” for the refusal (*Nadeau Poultry Farm Ltd v Groupe Westco Inc*, 2009 Comp Trib 6, aff’d 2011 FCA 188 (“*Nadeau*”) at paras 228-229 and 247; *Canada (Director of Investigation and Research) v Xerox Canada Inc* (1990), 33 CPR (3d) 83 (Comp Trib) at para 83).

[121] A similar approach must prevail under section 76. I am therefore of the view that, in order to be successful in an application under paragraph 76(1)(a)(ii) or subsection 76(8), the applicant must demonstrate that the low pricing policy is the overriding reason for the refusal, even though it may not be the only reason. Stated differently, it must be a principal reason for the refusal.

[122] In this case, no direct evidence has been provided by CarGurus, such as correspondence from Trader or internal notes reflecting discussions to that effect with Trader, showing that Trader’s refusal to supply the Trader Vehicle Listings is motivated or caused in any way by

CarGurus' low pricing policy. I would add that not only has CarGurus failed to provide direct evidence bearing on Trader's motives, but its claim in that respect has been squarely contradicted by Mr. Dunbar in the Dunbar Affidavit, where Mr. Dunbar denied that Trader was motivated in any way by CarGurus' low pricing policy.

[123] This, once again, is a situation different from *Stargrove* where the respondents in that application for leave had not produced any evidence in rebuttal and where the Tribunal found that Stargrove had itself provided some circumstantial evidence of motive on the part of the suppliers involved (*Stargrove* at paras 38-39).

[124] The Tribunal can of course consider circumstantial evidence when no direct evidence is available (*Used Car Dealers* at paras 44-48). However, such circumstantial evidence must still meet the "requirement that there be sufficient credible evidence to give rise to a *bona fide* belief that the conduct could be subject to an order" (*Used Car Dealers* at para 48). In *Used Cars Dealers*, efforts had been made by the applicant to provide evidence of concerns with the low pricing policy being the driving factor for the termination of the supply. The affidavit submitted in that case referred to circumstantial evidence on price differentials, the actions of a competitor and connections that provided to the applicant reasons to believe that the refusal to supply occurred because of its low pricing policy (*Used Cars Dealers* at paras 46-47). The affidavit submitted tried to provide evidence on the reasons for the refusal to supply and referred notably to the absence of other reasons for terminating supply. The applicant argued that, in the absence of an alternative reason, a reasonable adverse inference could be drawn from such silence and that the low pricing policy could be considered as the driving factor for the refusal.

[125] Even though there were some details in the affidavit to support the affiant's belief that the refusal may have been motivated by the low prices of the applicant, the Tribunal was nevertheless not convinced by such circumstantial evidence and could not conclude that there was sufficient credible evidence to show the possibility that the termination was due to a low pricing policy (*Used Cars Dealers* at para 61). The Tribunal thus dismissed the application for leave.

[126] In the current case, not only has CarGurus not provided any direct evidence on Trader's motivation but there is no circumstantial evidence on Trader's motives. No efforts or attempts have even been made to refer to circumstantial evidence supporting the proposition that Trader's refusal to supply the Trader Vehicle Listings was due to CarGurus' low pricing policy.

[127] It is worth citing the evidence provided by CarGurus in respect of that element of section 76. It is found at paragraphs 40 to 42 of the Blue Affidavit and reads as follows:

40. As noted in the First Affidavit at paragraph 110, I believe that Trader views CarGurus as its biggest competitive threat because the CarGurus Website is innovative and CarGurus drives considerable value to dealers and the public, as is proven by CarGurus' U.S. business. CarGurus' IMV ratings range drive consumer traffic and VDP views not only to the CarGurus' Website, but also dealers' websites based on CarGurus' rankings. This provides value to dealers that Trader cannot.

41. Moreover, CarGurus offers these services either for free or for a lower cost than Trader offers its own service. For example, CarGurus' basic package, which is offered to dealers free of charge, includes posting dealers' inventory on the CarGurus Website with up to 10 photographs, and allows CarGurus Website users to anonymously email such dealers about their available vehicles for sale.

42. I believe that Trader's different treatment of CarGurus and its refusal to deal with CarGurus on the usual terms with which it deals with other Digital Marketplaces stems from CarGurus' low pricing policy and from Trader's concern that CarGurus' expansion in the Canadian market would force Trader to compete by providing more innovative products and services and by lowering its prices.

[emphasis added]

[128] Similar wording appears at paragraph 99 of CarGurus' Memorandum of Fact and Law and at paragraphs 107 and 108 of its Proposed Notice of Application. I observe that paragraph 110 of the Blue Copyright Affidavit refers to CarGurus' innovative features and how it allows it to expand into the marketplace, but does not contain any reference to CarGurus' low pricing policy.

[129] I point out that this is the whole extent of the evidence provided by CarGurus on this causation element of section 76. Indeed, in its Reply Memorandum, when referring to the evidence to support a *bona fide* belief on that issue, CarGurus strictly refers to paragraph 107 of its Memorandum and to paragraphs 41-42 of the Blue Affidavit. No further evidence has been provided to support CarGurus' statements on Trader's motives or on the causal relationship between CarGurus' low pricing policy and Trader's refusal to supply the Trader Vehicle Listings.

[130] More specifically, nowhere does the Blue Affidavit refer or allude to efforts or attempts made by CarGurus to obtain evidence of CarGurus' pricing policy being the cause or motivation of the Trader Conduct. Left with such limited evidence and assertions, I can only conclude that there is no credible evidence to support the causation element contained in section 76. True, these are factual issues that would be elaborated and developed in an application on the merits. However, an applicant still needs to provide at least a minimum level of credible evidence on this element of the practice to be granted leave. I am of course mindful that, at the leave stage, and prior to discovery, the means available to CarGurus to find such evidence are more limited. However, it is still a burden that it carries in order to be granted leave. Even at the leave stage, an applicant cannot simply repeat the wording of the Act, provide no evidence in support and expect that such orphaned statements can be sufficient to give the Tribunal the *bona fide* belief it needs to have.

[131] The statements contained at paragraphs 40 to 42 of the Blue Affidavit lead me to make two further observations.

[132] First, Ms. Blue states at paragraph 42 that she “believe(s)” that the Trader Conduct stems from CarGurus’ low pricing policy. The belief of an affiant is not sufficient to establish the level of evidence needed under subsection 103.1(7) or 103.1 (7.1). The applicant has to provide sufficient credible evidence so that the Tribunal has the *bona fide* belief that an order could be made. But the Tribunal’s belief cannot simply rely on the applicant’s own belief. It has to rely on the applicant’s evidence.

[133] In *Brandon Gray Internet Services Inc v Canadian Internet Registration Authority*, 2011 Comp Trib 17 (“*Gray*”), the Tribunal indeed stated that a “bald statement of belief” about adverse impact on competition in the market (such as simply stating that the termination of supply will result in reduced competition), without any supporting evidence, was not sufficient, and therefore leave was not granted (*Gray* at para 13).

[134] My second observation is this. I find it striking to note that paragraphs 40 to 42 of the Blue Affidavit, and all other references made by CarGurus to the reason for the Trader Conduct and its refusal to supply the Trader Vehicle Listings, never suggest that CarGurus’ low pricing policy could be the overriding factor for the Trader Conduct. In fact, the Blue Copyright Affidavit, as the source of the Blue Affidavit, does not even mention CarGurus’ low pricing policy. In addition, in every sentence where CarGurus refers to this issue in its evidence, it always alludes to both its low pricing policy and to CarGurus’ superior innovative features. There is never a reference made solely to the primary role of CarGurus’ low pricing policy. Indeed, paragraphs 40 to 42 of the Blue Affidavit first refer to CarGurus’ innovative feature as being the apparent driver of the Trader Conduct and use the word “Moreover” to introduce the concern about the low pricing policy.

[135] This is a fundamental deficiency in CarGurus’ evidence.

[136] Section 76 is the price maintenance provision of the Act. Its purpose is to provide relief in respect of refusals to supply or discriminatory practice motivated by a person’s low pricing policy. It aims at reducing the restrictions that a supplier can put on the ability of resellers to compete on price, where those restrictions have, or are likely to have, an adverse impact on competition. The provision cannot be resorted to in order to sanction refusals by a supplier which may be driven by other motives. It may be that a supplier refuses to supply a product based on other behavior which could be found to be anti-competitive. It may be that a supplier would refuse to supply or discriminate against a person because of that person’s disrupting innovative marketing practices or products. But this is not what section 76 aims to address. Section 76 applies to refusals or discrimination motivated primarily by the low pricing policy of a person. Had Parliament intended, in section 76, to prohibit refusals to supply primarily motivated by a person’s innovative practices, it would have said so. It has not. Section 76 is strictly concerned with a low pricing policy. Other provisions of the Act, such as abuse of dominance, can be invoked to challenge an anti-competitive practice aimed at eliminating or disciplining an innovative new entrant. But that cannot constitute a ground to justify a section 76 application.

[137] The low pricing policy must be the overriding or principal cause of the supplier’s refusal or discrimination. The Tribunal accepts, as stated by the Competition Bureau in the Guidelines, that a person’s low pricing policy need not be the only reason for the refusal or discrimination. However, such low pricing policy has to be the *overriding* or *principal* reason informing and

motivating the supplier's decision. Even if a number of other factors contributing to the refusal are present, there still must be evidence that the low pricing policy plays a material and principal role in the refusal to supply.

[138] In this case, I do not find evidence allowing me to reasonably infer that CarGurus' low pricing policy could be the overriding or principal cause of Trader's refusal to supply, as opposed to CarGurus' status as a disruptive innovator. By systematically linking its claimed low pricing policy and its innovative features as the motives allegedly driving the Trader Conduct, CarGurus does not allow me to conclude that the low pricing policy could be the main or principal cause of the Trader Conduct. In fact, CarGurus' own evidence suggests that the overriding reason for the Trader Conduct is CarGurus' innovating features rather than its low pricing policy.

[139] This is the wording that CarGurus chose to use in its evidence and in the Blue Affidavit. Considering the evidence submitted, I am therefore not satisfied that CarGurus has met the evidentiary threshold on the causation element of section 76. There is no sufficient credible evidence to give me a *bona fide* belief that CarGurus' low pricing policy, separate and distinct from other competing and innovative features it may have, could be the principal motivation and the overriding factor behind the Trader Conduct and its refusal to supply the Trader Vehicle Listings.

[140] I observe in closing that, in addition, there is also ample evidence on the record that the reason driving the Trader Conduct and its refusal to supply the Trader Vehicle Listings is in fact its claim of copyright infringement by CarGurus and the ongoing litigation it commenced against CarGurus in the Copyright Proceeding. It may be that Trader's claim could be denied by the Ontario Superior Court of Justice and that its allegations of copyright infringement relating to the Trader photographs are not upheld by the Court. However, at this stage and in light of the evidence before me in this application for leave, the existence of the Copyright Proceeding provides an objective business reason for the refusal to supply the Trader Vehicle Listings to CarGurus and is yet another factor pointing to an absence of sufficient credible evidence that Trader's refusal to supply is motivated by CarGurus' low pricing policy.

d. Adverse Effect on Competition

[141] Third, I am not convinced that there is sufficient credible evidence to form a *bona fide* belief that the Trader Conduct could have an actual or likely adverse effect on competition in a market.

[142] For the purposes of the adverse effect analysis (whether under paragraph 76(1)(b) on price maintenance or paragraph 75(1)(e) on refusal to deal), it is recognized that the relevant market is the market in which the applicant participates, namely the operation of Digital Marketplaces.

[143] In *B-Filer*, the Tribunal stated that paragraph 75(1)(e) "requires the assessment of the competitiveness or likely competitiveness of a market with, and without, the refusal to deal" (*B-Filer* at para 200). The Tribunal also considered the concept of "adverse effect on competition" in *Nadeau*. The Tribunal held that, in order to determine whether a refusal to deal would be

likely to have an adverse effect, it was necessary to examine a series of indicators which could vary on a case-by-case basis. In *Nadeau*, these included factors such as market share and market concentration (requiring an assessment of the relevant product and geographic markets), barriers to entry, impact on prices, the effect on rivals' costs, the impact on the quality and variety of the product, possible foreclosure of supply to other processors in the market and the impact of the possible elimination of the applicant from the market.

[144] In each of *B-Filer*, *Visa* and *Nadeau*, the Tribunal stated that, in its view, even if the threshold for establishing an “adverse” effect on competition is lower than that for a “substantial” reduction, it still requires evidence that the refusal to deal or price maintenance would have the effect of creating or enhancing a supplier’s “market power”. For a refusal to deal to have an adverse effect on a market, the Tribunal stated that the “remaining market participants must be placed in a position, as a result of the refusal, of created, enhanced or preserved market power” (*B-Filer* at para 208). In other words, “without market power there can be no adverse effect in a market” (*Nadeau* at para 369; *Visa* at para 350).

[145] An assessment of an adverse effect on competition thus requires a consideration of whether the refusal creates, enhances or preserves the market power of the remaining market participants. In *Canada (Director of Investigation and Research) v NutraSweet Co.* (1990), 32 CPR (3d) 1, the Tribunal noted that “[m]arket power is generally accepted to mean an ability to set prices above competitive levels for a considerable period”. In that case, the Tribunal recognized that this valid conceptual approach is not one that can be readily applied. It held that the factors that need be considered in evaluating market power will vary from case to case but ordinarily include indicators such as market share and entry barriers (*Nadeau* at para 368). Market power has also been defined in the jurisprudence alternatively in terms of “an ability to set prices above competitive levels and to maintain them at that level for a significant period of time without erosion by new entry or expansion of existing firms,” and “the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition” (*TREB* at para 165).

[146] In this case, there is very limited evidence in the Blue Affidavit on the issue of adverse effect of the Trader Conduct on competition. At paragraph 59 of the Blue Affidavit, Ms. Blue simply states that: “If Trader continues its current practices, the percentage of the market it controls will only increase with time as it enters into exclusive agreements with additional dealers and Feed Providers, shutting CarGurus out of the market.” And there are the various references mentioned above relating to the alleged 42.5% market share of Trader. No specific assessment was made by CarGurus on the likely geographic or product market at stake.

[147] The Tribunal could conservatively assume that the relevant market in this case is the narrowest market in which CarGurus operates, namely the Canadian Digital Marketplaces. Assuming that is the case, the evidence on the record shows that there are at least 10 businesses or competitors in Canada offering Digital Marketplace services and competing in this downstream “market,” including Kijiji and Trader as the two major and leading players. The evidence provided does not allow the Tribunal to clearly measure the size of the downstream market which CarGurus claims will be affected by Trader’s refusal to supply, or the market power of participants absent CarGurus’ participation. However, looking at Exhibit 10 to the Blue

Affidavit, the evidence indicates that the market for Digital Marketplaces is quite competitive, with two leading competitors (Kijiji and Trader) and a series of smaller ones.

[148] From the information on the number and size of competitors in Exhibit 10, it is apparent that CarGurus is a fairly minor competitor for the time being. There is also no evidence of the market share or relative size that CarGurus would likely achieve in the foreseeable future in the absence of the Trader Conduct. This is therefore not a situation where a major competitor would be eliminated by the Trader Conduct. In fact, CarGurus' own projections rather indicate that, even without access to the Trader Vehicle Listings, it will continue to expand and will arguably increase its presence and market share in the business, be it at a slower growth rate.

[149] I am therefore not satisfied that CarGurus has provided sufficient credible evidence that the refusal to supply the Trader Vehicle Listings could create, enhance or preserve market power of any entity in the Digital Marketplaces market. It is not a situation similar to *Nadeau* where evidence had been provided that the anticipated refusal to supply would displace a major competitor in the downstream market (Nadeau) and eliminate it as a main competitor of the leading players in the business.

[150] As the Tribunal indicated in *Audatex*, the requirement of an actual or likely adverse effect on competition is a key dimension of the private recourses available under sections 75 or 76 of the Act. The Tribunal stated the following at paragraph 50 of that decision:

While sections 75 and 103.1 provide for a private right of action for refusals to deal, they are part of the Act and must be considered in the context of this legislation and what it aims to protect and accomplish. As Mr. Justice Rothstein said in *Barcode FCA*, “[the] basic purpose of the *Competition Act* as described in subsection 1.1 is ‘to maintain and encourage competition in Canada’ and the purpose of section 75 is in furtherance of that objective” (*Barcode FCA* at para 14). He elaborated on that point further in his reasons, restating the purpose of the Act to maintain and encourage competition and adding that “[i]t is not to provide a statutory cause of action for the resolution of a dispute between a supplier and a customer that has no bearing on the maintenance or encouragement of competition” (*Barcode FCA* at para 23).

[151] The requirement of an adverse effect on competition reflects the fact that the private application provisions of the Act are not there to arbitrate private contractual disputes relating to the supply of a product in circumstances where a refusal to supply does not have a market impact. The adverse competitive effect has to be more than an impact on CarGurus' business, as this is already captured by the requirement that the applicant be substantially affected by the refusal to supply. The evidence has to have a market dimension. As the Tribunal stated in *Nadeau* at para 368, the requirement that the practice is “likely to have” an adverse effect means that there is a requirement to establish the likelihood that an adverse effect is probable and not merely possible.

[152] Here, CarGurus is a new entrant. Evidence needed to demonstrate that there could be an adverse effect on competition in these circumstances is arguably more difficult to meet. But it is still the burden of the applicant to bring forward sufficient credible evidence to give the Tribunal

a *bona fide* belief that this requirement of section 76 could be met. In light of the market structure for the operation of Digital Marketplaces in Canada, the presence of two leading competitors and numerous other smaller ones, and the relatively small, but growing, size of CarGurus, I am not satisfied that sufficient credible evidence has been produced by CarGurus to support a *bona fide* belief that holding CarGurus out of the Digital Marketplaces market or limiting its expansion could have an adverse effect on competition in the market.

e. Conclusion regarding Section 76

[153] For all these reasons, I conclude that the Tribunal “could” not make an order under section 76 requiring Trader to supply CarGurus when the application is heard on the merits, as insufficient evidence has been provided on at least three elements set out in the price maintenance provision.

IV. CONCLUSION

[154] For the reasons discussed above, CarGurus’ application for leave is not supported by sufficient credible evidence to give rise to a *bona fide* belief that CarGurus may be or is substantially affected in its business by the alleged refusal to supply or exclusive dealing by Trader. Accordingly, CarGurus’ application for leave to apply under section 75 and 77 of the Act is denied.

[155] Similarly, the Tribunal concludes that it could not make an order under section 76 of the Act as the evidence on at least three elements of the price maintenance provision is insufficient to give rise to a *bona fide* belief that CarGurus could meet them.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[156] The application seeking leave for relief under sections 75, 76 and 77 of the Act is dismissed.

[157] The respondent Trader is awarded costs against the applicant CarGurus, at the mid-point of Column III of the table to Tariff B of the *Federal Courts Rules*, SOR/98-106.

DATED at Ottawa, this 14th day of October 2016.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

COUNSEL:

For the applicant:

CarGurus, Inc.

Nikiforos Iatrou
Bronwyn Roe

For the respondent:

Trader Corporation

Michael Koch
Peter Ruby
Hannah Arthurs

TAB 5

Competition Tribunal



Tribunal de la Concurrence

Reference: *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1
File no.: CT2003008
Registry document no.: 0011

IN THE MATTER OF an application by Barcode Systems Inc., for an order pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, granting leave to bring an application under section 75 of the Act.

B E T W E E N:

Barcode Systems Inc.
(applicant)

and

Symbol Technologies Canada ULC
(respondent)



Decided on the basis of the written record.
Member: Lemieux J. (presiding)
Date of reasons and order: 20040115
Reasons and order signed by: Lemieux J.

**REASONS AND ORDER REGARDING APPLICATION FOR LEAVE TO MAKE AN
APPLICATION UNDER SECTION 75 OF THE *COMPETITION ACT***

[1] Barcode Systems Inc. (“Barcode”) has applied to the Competition Tribunal (the “Tribunal”) pursuant to subsection 103.1(1) of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”) for leave to make an application under section 75 of that Act.

[2] Barcode alleges Symbol Technologies Canada ULC (“Symbol”), a subsidiary of Symbol Technologies Inc. (“Symbol US”), is refusing to supply it with barcode scanners contrary to the provisions of section 75 of the Act and seeks an order, if leave is granted and appropriate findings are made by the Tribunal, that Symbol accept Barcode as a customer on the “usual trade terms” forthwith upon the issuance of such an order.

[3] This application for leave is only the second such application to the Tribunal brought under the recent amendments to the Act providing for what has been termed as “a private access action” because the Commissioner of Competition (the “Commissioner”) does not initiate the proceeding.

[4] The first application for leave was decided by Justice Dawson in *National Capital News v. Milliken*, 2002 Comp. Trib. 41 (“National Capital News”), a decision which I endorse entirely.

[5] The test for the Tribunal granting leave is set out in subsection 103.1(7) of the Act. It provides as follows:

The Tribunal may grant leave to make an application under section 75 or 77 *if it has reason to believe that the applicant is directly and substantially affected in the applicant[']s business by any practice* referred to in one of those sections that could be subject to an order under that section. (emphasis added)

[6] In this case, the practice that is complained of and that could be subject to an order under section 75 of the Act is Symbol’s refusal to sell its products to Barcode after Symbol terminated its ten year relationship with Barcode in March 2003.

[7] I make the following points about the Tribunal’s test for granting leave.

[8] What the Tribunal must have reason to believe is that Barcode is directly and substantially affected in its business by Symbol’s refusal to sell. The Tribunal is not required to have reason to believe that Symbol’s refusal to deal has or is likely to have an adverse effect on competition in a market at this stage.

[9] I make this observation because Symbol, in its vigorous opposition to leave being granted, described what, in its view, was a highly competitive marketplace and argued that Barcode had provided no evidence as to this requirement as described in paragraph 75(1)(e) of the Act.

[10] As I read the Act, adverse effect on competition in a market is a necessary element to the Tribunal finding a breach of section 75 and a necessary condition in order that the Tribunal make a remedial order under that section. It is not, however, part of the test for the Tribunal's granting leave or not.

[11] Justice Dawson in *National Capital News*, *supra*, described what kind of proof the Tribunal had to have before it in order to have "reason to believe". She concluded that

. . . the leave application [must be] supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in [its] business by a reviewable practice [the refusal to deal here], and that the practice in question could be subject to an order.

[12] What this standard of proof means is that the applicant Barcode must advance sufficient credible evidence supported by an affidavit to satisfy the Tribunal that there is a reasonable possibility that its business has been directly and substantially affected because of Symbol's refusal to deal.

[13] The Tribunal measures the evidence on a scale which is less than the balance of probabilities. It is not sufficient, however, that the evidence shows a mere possibility that Barcode's business has been directly and substantially affected by Symbol's refusal to supply.

[14] Barcode's evidence was to the effect Symbol's refusal to supply, either directly or by preventing Symbol distributors or Symbol resellers from doing so, has now caused a substantial loss of revenues to the point where it, if continued, would force Barcode out of business. On December 19, 2003, on petition from the Royal Bank of Canada, an interim Receiver was appointed of all the property, assets and undertakings of Barcode.

[15] Barcode states Symbol's actions also critically impacted its ability to perform its ongoing maintenance contracts.

[16] Barcode asserts that, as of the filing of its application, 50 percent of its employees have been laid off.

[17] Symbol filed written representations and affidavits to counter Barcode. Symbol outlines the reasons why it is not supplying Barcode with the Symbol products. Specifically it denies that Barcode's business has been substantially affected. It says Barcode has not been precluded from carrying on business by any actions attributable to Symbol.

[18] Symbol states, if Barcode suffered any loss, it is because it breached its contract with Symbol or because of factors which have nothing to do with Symbol such as declining market conditions generally, increased competition from suppliers, exchange rate changes and Barcode's failure to meet usual trade terms with its current suppliers.

[19] On an application for leave, it is not the function of the Tribunal to make credibility findings based on affidavits which have not been cross-examined. I note that the Act requires an applicant to support an application for leave by a sworn affidavit while, for a person opposing leave only written representations are contemplated.

[20] These provisions confirm that the Tribunal's role when granting leave is a screening function simply deciding on the sufficiency of evidence advanced.

[21] There may be situations, however, where it can be demonstrated that an applicant's evidence is simply not credible without engaging the Tribunal in weighing contested statements from opposing parties and the applicant. This is not the case here.

[22] I close on a procedural point. Both Symbol and Barcode have sought leave to file additional material as a result of the limited right of reply granted by the Tribunal to Barcode, as an exception in the interest of justice.

[23] In only exceptional circumstances will the Tribunal grant parties a right of reply in leave applications which are to be dealt with expeditiously.

[24] The Tribunal sees no need to have additional evidence before it as proposed by Barcode or Symbol.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[25] The application for leave is granted.

[26] The Tribunal is prepared to expedite the hearing of the application and invites the parties to communicate with the Deputy Registrar of the Tribunal for this purpose.

DATED at Ottawa, this 15th day of January, 2004.

SIGNED on behalf of the Tribunal by the judicial member.

(s) François Lemieux

REPRESENTATIVES

For the applicant:

Barcode Systems Inc.

David P. Church

For the respondent:

Symbol Technologies Canada ULC

Colin MacArthur, Q.C.

TAB 6



PUBLIC VERSION

Reference: *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2009 Comp. Trib. 6
File No.: CT-2008-004
Registry Document No.: 0532

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER of an Application by Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited for an Order pursuant to section 75 of the *Competition Act*;

AND IN THE MATTER of an Application by Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited for an Interim Order pursuant to section 104 of the *Competition Act*.

B E T W E E N:

**Nadeau Ferme Avicole Limitée/
Nadeau Poultry Farm Limited**
(applicant)

and

**Groupe Westco Inc. and Groupe Dynaco,
Coopérative Agroalimentaire, and Volailles
Acadia S.E.C. and Volailles Acadia Inc./
Acadia Poultry Inc.**
(respondents)



Dates of hearing: 20081117 to 20081121, 20081124 to 20081128, 20081202 to 20081203

Before: Blanchard J. (presiding), H. Lanctôt and P. A. Gervais

Date of Reasons and Order: June 8, 2009

Reasons and Order signed by: Mr. Justice E. Blanchard, Mr. H. Lanctôt and Mr. P. A. Gervais

REASONS FOR ORDER AND ORDER

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

[1] Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited (the “Applicant” or “Nadeau”) brings an application for an order directing the Respondents to accept Nadeau as a customer and to supply live chickens to Nadeau on the usual trade terms. The application is made pursuant to section 75 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”).

[2] In the reasons that follow, we¹ find that:

- (a) The Applicant has established that it is substantially affected in its business due to its inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;
- (b) The Applicant has failed to establish that it is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;
- (c) The Applicant has established that it is willing and able to meet the usual trade terms of the suppliers of the product;
- (d) The Applicant has not established that the product is in ample supply; and
- (e) The Applicant has not established that the refusal to deal is having or is likely to have an adverse effect on competition in a market.

[3] Since the Act requires that all of the requirements of subsection 75(1) be met for an order to issue, it follows that the application will be dismissed.

II. BACKGROUND FACTS

A. The parties

[4] The Applicant, Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited, is a corporation incorporated under the laws of the Province of New Brunswick and is a wholly-owned subsidiary of Maple Lodge Holding Corporation (“Maple Lodge”), which is one of Canada’s largest chicken processors.

[5] Maple Lodge employs about 2,300 people and owns 100% of the shares of two chicken processing facilities in Canada, one in Norval, Ontario, which is operated by Maple Lodge Farms Ltd. (“Maple Lodge Farms”), and one in St-François de Madawaska, New Brunswick (the “St-François Plant”). The St-François Plant is operated by the Applicant.

[6] The Respondent Groupe Westco Inc. (“Westco”) is a corporation incorporated under the laws of the Province of New Brunswick. Westco is highly integrated in the chicken industry. It owns or controls egg hatching production quota, farms, chicken production quota and chicken production farms. Through its subsidiaries, Westco owns or controls around 50.9% of New Brunswick’s chicken production.

[7] The Respondent Groupe Dynaco, Coopérative Agroalimentaire (“Dynaco”), is a co-operative registered in the Province of Quebec. Dynaco has interests in certain chicken production facilities in the Province of New Brunswick. Dynaco is highly integrated in a number of industries, including the chicken industry. Dynaco is the [TRANSLATION] “fifth most significant co-operative in the Province of Quebec”.

[8] The Respondent Volailles Acadia S.E.C., created under the laws of the Province of Quebec, is registered as an extra-provincial limited partnership in the Province of New Brunswick, and the Respondent Volailles Acadia Inc./Acadia Poultry Inc., incorporated under the laws of Canada, is registered as an extra-provincial corporation in the Province of New Brunswick (collectively, “Acadia”). Acadia’s main activity is the production of chicken and turkey.

B. The poultry supply management system

[9] The events underlying this proceeding occurred in the context of Canada’s poultry supply management system. It is therefore useful to understand the workings of that system.

[10] Under Canada’s supply management system, the typical set of market-determined economic arrangements is replaced with a detailed and complex set of regulations, akin to a centrally planned economic system. It has been described as being, in effect, a state-mandated cartel arrangement.

[11] Supply management in the poultry sector evolved as a policy response to the interprovincial competition in chicken and egg marketing; also known as the “chicken and egg wars”. The policy regime originated in the early to mid-1970s and replaced open, and at times aggressive, competition with mandated market shares enforced by provincial and producer marketing quotas. As a result, the poultry sector is likely the most highly regulated industry in the Canadian economy.

[12] Supply management is commonly said to rest on three pillars, namely production control, price control and import control. We will briefly deal with each of these in turn.

[13] Chicken farmers or producers are limited to producing their quota amounts, which are measured in kilograms of live weight. A producer receives a single quota applicable to all of his or her production regardless of the intended destination. Non-compliance can give rise to penalties. National quotas are set by a federal marketing agency, the Chicken Farmers of Canada (the “CFC”). Its prime responsibility is to ensure that Canadian chicken producers supply a sufficient quantity of product to ensure that the domestic market meets consumer demand. The CFC then allocates provincial quotas of chicken to the provinces. In turn, the provincial marketing boards set individual quotas for producers. Unlike some other provinces, New Brunswick currently does not have regulations requiring producers to direct their live chicken supply to any particular processor. Since 1995, the national quota or the quantities of chicken required have been determined at the provincial level through a process known as the “bottom-up” approach. Under this approach, provincial processors negotiate with provincial marketing boards to determine provincial quota requirements. The provincial requirements are then

aggregated and adjusted, if necessary, by the CFC. The national quota is thus the aggregate of provincial requirements and is set periodically, “every 6 or 7 weeks depending on the year of production” according to the expert evidence adduced.

[14] While there is no legislation preventing the interprovincial trade of chickens, the evidence indicates that relatively few chickens move across provincial borders. In 2005, interprovincial trade in chickens involved only 4% of total Canadian production. A producer wishing to export chickens to another province must obtain a license from the CFC. The license is issued by the CFC as long as the producer is in compliance with statutory regulations.

[15] Farmers may buy and sell their quotas, but certain restrictions apply. One such restriction is that owners themselves must be engaged in the production of chickens. New entrants have little option but to purchase quota from existing farmers, which can prove costly. The cost of quota for an average-size chicken farm in 2007 climbed to \$2.25 million. In certain provinces new quotas are reserved for new entrants at no cost, but these quotas are limited. In most jurisdictions, free entry involves a very long wait and is not a realistic option for new entrants. The more realistic approach has been for new entrants to purchase existing quotas from producers. Most new quota allocations are issued to existing producers.

[16] The minimum price at which chickens may be sold in respective provinces is set by provincial marketing boards. Under law, the provincial boards are charged with the task of restricting production so that farmers can earn a reasonable margin, but at the same time they must prevent prices from rising so high that demand is choked off. The evidence would suggest that the boards have been successful, since chicken production in Canada has risen by 77% in the last 15 years. Certain provinces have used the price negotiated in Ontario as the benchmark price for their own negotiations. Since May 2003, the price in Ontario is established by a formula which includes taking into account market conditions, input costs based on a cost-of-production formula, and prices set in neighbouring provinces.

[17] Protection from imports from other countries is also an important feature of the supply management scheme. To import chickens into Canada, a special permit is required. Import quotas, also known as “tariff rate quotas” (“TRQs”), specify the quantity of imports that are allowed, and are allotted annually and not permanently. These quotas are managed by the federal Department of Foreign Affairs and International Trade, whose role it is to allocate the TRQs to individual firms and set and maintain the rules by which they are administered. The TRQs are automatically set at 7.5% of the previous year’s production. Allocation procedures vary by commodity and are affected by increases or decreases in demand of the commodity in question and other factors. For the most part, quota holders are likely to have their import quota allotment renewed or re-allocated in subsequent years.

[18] Given the significance of the supply management system and its impact on this case, we shall conduct a comprehensive review of the legislative and regulatory framework of the system later on in these reasons and particularly in those parts relating to paragraphs 75(1)(b) and (d) of the Act.

C. Nature of the Applicant's business

[19] The Applicant is a primary processor that slaughters live chickens and sells them (in whole or in parts) to further processors and other customers. The Applicant's only business is the St-François Plant, which was acquired in 1989. At the time of the acquisition, the former owner was insolvent. The Applicant has invested millions of dollars over the years to improve and maintain the St-François Plant. It has been the only chicken processing plant in New Brunswick since 1992 and has been slaughtering all of the chickens produced in New Brunswick since 1998.

[20] In February 2002, the St-François Plant was damaged by a fire that resulted in the closure of operations. It was rebuilt as a "broiler plant" and was up and running again in November 2002. During the rebuilding period, the Applicant continued to purchase all of New Brunswick's live chicken production and arranged to have the chickens slaughtered at other processing plants. According to the Applicant, the newly rebuilt St-François Plant is the most modern and efficient chicken processing facility in Canada.

[21] The Applicant currently has about 375 employees. It is the largest employer in the St-François community. At present, it runs one production line with two shifts, averaging sixty hours a week, five days a week.

[22] The Applicant states that it requires a full range of birds within certain weight tolerances in order to meet its customers' specifications. The Applicant offers both air-chilled and water-chilled chicken. Air-chilled chickens, which are considered to be "premium" chickens, are cooled after being eviscerated by using cold air, rather than water. This method prevents the absorption of water thus reducing the amount of moisture in the chicken. Having both systems at the St-François Plant gives the Applicant increased flexibility to satisfy its customers' needs.

[23] The majority of the Applicant's arrangements with its customers are verbal agreements that are entered into by way of a "handshake deal". The only written contract between the Applicant and any of its customers is a [CONFIDENTIAL] contract between the Applicant and [CONFIDENTIAL] relating to the sale of chicken by [CONFIDENTIAL] to [CONFIDENTIAL]. The Applicant also has written agreements with [CONFIDENTIAL] and [CONFIDENTIAL] with regard to their respective specifications and pricing requirements.

D. Nature of the Respondents' businesses

(1) Westco

[24] Westco is a group of chicken and turkey producers. Westco's head office is located in St-François de Madawaska. Through its subsidiaries, it currently owns or controls 50.9% of New Brunswick's quota, which represents an annual volume of 19,367,920 kg of live chickens. Westco presently has approximately 200 employees.

[25] Westco (formerly called Fermes Waska) was created in 1984 by the consolidation of a dozen New Brunswick chicken producers who wanted to increase their buying and negotiating power vis-à-vis egg and meal producers, chick breeders, carriers and processors. A further

consolidation of production quotas occurred during the 1990s, mainly between 1994 and 1998, resulting in an increase in Westco's quota. The consolidation was encouraged by Maple Lodge in order to bring production quota closer to the St-François Plant.

[26] In the early 1990s, Westco started to pursue a project of vertical integration. Westco's vertical integration started gradually, beginning with the purchase of trucks making it possible to transport chips and meal and continuing with the consolidation of meal purchasing to facilitate negotiations for its fabrication and price. Westco then constructed hatcheries, reproduction farms and transport facilities. During Westco's vertical integration, the size of farms also dramatically increased.

[27] Westco is now involved in almost all phases of the production of live chickens including the organic production of manure, the purchase of wholesale grains, egg production, the manufacture of meal, fecundation, chick production, poultry production and transportation. According to Westco, the only phases in which it is not involved are the processing of live chickens and distribution of processed chicken to the retail market.

(2) Dynaco

[28] Dynaco is an agricultural co-operative with over 1,500 members, 655 of which are agricultural producers. It is involved in other fields such as home renovation centers, the sale of petroleum products and transportation.

[29] Dynaco's poultry production represents 1.6% of its total sales figure and Dynaco owns 6.22 % of New Brunswick's chicken production quota.

[30] Dynaco holds 100% of the shares of Les Fermes J.J.C. Bolduc inc. and Les Fermes avicoles Bolduc ("Fermes Bolduc") and also owns 25% of the shares of Cormico Inc. ("Cormico"). Cormico's other shares are owned by La Coop Fédérée ("Coop Fédérée") (25%) and the Cormier family (50%). Its chicken production quota represents 4.98% of New Brunswick's supply. Coop Fédérée is Canada's largest firm in the chicken sector: with revenues of \$2.9 billion, this poultry co-operative ranks second amongst all co-operatives. The quota held by Fermes Bolduc is, however, the only New Brunswick production quota over which Dynaco has control with respect to the slaughtering destination.

(3) Acadia

[31] Acadia was created in 2006 to acquire poultry and pig production facilities. Acadia's main activity is chicken and turkey production. It operates four chicken production sites in New Brunswick. Its pig production has been abandoned.

[32] Acadia currently owns or controls 16% of New Brunswick's chicken production quota. Since 2006, Acadia has also been producing the quota for Slipp Farms, a New Brunswick chicken producer, under a leasing agreement. Its quota represents 1.01% of New Brunswick's supply or about 3,679 chickens per week. Acadia does not exert any control over where Slipp Farms' production is processed.

E. Relationship between the Respondents

[33] Westco owns one of Dynaco's 734 shares. Dynaco is a member of Coop Fédérée. Dynaco is also indirectly related to Olymel S.E.C. ("Olymel"), given that Coop Fédérée owns 60% of Olymel. Olymel is a limited partnership formed under the laws of Quebec. It is a primary and secondary chicken processor and is the Applicant's primary competitor in Quebec and the eastern provinces. Olymel currently owns two chicken processing plants, one in Berthierville and another in St-Damase, Quebec. On average, the aforementioned plants process approximately 1.3 million chickens per week. Olymel also owns 50% of Volaille Giannone inc., which operates a chicken processing plant in St-Cuthbert, Quebec.

[34] The shareholders of Volailles Acadia Inc./Acadia Poultry Inc. are the same as the limited partners of Volailles Acadia S.E.C. Acadia is jointly owned by Coop Fédérée (30%), Dynaco (30%), Purdel Coopérative Agro-Alimentaire ("Purdel") (15%) and Westco (25%). Purdel is also a member of Coop Fédérée. Acadia is thus also indirectly affiliated with Olymel, as three of its four co-owners are related to Coop Fédérée.

[35] Rémi Faucher, who testified on behalf of both Acadia and Dynaco in these proceedings, has worked for each of these Respondents. Mr. Faucher was president and administrator of Acadia from May 2006 to July 2008 and was also president and general manager of Dynaco from September 1998 to February 2008.

F. The Applicant's supply of live chickens

[36] When the St-François Plant was acquired in 1989, the birds in the province were split between northern and southern New Brunswick (50/50). At that time, there was another processing plant in Sussex, New Brunswick, which was processing birds from southern New-Brunswick, while the St-François Plant was processing birds from the province's northern part. In 1989, the St-François Plant was in financial difficulty as a result of problems between the previous owners and producers. Consequently, many producers from northern New Brunswick were shipping their birds to Quebec and Ontario for processing.

[37] In or about June 1990, the Applicant entered into negotiations with New Brunswick producers that were shipping their production out-of-province. The Applicant wanted to bring the New Brunswick birds back to New Brunswick to be processed at the St-François Plant. The Applicant agreed to pay the producers \$0.065 over the Ontario price instead of the price set by the New Brunswick chicken marketing board, which was about \$0.04 over the Ontario board price. The negotiations thus raised the New Brunswick board price (the "NB Board Price") by \$0.025.

[38] The Sussex plant closed in 1992, making the St-François Plant the only chicken processing plant in New Brunswick. In late 1995, as a result of poor markets and the suggestion of the then Deputy Minister of Agriculture, the Applicant introduced a "relocation bonus" whereby it split its transportation costs for transporting birds from southern New Brunswick to northern New Brunswick with producers from the north who bought quota from the south. The agreement was that the Applicant would pay \$0.03/kg for three years from the date the producer

purchased the quota. Payments under the program started in about 1996 and the last of the quota was purchased in 1998. Accordingly, the program was completed by 2001. As of 1998, the Applicant was processing the totality of the New Brunswick production.

[39] The Applicant began receiving supply from the Respondents in 1990 and was processing the totality of their production at the time the Applicant filed its Notice of Application with the Tribunal on March 17, 2008. The Respondents' production facilities are currently all located within 30 km of the St-François Plant. The Applicant does not have any written contracts with New Brunswick producers, including the Respondents, specifying the number and size of chickens that are to be supplied by those producers to Nadeau. There are also no contractual arrangements between the parties specifying a term for supply.

[40] From 1990 to January 2007, the Applicant always paid its producers the NB Board Price for their chickens, which is \$0.065 above the regulated Ontario minimum price. In January 2007, the Applicant developed a market-based incentive plan for producers in New Brunswick (the "Incentive Plan"). The Incentive Plan cost the Applicant \$[CONFIDENTIAL] in 2007, of which \$[CONFIDENTIAL] went to the Respondents collectively. Westco gained \$[CONFIDENTIAL] from the Incentive Plan that year.

[41] Prior to May 2007, the Applicant obtained all of its live chickens from New Brunswick producers, with almost 75% being supplied by the Respondents or their quota-holding predecessors. Due to a plant closure in Nova Scotia in May 2007, the Applicant began to obtain supply from Nova Scotia and Prince Edward Island. When the Notice of Application in this case was filed, the St-François Plant was processing on average about 565,800 chickens per week from the following sources:

Westco	186,230
Acadia	58,670
Dynaco	26,450
New Brunswick, other	94,450
Prince Edward Island	40,000
Nova Scotia	160,000

[42] The Applicant began receiving an additional 25,000 birds per week from Nova Scotia in June 2008 and another 6,250 birds per week in September 2008.

[43] In order to accommodate the surplus of birds coming from Nova Scotia and Prince Edward Island, the Applicant started a second shift, which required it to hire approximately 130 new employees. In order to offset the additional costs incurred by running a second shift, the Applicant needed some assurance that it would receive the Nova Scotia birds for a reasonable time period. The Applicant therefore made a "handshake deal" with certain Nova Scotia producers under which they would send Nadeau their chickens for a period of three years. This "handshake deal" was entered into in May 2007.

G. The termination of the supply relationship

(1) Westco

[44] In January 2007, Westco advised the Applicant of its interest in buying or investing in the St-François Plant. Westco submits that the only way to ensure its future in the poultry industry is to proceed with a complete vertical integration of its operations, which requires Westco to acquire an existing slaughterhouse or to build a new one. During a meeting which was held in Atlanta on January 25, 2007, Anthony Tavares, the president and CEO of Maple Lodge at the time, informed Westco that Maple Lodge's shareholders would likely not be interested in selling the St-François Plant. Mr. Tavares further stated that a structure that would result in Westco owning a percentage of the St-François Plant and retaining 100% of its live production assets would result in non-aligned shareholder interests and would likely eventually lead to conflicts.

[45] Shortly after the meeting in Atlanta, Mr. Tavares met with the Board of Directors of Maple Lodge, which decided that it was not interested in selling to Westco. The Board, however, indicated that it would be prepared to look at an ownership structure in which Nadeau and Westco assets would be pooled and Westco and Maple Lodge would each own a part of the combined operations. This proposal was communicated to Westco, but there was no agreement.

[46] Westco approached Olymel in March 2007 in order to develop a partnership so as to complete its strategy of vertical integration. As mentioned above, Olymel is a chicken processor in Quebec and competes with the Applicant in Quebec and the eastern provinces. The purpose of the partnership was to acquire the assets or shares of the Applicant or to acquire property and construct, start up, own and operate a new chicken processing plant. Westco and Olymel thus worked out a business plan envisaging the acquisition of the St-François Plant or, in the event that negotiations failed with the Applicant, the construction of a new processing plant in New Brunswick. The partnership between Olymel and Westco is the Sunnymel Limited Partnership ("Sunnymel") which was created pursuant to the New Brunswick *Limited Partnership Act*, S.N.B. 1984, c. L-9.1.

[47] Thomas Soucy, Chief Executive Officer of Westco, contacted Mr. Tavares in mid-August 2007 and said that he wanted Mr. Tavares to meet with him and Réjean Nadeau, President and Chief Executive Officer of Olymel. At the meeting, Mr. Tavares was advised that Westco and Olymel wanted to buy the St-François Plant. He was told that if the Applicant was not willing to sell the St-François Plant, all of the chickens produced by Westco would be diverted to Quebec and Sunnymel would then build its own plant in New Brunswick.

[48] Mr. Tavares met with Westco representatives again on September 6, 2007. During the meeting, Mr. Tavares told Westco's representatives that he was shocked by their decision to partner with Olymel and also stated that he was of the opinion that it was a poor business decision. Westco's representatives did not reconsider.

[49] Following the September 6, 2007, meeting, Mr. Tavares advised Mr. Soucy that although its first choice was to maintain the status quo, Maple Lodge's Board of Directors had, given the circumstances, instructed him to assemble a negotiating team.

[50] On November 6, 2007, the parties started negotiations for the sale of the St-François Plant. The purchase price offered by Sunnymel was less than 25% of the value attributed to the St-François Plant by the Applicant. The negotiations therefore broke down and, on January 17, 2008, Westco gave written notice that it would cease supplying its live chickens to the Applicant, effective July 20, 2008, and that its chickens would be diverted to Olymel in Quebec pending Sunnymel's construction of a new slaughterhouse in New Brunswick.

[51] During the negotiations, the Applicant filed complaints with the New Brunswick Minister of Agriculture and Aquaculture and with Chicken Farmers of New Brunswick (sometimes "CFNB").

(2) Dynaco

[52] The Applicant submits that during the negotiations for the acquisition of the St-François Plant, Mr. Soucy affirmed that he had the authority to speak on behalf of Dynaco and that that is why Dynaco was referenced in the Applicant's correspondence with the Minister of Agriculture and Aquaculture. Dynaco states that Mr. Soucy never had the authority to speak on its behalf. Notwithstanding an apology by the Applicant for the mistaken reference to Dynaco in the letter to the Minister, Dynaco confirmed by two letters dated March 6, 2008, that its chickens would cease arriving at Nadeau, effective September 15, 2008.

(3) Acadia

[53] By letter dated February 28, 2008, Acadia gave the Applicant formal notice that it would cease supplying it with live chickens, effective September 15, 2008. Acadia submits that this was a business decision and states that its decision to cease supplying the Applicant was not influenced by the negotiations that took place between the Applicant and Westco regarding the acquisition of the St-François Plant.

H. History of the proceeding and relief sought

[54] This proceeding is brought pursuant to the Tribunal's order of May 12, 2008, which granted the Applicant leave to apply for an order under section 75 of the Act. The Applicant seeks an order requiring the Respondents to continue supplying the Applicant with live chickens on the usual trade terms and in the numbers previously provided by the Respondents.

[55] On June 26, 2008, the Tribunal granted the Applicant's request for interim relief pursuant to section 104.1 of the Act (the "Interim Supply Order"). The Respondents were ordered to continue to supply the Applicant with live chickens on usual trade terms at the level of weekly supply that was in place at that time, namely 271,350 live chickens, pending the hearing of the main application.

[56] On November 4, 2008, the Applicant filed a motion for an order requiring the Respondents to show cause why they should not be held in contempt of the Interim Supply Order ("Show Cause Motion"). The Applicant alleged that the Respondents breached and are continuing to breach the Interim Supply Order, as the Applicant has been and will continue to be significantly short on deliveries of chicken.

[57] On November 6, 2008, Westco filed a motion for an order or direction regarding the interpretation of the Interim Supply Order. Westco seeks an order to confirm its view that the weekly number of chickens ordered to be delivered to the Applicant is a notional figure based on a hypothetical average weight of 2 kg and that the volume of live chickens to be supplied to the Applicant by the Respondents will :

- i. be decreased by the volume of replacement chickens obtained by the Applicant;
- ii. vary proportionally and in accordance with the periodic fluctuation of the Respondents' production quotas; and
- iii. reflect the Respondents' production schedules.

[58] On February 26, 2009, the Tribunal dismissed the Show Cause Motion with respect to Acadia and Dynaco. It granted the motion with respect to Westco and ordered a show cause hearing. The show cause hearing has not yet taken place and the matter is still outstanding before the Tribunal. Westco's motion for an order or direction regarding the interpretation of the Interim Supply Order will be argued at the show cause hearing.

III. LEGISLATIVE FRAMEWORK

[59] The refusal to deal provision is contained in section 75 of the Act. It reads as follows:

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

(a) a 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,

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,

75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut :

a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;

b) que la personne mentionnée à l'alinéa a) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;

c) que la personne mentionnée à l'alinéa a) accepte et est en mesure de respecter les conditions de commerce normales imposées par le

(d) the product is in ample supply, and

(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

(3) For the purposes of this section, the expression “trade terms” means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

ou les fournisseurs de ce produit;

d) que le produit est disponible en quantité amplement suffisante;

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

(2) Pour l'application du présent article, n'est pas un produit distinct sur un marché donné l'article qui se distingue des autres articles de sa catégorie en raison uniquement de sa marque de commerce, de son nom de propriétaire ou d'une semblable particularité à moins que la position de cet article sur ce marché ne soit à ce point dominante qu'elle nuise sensiblement à la faculté d'une personne à exploiter une entreprise se rapportant à cette catégorie d'articles si elle n'a pas accès à l'article en question.

(3) Pour l'application du présent article, « conditions de commerce » s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

(4) Le Tribunal saisi d'une demande présentée par une personne autorisée en vertu de l'article 103.1 ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

IV. THE PARTIES' WITNESSES

[60] Before turning to the analysis of the merits of the application before us, it is important to identify all the witnesses who appeared before the Tribunal. A detailed description of their testimony appears in Schedule A to these reasons.

A. The Applicant

(1) Experts

[61] Dr. Richard Barichello, Dr. Roger Ware and Mr. Grant Robinson filed expert reports and testified as experts on behalf of the Applicant.

[62] Dr. Richard Barichello is an associate professor at the University of British Columbia where he teaches in the areas of agricultural policy, food markets and international agricultural development. The Tribunal found that he was qualified as an expert in the field of agricultural economics with a specialization in regulated markets, especially supply management, quota markets, trade policy and the analysis of government policy. The Respondents did not take issue with Dr. Barichello's qualifications to give an expert opinion on these matters.

[63] Dr. Roger Ware is a professor of economics at Queen's University. With the parties' agreement, the Tribunal recognized Dr. Roger Ware as an expert in the areas of economics, competition policy and industrial organization, including market definition and the competitive behaviour of firms.

[64] Grant C. Robinson is a chartered accountant who has worked as an outsource chief financial officer for Maple Lodge. The Tribunal found that he was qualified to give evidence as an accountant, including his expert opinion on the area of the chicken processing industry.

(2) Lay witnesses

[65] Seventeen other individuals appeared on behalf of the Applicant.

[66] Two members of the Applicant's management team testified. The Applicant called Yves Landry, the Applicant's general manager, and Denise Boucher, its office manager.

[67] Anthony Tavares, the former president of the Applicant and Chief Executive Officer of Maple Lodge, and John Feenstra, the former general manager of the Applicant, also gave evidence.

[68] The Applicant called three members of its procurement team to testify about the Applicant's efforts to procure chickens from Quebec. Those members were Tina Ouellette, Léonard Viel and Réjean Plourde.

[69] Further processors of chickens and other customers of the Applicant also appeared before the Tribunal. They are:

- (i) Guy Chevalier, President, Service Alimentaire Desco Inc. ("Desco"). Desco is a further processor and distributor of chicken;
- (ii) Terry Ellis, President, Sunchef Farms Inc. ("Sunchef"). Sunchef is a further processor of chicken;
- (iii) Lyndsay Gazzard, Senior Purchasing Manager responsible for poultry purchases for the Unified Purchasing Group of Canada ("UPGC"). UPGC operates as the purchasing agent for YUM! Restaurants International Canada Ltd.;
- (iv) Corey Goodman, General Manager, UPGC, and Chief Purchasing Officer, Prizm;
- (v) Debbie Goodz, President and CEO, Poulets Riverview Inc. ("Riverview"). Riverview is a further processor and distributor of chicken; and
- (vi) Jeffrey Lloyd McHaffie, the *de facto* vice-president of Puddy Bros. Limited ("Puddy"), in charge of sales and the purchase of poultry products. Puddy is a further processor of chicken.

[70] Kevin Thompson, Executive Director, Association of Ontario Chicken Processors, and Bruce McCullagh, Senior Vice President and General Manager, Poultry Operations, Maple Leaf Consumer Foods ("Maple Leaf"), also testified on behalf of the Applicant. Maple Leaf is a large poultry processing company located in Ontario.

[71] Finally, Andre Merks, a Nova Scotia chicken farmer, and Michael Donahue, Vice-President, Agri Stats, Inc. ("Agri Stats"), were called by the Applicant. Agri Stats is a statistical research and analysis firm that offers benchmarking services for the poultry industry across North America.

B. The Respondents

(1) Expert

[72] Margaret Sanderson was called as an expert by the Respondent Westco. Ms. Sanderson has held a number of positions with the Competition Bureau including the position of Assistant Deputy Director of Investigation and Research for the Bureau's Economics and International Affairs Branch. The Tribunal accepted Ms. Sanderson as an expert in the area of economics,

competition policy and industrial organization, including market definition and the competitive behaviour of firms. The Applicant consented to Ms. Sanderson's expertise.

[73] Ms. Sanderson was the only expert to testify on behalf of the Respondent Westco. Dynaco and Acadia did not call any experts.

(2) Lay witnesses

(a) Westco

[74] Five lay witnesses appeared on behalf of Westco. Westco called two individuals who testified about its operations. They were Thomas Soucy, Westco's Chief Executive Officer and President, and Bertin Cyr, a member of Westco's Board of Directors.

[75] Westco also called two Olymel employees. The vice-president of Olymel's chicken procurement division, Yvan Brodeur, and another Olymel employee, Julie Desroches, gave evidence.

[76] Richard Wittenberg was the last lay witness to testify for Westco. He is a Nova Scotia chicken farmer.

(b) Dynaco

[77] Gilles Lapointe and Rémi Faucher testified on behalf of Dynaco. Gilles Lapointe is Dynaco's chief financial officer and Rémi Faucher is Dynaco's former chief executive officer.

(c) Acadia

[78] As stated above, Rémi Faucher also testified for Acadia as he acted as Acadia's president from 2006 until 2008. He was the only witness called by Acadia.

[79] Before turning to the elements of section 75 and the issues to be determined, we dispose of an outstanding matter: the ruling with respect to objections made by Westco to certain paragraphs found in certain witness statements.

V. THE RULING WITH RESPECT TO WESTCO'S OBJECTIONS TO WITNESS STATEMENTS

[80] Prior to the hearing of the Application, the parties filed witness statements setting out the lay witnesses' evidence in chief in full pursuant to the *Competition Tribunal Rules*, SOR/2008-141 (Rules 68-70). The parties were provided with an opportunity to raise objections with respect to the admissibility of the witnesses' statements or parts thereof. Both the Applicant and Westco raised such objections. In its order dated October 31, 2008, the Tribunal dealt with some of the objections raised by the parties but it reserved its ruling on three of Westco's objections until the final reasons. What follows is the ruling on those objections.

[81] Westco argued that certain statements made in the witness statements of Yves Landry (paras. 74-79), Réjean Plourde (paras. 7-9) and Lyndsay Gazzard (paras. 9-12) (the “Contested Statements”) consisted of hearsay evidence and were consequently inadmissible. Westco further stated that the individuals mentioned in the Contested Statements were not identified as witnesses scheduled to appear during the hearing.

[82] The Applicant indicated that the Contested Statements did not consist of hearsay as they were not put into evidence for the purpose of proving the truth of their contents. The Applicant argued that the Contested Statements were rather offered as proof that the assertions were made to these witnesses. The Applicant submitted that the assertions were fact evidence that could be given orally by the witnesses during the hearing and stated that there was no requirement that persons named in a witness statement appear on a party’s witness list. The Applicant further argued that the Contested Statements were relevant to the issues in the litigation and had probative value.

[83] With respect to paragraph 77 of the statement of Mr. Landry, the Applicant argued that it did not constitute hearsay evidence as Mr. Landry was providing his own testimony as to the identity of Mr. Morin.

[84] Hearsay is testimony or written evidence of a statement made to a witness by a person who is not called as a witness, the statement being offered to show the truth of the matter stated therein. The main concern underlying the admissibility of hearsay lies in the inability to test the truth of the statement or assertion through cross-examination. Therefore, written or oral statements “are inadmissible, if such statements [...] are tendered either as proof of their truth or as proof of assertions implicit therein.” (John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Markham: Butterworths, 1999) at 173).

[85] Upon reviewing the Contested Statements and considering the arguments of the parties, we admit the statements for the purpose of establishing the fact that they were indeed made and not to prove the truth of their contents. To that end, the Contested Statements are not hearsay. We now turn to the elements of section 75.

VI. THE ELEMENTS OF SECTION 75 AND THE ISSUES TO BE DETERMINED

A. Onus and standard of proof

[86] The burden of proof rests on the Applicant who must establish each constituent element contained in paragraphs (a) through (e) of subsection 75(1) of the Act on the balance of probabilities.

B. Has the Applicant established that it is substantially affected in its business due to its inability to obtain adequate supplies of a product anywhere in a market on usual trade terms pursuant to paragraph 75(1)(a) of the Act?

[87] Market definition is the first issue. This question will be assessed from two perspectives: the product market and the geographic market where the Applicant might reasonably be expected to look for supplies of live chickens. We will deal with each in turn.

(1) The relevant product market

[88] In its Notice of Application, the Applicant seeks an order “directing the Respondents to accept Nadeau as a customer and to supply live chickens to Nadeau on the usual trade terms, in the numbers previously provided to Nadeau by the Respondents.” In its Notice of Application and Reply (the “Pleadings”), the Applicant deals only with numbers of live chickens and does not mention that the chickens must be within a given weight range. However, in its submissions, the Applicant takes the position that the “product” for the purposes of paragraph 75(1)(a) is live broiler chickens, in a full range of sizes from a minimum of 1.71 kg to a maximum of 2.4 kg.

[89] The Respondents are of the view that the “product” is clearly live chickens since this is the product described in the Applicant’s Pleadings. Further, the Respondents contend that this is the product that meets the test for determining the product market articulated in *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2006 Comp. Trib. 42.

[90] In *B-Filer*, the Tribunal adopted the approach to the definition of product market in the context of paragraph 75(1)(a) set out in *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1, aff’d (1991), 38 C.P.R. (3d) 25; [1991] F.C.J. No. 943 (QL) (F.C.A.), where it is stated that the ultimate test concerns the effect on the business of the person refused supplies. In *B-Filer*, the Tribunal restated the test in the following terms at paragraphs 79 and 80 of its reasons:

[79] For purposes of clarity, we articulate the “*Chrysler test*” as follows: For the purposes of 75(1)(a), products are substitutes, and so are included in the same market, if a person is not substantially affected in his business (or if the person is not precluded from carrying on business) as result of switching to these other products.

[80] In regard to the meaning of “substantially” as used in paragraph 75(1)(a), as noted by the Tribunal in *Chrysler* at page 23, “[t]he Tribunal agrees that ‘substantial’ should be given its ordinary meaning, which means more than something just beyond *de minimis*. While terms such as ‘important’ are acceptable synonyms, further clarification can only be provided through evaluations of actual situations.” In our view, for example, a person would be considered substantially affected in his business or precluded from carrying on business if switching to other products resulted in the person’s business moving out of the market in which it currently participates.

[91] It is noteworthy that the Tribunal in *B-Filer* took into consideration whether the addition of paragraph 75(1)(e) had changed the context and purpose of section 75. The Tribunal ruled that the market of concern in 75(1)(e) need not be the market of concern in paragraphs 75(1)(a) and 75(1)(b), and therefore the addition of 75(1)(e) did not change the ultimate concern of 75(1)(a). We are also of that view.

[92] The Tribunal finds that the proper test for determining the product market is the above-stated test articulated in *B-Filer*, which is based on the substitutability of products. The application of that test to the evidence leads us to the conclusion that the relevant product market here is live chickens without regard for weight. Our reasons for this conclusion now follow.

[93] The evidence indicates that a number of the Applicant's customers require chickens that meet certain specifications particularly in respect to size. [CONFIDENTIAL].

[94] Since its reconstruction after the 2002 fire, the St-François Plant has been producing only "broiler chickens". Mr. Feenstra's evidence, on cross-examination at the hearing, is that broiler chickens range in size between 1.7 and 2.4 kg live weight. We note that a "broiler" is defined under Order II of the New Brunswick Chicken Marketing Board as a chicken which is not more than 2.65 kg live weight.

[95] The above evidence is of little assistance in determining whether chickens in the Applicant's stated size range, namely a minimum of 1.71 kg and a maximum of 2.4 kg, can be substituted by smaller or larger chickens without substantially affecting the Applicant's business. The Applicant has not established the impact of losing supply of live chickens within the stated size range on its business. For instance, we do not know if the Applicant had the option of processing and marketing larger or smaller birds in the event that it lost its supply of all chickens in the stated size range. The Applicant's evidence focuses essentially on the loss of live chickens, not live chickens of a given size.

[96] While there is some evidence relating to the Applicant's size requirements, the Applicant's expert, Dr. Ware, made no case for a narrower market. Dr. Ware does not explicitly refer to the size of chickens. In discussing the product market under paragraph 75(1)(a), he refers only to the "market for selling live chicken". At paragraph 35 of his report, he acknowledges the difficulty in obtaining birds that meet the size and quality requirements of the Applicant's customers, but no further discussion on the issue is found in his report. Ms. Sanderson, in her expert report, expresses the view that "the relevant product market is not in dispute here, it is live chicken". We find there is insufficient evidence to establish that chickens in a range of sizes from a minimum of 1.71 kg to a maximum of 2.4 kg cannot be substituted by other chickens.

[97] Further, the Applicant's Pleadings do not specify that the live chickens at issue are chickens in a range of sizes from a minimum of 1.71 kg to a maximum of 2.4 kg. As stated above, the Notice of Application deals with a broader product market, live chickens. It would have been open to the Applicant to move to amend its Pleadings, but it did not. In the absence of such an amendment, it is our view that it would be unfair for the Respondents to be required to address the issue of a narrower product market without notice.

[98] The Applicant has therefore failed to establish that the product market is defined more narrowly to include only those birds in the stated size range. In this respect, the Applicant has failed to meet its onus. We therefore find the product market for the purposes of paragraph 75(1)(a) of the Act to be “live chickens”.

(2) The relevant geographic market

(a) Positions of the parties

[99] There is no agreement between the parties as to the definition of the relevant geographic market.

[100] It is the Applicant’s position that the relevant market is limited to the Province of New Brunswick. The Applicant argues, in the alternative, that even assuming replacement supply can be obtained from Quebec producers, this supply cannot be obtained on usual trade terms. The Applicant’s expert, Dr. Ware, expresses the opinion that, because of high transportation costs and high premiums to attract Quebec farmers already bound by contracts with Quebec processors, it is “neither economic nor efficient” for the Applicant to replace the Respondents’ supply with supply from locations farther away in Quebec. In reaching this conclusion, Dr. Ware points to the level of interprovincial trade. He notes that, at present, between 4% and 5% of Quebec-grown chickens are shipped outside the province and that this level will reach 14% if the Respondents’ supply is replaced with supply from Quebec. In Dr. Ware’s view, it is unlikely that such a level of export would be permitted by the Quebec governmental agencies in the long run.

[101] The Respondents contend that the relevant geographic market includes New Brunswick, Quebec, Nova Scotia and Prince Edward Island, and submit that the Applicant can source live chickens from producers in Quebec without being substantially affected. Ms. Sanderson is of the opinion that Quebec producers can provide a ready alternative to replace the Respondents’ supply and, in support of her conclusion, points to the following factors:

- (i) The Applicant’s current live chicken shipments include shipments from more distant locations, such as Nova Scotia and Prince Edward Island;
- (ii) A substantial volume of chickens is produced in regions that are located within a reasonable distance from the St-François Plant such as the Quebec City, Beauce and Central Quebec regions;
- (iii) There are no regulatory restraints preventing the Applicant from sourcing chickens in Quebec;
- (iv) The Applicant’s survey indicates that Quebec producers are willing to supply Nadeau live chickens at a reasonable cost; and
- (v) The costs associated with Quebec supply such as shrinkage, transportation and birds that are dead on arrival at the processing plant (“DOAs”) are not so high as to make it uneconomic for the Applicant to source chickens from Quebec.

(b) Analysis

[102] There is no dispute that New Brunswick forms part of the geographic market. However, at the outset, we reject the contention that the geographic market in the instant case is confined to New Brunswick. At a minimum, the market would include Prince Edward Island since Nadeau has obtained and expects to continue to obtain supply from that province. Both Mr. Feenstra and Mr. Tavares testified that the Applicant will continue to process these chickens. The undisputed evidence is that Prince Edward Island is a long term supplier.

[103] It is useful to discuss the approach we adopt in order to define the geographic market. The Tribunal acknowledged in *Chrysler* that, because of the language used in paragraph 75(1)(a), the market definition analysis under that paragraph would be different from the analysis usually performed under other sections of the Act. The Tribunal held at page 10 as follows:

Products and markets can only be meaningfully defined in a particular context and for a particular purpose. The approach to defining these terms may be entirely different where, as in the case of a merger, the ultimate test is whether the merger will substantially lessen competition and the definition must be consistent with the attempt to determine whether the merger will result in an increase in prices or in other effects consistent with a lessening of competition. In the case of paragraph 75(1)(a), the ultimate test concerns the effect on the business of the person refused supplies.

[104] As stated above, the Tribunal relied, in *B-Filer*, on the above paragraph in *Chrysler* and developed the “*Chrysler* test” to determine the relevant product market under paragraph 75(1)(a). While the Tribunal was not required to consider the geographic market definition, it nevertheless noted that the “correct test for defining markets” (our emphasis) for the purposes of paragraph 75(1)(a) is the *Chrysler* test which it articulated as follows:

For the purposes of 75(1)(a), products are substitutes, and so are included in the same market, if a person is not substantially affected in his business (or if the person is not precluded from carrying on business) as result of switching to these other products.

[105] In *Chrysler*, the Tribunal did not explicitly allude to the proper test for defining the relevant geographic market. It based its conclusion on the geographic market on functional indicators, in particular, the existence of different price lists from Chrysler, the only supplier for Canada and the United States. The existence of price differences is one of the functional indicators referred to in the Competition Bureau’s *Merger Enforcement Guidelines*. Therefore, the test in *Chrysler* for defining the geographic market essentially consisted of the simple application of these functional indicators.

[106] In the instant case, there is evidence of functional indicators which support the contention that parts of Quebec should be included in the geographic market. These indicators are those summarized from the evidence of Ms. Sanderson at paragraph 101 above and which essentially consist of the location of current suppliers; the relative proximity of potential Quebec suppliers

to the St-François Plant based on the Applicant's survey; significant volumes of chickens in Quebec being located at a reasonable distance, around 500 km, from the St-François Plant; and the absence of regulatory restraints preventing the Applicant from sourcing chickens in Quebec.

[107] We are of the view that consideration of these functional indicators is the preferred approach to defining the geographic market in the instant case. These indicators will be comprehensively dealt with below. As will be seen, they clearly support including that part of Quebec within 500 km from the St-François Plant as part of the geographic market. We find support for our position in the results obtained in the procurement survey conducted by the Applicant, which indicate that numerous Quebec suppliers within 500 km of the St-François Plant are willing to supply chickens to the Applicant. Indeed this radius was acknowledged in Ms. Sanderson's report; she states that "... chicken from Quebec (at the very least from within 500 km of St. Francois) should comprise part of the relevant geographic market for Nadeau's live chicken volumes."

[108] In the circumstances of this case, the proper approach is to consider the above-mentioned functional indicators discussed in Ms. Sanderson's evidence. We find support for our approach to defining the geographic market in the expert evidence adduced before us.

[109] Neither Ms. Sanderson nor Dr. Ware expressed a formal opinion as to the limits of the relevant geographic market for the purposes of paragraph 75(1)(a). Nor did they explicitly set out the test that should be applied to determine the market. While they were silent on the exact parameters of the relevant geographic market, both experts did address the question of whether the Applicant can obtain supplies in Quebec.

[110] Dr. Ware testified that the determination of the relevant geographic market in this case poses some difficulties:

But the important point here is, especially with respect to the geographic market, is that it really is a construct; that we--it's not actually the case that necessarily a supplier who is just outside that boundary plays no role in this market at all. Neither is it the case that every supplier that's inside that boundary plays an equal role in competition.

[111] To the extent that geographic market definition is a pre-condition for analysis under paragraph 75(1)(a), it is to suggest a definition that includes a geographic area within which an applicant might reasonably be expected to look for supplies following a refusal to deal. This geographic market may include areas from which supplies of live chickens are currently obtained by the Applicant and could, in this case, therefore include New Brunswick, Prince Edward Island and Nova Scotia. Further, the geographic market could also include areas where an applicant might reasonably be expected to seek supplies and may therefore include, pursuant to the evidence adduced, geographic areas that are similarly placed in relation to an applicant's existing sources of supply. This method reflects the approach adopted by the experts who gave their opinions before the Tribunal.

[112] We are of the view that, in this case, the geographic market also includes parts of Quebec. Both Dr. Ware and Ms. Sanderson turned to that province to determine whether obtaining supplies from that province is a reasonable possibility for the Applicant. Mr. Robinson, an expert who testified on behalf of the Applicant, based one of his four scenarios on the assumption that the Applicant can replace the Respondents' supply with Quebec-grown chickens and examined the effect of such replacement supply on the Applicant's business.

[113] We agree that the geographic market includes parts of Quebec where the Applicant might reasonably be expected to look for supplies of live chickens. The evidence adduced shows that many producers in Quebec located within 500 km of the St-François Plant are no farther than the distance between the Applicant's current suppliers and its St-François Plant. For example, the Applicant processes chickens from Prince Edward Island producers, and the distance between these producers and the St-François Plant is approximately 650 km. As explained above, both Mr. Feenstra and Mr. Tavares testified that the Applicant will continue to process these chickens.

[114] Further, as stated above, there are no regulatory impediments to interprovincial shipments. A producer must obtain a license from the CFC pursuant to the *Canadian Chicken Licensing Regulations*, SOR/2002-22. After having obtained such a license, the producer can export chickens in accordance with the conditions set out in the *Canadian Chicken Licensing Regulations*.

[115] Dr. Ware, however, expressed the opinion that, if the Applicant were to replace the Respondents' supply with Quebec-grown chickens, an intervention by Quebec governmental agencies would be likely. In his view, the resulting increase in interprovincial trade will have a direct impact on Quebec's VAG ("volume d'approvisionnement garanti"). The Quebec Chicken Marketing Board, under the VAG, fills interprovincial demands of processors located outside the province, before allocating live chicken supply to Quebec processors under the Quebec processor allocation system. Therefore, the greater the volume of supply sold to processors located outside Quebec is, the smaller the volume available to Quebec-based processors will be. In Dr. Ware's view, it is unlikely that a high level of interprovincial trade, around 14%, would be permitted by the Quebec governmental agencies in the long run.

[116] To support his view, Dr. Ware refers to the Applicant's submissions in an application brought before the Chicken Farmers of New Brunswick in which it stated that "... the industries in Ontario and Quebec undertook negotiations because interprovincial trade reaching 5 to 7% of total production was considered a crisis situation." In his examination in chief, he admitted that he was not an expert in this particular field.

[117] After a careful review of the evidence, we conclude that it is insufficient to support Dr. Ware's hypothesis. The evidence establishes that provincial processing associations have expressed concerns about interprovincial trade. Mr. McCullagh testified that the Quebec and Ontario processing associations have approached their respective governments to advise them "that interprovincial trade has the jeopardy of creating an unsustainable premium war". According to Mr. Brodeur, over the last few years, attempts have been made to address these concerns, but, up until now, no solution has been found. Mr. Robinson, the Applicant's expert who was recognized by this Tribunal as having expertise in the chicken processing industry, stated that the increase in interprovincial trade would have a significant impact on the

competitive price to acquire live supply, but he did not confirm the evidence adduced by Dr. Ware according to which Quebec stakeholders would intervene to limit such trade.

[118] We find that there are no regulatory impediments to interprovincial trade and that while processing associations have expressed concerns about interprovincial trade, the evidence is insufficient to conclude, on the balance of probabilities, that an increase in interprovincial trade between Quebec and New Brunswick would induce a drastic intervention by Quebec governmental agencies.

[119] In summary, given the absence of regulatory restrictions and the proximity of many Quebec producers to the Applicant's St-François Plant, we agree that parts of Quebec should be included in the geographic market for the purposes of the analysis performed under paragraph 75(1)(a).

[120] Regarding Nova Scotia chickens currently processed by the Applicant at its St-François Plant, apart from the three-year arrangement involving the delivery of 160,000 chickens per week, there is evidence of limited supply being sourced from Nova Scotia. In June and September 2008, the Applicant sourced an additional 31,250 chickens per week from Nova Scotia. While there is a paucity of evidence regarding Nova Scotia supply, we nevertheless conclude that Nova Scotia is part of the geographic market because chickens are currently being sourced from there and because the evidence also indicates that the Applicant is not processing these chickens at a loss.

[121] The geographic market will therefore comprise New Brunswick, Prince Edward Island, parts of Quebec which extend to a radius of 500 km of the St-François Plant and Nova Scotia. The parties did not suggest that any other geographic areas be considered.

[122] We now turn to the analysis under paragraph 75(1)(a) and consider the following question.

(3) Is the Applicant substantially affected in its business because of its inability to obtain adequate supplies of live chickens anywhere in a market on usual trade terms?

[123] The analysis under paragraph 75(1)(a) sets out a number of components that require definition, in particular the phrases "substantially affected" and "usual trade terms".

(a) The meaning of "substantially affected"

[124] We turn first to the meaning of "substantially affected". The Tribunal dealt with the expression in the *Chrysler* case, and concluded that the ordinary dictionary meaning should be given to the word "substantially", and that it required showing "more than something just beyond *de minimis*". The Tribunal, in that case, went on to state that, "[w]hile terms such as 'important' are acceptable synonyms, further clarification can only be provided through evaluations of actual situations" (*Chrysler*, at p. 23). In *Sears Canada Inc. v. Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.*, 2007 Comp. Trib. 6, the Tribunal also held that the term

“substantial” in respect to the expression “substantially affected” carries meanings such as “important” and “significant” (*Sears*, at para. 31).

[125] The parties disagree on the meaning to be given to this phrase. The Applicant submits that terms such as “large, significant, important and substantial” capture the concept of a substantial effect on a business. In support of its argument, the Applicant points to the *Chrysler* case.

[126] The Respondent Westco adopts a different approach. In its submissions, it argues that the Tribunal has never really dealt with or specifically defined “substantially affected” or any of the various components of paragraph 75(1)(a) and invites the Tribunal to do so in this case.

[127] The Respondent Westco argues that paragraph 75(1)(a) contemplates two circumstances: first, that the refusal substantially affects the Applicant in “his business” (“son entreprise”), and second, that it precludes “a person” from “carrying on business” (“ne peut exploiter une entreprise”). In the latter case, the Respondent contends that this could only mean that the refusal would effectively preclude a new entrant from entering the market because no reference is made to the Applicant’s existing business (“his business”). In the Respondent’s view, the rules of statutory interpretation require that the terms “substantially affected” and “precluded from carrying on business” be read together. The Respondent contends that this approach is consistent with the case law, since the term “substantially affected” would be given its usual and ordinary meaning in accordance with the case law (*Chrysler* and *Sears*), but would be qualified by the expression “precluded from carrying on business”. Consequently, the required magnitude of the “substantial effect” would be such that it would approach an applicant being unable to continue in business. The Respondent therefore submits that an enterprise that is not affected to the point of it being unable to carry on business does not meet the test of “substantially affected” for the purposes of paragraph 75(1)(a).

[128] With respect, and for the reasons that follow, we reject the Respondent’s above interpretation of “substantially affected” in paragraph 75(1)(a).

[129] The applicable principle of statutory interpretation, also known as “the modern approach to interpretation”, was endorsed by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. At paragraph 21 of that decision, Mr. Justice Iacobucci wrote:

Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter “*Construction of Statutes*”); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)); Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[130] In accordance with this approach to statutory interpretation, we will first consider the words of paragraph 75(1)(a), and in particular the following words which are at issue: “a person is substantially affected in his business or is precluded from carrying on business”. The sole issue here is whether the two circumstances contemplated in the provision should be read together as suggested by the Respondent. In our view, the above-cited words, read in their grammatical and ordinary sense, contemplate two separate circumstances. The phrase “substantially affected in his business” is not qualified by the phrase “or is precluded from carrying on business” (emphasis added). Had Parliament intended this to be so, it would have used the word “and” and not “or” in linking the two phrases. Support for the proposition that Parliament intended two separate scenarios by the provision is found in the 1975 House of Commons committee debates. The Minister responsible for the legislation, in response to questions from committee members, indicated that the purpose of the clause was to protect someone who was in business from being put out of business and to allow the entry of others in the market. We reproduce below the relevant passages from the transcripts of the committee debates.

Mr. Clarke (Vancouver Quadra): What was the intent of the clause then?

Mr. Ouellet: Well, under certain conditions to make sure that the refusal to deal could become a reprehensible action.

Mr. Clarke (Vancouver Quadra): But was it the purpose of that clause to protect someone who was in business from being put out of business?

Mr. Ouellet: Yes. But we would like to allow the entry of others, because if we add too many conditions the refusal to deal will never become a reprehensible activity.

Mr. Clarke (Vancouver Quadra) Did the Minister say, Mr. Chairman, that they did want to prevent the entry of others or they did not want to prevent the entry of others?

Mr. Ouellet: To facilitate the entry of others.

Mr. Clarke (Vancouver Quadra): That is what I thought. But the way I read the recommendations from the Senate Committee they are suggesting the present wording would discriminate against someone who wanted to enter that field and their recommendation was designed, in their description, to facilitate the entry of someone into the field. Their criticism is - and I will see how it is worded here. It says:

The Committee does not consider that the reviewable practice jurisdiction should be available to someone who has never been in business.

And it recommends the deletion of the words “or is precluded from carrying on business”.

Mr. Ouellet: The way the proposal made by the Senate has to be understood is that they want to deal with people that are already in the business. We feel it would be too restrictive.

Mr. Clarke (Vancouver Quadra): Do you mean that the Senate recommendation is the opposite of what I have been saying?

Mr. Ouellet: As suggested by the Senate, it will narrow the protection that we are giving, and we do not want to go that far.

Mr. Clarke (Vancouver Quadra): Perhaps the definition hangs on the word “precluded” – precluded from carrying on business, and the way you are reading that is, “or is prevented from entering business,”? Is that the idea?

Mr. Ouellet: Yes.

(Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs*, 30th Parl. 1st Sess., No. 46 (May 12 1975) at 46:14 - 46:15).

[131] In this case, the Applicant is already in the business of processing chickens and is not seeking to enter the market. In order to meet the test of “substantially affected” for the purposes of paragraph 75(1)(a), the Applicant need not demonstrate that it is affected by the refusal to the point of it being unable to carry on business. Rather, it is required to establish on a balance of probabilities that it is affected in an important or significant way. This interpretation is in accordance with the above-cited principle of statutory interpretation and with the case law of the Tribunal.

[132] Having defined “substantially affected”, we now turn to the meaning of “usual trade terms”.

(b) The meaning of “usual trade terms”

[133] “Usual trade terms” is relevant to section 75 in three ways. First, under paragraph 75(1)(a), it must be established that an applicant is unable to obtain adequate supplies on the usual trade terms; second, an applicant must be willing under paragraph 75(1)(c) to meet those trade terms as a condition of supply; and third, any order issued under section 75 must be based on the usual trade terms. We turn now to the paragraph 75(1)(a) requirement.

[134] Subsection 75(3) of the Act defines trade terms as follows:

75(3) For the purposes of this section, the expression “trade terms” means terms in

75(3) Pour l’application du présent article, « conditions de commerce »

respect of payment, units of purchase and reasonable technical and servicing requirements.

s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

[135] Paragraph 75(1)(a) speaks of supply of a product on “usual” trade terms. Reference to the dictionary definition of “usual” is helpful. The *Canadian Oxford Dictionary* (2004) defines “usual” as follows: “such as commonly occurs or is observed or done, customary, habitual ...”. *Webster's Ninth New Collegiate Dictionary* (1986) provides the following definition: “Normal; commonly or ordinarily used; found in ordinary practice or in the ordinary course of events”.

[136] The term “usual” qualifies the statutorily defined expression “trade terms” in paragraph 75(1)(a). Applying the ordinary meaning to the term, we are left with trade terms that are ordinarily used or found in ordinary practice in a market. The specific terms which are ordinarily used will, of course, vary and depend on the circumstances in each case. Further, there may be a need to interpret the words and phrases used in the definition of “trade terms” found in subsection 75(3), in particular, for our purposes: “terms in respect of payment”.

[137] The parties disagree on the elements to be included in defining “usual trade terms”. In reference to the statutory definition in subsection 75(3), the Applicant argues the term “usual trade terms” must have a correlative meaning and therefore refers to the practice that had been in place between the contending parties in terms of price, units, etc. before the refusal to supply. It is the Applicant's contention that the “usual trade terms” in place between each of the Respondents and the Applicant entailed the following elements:

- (a) delivery of chickens in a full range of broiler sizes, namely, from 1.71 kg to 2.4 kg;
- (b) the CFNB regulated price, which equates to the Ontario base price plus \$0.065/kg, plus applicable CFNB size premiums, where applicable;
- (c) delivery of chickens grown within 30 km of the St-François Plant, thus resulting in minimal transportation costs, minimal DOAs, and minimal shrink;
- (d) payment pursuant to the Marketing Orders of the CFNB, namely net 7 days; and
- (e) delivery each and every week of chickens in numbers averaging about:
 - (i) from Westco, 186,230 chickens per week;
 - (ii) from Acadia, 58,670 chickens per week; and
 - (iii) from Dynaco, 26,450 chickens per week,

for a total supply from the Respondents of about 271,350 chickens per week.

[138] The Respondents argue that subsection 75(3) provides a complete definition of “trade terms” and as such can only refer to “terms in respect of payment, units of purchase and reasonable technical and servicing requirements”. The Respondents contend that the definition

does not include price or volume and that, had Parliament wanted price to be included in “trade terms”, it would have said so expressly and not used the phrase “terms in respect of payment” in its definition. Further, the Respondents argue that since paragraph 75(1)(d) requires that the product be in ample supply, it was not contemplated that volume be a concern. It is consequently argued that the Tribunal would not have the jurisdiction to grant the Applicant’s request and order the Respondents to continue to supply “in the numbers previously provided to Nadeau by the Respondents”. It is also argued that since the product market is live chicken, and not chickens of a specified weight, there is no basis here to support size or weight of the chickens as a usual trade term.

[139] We are of the view that “usual trade terms” must be determined in relation to a defined market at a particular time. The applicable time frame in this case is generally at about the time the Respondents gave notice of their refusal to continue to supply. For the purposes of this application, we have also determined above that the product is live chickens and that the geographic market includes parts of the Province of Quebec as well as New Brunswick, Nova Scotia and Prince Edward Island.

[140] What then are the applicable “usual trade terms” that are ordinarily used or found in ordinary practice in the geographic areas? We do not accept the Applicant’s submission that the applicable terms are those which reflect the very agreements, in terms of price, units supplied etc., that prevailed between the Respondents and the Applicant prior to the refusal. Parliament did not provide that the Applicant need only establish its inability to obtain supply on the “same” trade terms, for the purposes of paragraph 75(1)(a). Had it intended this, it would have expressly provided so, as it did elsewhere in the Act. See section 80 of the Act where reference is made to “same” trade terms.

[141] In our view, the plain reading of the provision leaves no doubt that the trade terms are not those specific to the parties, but rather those that are viewed from the perspective of all processors competing for live chickens in the defined market generally. In such a market, the usual trade terms are identified and customarily come to be expected by suppliers of live chickens.

[142] Price is clearly the most important element influencing trade in chickens. It is a commodity product and is sold largely on the basis of price. In the context of supply management, if price were not important, the marketing board would have felt no need to set a minimum price. It is difficult therefore to divorce trade terms from price. The issue here is whether the expression “terms in respect of payment” is to be interpreted to include price and, in particular, premiums. We respectfully reject the Respondents’ position on the question and, for the reasons that follow, find that “terms in respect of payment” must be interpreted to include price in the circumstances.

[143] We acknowledge that the issue has never been dealt with before by the Tribunal. In *Chrysler*, the Tribunal ordered Chrysler Canada to accept the complainant as a customer for the supply of Chrysler parts “on trade terms usual and customary to its relationship with [the complainant] as the said terms existed prior to [the date that the complainant was first refused supply]” (at p. 28). In that case, there was but one supplier and one customer. The Tribunal has not yet identified the “usual” trade terms involving a business with multiple suppliers and

customers. If “terms in respect of payment” includes price, it could be argued that the Tribunal’s order in *Chrysler* prevented Chrysler Canada from ever raising its price to the complainant. Since the Tribunal recognized the regular fluctuation in Chrysler Canada’s prices, this would appear not to have been the Tribunal’s intention. If price, however, is not to be included as a usual trade term, there would be nothing to prevent a supplier, even one subject to a section 75 order, from raising its prices to a person to the point that this person can no longer afford to purchase from the supplier. This would render the provision ineffective, particularly in cases where a complainant was the sole purchaser in a market.

[144] While there is no dispute that “terms in respect of payment” includes credit terms and acceptable methods of payments, in the context of paragraph 75(1)(a), we are of the view that price is also included. Otherwise, a complainant who is unable to obtain adequate supplies in a market because prices are higher than the usual price would have no possibility of relief under the provision, simply because other usual terms of payment are in place. For example, in the instant case, it would matter little if the credit terms and the methods of payment available in the market for processors were the usual terms prevailing in that market, if the amount to be paid in order to obtain live chickens was increased by suppliers to an amount higher than the usual price paid for live chickens in that same market. In essence, the only term of payment that really matters in the circumstances here is price.

[145] Under supply management, price is essentially the principal trade term. As discussed above, the minimum price is set by the respective provincial marketing boards. Whether this minimum price set by the marketing board translates into a usual trade term will depend on the circumstances. In this case, the ultimate price paid by chicken processors in the market may be higher than the minimum price. This will depend on a number of factors, not the least of which is the premium paid to producers. A premium is an amount over the board price paid by processors to producers. Therefore, the notion of price as a “usual trade term” is best expressed, for our purposes, in terms of a range of prices. This approach recognizes the dynamic reality of a competitive market and would be particularly helpful in the event that the Tribunal were to issue an order to continue supply on “usual trade terms”, since it would allow for flexibility by not binding the parties to a fixed price. The range of prices for our purposes would include minimum board prices set by the provincial marketing boards from time to time, plus the applicable premium, which would likely also vary by reason of competitive market forces.

(c) Applicant’s inability to obtain adequate supplies on usual trade terms

[146] Having determined the meaning of “substantially affected” and “usual trade terms”, we will now turn to the question of whether the Applicant has established that it is substantially affected in its business because of its inability to obtain adequate supplies anywhere in a market on usual trade terms.

[147] The parties disagree markedly on whether the suppliers are likely to provide adequate replacement supplies on usual trade terms. Quebec is important in the instant case because it is the most likely source of replacement chickens for the Applicant.

[148] The Applicant, at the time it filed its application, processed around 94,450 chickens from southern New Brunswick, 40,000 chickens from Prince Edward Island, and 160,000 chickens

from Nova Scotia. On the evidence, there is no dispute that it is unlikely the Applicant can obtain the required additional volumes of chickens to replace the Respondents' chickens from southern New Brunswick or Prince Edward Island. In respect to New Brunswick and Prince Edward Island, the evidence shows that the Applicant currently processes all of the New Brunswick and Prince Edward Island supply.

[149] The 160,000 chickens from Nova Scotia were to be made available for a period of three years, and there is little evidence to indicate whether this volume of chicken would be available in the long term. Since the Interim Supply Order, the Applicant has secured an additional supply of around 31,250 chickens per week from Nova Scotia. However, we do not know the terms, if any, on which the Nova Scotia producers that are continuing to supply ACA Co-Operative Ltd. ("ACA"), the only Nova Scotia processor, would be willing to switch to the Applicant. No survey of Nova Scotia producers was conducted by the Applicant in order to ascertain the availability and terms of supply from Nova Scotia, as was done in Quebec. Nor did the experts address this issue. As a consequence, we are unable to make a finding regarding the terms on which additional supply could be acquired from Nova Scotia.

[150] This leaves Quebec as the only source of additional supply about which we actually know the possible terms of supply. Therefore, producers located in parts of Quebec are the most likely source of replacement supply for the Applicant. In order to determine whether the Applicant can obtain supplies from these producers on the usual trade terms, it is useful to define the relevant usual trade terms that are applicable to live chickens in Quebec.

(i) The relevant usual trade terms

[151] In order to determine whether the Applicant has met its burden in establishing that it is unable to obtain adequate supplies of live chickens anywhere in the market on "usual trade terms", it is necessary to clearly define the usual trade terms in this case. By definition, "trade terms" includes "terms in respect of payment", which we have interpreted to include price. It also includes "units of purchase" and "reasonable technical and servicing requirements". No issues regarding technical and servicing requirements are raised in this case. The only issue in respect to trade terms is the price of the replacement chicken.

[152] In order to assess whether the Applicant is able to obtain adequate supplies "on usual trade terms", the usual price for live chickens in the market must be determined. As stated above, in the circumstances, that price will consist of a range of prices. In order to determine the usual range of prices, we turn to the evidence adduced and in particular the evidence regarding premiums.

[153] Determining the range of prices for live chickens in those relevant parts of Quebec will indicate the "usual trade terms" for those chickens. The price usually paid by the Applicant is not necessarily the applicable "usual trade term". It is rather the usual price for live chickens paid by processors in the market. For our purposes, these processors are mostly Quebec-based processors and, as indicated in our earlier analysis on the geographic market, these processors would be competing in the area where the Applicant is likely to find its replacement chickens. They are paying the Quebec board price set by the Quebec marketing board, Les Éleveurs de volailles du Québec, which is \$0.065 below the NB Board Price, plus a premium. Significant evidence was

adduced regarding premiums. Premiums currently being paid by Quebec processors will afford the best evidence of the usual prices being paid by processors in the market and are the best indicator of usual trade terms.

[154] The evidence on premiums stems principally from efforts made by the Applicant's procurement team following the Tribunal's Interim Supply Order dated June 26, 2008. The Applicant's management team instructed the procurement team to begin making efforts to inquire about the availability of chickens from Quebec producers. Initially, calls were made to a list prepared by the Fédération des producteurs de volailles du Québec in the year 2000 containing the names of 700 Quebec producers. In total, attempts were made to contact 454 producers. Many could not be contacted by reason of incorrect phone numbers, phone line disconnection and number changes. This comes as no surprise, given that the list of names and contact information was over eight years old. Many producers did not respond to the initial telephone message, and of those that did, only 67 requested a meeting with a procurement agent of the Applicant. Call logs were kept and turned over to the Applicant's procurement agents for follow-up. These call logs were eventually filed in evidence.

[155] The Respondents contend that the Applicant's procurement effort or survey of Quebec producers was essentially undertaken as a result of the Tribunal's Interim Supply Order and was not a serious effort to obtain replacement chickens in Quebec. In its Interim Supply Order, the Tribunal found that there was a duty to mitigate damages. At paragraph 37 of its reasons it wrote:

I reject the Applicant's contention that it had no duty to mitigate. It could not sit idly by and make no attempt to secure additional live chickens when faced with the loss of about half of its supply. However, what is adequate mitigation will turn on the circumstances of each case.

[156] The Respondents point to a number of deficiencies in the Applicant's procurement effort. They argue that the Applicant's procurement team did not have a mandate to close a deal or sign contracts for supply with any of the Quebec producers called. They point to Mr. Feenstra's testimony, where he attests that the procurement team was "[t]o gauge what the opportunities are to procure chickens in Quebec". He also asserted on examination for discovery that he was not hopeful of the outcome of the procurement survey and that he would not initiate negotiations with Quebec producers who were not willing to sell their supply of live chickens at a price that is equal to or lower than the NB Board Price. They point to the testimony of Ms. Ouellette, where she attests that Mr. Landry had ordered her to end her calls to Quebec producers even though 196 producers had yet to be contacted by the Applicant's procurement team.

[157] There is evidence, essentially uncontested, to support a finding that the Applicant's procurement effort was not designed with the objective of securing sufficient live chickens from Quebec to replace all the chickens lost as a result of the Respondents' refusal to supply. However, whether or not the Applicant's efforts were genuinely motivated by a desire to obtain replacement chickens from Quebec is essentially not material to the question of whether replacement chickens are actually available on usual trade terms from Quebec. While the procurement effort is not a perfect gauge of the opportunities available in Quebec, it does provide evidence to assist in answering the question. The call logs reflect information obtained as a result of the procurement efforts. While this information has been interpreted differently by

the experts, it is essentially unchallenged. Further, the members of the procurement team consisting of Ms. Ouellette, Mr. Plourde and Mr. Viel gave testimony regarding the procurement efforts. In our view, they did so in a forthright manner, and we find their testimony to be credible.

[158] Ms. Ouellette was tasked with placing the initial call to producers in Quebec for the purpose of inquiring as to whether they were interested in meeting with the Applicant to discuss the possibility of supplying chickens. In determining which producer to call, Ms. Ouellette attests that she considered the geographic location of each producer *vis-à-vis* the location of the St-François Plant. She stated that the majority of the calls were placed to producers that were located east of Montreal. Ms. Ouellette kept call logs for each call placed. Of the producers with whom she spoke, 67 requested a meeting with a “Nadeau procurement agent”. She then gave the call logs containing the contact information of each interested producer to either Mr. Plourde or Mr. Viel, who were responsible for the follow-up.

[159] Mr. Plourde eventually met with 39 producers between July 14 and September 19, 2008. During these meetings, he made detailed notes which were annexed to the call logs. Mr. Plourde attests that the Quebec producers he met demanded the following pricing arrangements before they would agree to moving their production to the Applicant, namely [CONFIDENTIAL]; and payment of premiums in addition to the Quebec board price, ranging from \$[CONFIDENTIAL] to \$[CONFIDENTIAL]/kg.

[160] Mr. Viel, who is the Applicant’s manager of sales and transportation, assisted the procurement team when Mr. Plourde was on vacation. He met with 11 Quebec producers in the week of July 21, 2008, and also made detailed notes during these meetings, which notes he attached to the call logs provided by Ms. Ouellette. Mr. Viel attests that the producers he met with indicated they would consider moving their production to the Applicant on pricing arrangements which would include [CONFIDENTIAL] and premiums ranging from \$[CONFIDENTIAL] to \$[CONFIDENTIAL]/kg. Mr. Viel further stated that each producer would be able to supply between [CONFIDENTIAL] and [CONFIDENTIAL] heads per eight-week quota period.

[161] As indicated above, in order to determine the usual trade terms for live chicken in Quebec, it is helpful to examine evidence of the “usual” premium paid by processors in that geographic area. The survey of the Applicant’s procurement team tabulated data of premiums actually paid by Quebec processors to producers in that province. This evidence was considered by the experts. Ms. Sanderson attested that among all of the producers who offered the Applicant supply at a requested premium of \$[CONFIDENTIAL]/kg, the highest premium that the producer receives from its current Quebec customer is \$[CONFIDENTIAL] above the Quebec board price. Based on the procurement surveys conducted by the Applicant, Ms. Sanderson aggregated the premiums that are currently received from Quebec processors and divided these by the total number of kilograms offered. She found that the weighted average premium that is currently received by the surveyed producers from processors is \$[CONFIDENTIAL]/kg above the Quebec board price. The evidence indicates that the survey conducted by the Applicant’s procurement team covered less than [CONFIDENTIAL]% of the Quebec quota owned by producers located within 500 km of the Applicant’s plant in St-François. The producers surveyed

that did not specify a premium and those that indicated that they would not supply the Applicant represented [CONFIDENTIAL]% of the total quota within 500 km of the St-François Plant.

[162] While it is difficult to determine from the above evidence what premium would be sought by those producers that were not surveyed, the evidence provides a good indication of the premiums currently being paid by Quebec processors to producers in the relevant area of Quebec. Further, the evidence adduced in respect to the “Projet Westco” (the “Projet Westco Report”), a 2007 report prepared by Olymel regarding a possible partnership with Westco, indicates that the premiums paid by Olymel for its Quebec live supply in 2006 is \$[CONFIDENTIAL]/kg above the Quebec board price. Mr. Brodeur’s witness statement confirms that Olymel’s current premium is in the order of \$[CONFIDENTIAL]/kg above the Quebec board price.

[163] The above evidence in respect to premiums paid by Quebec processors is not speculative, nor is it contested. It represents direct evidence of premiums that are actually being paid by processors in the relevant areas of Quebec. While the survey does not tabulate the premiums paid by all processors in Quebec, the data is sufficiently complete to allow us to determine a range of premiums that are usually paid by processors in that part of the Quebec market covered by the Applicant’s procurement survey, which includes that area within 500 km of the St-François Plant. We find that premiums range from \$[CONFIDENTIAL] and \$[CONFIDENTIAL] over the Quebec board price. It follows that usual trade terms for Quebec chickens, in this instance, would include prices within that stated range of premiums above the Quebec board price.

[164] We note that Quebec prices including the premiums are very close to the NB Board Price. As mentioned above, both the Quebec board price and Ontario board price are \$0.065 below the NB Board Price. The Serecon Report, a consultant’s report on the assessment of the broiler chicken industry in Nova Scotia published in July 2008, indicates that “there is no real historical pattern of a consistent spread in price between Nova Scotia and Ontario” and that “[f]or the past few periods (about the past year), the spread has been somewhat consistently 6.5 cents”. We also know that the Applicant pays Nova Scotia producers the NB Board Price. Mr. Wittenberg testified that the Nova Scotia board price was “somewhat higher” than the NB Board Price, but he did not know the exact board price. Mr. Merks testified that “historically”, the Nova Scotia board price was \$0.02 below the NB Board Price. We are satisfied on the evidence that the Nova Scotia and New Brunswick board prices are very close.

(ii) Are supplies available on usual trade terms?

[165] We now turn to considering whether the Applicant is able to obtain supplies of chickens in Quebec on usual trade terms or within the stated price range. Both Mr. Robinson and Ms. Sanderson considered the data obtained from the Applicant’s procurement survey.

[166] In his expert report on behalf of the Applicant, Mr. Robinson made certain assumptions in respect to the replacement of the Respondents’ birds with birds from Quebec. He assumed this chicken could be obtained in Quebec, but that premiums would have to be paid to entice them away from their current processor; that the Applicant would be responsible for DOAs, transportation cost and shrink; and that the appropriate chickens can be found for the sizes necessary for the customers. Mr. Robinson assumed, based on conversations the Applicant’s

management team had with Quebec producers, that a minimum premium of \$[CONFIDENTIAL]/kg over the Quebec board price would have to be paid.

[167] Ms. Sanderson stated that because of the assumptions adopted in both the Ware and Robinson reports, these reports overstate the potential impact that the loss of the Respondents' supply of live chickens would have on the Applicant. She stated that the assumed premium is far above the premiums currently and historically paid in Quebec. She first estimated the premium needed to obtain chickens from Quebec producers to be in the area of \$[CONFIDENTIAL]/kg. After corrections were made in the affidavits of Ms. Boucher, Mr. Viel and Mr. Plourde, and based on additional testimony, Ms. Sanderson revisited her opinion on the premiums that the Applicant would have to pay above the Quebec board price in order to obtain chickens from Quebec. Her revised opinion was that that premium would be in the area of \$[CONFIDENTIAL]/kg. She explained that in coming to this opinion, she assumed that the producers in Quebec that the procurement team did not meet or contact would respond in the manner as those that were contacted. In other words, the premiums requested by the producers that did respond were extrapolated and applied for the purpose of her analysis to all producers from Quebec in the market.

[168] The parties therefore take different approaches in reviewing the data obtained from the Applicant's procurement survey. On premiums, each of the two experts disputes the appropriateness of the different assumptions made by the other. In the end, we note that neither expert takes issue with the accuracy of the data collected. It is not disputed that, at a minimum, a premium of at least \$[CONFIDENTIAL]/kg would have to be paid, which is higher than the premiums we have determined to be within the usual trade terms (i.e. \$[CONFIDENTIAL]/kg - \$[CONFIDENTIAL]/kg).

[169] The Applicant contends that two other factors bear on the question of whether the Applicant can obtain chickens in Quebec on usual trade terms. First, the concerns expressed by a number of witnesses regarding interprovincial trade and premium wars; second the specific characteristics of co-op producers and their significance in the market place. It is useful to review the evidence adduced in respect to these factors.

(iii) Premium wars

[170] There is significant evidence adduced, essentially on behalf of the Applicant, regarding concerns in respect to growing interprovincial trade in live chickens. Mr. McCullagh, the vice-president of Maple Leaf, expresses the view that increased interprovincial trade is "a jeopardy to processing companies". He says that the supply management system affords protection to Canadian chicken producers and allows for sustainable farm earnings. He attests that the system further insulates chicken farmers from competition by reason of the national quotas which are allocated to provinces based upon a market share system and governed by an interprovincial agreement.

[171] Mr. McCullagh expresses the view that any attempts by the Applicant to source chickens from Quebec would be very expensive and that such a strategy is highly unlikely to succeed. If, however, the strategy were successful, he attests that Quebec processors who lose supply to the Applicant would seek to regain chickens by offering premiums to producers in other provinces,

such as Ontario. According to Mr. McCullagh, the outcome would be that downstream processors, retailers, food service operators and consumers would incur greater costs, and chicken producers would receive an unfair financial benefit by leveraging power allotted to them through the quasi-monopoly afforded to them through supply management regulations.

[172] At the hearing, Mr. McCullagh testified that Maple Leaf was extremely concerned with the developments in interprovincial trade because of the tremendous risk that premiums will be driven to unsustainable levels for the industry. [CONFIDENTIAL]. He also expressed the view that this premium war had the potential, by reason of the limited supply of chickens owing to quotas, to escalate to encompass the entire industry.

[173] The executive director of the Association of Ontario Chicken Processors, Mr. Thompson, expressed similar views in regard to premium wars. He explained that under supply management, no province is able to increase its share of national chicken production beyond its historical market share. Processors that lose supply to an interprovincial competitor have little choice but to retaliate by providing increased premium incentives to induce local producers to return to processors within their own province, if they wish to stay in business.

[174] Mr. Thompson expresses the view that the interprovincial movement of chicken is a weakness in the regulated supply system. He attests that the provincial percentage share of national production is effectively fixed. He argues that because of this, the only avenue outside of consolidation where processors may seek additional supply is by “raiding” the producers selling to their competitor in neighbouring provinces.

[175] This aspect of interprovincial trade in chicken is also acknowledged by Mr. Brodeur, who testified on behalf of the Respondent Westco. In his testimony, he attests that the pressure from Ontario processors attempting to source chickens from Quebec is now very strong and growing. He recognized that this could have an upward effect on premiums. He also testified that it was essentially smaller processors that were involved in Quebec-Ontario interprovincial trade of chickens and that the “big players” were essentially not involved. He considered Olymel, Exceldor, Maple Leaf and Maple Lodge to be the big players. He testified that Maple Lodge and Exceldor did trade but only for smaller volumes.

[176] Both Mr. Tavares and Mr. Feenstra testified to the effect that increased interprovincial trade in chickens would spark a price war that would increase costs for any processor and would further erode profits. They expressed the general reluctance of major processors to become involved in interprovincial trade of chickens for this reason. Mr. Feenstra stated that he had been involved in premium wars in the past and that the net effect of a premium war is a huge hit on the processing sector because if they want supply, processors have no choice but to pay the premiums demanded by the producers.

[177] Professor Barichello stated in his report that relatively little interprovincial trade in chickens takes place in Canada. The bulk of this movement is between Ontario and Quebec. He reported that in 2005, interprovincial trade in chickens involved only 4% of total Canadian production. He is of the opinion that because the quantity of output is fixed under supply management, producers can only increase their margin by demanding a higher price from the processor, or by making their operations more efficient, or both.

[178] Dr. Ware, in examination in chief, explained that even if the Applicant were able to source all of the Respondents' chickens from Quebec, this would represent an increase in demand for supply of chicken from Quebec by about 10%. He says that in a supply management system where the total amount of chicken produced in Quebec is regulated and cannot be expanded, this could only occur by bidding supply away from other chicken processors. This would cause price increases in the form of escalating premiums.

[179] While there are no regulatory restrictions on interprovincial trade in chickens, [CONFIDENTIAL]. We know that under supply management, supply is limited. In these circumstances, it is understandable that to attract supply away from other processors, a higher price would have to be offered.

[180] We are prepared to accept that the evidence supports the contention that circumstances surrounding interprovincial trade in live chickens and premiums could lead to upward pressure on the price of live chickens in the market. In our view, however, this is no more than the result of competition between processors in a market where the aggregate supply of live chickens remains unchanged. The underlying theme of the evidence of processors and their representatives cited above is that processors should not have to compete for live chickens because such competition would result in higher prices and a "premium war" amongst processors. This evidence is self-serving. It should come as no surprise that in a market where supply is limited, competition for that supply usually results in higher prices. In the instant case, the issue is not about "premium wars", but rather the supply of live chickens. The issue of the supply of live chickens will be comprehensively dealt with below when we consider the "ample supply" requirement under paragraph 75(1)(d) of the Act.

(iv) Co-op producers and their significance in the market place

[181] The evidence indicates that the Exceldor co-op is an important processor with approximately 47% of the Quebec slaughter. This is similar to Olymel's share. The Exceldor co-op is made up of and owned by 260 member suppliers or producers. The Exceldor producers receive a dividend based on the Co-op's performance at the year's end. In his report, Mr. Robinson expresses the view that Exceldor's status as a co-op represents yet another barrier to the Applicant in its effort to source chickens from Quebec. He refers to the philosophy of co-op members that would favour having their product processed in a plant they own so that they may benefit from year-end dividends. Apart from making up these dividends, the Applicant would have to overcome this different philosophy of co-op members who favour the co-op business model over the Applicant's for-profit model. Mr. Robinson expresses the view that it may not be possible to entice any significant number of producers or chickens from Exceldor members no matter what price is paid by the Applicant. Given the significance of Exceldor's share of Quebec slaughter, this represents another significant hurdle for the Applicant.

(v) Conclusion regarding the Applicant's ability to obtain chickens in Quebec on usual trade terms

[182] The evidence reviewed above indicates that even if the Applicant were able to access the necessary volume of chickens to replace the Respondents' from Quebec producers, it would only be able to do so at premiums that exceed those considered within the range of usual trade terms.

Ms. Sanderson conceded that the Applicant would have to pay a premium of \$[CONFIDENTIAL] above the Quebec board price to obtain replacement supplies, whereas we have found the usual trade terms in that market regarding premiums to be between \$[CONFIDENTIAL] and \$[CONFIDENTIAL] above the Quebec board price. In all of the circumstances, we find that the Applicant is unable to obtain adequate supplies of live chickens anywhere in the market on usual trade terms.

(d) Is the Applicant substantially affected in its business?

[183] We now turn to the question of whether the Applicant is substantially affected in its business due to its inability to find adequate supplies of live chickens anywhere in the market on usual trade terms. We will first review the evidence adduced by the parties, in particular the expert reports.

(i) The Applicant's evidence

[184] The reports of Mr. Robinson and Dr. Ware deal directly with the elements of paragraph 75(1)(a). We turn first to the evidence of Dr. Ware.

[185] Dr. Ware notes that the Respondents supply almost one half of the chickens processed by the Applicant and that if this supply were redirected to rival processing facilities, the Applicant would lose over half its revenue. Dr. Ware indicates that "[t]here is no economically feasible source of supply whereby Nadeau can make up this shortfall in supplies of live chicken". He further states that replacing such a volume would take at least months if not years and that the only economically comparable replacement would have to come from New Brunswick. With respect to the market for selling live chickens, Dr. Ware is of the opinion that the Applicant would not be able to bid supply away from producers outside New Brunswick because those producers are already contractually committed to other processors; that not all producers raise chickens that meet the Applicant's size and quality requirements; and that very high premiums would have to be paid to producers in Quebec to attract them away from current processors. Dr. Ware relies on the affidavit evidence of Mr. Tavares in support of these claims. He also indicates that because of high transportation costs "it is neither economic nor efficient for [the Applicant] to replace the large amount of supply from the respondents with supply from greater distances."

[186] With respect to the market for purchasing live chickens, Dr. Ware's observations are not based on any independent analysis. He does not seek to quantify the costs the Applicant would incur to replace the Respondents' live chicken supply.

[187] Mr. Robinson gave evidence with respect to projected earnings of the Applicant. He was asked to review the Applicant's operations to assess the impact of the withdrawal of the Respondents' birds, namely 271,350 birds per week. Mr. Robinson approached his task by developing the following four different scenarios involving:

1. the loss of the Respondents' chickens;
2. replacement of the Respondents' birds with birds from Quebec;
3. the loss of the Respondents' birds and Nova Scotia birds; and

4. replacement of the Respondents' birds with birds from Quebec and loss of Nova Scotia birds.

[188] In developing the four models, Mr. Robinson used the 12-month period ending June 30, 2008, as the base period for his analysis (the "Base Period"). This period included supply from the Respondents as well as Nova Scotia and Prince Edward Island. Mr. Robinson reasoned that this period represented an appropriate base since it not only represented the current operations of the Applicant but was also representative of the performance the Applicant could achieve "on a long term basis" through good and poor periods. In his testimony, Mr. Robinson refers to very strong prices in the poultry market for the first six months of the Base Period ending December 31, 2007, and a very weak market for the remainder of the period.

[189] Mr. Robinson made certain assumptions in respect to the replacement of the Respondents' birds with birds from Quebec. He assumed that these chickens could be obtained in Quebec, but that premiums would have to be paid to entice them away from their current processor; that the Applicant would be responsible for DOAs, transportation costs and shrink; and that the appropriate chicken could be contracted for the sizes necessary for the customers. As stated above, Mr. Robinson assumed, based on conversations the Applicant's management team had with Quebec producers, that a minimum premium of \$[CONFIDENTIAL]/kg would have to be paid on the Quebec board price. He also assumed that, as a result of having to haul the birds up to six hours, the Applicant would have to compensate producers for higher DOAs, higher transportation costs and higher shrink. This would amount to an additional \$[CONFIDENTIAL]/kg on top of the live price premium.

[190] Mr. Robinson concluded that in all four scenarios, the Applicant's operations are negatively impacted to a significant degree.

(ii) The Respondents' evidence

[191] Ms. Sanderson acknowledges that certain costs are higher when sourcing live chicken from Quebec rather than from New Brunswick, such as transportation costs, shrink and mortality. She notes that the regulated minimum board price paid to Quebec producers is \$0.065/kg lower than that paid to New Brunswick producers. Ms. Sanderson factors in the additional costs to the Applicant to purchase replacement chickens for volumes lost because of increased mortality and shrink for more distant shipments. She is of the opinion that the Applicant would be able to replace all of the Respondents' chickens with chickens from Quebec at an additional cost of approximately \$[CONFIDENTIAL]. This would cover additional costs associated with premiums, shrink, DOAs and transportation. In Ms. Sanderson's view, this would still leave the Applicant with operational earnings of approximately \$[CONFIDENTIAL], which is more than [CONFIDENTIAL]% over the Applicant's average earnings from operations between 1998 and 2007.

[192] Ms. Sanderson expresses the opinion that, because of the assumptions essentially about the size of the premiums in the Robinson and Ware reports, their estimate of the potential impact on the Applicant from the Respondents' shifting their supply of live chickens from the Applicant to Sunnymel is overstated.

(iii) Positions of the parties

[193] It is the Applicant's position that it is substantially affected by the refusal and relies on the evidence of Mr. Robinson. Mr. Robinson testified that without the Respondents' supply, the Applicant's earnings from operations would drop by \$[CONFIDENTIAL] from \$[CONFIDENTIAL] to \$[CONFIDENTIAL] using the Base Period as a comparator. He testified that, assuming that the Applicant incurred additional costs for transportation and for DOAs and shrink, and assuming that the Applicant would be required to pay a premium of \$[CONFIDENTIAL] over the Quebec board price to access replacement chickens in Quebec, the Applicant's earnings from operations would drop by \$[CONFIDENTIAL] from \$[CONFIDENTIAL] to \$[CONFIDENTIAL].

[194] The Respondents argue that the Applicant is not substantially affected by the refusal. They contend that the evidence supports their submission that the Applicant would be able to replace the Respondents' chickens with chickens from Quebec and in doing so would be able to maintain historic levels of processing which would result in earnings that would allow it not only to survive but also to be viable.

[195] The Respondents point to the Applicant's own procurement initiative, which concluded that within a 600 km radius of the Applicant's plant in St-François, a significant volume of live chickens is available from Quebec producers upon payment of certain premiums over the Quebec board price.

[196] The Respondents also rely on the opinion of the Applicant's expert, Mr. Robinson, who testified using the same approach as that used by Ms. Sanderson, that the Applicant would incur additional costs of \$[CONFIDENTIAL] in order to procure replacement chickens from Quebec and would be left with earnings of over \$[CONFIDENTIAL]. The Respondents argue that even earnings of this magnitude approach the Applicant's average yearly earnings prior to the arrival of the Nova Scotia and Prince Edward Island chickens, and that the Applicant therefore cannot be "substantially affected" by their refusal even if the Applicant had to replace all the Respondents' chickens with chickens from Quebec producers.

[197] The Respondents essentially argue that chickens are available in the market to replace the chickens currently supplied by the Respondents in sufficient quantities and on trade terms that would allow the Applicant not only to survive but to be viable based on the survival and viability thresholds set by Mr. Tavares in his testimony. Mr. Tavares attested that the Applicant "requires a guarantee of 350,000 chickens per week to stay viable", but later stated that a weekly supply of 300,000 live chickens would allow the Applicant to get by, that "getting by" referred to "viability in the long term" and that "[d]epending on the markets, it could mean losing a lot of money".

[198] Further, the Respondents contend that even if the Applicant failed to replace any of the Respondents' chickens, its current supply from Nova Scotia and Prince Edward Island and other producers in New Brunswick would allow the Applicant to maintain processing such that it would achieve 108.5% and 93.05% of its self-declared survival ("getting by") and viability thresholds respectively. In the Respondents' view, given the above considerations, the Applicant cannot be substantially affected in its business by reason of the refusal.

[199] The Respondents Dynaco and Acadia argue that their respective refusals cannot substantially affect the Applicant's business because of their small numbers.

(iv) Analysis

[200] Earnings are a meaningful indicator of the performance of an enterprise. In order to assess the impact of the refusal at issue on the Applicant's business, it is therefore useful to consider the Applicant's earnings over time. The projected impact on future earnings by the refusal will be a helpful guide in determining whether the Applicant's business is substantially affected by the refusal.

[201] The evidence of both Mr. Robinson and Ms. Sanderson addresses the question of projected earnings of the Applicant. As discussed above, various models were developed by Mr. Robinson and reviewed by Ms. Sanderson. We review below certain relevant aspects of this evidence.

[202] Mr. Robinson's first scenario involved the loss of the Respondents' chickens. He concluded that without those chickens, the Applicant's earnings would drop by \$[CONFIDENTIAL] from \$[CONFIDENTIAL] to \$[CONFIDENTIAL] using the Base Period as a comparator. Ms. Sanderson assumed that the Applicant would be able to replace the Respondents' chickens with Quebec-sourced chickens, and she did not provide an estimate of the Applicant's earnings if it could not obtain supply on usual trade terms. She is of the opinion that the Applicant would incur an additional cost of almost \$[CONFIDENTIAL] if it were to replace the Respondents' chickens with Quebec-sourced chickens.

[203] Of the four scenarios considered by Mr. Robinson, the one that least affects the Applicant's business is the second scenario, which assumes that the Respondents' birds are replaced with Quebec birds and that the Nova Scotia and Prince Edward Island birds continue to be processed by the Applicant. If the Applicant can demonstrate that under this scenario its business is substantially affected by the refusal, there will be no need to consider the other scenarios developed by Mr. Robinson, including his first scenario in which the Applicant's earnings will drop to \$[CONFIDENTIAL].

[204] In the second scenario, Mr. Robinson makes the following assumptions: that chicken could be obtained in Quebec but that premiums would have to be paid to Quebec producers to entice them away from their current processor; that the Applicant would be responsible for DOAs, transportation costs and shrink; that the appropriate chickens could be contracted for the sizes necessary for the Applicant's customers. As mentioned above, Mr. Robinson assumed a premium of \$[CONFIDENTIAL]/kg of live chicken based on conversations between the Applicant's management and Quebec producers.

[205] As a result of this analysis, Mr. Robinson identified that the earnings from operations would drop by \$[CONFIDENTIAL] from \$[CONFIDENTIAL] to \$[CONFIDENTIAL] and that the St-François Plant would continue to operate [CONFIDENTIAL]. In Mr. Robinson's opinion, under this scenario, as with the other three he developed, the removal of the Respondents' chickens would have a significant impact on the profitability of the operations and, by extension, on the viability of one of the "most efficient processing plants in Canada".

[206] Ms. Sanderson disagreed with the size of the premium that Mr. Robinson assumed would have to be paid by the Applicant to Quebec producers. Initially, she was of the view that a more realistic premium would be \$[CONFIDENTIAL] over the Quebec board price. Ms. Sanderson was of the opinion that after taking into account the differences in board prices, premiums and transportation costs, and the cost of purchasing additional chickens to replace the lost volumes from increased mortality and shrink, the total incremental cost to the Applicant to source live chickens from Quebec instead of the Respondents is \$[CONFIDENTIAL]/kg of live weight, which represents [CONFIDENTIAL]% of the Applicant's total cost of sales for the 12-month period ending June 2008. In Ms. Sanderson's opinion, this would leave the Applicant with earnings of \$[CONFIDENTIAL] for the period, as opposed to over \$[CONFIDENTIAL] estimated by Mr. Robinson.

[207] As discussed earlier, these figures were revised by Ms. Sanderson as a result of corrected data adduced during the trial. As explained above, her estimate of earnings for the period was revised to \$[CONFIDENTIAL] after corrections were made to affidavits and additional evidence was provided. This now represents a drop of approximately \$[CONFIDENTIAL] from estimated earnings of \$[CONFIDENTIAL]. Her revised opinion was that the premium would be in the area of \$[CONFIDENTIAL].

[208] On cross-examination, Ms. Sanderson agreed that a reduction in earnings of "[CONFIDENTIAL]" is in an order of magnitude of [CONFIDENTIAL] %. She acknowledged that [CONFIDENTIAL] % is "a large number" (the actual reduction is in the order of [CONFIDENTIAL] %). She nevertheless went on to express the opinion that the Applicant would not be substantially affected or precluded from carrying on business by reason of the refusal, because its earnings from operations would be comparable with historical levels.

[209] Ms. Sanderson stated her opinion as follows on examination in chief at the hearing:

Yes. So – given I find that they're going to be able to earn profits – earnings from operations that are in the range of [CONFIDENTIAL], which is [CONFIDENTIAL]percent higher than the average over '98 through to 2007 and about, if you exclude the year of the fire. So given that their earnings are within the range of historical levels, they're certainly not precluded from carrying on business if they get replacement supply.

And I would also conclude that they're not substantially affected given their earnings are comparable to historical levels.

[210] It is noteworthy that Mr. Robinson's assessment regarding the Applicant's reduction in earnings relative to the Base Period is in the order of a [CONFIDENTIAL] % reduction.

[211] In terms of transportation costs, Ms. Sanderson compared the live-haul cost of chickens from Quebec with the Applicant's average live-haul cost for all of New Brunswick. Mr. Robinson accepts Ms. Sanderson's live-haul cost of \$[CONFIDENTIAL]/kg for Quebec chickens, but argues that she should have compared that cost with the live-haul cost for the Respondents' chickens. Had this been done by Ms. Sanderson, Mr. Robinson maintains that the result of her analysis would have essentially been the same as his. If the analysis undertaken by both experts assessed the incremental costs of replacing the Respondents' chickens with Quebec

chickens, then the approach advocated by Mr. Robinson would necessarily produce a more accurate result in terms of incremental costs, as it relates to the replacing of the Respondents' birds.

[212] While we agree with Mr. Robinson's approach, we disagree with his estimate (\$[CONFIDENTIAL]) of the live-haul cost for the Respondents' chickens. We agree with Ms. Sanderson that this estimate must be incorrect because Mr. Landry testified that the cost of transporting live chickens from southern New Brunswick to the St-François Plant varies between \$[CONFIDENTIAL] and \$[CONFIDENTIAL], and that 15% of the Applicant's New Brunswick supply comes from southern New Brunswick. He added that the Applicant's average transportation cost for New Brunswick chickens is around \$[CONFIDENTIAL]/kg. The freight costs associated with the Respondents' live chickens must therefore be approximately \$[CONFIDENTIAL]/kg, since the Respondents' supply represents 85% of the Applicant's New Brunswick supply. The incremental transportation costs of supplying the replacement birds, approximately \$[CONFIDENTIAL]/kg, are therefore part of the additional costs of replacing the Respondents' birds, and these costs, together with premiums, constitute the main factors affecting the cost of live chickens to be obtained from Quebec. Premiums also represent the main area of disagreement between the two experts.

[213] It is not disputed that Nadeau will incur additional costs when sourcing chicken in Quebec because of DOAs and shrinkage. With respect to DOAs, Mr. Landry testified that if a load arrives at the St-François Plant with a DOA rate of 1% or more, the Canadian Food Inspection Agency will conduct an investigation. If this rate is 3% or higher, the Agency will impose a fine.

[214] There is general agreement between Mr. Robinson and Ms. Sanderson in respect of DOA/shrink costs. Mr. Robinson finds that Nadeau's shrink and DOA percentages would be [CONFIDENTIAL]%. There is, however, a different approach in respect to losses associated with replacing DOAs and shrink. Ms. Sanderson does not factor in lost profits, since these chickens are replaced with new purchases.

[215] Both experts agree that, as a result of the Applicant having to replace all of the Respondents' chickens with chickens from Quebec, earning from operations will drop, relative to the Base Period, to a range from \$[CONFIDENTIAL] to \$[CONFIDENTIAL]. Ms. Sanderson's opinion acknowledges this reduction in earnings but reasons that the Applicant is not substantially affected or precluded from carrying on business as a result, because this range of earnings is comparable with historic levels. Historic levels are defined by Ms. Sanderson as the average earnings between 1998 and 2007, excluding the year of the fire.

[216] The Tribunal accepts that the approach taken by both parties regarding the Applicant's earnings is the correct one for assessing the projected earnings of the Applicant as a result of the refusal. With respect, however, we reject Ms. Sanderson's conclusion on "substantial effect" for the reasons that follow.

[217] On cross-examination, Ms. Sanderson agreed that a [CONFIDENTIAL]% reduction in earnings is "a large number" but was of the opinion that the Applicant was not substantially affected. Her opinion is based on the choice of a different comparator period. In her analysis, Ms.

Sanderson adopts the period 1998-2007 in support of her conclusion. In her view, excluding the year of the fire, this period reflects the historic performance of the Applicant in terms of earnings. Her analysis consequently fails to take into account the subsequent period, when earnings from operations were significantly higher as a result of the arrival of additional chickens from Nova Scotia and Prince Edward Island. In our view, this approach does not fairly reflect the Applicant's circumstances. It is an approach that would purport to measure the impact of the refusal on the basis of the Applicant's historic performance and not its current circumstances. Such an approach would not allow for consideration of growth and dynamic expansion of an enterprise in assessing the effect of a refusal to deal under paragraph 75(1)(a). We agree, however, that current earnings should not be considered if they reflect unusual or non-recurring circumstances.

[218] Here, for reasons that are particular to this case, the Applicant saw its processing capacity increase significantly for a three-year period as a result of certain agreements with Nova Scotia and Prince Edward Island producers. A second shift had to be set up at the Applicant's plant and additional employees had to be hired. In many ways, this was a planned expansion of production, although potentially not for an indefinite period. This is not comparable with an exceptional event such as a fire or other act of God, which arguably would not be reflective of normal operations.

[219] While the Applicant's earnings from operations since 2007 indicate a significant increase in earnings over prior years, they are nevertheless earnings that resulted from business decisions which were made in the context of an expansion of operations owing to particular circumstances. The substantial effect on the Applicant's business by reason of the Respondents' refusal must, in our view, be considered in the context of this increased capacity and, by extension, the Applicant's increased earnings, because this is the Applicant's current business situation. To conclude otherwise would be inconsistent with the provision which requires that the Applicant be substantially affected in "his business". The fact that the Applicant's earnings are above its historic average is of no consequence. What matters, for the purpose of paragraph 75(1)(a), is the effect of the refusal on the Applicant's current business. In our view, it is therefore appropriate to consider the Applicant's recent increase in earnings in assessing the effect of the refusal on the Applicant's business.

(v) Conclusion on paragraph 75(1)(a)

[220] In summary, we agree with Mr. Robinson that the Base Period is the appropriate comparator period in the circumstances. The increase in earnings over the historic average, reflected in the selected Base Period, is representative of the Applicant's current business earnings and is therefore a proper basis upon which to consider the effect on the Applicant's business that may be caused by reason of the Respondents' refusal to supply.

[221] In the result, we find that a reduction in earnings of [CONFIDENTIAL]% relative to the Base Period is significant and important in the circumstances of this case. We therefore find that, on the basis of the evidence and arguments adduced, replacing the Respondents' chickens with Quebec chickens will have a substantial impact on the Applicant's business. Given our above determinations, we find that the Applicant has established that it is substantially affected in its business due to its inability to obtain adequate supplies anywhere in a market on usual trade

terms. Because of the effect of the refusal on earnings explained above, we are of the view that our conclusion would have been the same under any of the Robinson scenarios. Therefore, by reason of the projected impact on the Applicant's earnings, the Applicant would be substantially affected in its business.

[222] Certain other options in terms of supply, which are potentially plausible, were simply not argued before the Tribunal: for instance, the possibility of replacing one half of the Respondents' supply from Quebec producers, as opposed to all of it. The impact on the Applicant's business was not considered by the experts, nor did the parties advance arguments on such a scenario and, in these circumstances, we decline to speculate on its effect on the Applicant's profits.

[223] On the evidence, and upon consideration of the arguments advanced by the parties, for the above reasons, we are satisfied that the Applicant has met its burden under paragraph 75(1)(a) of the Act.

[224] We now turn to consideration of the requirement under paragraph 75(1)(b).

C. Has the Applicant established that it is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market pursuant to paragraph 75(1)(b) of the Act?

(1) Parties' Submissions

[225] The Applicant contends that it is unable to obtain adequate supplies of live chickens because of insufficient competition among suppliers in the market. It submits that as a result of the supply management scheme, chicken producers are completely insulated from competition. The Applicant states that it is in fact the processors who fight among themselves to offer ever-increasing prices to producers.

[226] The Respondent Westco contends that the insufficient competition referred to in paragraph 75(1)(b) must be assessed in light of the overall context of the Act and can only refer to situations in which a competitor or competitors have a dominant position or a monopoly, or in which there is a lack of competition as a result of any kind of collusion. It submits that there are a considerable number of suppliers in the relevant market and that there is no evidence of collusion among them, which indicates that there is no issue of insufficient competition. Westco further states that not only are there several competitors, but the evidence also shows that chicken producers are indeed willing to compete and supply the Applicant with their production upon payment of premiums over and above the board price set by regulatory authorities. The Respondents Dynaco and Acadia also submit that there are enough producers in the relevant market to conclude that there is sufficient competition.

[227] In the alternative, the Respondents contend that the evidence in the Tribunal's record shows that the cause of any inability on the Applicant's part to obtain replacement birds has nothing to do with a lack of competition among suppliers of live chickens. It is rather because of the following three factors that came to light during the hearing, namely, the Respondents' objectively justifiable business reasons for the refusal, the workings of the supply management system and the level of competition among processors.

(2) Analysis

[228] Pursuant to paragraph 75(1)(b) of the Act, the refused party must demonstrate that it is unable to obtain adequate supplies of the product because of insufficient competition among suppliers in the market. As was set out in *B-Filer*, paragraph 75(1)(b) of the Act contains two requirements. First, there must be insufficient competition among suppliers in the relevant market. Second, the inability of the refused party to obtain adequate supplies of the product must be by reason of that insufficient competition. The Tribunal, in *Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83, considered the causal requirement of the provision and concluded as follows, at page 116:

In addition, the refusal to supply must occur “*because of insufficient competition among suppliers of the product*”. That is, the overriding reason that adequate supplies are unavailable must be the competitive conditions in the product market.

(emphasis added)

[229] The Tribunal must therefore determine whether the Applicant has established that insufficient competition among suppliers in the market is the overriding reason why it is unable to obtain adequate supplies of the product in the market. The product and geographic markets, for the purposes of paragraph 75(1)(b), are the same as those which have been defined pursuant to paragraph 75(1)(a). The relevant geographic market therefore consists of New Brunswick, Prince Edward Island, parts of Quebec within a 500 km radius of the St-François Plant, and Nova Scotia.

[230] The Tribunal has not yet had an opportunity to determine the meaning of “insufficient competition”. In *Xerox* and *Chrysler*, the Tribunal defined the relevant product market in a very narrow manner, and it was therefore not difficult for the Tribunal to conclude that there was insufficient competition among suppliers in the market. The Tribunal noted that the level of competition among suppliers will depend on the facts of the particular case. The Tribunal also stated the following in *Xerox*, at page 116:

Clearly a market composed of numerous suppliers acting independently would not qualify. (It is also very difficult to conceive of a case before the tribunal where so many of a multitude of suppliers would refuse to supply an individual that his business could be “substantially affected”. One would postulate that if one supplier did not want the business, another would be more than happy to earn the extra revenue.)

[231] We now turn to an assessment of the competitive conditions in the market. The evidence on the record shows that there are many suppliers in the relevant market. Data provided by the Chicken Farmers of New Brunswick indicate that in 2007 there were 38 chicken producers in New Brunswick, 82 producers in Nova Scotia, 7 producers in Prince Edward Island and 760 producers in Quebec. Statistics from Les Éleveurs de volailles du Québec indicate that in 2006 there were 85 producers in the Beauce region, 62 producers in the Québec region and 22 producers in the Côte-du-Sud region, all of which are located in Quebec within 400 km of the

St-François Plant. From this data, the Tribunal can conclude that there are, in fact, numerous producers located in the relevant geographic market.

[232] The evidence adduced at the hearing shows that over the last few years a number of chicken producers have consolidated their quotas and that some producers have formed alliances to reap financial benefits. Further, the evidence demonstrates that some producers are related, as they are members of the same co-operatives. The evidence does suggest some lack of independence among producers in the New Brunswick market. In fact, Mr. Feenstra has indicated that only eight nominal quota holders in New Brunswick are independent from the Respondents. The Respondents together produce almost 75% of New Brunswick's live chickens. Mr. Feenstra, however, also acknowledged that he is not aware of that degree of concentration in any other Canadian province. In fact, no evidence was adduced regarding such concentrations in Nova Scotia, Prince Edward Island or parts of Quebec. Furthermore, evidence adduced by the Applicant concerning its efforts to seek replacement supply of live chickens in Quebec clearly demonstrates that producers are acting independently. Results from the Applicant's survey show that producers were in fact offering live chickens to the Applicant at different prices above the board price. Under these circumstances, there is insufficient evidence to conclude that there is either collusion or a lack of independence amongst producers in the market as a whole.

[233] Normally, the presence of numerous suppliers acting independently is a strong indicator of sufficient competition. However, the parties in this matter are operating within the supply management system, which is governed by a detailed and complex set of regulations. We must therefore consider the impact, if any, of the supply management system on competition among suppliers in the market.

[234] As discussed above, under supply management, the minimum price for which chicken may be sold in respective provinces is set by the provincial marketing boards. Production is also restricted to quota holders and limited by a producer's quota allocation.

[235] The Applicant asserts that as a result of the supply management system, chicken producers do not compete amongst themselves. Mr. McCullagh indicated that the supply management system has been a "quasi-monopoly for chicken producers" and Dr. Ware indicated that "[w]hatever the merits of such a system, there is no doubt that competition is restricted by it, as entry is precluded completely and the competitive battles for market share which create benefits for consumers and foster incentives for innovation are also completely absent".

[236] The purpose or objects of the acts and regulations governing the supply management system are not intended to limit competition. The CFC was created in 1978 by order in council pursuant to section 16 of the *Farm Products Agencies Act* ("FPAA"), R.S.C. 1985, c. F-4. Section 21 of the FPAA identifies the objects of a farm product agency:

21. The objects of an agency are

(a) to promote a strong, efficient and competitive production and marketing industry for the regulated product or products in relation to which it may exercise its powers; and

21. Un office a pour mission :

a) de promouvoir la production et la commercialisation du ou des produits réglementés pour lesquels il est compétent, de façon à en accroître l'efficacité et la compétitivité;

(b) to have due regard to the interests of producers and consumers of the regulated product or products.

b) de veiller aux intérêts tant des producteurs que des consommateurs du ou des produits réglementés.

(emphasis added)

(nos soulignements)

[237] As an agency created under Part II of the FPAA, the CFC has the power to implement a marketing plan for chicken pursuant to the terms of the proclamation establishing it (see s. 22(1) FPAA). Some of the terms of that plan are found in the 2001 Federal Provincial Agreement for Chicken. The purpose and objectives of that agreement are as follows :

1.01 This Agreement provides for an orderly marketing system for chicken coordinated in a flexible and market responsive manner having appropriate safeguards so as to provide consistency, predictability and stability in accordance with the following objectives:

1.01 Le présent Accord établit un système de commercialisation ordonnée du poulet coordonné de façon flexible et axée sur le marché, comportant les mesures de protection nécessaires pour assurer l'uniformité, la prévisibilité et la stabilité en conformité avec les objectifs suivants :

(a) to optimize sustainable economic activity in the chicken industry;

(a) optimiser l'activité économique durable dans l'industrie du poulet;

(b) to pursue opportunities in both domestic and international markets;

(b) rechercher des débouchés tant sur le marché national que sur le marché international;

(c) to enhance competitiveness and efficiency in the chicken industry; and

(c) améliorer la compétitivité et l'efficacité dans l'industrie du poulet;

(d) to work in the balanced interest of producers, industry stakeholders and consumers.

(d) travailler dans l'intérêt mutuel des producteurs, des intervenants de l'industrie et des consommateurs.

(emphasis added)

(nos soulignements)

[238] The Applicant's expert, Dr. Barichello, has indicated that competition, within the context of the supply management system, can exist among producers in the provinces in which premiums are paid, albeit not below the minimum price established by the board:

Ms. Healey: So to the extent - - so there's that range, minimum price and up; that's an area in which producers could engage in competition?

Dr. Barichello: That's correct.

Ms. Healey: You want 6 cents for your birds; I'll agree to 4.5?

Dr. Barichello: Right.

[239] However, Dr. Barichello also stated that there was a relatively modest scope for competition within the market, as the margin within which producers could compete was limited. He also added that “[n]ormal competitive pressure would be when you would be able to also lower your required price such as below the minimum price”.

[240] The Tribunal accepts that the margin in excess of the regulated minimum price that Quebec producers receive is relatively small. In our view, however, it is competition among individual producers that keeps this margin relatively small. What matters is that the price received by producers (including the margin in excess of the regulated minimum price) is determined by competition among producers. As for Dr. Barichello’s contention that the minimum price set by the provincial board restricts competition, we are of the view that the regulated minimum price does not itself limit a producer’s ability to compete effectively unless the aggregate market supply set by the marketing board exceeds demand at the regulated minimum price. In that case, the regulated minimum price would prevent the competitive price adjustment required to clear the market. There is no evidence that competition in the relevant market is currently inhibited in this way.

[241] Significant evidence was adduced to the effect that prices received by producers in Quebec exceed the minimum price set by the marketing board. Such evidence was outlined under the paragraph 75(1)(a) analysis and will not be repeated here. Suffice it to say that the Tribunal is satisfied that prices received by producers in Quebec generally include a premium above the regulated base. As Dr. Barichello has conceded, this premium and thus the price received by each producer can be determined by competition among individual producers.

[242] Furthermore, some Quebec producers canvassed during the Applicant’s procurement survey indicated that they were seeking the same price as other producers were getting. This is consistent with price-taking behaviour and supports the finding that an individual producer cannot set the price and that the price ultimately paid is set by the competitive forces in the market.

[243] The restrictions on entry and expansion established by the supply management system have an impact on competition, but inelastic market supply does not itself imply that there is insufficient competition among suppliers in the market.

[244] In our view, while supply management restricts the available aggregate supply and makes it less price-responsive, it does not give any one producer any price-setting power. The inability of the Applicant to obtain adequate supplies on the usual trade terms is not the result of insufficient competition among individual producers. The existence of inelastic market supply is not incompatible with the market price being set by competition among individual producers in the market.

[245] Apart from producers in Quebec, there is very little evidence regarding the prices producers in Nova Scotia and Prince Edward Island are receiving relative to their respective regulated minimum prices. We know that in New Brunswick, there is an Incentive Plan in place. We are unable, therefore, to make a conclusive finding as to whether and how the regulated minimum prices in those provinces might have affected competition among producers.

[246] To conclude, we are of the opinion that the Applicant has failed to establish that there is insufficient competition among suppliers in the relevant market for the following reasons: the number of producers in the market; the absence of any evidence that producers, except for the Respondents, are not acting independently; and our conclusion that supply management in and of itself does not establish that there is insufficient competition among individual producers.

[247] Even if there were a finding of insufficient competition among suppliers, we would nevertheless still be of the view that the Applicant has not met its burden under paragraph 75(1)(b) of the Act. There is inadequate evidence to establish that the competitive conditions of the market are the overriding reason why the Applicant is unable to obtain adequate supplies of the product. The overwhelming evidence indicates that the limit on aggregate supply which results from the supply management system is essentially the reason why the Applicant is unable to obtain adequate supplies of live chickens. As will become evident from our discussion of ample supply for the purposes of paragraph 75(1)(d) later in these reasons, the limit on aggregate supply has a very significant impact on the question of whether the Applicant is able to obtain adequate supplies of chickens in the market.

[248] Therefore, for the purposes of paragraph 75(1)(b), we conclude that the Applicant has not established that it is unable to obtain adequate supplies of chickens because of insufficient competition among suppliers in the market.

D. Has the Applicant established that it is willing and able to meet the usual trade terms pursuant to paragraph 75(1)(c) of the Act?

[249] The Applicant contends that it has always met the usual and customary terms of trade. The testimony of the Applicant's representatives, Mr. Feenstra, Mr. Landry, and Mr. Plourde, indicates that the Applicant is willing to meet the usual trade terms with respect to Quebec supply. There appears to be no dispute that the Applicant is willing and able to meet the usual trade terms.

[250] On the evidence, we are satisfied that the Applicant is willing and able to meet the usual trade terms of the suppliers of live chickens.

E. Has the Applicant established that the product is in ample supply pursuant to paragraph 75(1)(d) of the Act?

[251] The Tribunal has dealt with this element of the provision only once. *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28, is the only case in which the Tribunal has made a determination in respect to ample supply. It decided that the product, Harley-Davidson motorcycles, was not in ample supply and consequently declined to grant an interim order. The Tribunal held, at paragraph 19, that "section 75, and, therefore, interim orders under section 75, are meant to deal with situations in which the product is readily available and unencumbered in the sense that it has not been sold or promised to another purchaser."

[252] In *Quinlan's*, the Tribunal acknowledged that the product was in ample supply some months of the year, but found that it was not appropriate to order interim supply, in the

circumstances, because the product was not in ample supply at the time the order to supply was sought.

[253] In the circumstances of this case, the supply of the product, live chickens, is regulated under the supply management system. The system strictly controls the supply of live chickens in Canada through a quota system. Under supply management, each producer may only produce live chickens in accordance with its quota in a given period. A producer faces a significant penalty if it exceeds its quota. The system does provide for adjustments in the total supply of live chickens. This adjustment is fixed at each production period through a complex adjustment formula designed to strike a balance between chicken production and consumer demand. The issue here is whether, under these circumstances, live chickens can be said to be in ample supply for the purposes of paragraph 75(1)(d).

(1) The supply management system

[254] Before proceeding further, it is useful to fully understand the complex supply management system in place for the production of live chickens in Canada and to appreciate how that system functions. To that end, we will review below the various statutory and regulatory provisions which underlie the system, applicable federal-provincial agreements and certain orders issued by provincial marketing boards which are material to the issues in this case.

(a) Chicken Farmers of Canada and the 2001 Federal- Provincial Agreement

[255] As mentioned above, the Chicken Farmers of Canada was created in 1978 by order in council and implements a marketing plan pursuant to the terms of the 2001 Federal-Provincial Agreement for Chicken (the "FPA"). Schedule A to the FPA is known as the *Chicken Farmers of Canada Proclamation*, SOR/79-158. This document establishes the CFC and the quota system. Under section 6 of the Proclamation, the CFC shall establish a quota system for the signatory provinces by which quotas are allotted to chicken producers in each province to which quotas are allotted by the appropriate board. The CFC Board of Directors is comprised of the following persons:

- (i) ten members representing the producers of each provincial marketing board;
- (ii) two persons appointed by the Canadian Poultry and Egg Processors Council;
- (iii) one person appointed by the Canadian Restaurant and Food Service Association;
- (iv) one person appointed by the Further Poultry Processors Association of Canada; and
- (v) one national chairperson elected from among the chairs of the provincial marketing boards.

[256] Under section 3.01 of the FPA, each Provincial Commodity Board agrees to limit chicken production pursuant to the quotas:

3.01 In the fulfillment of their obligations under section 2.05, the Provincial Commodity Boards each agree:

3.01 Dans le cadre de la réalisation de leurs obligations en vertu de l'article 2.05, chaque office de commercialisation

provincial convient :

(a) to limit the total quantity of chicken produced in their respective provinces, and marketed, to the quota allocation as determined from time to time by reference to this Agreement;

(a) de limiter la quantité totale de poulet produite et commercialisée dans leur province respective à l'allocation de contingents déterminée, de temps à autre, conformément au présent Accord;

(b) to establish the minimum prices at which live chicken may be sold in their respective provinces; and

(b) d'établir des prix minimums de vente du poulet vivant dans leur province respective;

(c) in conjunction with CFC, to implement and maintain a coordinated system of quota allotment that is auditable by CFC, where the basic effects as between provinces are similar.

(c) de mettre en œuvre et de maintenir, en collaboration avec les PPC, un système coordonné d'allocation de contingents qui peut être vérifié par les PPC lorsque les effets de base entre les provinces sont similaires.

(emphasis added)

(nos soulignements)

[257] Schedule B to the FPA is known as the Operating Agreement and its purpose is to set out the fundamentals of the operation of the marketing system for chickens.

[258] Schedule B distinguishes “federal quota” from “provincial quota”. It defines “federal quota” as “the quantity of chicken expressed in live weight that a producer is entitled to market in interprovincial and export trade in a period, and is allotted to the producer by the Provincial Commodity Board on behalf of CFC”. This is different from the “provincial quota” defined as “the quantity of chicken expressed in live weight that a producer is entitled to market in intraprovincial trade in a period, and is allotted to the producer by the Provincial Commodity Board.”

[259] It appears, however, that the provinces adopt as the provincial quota the exact share assigned by the CFC. Justice Abella, in *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20; [2005] 1 S.C.R. 292, acknowledged that this is the accepted practice in the industry. She states at paragraph 8 that “[e]ach provincial body ... adopts as its intraprovincial production quota the exact share federally assigned to it.”

[260] It is also accepted that the system provides for a granting of authority in respect of allotting federal quotas and administering them in accordance with the *Canadian Chicken Marketing Quota Regulations*, SOR/2002-36 (see subsection 2(1) of the *Chicken Farmers of Canada Delegation of Authority Order*, SOR/2003-274). This was recognized by Justice Abella in *Pelland*, where she wrote at paragraph 9 of the Court’s decision that “[i]n order to facilitate the integration of production and marketing quotas, the federal body delegates its authority to regulate the marketing of chickens in interprovincial and export trade to the provincial body”.

[261] This regulatory scheme provides strict limitations on quotas. Section 9 of the *Canadian Chicken Marketing Quota Regulations* provides the following limits:

9. The Provincial Commodity Board of a province must allot federal quotas to producers in the province in such manner that the aggregate of the following numbers of kilograms of chicken that is produced in the province, and authorized to be marketed, during the period referred to in the schedule will not exceed the applicable number of kilograms of chicken set out in column 2 of the schedule in respect of the province for that period:

(a) the number of kilograms of chicken authorized to be marketed by producers in interprovincial or export trade under federal quotas allotted on behalf of CFC by the Provincial Commodity Board;

(b) the number of kilograms of chicken authorized to be marketed by producers in intraprovincial trade under provincial quotas allotted by the Provincial Commodity Board; and

(c) the number of kilograms of chicken anticipated to be marketed by producers under quota exemptions authorized by the Provincial Commodity Board.

(emphasis added)

9. L'Office de commercialisation d'une province doit allouer des contingents fédéraux aux producteurs de cette province de manière que la somme des nombres de kilogrammes de poulet ci-après, exprimés en poids vif, qui sont produits dans une province et dont la commercialisation est autorisée au cours de la période visée à l'annexe, n'excède pas le nombre de kilogrammes de poulet, exprimé en poids vif, visé à l'annexe pour cette province, pour la période en cause :

a) le nombre de kilogrammes de poulet que les producteurs sont autorisés à commercialiser sur le marché interprovincial ou d'exportation, au titre des contingents fédéraux alloués au nom des PPC par l'Office de commercialisation de la province;

b) le nombre de kilogrammes de poulet que les producteurs sont autorisés à commercialiser sur le marché intraprovincial, au titre des contingents alloués par l'Office de commercialisation de la province;

c) le nombre de kilogrammes de poulet que les producteurs prévoient de commercialiser en vertu des exemptions de contingents autorisées par l'Office de commercialisation de la province.

(nos soulignements)

[262] The schedule referred to in the above provision sets the quota allocation for an eight-week production period. The system provides for periodic adjustments to the schedule. We reproduce in Schedule B to these reasons a recent schedule issued covering the quota period of January 4, 2009, to February 28, 2009.

[263] The FPA also provides for a specific quota allocation procedure (see sections 3.01 to 3.10 of the FPA) (the "quota allocation procedure") and for subsequent adjustments to the quotas set

in the initial procedure (see sections 4.01 to 4.11 of the FPA) (the “quota adjustment procedure”). We will briefly review these two regulatory procedures.

(b) The quota allocation procedure

[264] Section 3.02 of the FPA provides that, for six periods at a time, the CFC will establish the initial base for each province pursuant to a formula which takes into account the previous year’s level. Each provincial commodity board may make a request to adjust the initial base allocation for one or more of the six periods provided that the adjustments for any period do not exceed 5% and the total of the bases for the six periods does not change (s. 3.03).

[265] Further, prior to each period, each provincial commodity board also makes a written quota allocation request to the CFC in the following manner:

3.05 ...

(a) in accordance with the procedures, if any, established pursuant to section 5.01 below, the Provincial Commodity Board will consult with its processors using a “bottom up approach and, having regard to the market requirements proposed by those processors will arrive at the estimated provincial market requirements prior to the submission of the quota allocation request for the period to CFC;

(b) in accordance with the procedures, if any, established pursuant to section 5.02 below, Provincial Commodity Boards in each region shall consider discussing market conditions and estimated market requirements in the region prior to the submission of the quota allocation request by each Provincial Commodity Board to CFC; and

(c) in submitting its quota allocation request to CFC for a period, each Provincial Commodity Board will provide to CFC the rationale for the request which will enable CFC to fulfill its obligations under the *Farm Products Agencies Act*, including those in section 23(2).

3.05 [...]

(a) l’office de commercialisation provincial consulte ses transformateurs, conformément à la procédure, s’il y en a une, qui est établie en vertu de l’article 5.01, en utilisant une approche «ascendante» et, après avoir examiné les besoins de marché proposés par ces transformateurs, estime les besoins du marché provincial avant de soumettre aux PPC la demande d’allocation de contingents pour la période;

(b) les offices de commercialisation provinciaux de chaque région envisagent de discuter, conformément à la procédure, s’il y en a une, qui est établie en vertu de l’article 5.02 ci-dessous, des conditions de marché et des estimations des besoins du marché dans la région avant de présenter la demande d’allocation de contingents aux PPC;

(c) lorsqu’il présente sa demande d’allocation de contingents aux PPC pour une période, chaque office de commercialisation provincial fournit aux PPC la justification de la demande, ce qui permet aux PPC de s’acquitter de leurs obligations en vertu de la Loi sur les offices des produits agricoles, y compris

celles qui sont prévues au paragraphe 23(2).

(emphasis added)

(nos soulignements)

(c) The quota adjustment procedure

[266] The Operating Agreement also sets out certain rules regarding adjustments to the quota allocation. Temporary changes to the regional range are possible in certain circumstances (see s. 4.02). For provinces in a region (“region” is defined in section 2.01 of the Operating Agreement), the regional range shall allow for quota allocation changes of up to 5%. An adjustment to the regional range, which is not temporary and which establishes a new regional range requires a special vote of the CFC (s. 4.01).

[267] Further, section 4.07 provides that a provincial board may request a quota allocation that exceeds the provincial range for one or more periods to accommodate exceptional circumstances (“provincial range” means the percentage change from the base for a province for a period). Section 4.06 provides that “[f]or a province, the provincial range shall allow for quota allocation changes of up to eight (8) percent” and “[a]n adjustment to the provincial range, other than pursuant to section 4.07, requires a special vote” of the CFC.

[268] What emerges from the above provisions of the FPA is that any adjustments to quotas are made provincially and/or regionally. The system provides for adjustments to be made on a “macro” level, that is, for all producers within a province or a region.

[269] The evidence adduced before the Tribunal does not contradict the above summary of the supply management system. We note, in particular, the evidence of Mr. Feenstra in his reply affidavit, wherein he confirms that the “bottom-up” approach was implemented across Canada in or about January 1995. He further attests that during the period leading up to the new approach, processors had experienced shortages of chickens for so long and thought they could sell a lot more chicken. According to Mr. Feenstra, this shortage led to a recommendation to increase volumes and prices substantially. Mr. Feenstra further testified that the market could not handle the increase and that a significant oversupply of chickens resulted across Canada.

(2) Positions of the parties

[270] The Applicant argues that the product here is in ample supply. It takes the position that the Respondents can and do raise enough chickens and just want to deprive the Applicant of them. It is argued that the purpose of paragraph 75(1)(d) is to ascertain whether the supplier, through no fault of its own, is unable to supply the Applicant with the product. Alternatively, the Applicant argues that the purpose of the supply management system as a whole is to ensure a match between supply and demand or, in other words, to ensure ample supply to meet consumer needs. The Applicant also relies on a statement made by Mr. Brodeur, who stated at the hearing that there is too much supply (“Il y a trop d’approvisionnement”).

[271] The Respondents argue that the product is not in ample supply. It is argued that ample supply must be assessed not in relation to the Applicant's need, but rather in relation to what is available in the relevant market or from the supplier from whom an obligation to supply is sought. The focus must be on the suppliers' capacity to offer product in the relevant market. The Respondents contend that live chickens are not generally a product in ample supply because the supply management system regulating the chicken industry expressly limits the quantities that may be supplied by producers in a given period. In the Respondents' view, this is the primary reason chickens are not available in ample supply.

[272] Further, the Respondents argue that section 75 is not intended to apply to situations where a supplier's particular production capacity is limited, nor is it intended to oblige the Tribunal to arbitrate an agreement between customers who are seeking access to a limited supply of products. It is argued that the section provides for only one remedy, namely acceptance of the customer on usual trade terms. If the product were in ample supply, there would be no need for an order stipulating a volume or to allocate supply, since the suppliers in the market would have available capacity to meet the needs of the person who has been refused supply. Conversely, the Respondents maintain that if, in order to accomplish its purpose, an order should need to specify a volume to ensure supply to a customer at the expense of another, the product then would not be in ample supply, and the conditions of section 75 would not have been met.

[273] Finally, the Respondents maintain that it does not matter whether the product is no longer available because it is reserved for an innocent third party, as in *Quinlan's*; or whether it is no longer available by reason of a business decision by the Respondent Westco to vertically integrate its operations. The supplier simply does not have "ample supply" of the product because there is no excess capacity available to meet the demand.

(3) Analysis

(a) Meaning of "ample supply"

[274] Defining "ample supply/quantité amplement suffisante" in the context of paragraph 75(1)(d) is essentially a question of legal interpretation. It is now accepted law that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27).

[275] The word "ample" is defined by both the *Canadian Oxford Dictionary* (2004) and *Webster's Encyclopedic Dictionary of the English Language* as plentiful, abundant, extensive and more than enough. *Le Petit Robert de la langue française* (2006) defines "amplement" as "abondamment" and "en allant au-delà du nécessaire". This is to be contrasted with the word "adequate" found in paragraph 75(1)(a), which is defined by the *Canadian Oxford Dictionary* as sufficient, satisfactory, and barely sufficient. The *Webster's Encyclopedic Dictionary of the English Language* defines "adequate" as equal to or sufficient for a special requirement.

[276] A different meaning of “supply” was therefore intended in each paragraph. In its grammatical and ordinary sense, ample therefore means more than a sufficient or adequate supply. It means supply available in abundance or to the point that it is considered to be excessive. Ample or abundant supply must then be considered in the context of the object and scheme of the Act, the object of the particular provision, and the intention of Parliament.

[277] The purpose of the Act is set out in section 1.1. It essentially provides that the purpose of the Act is to maintain and encourage competition in Canada. It includes, among other objectives, doing so 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.

[278] In *Xerox*, the Tribunal had occasion to consider the constitutionality of section 75 of the Act. In finding the provision to be within Parliament’s legislative authority and constitutionally valid, it commented on the purpose of the provision. At page 78 of its decision, the Tribunal wrote:

Section 75 can certainly be characterized as ancillary to the main purpose of the legislative scheme as well as having an intimate connection thereto. The immediate effect of an order to supply is to open up channels of distribution and free competitive forces hindered by lack of access to supplies. The section’s objective is to promote or preserve competition. Section 75 operates within the same regulatory parameters as do the other provisions of Part VI.

[279] We agree with the above characterization of the objective of the provision. The goal of promoting and maintaining competition is also reflected in the scheme of the Act. The scheme under section 75 of the Act provides for certain conditions which, when met, render a refusal to deal, an otherwise legal act, a reviewable practice. Two of these conditions make express reference to competition being affected. In paragraph 75(1)(b), it must be established that there is insufficient competition among suppliers in the market, and paragraph 75(1)(e) requires that it be shown that the refusal to deal is having or is likely to have an adverse effect on competition in the market. Therefore, a refusal’s impact on competition is a central focus of the provision. Once it is established that competitive forces are hindered by the refusal or the lack of access to supplies, the Tribunal may, pursuant to section 75 of the Act, order that one or more suppliers of a product in a market accept the Applicant as a customer on usual trade terms. As stated by the Tribunal in *Xerox*, the effect of the remedy under section 75 is to open up channels of distribution and free competitive forces hindered by lack of access to supplies.

[280] The term “ample supply” must be interpreted harmoniously with the above discussed purpose of the Act and scheme. Supply is not ample when suppliers generally would be inhibited from growing or even changing the nature of their business, or be forced to ration supplies between current and potential future customers because supply is limited. A product is in ample supply when its availability is not in issue when a supplier considers whether to develop its business by seeking new customers and/or new distribution channels, such as involvement in the downstream processing market.

[281] A remedy under section 75 would not be available in circumstances where a refusal to supply was caused by reason of a shortage of supply in general as a result of a strike, scarcity of raw materials, or by reason of an upstream supplier going out of business. In such circumstances, supply is constrained by reason of factors beyond anyone's control. As a consequence, a supplier is unable to meet demand in the market, by reason of supply being limited. It follows that the product is therefore not in ample supply. This view finds support in the 1974 transcripts of committee proceedings before the House of Commons when Bill C-7 (*An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, 2nd Sess., 29th Parl.) was being debated. The issue being debated was a refusal where the product was in short supply. The following question was put to the minister responsible, followed by his response:

Mr. Frank: Mr. Chairman, Mr. Minister, unfortunately I do not have the legal mind that most members of this committee apparently have and this disturbs me to some degree, to the effect that, when this bill gets passed, if it ever does, just what in actual fact may happen.

To clarify one particular area, which, no doubt, you can adjust to suit other areas: in the fertilizer business back in the winter, there was some degree of concern at the lack of products for dealers to sell. As a specific example, a company that supplied dealers went out of business and the dealers that were supplied by them naturally could not have the product unless they were able to acquire it from other manufacturers.

At that particular time, the other manufacturers felt that they wanted to protect their dealers and make sure that they were not shorting them. Consequently, they refused to sell to these dealers that had unfortunately found themselves ex-customers of this other company. Now, would this particular area here change that particular picture? In other words, would it make it necessary for these manufacturers to sell to dealers that they had not supplied before?

Mr. Gray: No, because in the situation you have outlined it would appear that the product in question was not in ample supply, and in order for the Commission to make an order requiring a supplier to supply somebody, it would have to find that the product was in ample supply.

(Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs*, 29th Parl. 2nd Sess., No. 9 (April 30, 1974) at 9:34)

[282] Bill C-7 died on the order paper, but the provision at issue was eventually brought back under a different bill. The above exchange is therefore relevant and would appear to support an intention by the minister to have the provision apply only where there is evidence of ample supply of the product in the market. What is also suggested is that in cases where product is in short supply, a supplier would not be required to ration limited supplies of a product in a manner that prevents existing customers from obtaining the quantities they wish to purchase.

[283] The above factors support a definition of “ample supply” consistent with that articulated by the Tribunal in *Quinlan’s*. The words “ample supply”, read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament, are meant to deal with situations in which the product is in ample supply, in the sense that suppliers are not obliged to choose between serving new customers and continuing to supply historic quantities to existing customers.

(b) Are “live chickens” a product in ample supply in the circumstances of this case?

[284] As can be observed from the above review of the supply management system for live chickens in Canada, the system as structured does provide for adjustments in the total supply of live chickens. This adjustment is fixed at each production period through a complex adjustment mechanism designed to strike a balance between chicken production and consumer demand. Essentially quotas are adjusted by the CFC when consumer demand for chicken increases or decreases. This is measured by what industry participants refer to as a “bottom-up” process which starts when processors gauge changes in consumer demand for chicken. According to Mr. Brodeur, any increase in demand translates into a corresponding increase in what is known as the “meat margin”. The “meat margin” measures the difference between the minimum board prices for live chickens set by the provincial marketing board and the aggregate of the prices paid for processed chickens at both the primary and secondary stages of transformation. These prices are not regulated and are set by market forces. Therefore, when the prices for processed chickens either rise or fall, the “meat margin” increases or decreases. This reflects an increase or decrease in consumer demand. It is when the “meat margin” exceeds historic levels that the CFC is led to conclude that supply and demand for chickens in Canada is not in equilibrium, and as a result there is a need to increase production quotas in order to satisfy increased consumer demand. The evidence indicates that, historically, such an adjustment has served to reduce prices at both the wholesale and retail levels. The converse is also true. When the “meat margin” is below historic levels, quotas may be reduced. As seen above, such adjustments in quotas, if any, can only occur at the end of an eight-week production period.

[285] We are satisfied that the above review of the supply management system in Canada as it relates to chickens properly reflects the system under which the parties to this application are operating and were operating at the time of the filing of the application. It is a system that does not allow for an immediate or timely response to changes in market conditions as would be the case in an unregulated market.

[286] The system in place provides for supply to be adjusted at the “macro” level. Quotas may be increased nationally and even on a provincial level as a result of increased consumer demand. However, under the system, there is no assurance that a particular supplier who wishes to increase production can obtain the increased quota that it needs to meet its business plan. Indeed the evidence of Mr. Feenstra indicates that adjustments in the system are made across the system and that an increased quota over a previous period is divided up on a pro-rata basis between each existing producer. That is of little assistance to individual producers who wish to accommodate additional customers.

[287] Under the system, aggregate supply is maintained at adequate levels to meet consumer demand. The level of supply is essentially fixed for any given period. Increases in quotas are made only after the market data is computed and assessed at various levels of administration in the system for a given period. When quotas are adjusted, they are adjusted on an aggregate basis and distributed on a pro-rata basis among existing producers. This takes time, and in the meantime, a producer is unable to increase production to meet increased demand. A producer can only supply more if it acquires production quotas from another producer, and processors can only increase capacity and grow in the market by obtaining additional supply by accessing supply that is destined for another processor, since total supply is limited by the system.

[288] As can be seen from the above review of the supply management system, the main focus has been to ensure stability and a reasonable rate of return for producers and an adequate supply for consumers. Indeed, on the latter point, the Marketing Plan issued under Order I of the Chicken Farmers of New Brunswick (see Schedule C) uses such language. The plan provides that one of its objects is to ensure that there is “adequate supply of New Brunswick grown chicken available to the consumer”. Under the supply system as discussed above, the product cannot be said to be in ample supply, in the sense that it is available on a timely basis to individuals wishing to expand or develop their businesses. This is a consequence, in particular, of the time lag required for an adjustment in aggregate supply and of the apportioning of any adjustment among all suppliers.

[289] In accordance with the definition of “ample supply” set out earlier in these reasons, and in the circumstances of this case, it follows that the product, live chickens, cannot be said to be in ample supply as that term is understood for the purposes of paragraph 75(1)(d) of the Act.

[290] The Applicant further argues that “(s)ubsection 75(1)(d) cannot be interpreted so as to permit the malefactors to profit from their own misconduct”. The Applicant maintains that the Respondents “embarked on a deliberate and conspiratorial course of conduct, as far back as August 2006, whose sole purpose and object was to attempt to force an improvident sale of the Nadeau Plant”. In support of its argument, the Applicant relies on evidence adduced by different witnesses which indicates that the Respondents were strategizing to acquire the St-François Plant at below market value by threatening to cut off supply to the Applicant if it was not prepared to sell. A number of e-mails and other correspondence were adduced in evidence, including exchanges between the Respondents and their respective officials that support elements of the Applicant’s allegation.

[291] As stated earlier, the Respondents argue that the prime reason that motivated their decision to refuse supply to the Applicant is their decision to have their birds processed by Sunnymel. This would allow for continued vertical integration of Westco’s enterprise. In essence, the Respondents say that it was no more than a business decision.

[292] We are of the view that we need not decide whether the Respondents’ conduct, which led to its decision to terminate supply to the Applicant, is misconduct, as alleged by the Applicant, or tough negotiations motivated by a business decision, as argued by the Respondents. In our view a determination is not necessary in the circumstances because of our above finding that there is

not “ample supply” of chickens in the market. In the context of a section 75 application, for a remedy to be available, all the requirements in subsection 75(1) must be met.

[293] We now turn to the final requirement under subsection 75(1) and consider whether the refusal is having or is likely to have an adverse effect on competition in a market.

F. Has the Applicant established that the refusal to deal is having or is likely to have an adverse effect on competition in a market pursuant to paragraph 75(1)(e) of the Act?

[294] Under paragraph 75(1)(e), the market of concern is different from the market defined for the purposes of paragraph 75(1)(a). Our analysis will involve the “downstream market”. We will begin by defining this market, which includes defining the relevant product market and the relevant geographic market.

(1) Relevant product market

[295] Neither party disputes that the product market includes processed chicken. The only question is whether “further processed chicken” and “air-chilled chicken” constitute separate and distinct product markets. The parties adopt different approaches to this question.

[296] In its Pleadings, the Applicant states that the refusal to deal is likely to have an adverse effect on competition “at various levels of the market for chicken”. The Applicant’s final submissions also refer to “sub-markets”. Dr. Ware refers to both the market for “processed chicken” and the “market for further processed chicken” in his reports. In his examination in chief, Dr. Ware stated that there can be subcategories within the broad category of processed chicken such as air-chilled chicken, but said that he “didn’t have even close to adequate data” that would allow him to make that identification. He also stated, however, that the market for further processing of chicken constituted another product market in this case.

[297] The Respondents assert that the relevant product market is processed chicken. Ms. Sanderson’s report also refers to “processed chicken”. In cross-examination, when asked whether air-chilled products are different from water-chilled products, Ms. Sanderson stated the following:

They may be different products, but they may be part of the same relevant product market. So for example, because this happens with differentiated products, it may be the case that you’re unable to increase the price of an air-chill product by a substantial amount, because if you were to do that, customers will substitute to water-chill products. If there’s sufficient substitution possibilities between those products at a market level, then they might be part of the same relevant product market even though they’re distinguished from each other.

[298] With regards to air-chilled chicken and water-chilled chicken, we acknowledge, as did Dr. Ware, that they may well be “subcategories for processed chicken”. However, there is

insufficient evidence on the record to support a conclusion that they are separate product markets.

[299] We come to the same conclusion with respect to further processed chickens. There is a paucity of evidence on this issue. Counsel for the Applicant acknowledged that stakeholders do not always agree on the definition of “further processing”. This disagreement may lie in the fact that there are different types of further processing operations such as boning, cutting, and cooking. Mr. Donahue referred to different “grades of further processing” and responded as follows in cross-examination when asked about the Applicant’s processing operations:

[CONFIDENTIAL]

[300] Dr. Ware described the product market for further processed chicken as “basically anything that happens to the chicken after it’s been killed and possibly cut up”. However, without further evidence, we are unable to conclude on the record before us that further processed chicken constitutes a separate product market.

[301] We therefore find that the product market for the purpose of paragraph 75(1)(e) is processed chicken. We agree that further processed chicken forms part of the same relevant product market in the circumstances.

(2) Relevant geographic market

[302] The parties disagree on the definition of the relevant geographic market. The dispute turns on whether Ontario or parts of Ontario should be included in the geographic market.

(a) Positions of the parties

[303] In its Pleadings, the Applicant submits that the relevant geographic market for the purposes of paragraph 75(1)(e) is Quebec and the Maritimes. In its submissions, however, the Applicant takes the position that provincial boundaries are artificial boundaries and distances itself from a formal definition of the geographic market. When asked about the Applicant’s submissions concerning the relevant geographic market, counsel for the Applicant stated:

All right. In my argument I don’t look at geographic. I think if you remember Dr. Ware said, he said provincial boundaries are somewhat artificial lines that are drawn and they may not be relevant for the purpose of the market analysis. Because the real question is, is what is the market that’s affected?

...

My point though is that in trying to draw --I submit that it’s somewhat artificial to use geography as the defining characteristics of the behaviour of a market where the element that is concern is the impact, wherever it may fall, of the particular behaviour. We have to look at the impact of the behaviour wherever it may fall, and if it falls within three miles of Toronto, fine, but if it falls 1,000 miles away it’s still relevant for the purpose of the 75(1)(e) analysis.

[304] Dr. Ware did express the view that relevant markets need not necessarily coincide with provincial borders. Using provincial boundaries, however, he found that the “best definition” of the geographic market is one that consists of Quebec, New Brunswick, Nova Scotia and Prince Edward Island.

[305] The Respondents are of the view that the relevant geographic market is the region comprising Ontario, Quebec and the Maritimes.

(b) Analysis

[306] Dr. Ware is of the opinion that the hypothetical monopolist test should be used to define the relevant geographic market, but expresses the view that the data are insufficient to determine the precise boundaries of the market pursuant to such a test:

My conclusion was, and is, that the geographic market for processed chicken is likely -- well, let me put it this way, well described by the boundary of Quebec, New Brunswick and the maritime provinces, not including Newfoundland, but it's certainly smaller than the boundary of those same provinces and the Province of Ontario. That's my conclusion. The reason -- so my reasoning that I have used in reaching this conclusion is indirect. It's indirect because, as I said, I don't have the ability -- I mean, what I need to do to make a formal precise conclusion of that kind is I need to -- I need to actually estimate the ability of a hypothetical monopolist who controlled the supply within Quebec, New Brunswick and the other maritime provinces too if they were to act as one to increase the price. That would give me the answer. That would give me a precise answer, but I don't have the ability to do that. I need a lot of data on demand elasticities and supply, behaviour of all the relevant producers. I don't have that information, but I do have indirect information and there are various indirect indicators that one can use to assess whether or not the geographic market is, in a sense, broad or relatively narrow. And, again, I do stress that because this is both a spatially and a product differentiated market, that geographic market definition is going to be a rather fuzzy sort of concept because if you have -- you know, clearly these producers are separated by space. We're talking about a lot of territory here.

[307] Instead, Dr. Ware therefore relies on indirect indicators, namely (1) the predicted effect of a hypothetical Nadeau/Olymel merger on the price of Nadeau's products; (2) concerns expressed by Nadeau's customers regarding its possible exit from the market; (3) the apparent clustering of processors; (4) transportation costs; (5) price relationships between different geographic areas as described in the *Merger Enforcement Guidelines*; and (6) the regulatory limitation of the aggregate supply of chickens available to the market.

[308] Ms. Sanderson is not explicit about the test she uses to define the geographic market. The evidence on which she relies includes (1) Nadeau's and Olymel's historic shipping patterns; (2) shipping distances; (3) transportation costs; and (4) price comparisons.

[309] While the usual approach to market definition under paragraph 75(1)(a) is based on the ability of the applicant to substitute in favour of alternative service or material inputs without being substantially affected, the Tribunal clarified in *B-Filer*, as mentioned earlier in these reasons, that the approach need not be the same under paragraph 75(1)(e):

[78] In our view, while the addition of paragraph 75(1)(e) changes the context and purpose of section 75 to the extent that there is now a focus on determining whether refusals to deal result in adverse effects on competition, this amendment does not change the ultimate concern of 75(1)(a). That concern, as stated in *Chrysler*, is the effect on the business of the person refused supply. Since the market of concern under 75(1)(e) need not be the market of concern in paragraphs 75(1)(a) and 75(1)(b), the market that best suits the particular context and purpose of 75(1)(e) can be separately considered when considering that paragraph of the Act.

[310] Therefore, the conventional hypothetical monopolist approach to market definition which, in essence, relies on the practical indicia suggested in the *Merger Enforcement Guidelines*, can be used under paragraph 75(1)(e).

[311] Both the Applicant and the Respondents ultimately make use of the practical indicia suggested in the *Merger Enforcement Guidelines* and commonly used in connection with geographic market definition in merger cases to support their proposed market definitions. Practical indicia include transportation costs, price relationships, shipping patterns and trade views.

[312] Our approach to determining the relevant geographic market will involve considering the above-mentioned practical indicia as well as the following indicators suggested by Dr. Ware: (1) the predicted effect of a hypothetical Nadeau/Olymel merger on the price of the Applicant's products; (2) concerns expressed by the Applicant's customers regarding the Applicant's possible exit from the market; (3) the apparent clustering of processors; and (4) the regulatory limitation of the aggregate supply of chickens available to the market. We will consider each of these indicators in turn.

(i) The predicted effect of a hypothetical Nadeau/Olymel merger

[313] Dr. Ware is of the opinion that an Olymel/Nadeau merger would result in an increase of approximately [CONFIDENTIAL]% in the price of processed chicken. [CONFIDENTIAL]. On the assumption that the geographic market would consist of Ontario, Quebec and the Maritimes, Nadeau would hold a 7% market share in such a market. Dr. Ware reasons that a "7% market share" is not sufficient to produce a price increase of nearly 2% and concludes that these data point to a narrower geographic market.

[314] Ms. Sanderson notes that the [CONFIDENTIAL]. She adds that Dr. Ware did not question the Nadeau management team's belief or provide any analysis to support the [CONFIDENTIAL]% price increase upon which he founded his opinion. She also notes that Olymel's managers, "who are in a more informed position to assess Olymel's ability to raise

prices to Olymel customers should the Partnership acquire the St. François facility”, did “not identify price increases as part of their internal valuation of the acquisition”.

[315] We note that the Projet Westco Report indicates that [CONFIDENTIAL]. While this may represent Olymel’s view, this does not necessarily imply either higher prices in general or a [CONFIDENTIAL]% price increase in particular.

[316] We are also of the view that Dr. Ware’s opinion regarding the effect of a hypothetical merger on the price of processed chicken is of little assistance in determining the geographic market. Dr. Ware’s market share analysis is incomplete in its own terms in that it does not appear to take into account the combined market share of the merging parties. Further, apart from the belief of the Applicant’s management team reflected in the Robinson Report, there is simply no explanation to support the conclusion that the merger would result in a [CONFIDENTIAL]% price increase.

(ii) Concerns expressed by the Applicant’s customers

[317] As a second indicator, Dr. Ware cites the concerns of some of the Applicant’s customers that prices would increase and service would deteriorate if the Applicant were to cease to be a competitor. He points, for example, to a letter written by Ms. Goodz, the president of Riverview, who wrote that “[i]f the Nadeau plant were to shut down, or even if it were to be acquired by a competitor, I would definitely foresee that prices would definitely rise, and supply problems would occur”. Dr. Ware is of the opinion that these customers would not be concerned if the geographic market were broader, that is, if it included Ontario processors; the fact that these customers expect prices to rise and supplies to be restricted indicates that the geographic market is significantly smaller.

[318] In her report, Ms. Sanderson closely examines each of the letters cited by Dr. Ware and notes that in many cases, alternative sources of supply exist.

[319] Complaints by customers will be dealt with more comprehensively later in these reasons when we consider the adverse effect on competition. In the absence of further corroborating evidence to support complaining customers’ concerns about price increases and supply shortages, very little can be concluded in terms of their impact on geographic market definition.

[320] First, as pointed out by Ms. Sanderson, many of the complaining customers did not investigate alternative sources of supply in the event the Applicant is unable to continue supplying chickens. This was the case of the general manager of UPGC, also Prizm’s chief purchasing officer, who admitted in cross-examination that he had not sought out other sources of supply.

[321] Second, there is no evidence to establish the relative importance of these complaints in respect to the geographic definition of the market. For instance, Puddy, one of the largest complaining customers, is located in the Greater Toronto Area and is closer to Ontario processors and Quebec processors than it is to the Applicant. Consequently, Puddy’s complaint does not point to a narrower geographic market.

[322] On the evidence, it is difficult to assess the relative importance of customers' complaints and concerns. Many of the complaints are not based on the geographic proximity of competing suppliers. For these reasons we find this indicator to be of little utility in determining the geographic market and consequently conclude that no inference can be drawn for defining the geographic market.

(iii) The apparent clustering of processors

[323] Also regarded as being instructive by Dr. Ware is a map of Eastern Canada (Figure 1 in his Expert Report) that appears to show that there is a cluster of processors around the Toronto area. Dr. Ware testified that :

...there are two distinct clusters of poultry processing plants in Eastern Canada. Given the significance of transportation costs, the cluster of processing plants west of Toronto are unlikely to be part of the same market as those in Quebec, New Brunswick and Nova Scotia (the plant in Newfoundland is supplied by, and supplies to, only Newfoundland).

[324] While admitting that this was not a "super scientific approach", he stated that these clusters illustrate "a kind of density of economic activity that they are more likely - the ones close together - are more likely to be in the same geographic area than the ones that are further away".

[325] While Dr. Ware's definition of clustering is somewhat vague, we accept the general proposition that plants that are close together are more likely to be in the same geographic market than plants that are further away from each other. There are, however, many factors (such as the availability of the requisite inputs) that bear on the location of plants. Whether plants in different locations are in the same geographic market depends on the characteristics of the product concerned, in particular, the distance over which it can be shipped economically. Looking at plant locations is simply the starting point of the analysis required to determine the boundaries of the geographic market. In the circumstances, this indicator is of little assistance in defining the geographic market.

(iv) Regulatory limitations

[326] At paragraph 23 of his first report, Dr. Ware also suggests that another reason why geographic markets for processed chicken are smaller than might be expected from their basic manufacturing characteristics is because the supply elasticities for live chickens are kept low by supply management policies. If the price of processed chicken rises in one area, potential importers will have to bid chicken away from consumers in other areas.

[327] Ms. Sanderson responds that the inelasticity of the supply of live chickens is common throughout Canada and that there is no reason to believe that it is possible to distinguish Quebec and the Maritimes from Ontario or the rest of Canada on this basis.

[328] It is true that under the marketing board regime, additional chickens can be shipped to one geographic area only by diverting them from another, but this is also true within individual provinces. We therefore agree with Ms. Sanderson that there is no reason to distinguish Quebec and the Maritimes from Ontario on this basis.

(v) Transportation costs

[329] In his first report, Dr. Ware relies on the Projet Westco Report to conclude that the Applicant's transportation cost for processed chicken is \$[CONFIDENTIAL]/kg. In her expert report, Ms. Sanderson states that if the transportation cost is \$[CONFIDENTIAL]/kg, it is less than [CONFIDENTIAL]% of the average price of processed chicken; she therefore notes that large shipments of processed chicken can be made over substantial distances because of low transportation costs. In this regard, she testified that the analysis should focus on the cost to ship processed chicken relative to the price, rather than the cost of processed chicken.

[330] At paragraph 20 of his reply report, Dr. Ware points to data on sales for quota period A-76 to conclude that the average transportation cost as a proportion of the sale price is not [CONFIDENTIAL]%, but rather [CONFIDENTIAL]%. Prior to the hearing, Westco objected to paragraph 20 and other paragraphs of Dr. Ware's reply report on the basis that it failed to constitute a proper reply to Ms. Sanderson's report. In an order dated November 7, 2008, the Tribunal held that the evidence would be admitted; Westco was granted the latitude to address this issue at the hearing (see *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2008 Comp. Trib. 31).

[331] Dr. Ware testified that transportation costs matter because customers say they matter and because the figure of [CONFIDENTIAL]% is significant. He failed, however, to explain the significance of [CONFIDENTIAL]% or to point to any customer who stated that transportation costs matter *per se*.

[332] In her examination in chief, Ms. Sanderson testified that the figure of [CONFIDENTIAL]% is incorrect, as it is the result of an error in the sales data on which Dr. Ware relied. She found that transportation costs for Nadeau averaged [CONFIDENTIAL]% of its sales revenue of 2007. Ms. Sanderson testified that it is significant that transportation costs are less than 5% of the price of the product because this would allow competitors to undercut a 5% price increase by a hypothetical monopolist.

[333] We agree with Ms. Sanderson that Nadeau's average transportation cost was [CONFIDENTIAL]% of the average price of its products in 2007. As an average, however, it does not tell us what the fixed component (loading and unloading) of transportation costs is and how the variable component of transportation costs increases with distance. As a consequence, it does not speak conclusively to the boundaries of the geographic market. Nevertheless, Nadeau's average transportation cost does reflect the cost of relatively large shipments in excess of 1,000 km because we know that one of the Applicant's largest customers, [CONFIDENTIAL], is located in Mississauga, Ontario. The evidence that the Applicant's transportation costs for processed chicken averaged [CONFIDENTIAL]% of the price of its products certainly implies that transportation costs are not prohibitive even over significant distances. It could also imply

that transportation costs would not prevent an Ontario processor from undercutting a 5% price increase by a New Brunswick or Quebec producer and vice versa. The stated 5% price increase refers to the hypothetical monopolist test as articulated in the *Merger Enforcement Guidelines*².

(vi) Price comparisons

[334] The expert economists make a variety of price comparisons, none of which are entirely satisfactory.

[335] At paragraph 21 of his initial report, Dr. Ware refers to paragraph 3.25 of the *Merger Enforcement Guidelines*, which states that “[e]vidence that prices in a distant area have historically either exceeded or have been lower than prices in the candidate geographic market by more than transportation costs may indicate that the two areas are in separate relevant markets, for reasons that go beyond transportation costs”. He then compares retail prices for various cuts of processed chicken in Ontario, Quebec and New Brunswick because wholesale price data are sparse. Dr. Ware finds that retail prices of processed chicken are higher in New Brunswick than in Ontario and assumes that this implies that wholesale prices are also higher.

[336] In her report, Ms. Sanderson notes that a review of the retail price data for the products set out in Dr. Ware’s report shows that the average retail price for those products is \$[CONFIDENTIAL] in Ontario, \$[CONFIDENTIAL] in Quebec, and \$[CONFIDENTIAL] in New Brunswick, making average prices 17% lower in Ontario and 20% lower in Quebec than in New Brunswick. At first glance, this would mean that Quebec is not in the same market as New Brunswick and that therefore Quebec-based Olymel does not compete with the Applicant. Ms. Sanderson finds that such a conclusion is nonsensical and that conclusions of this type cannot be drawn from retail price comparisons. [CONFIDENTIAL].

[337] In his reply report, Dr. Ware uses another source of data to construct average wholesale prices for the Applicant’s sales by province. Dr. Ware conducts an analysis of Nadeau’s 2007 sales and finds that when the analysis is confined to products sold in all three provinces, the weighted average wholesale price was \$[CONFIDENTIAL] in Ontario, \$[CONFIDENTIAL] in Quebec and \$[CONFIDENTIAL] in New Brunswick. [CONFIDENTIAL].

[338] At the hearing, Ms. Sanderson produced a price comparison of the average Ontario, Quebec and New Brunswick prices of the Applicant’s five biggest-selling products in Ontario. Ms. Sanderson testified that these top five products represent [CONFIDENTIAL]% of the Applicant’s sales in Ontario. Her bar graph is reproduced as Table 1 below.

Table 1

[CONFIDENTIAL]

[339] Ms. Sanderson stated that this comparison shows that the prices are basically the same. [CONFIDENTIAL].

[340] During her cross-examination, Ms. Sanderson agreed that [CONFIDENTIAL] of the [CONFIDENTIAL] products sold in all three provinces were priced higher in New Brunswick than in Ontario. Further, [CONFIDENTIAL] of the [CONFIDENTIAL] products were priced higher in New Brunswick than in both Quebec and Ontario. Ms. Sanderson stated that this was consistent with the weighted average price being [CONFIDENTIAL] in New Brunswick than in Ontario.

[341] Both experts agreed that a comparison of the Applicant's weighted average wholesale prices of products sold in all three provinces, Ontario, Quebec and New Brunswick, in 2007 was the most informative. As mentioned above, the comparison was confined to [CONFIDENTIAL] products sold in all three provinces. The results were as follows: Ontario, \$[CONFIDENTIAL]/kg; Quebec, \$[CONFIDENTIAL]/kg; and New Brunswick, \$[CONFIDENTIAL]/kg. The Applicant's weighted average price in Ontario was [CONFIDENTIAL] and its price in Quebec [CONFIDENTIAL] than in New Brunswick during 2007.

[342] The extent to which the observed differences in the weighted average prices are due to differences in the mix of products sold in each province and to the average size of the customers in each province is unclear. The same is true of the extent to which these averages might vary from year to year. The above data support the contention that differences amongst the three provinces are relatively small. There is no expert evidence on price differentials that would allow for any inference to be drawn with respect to the relationship between prices in Prince Edward Island and Nova Scotia and the remainder of the market.

[343] With respect to the differences between New Brunswick and Quebec prices, the Applicant has already defined New Brunswick and Quebec as being in the same geographic market. The observation of price differences between New Brunswick and Quebec merely serves to emphasize that there is a certain amount of underlying price variability within a geographic market.

(vii) Shipping Patterns

[344] In Ms. Sanderson's view, processed chicken can be shipped economically for considerable distances. She notes that the Applicant's revenues from sales in Ontario account for [CONFIDENTIAL]% of the Applicant's sales revenues whereas the Applicant's revenues from sales in New Brunswick and Nova Scotia account for [CONFIDENTIAL]% and [CONFIDENTIAL]% respectively of the Applicant's sales revenue. She states that the Applicant's furthest Ontario customer is located [CONFIDENTIAL]km from the St-François Plant. Relying on the Applicant's customer data for quota period [CONFIDENTIAL], she concluded that the Applicant makes frequent and large shipments of processed chicken every day to very distant customers, including customers based in Ontario. In her opinion, the fact that the Applicant can profitably ship processed chicken to Ontario is clear evidence that Quebec and Ontario processors can profitably ship to customers located in New Brunswick and Nova Scotia.

[345] Ms. Sanderson also finds that the Applicant's customers based in Quebec and Ontario have access to alternative nearby processors and that in many instances, the closest processing facility is not the Applicant's plant.

[346] She adds that Olymel makes [CONFIDENTIAL]% of its sales in Ontario and that over [CONFIDENTIAL]% of those sales are made to customers located in the Greater Toronto Area. Ms. Sanderson concludes that, given that Olymel can profitably ship processed chicken 475 km to Toronto, Ontario processors could profitably ship their products the same distance in the other direction:

... it is self-evident that Ontario-based processors in the GTA can also profitably ship product to Montreal and throughout Quebec, which they do. Consequently, the prices that Olymel charges to its Quebec customers are influenced by competition from Ontario processors and as a result, Nadeau's prices to its Quebec customers are also influenced by Ontario processors given the competition that exists between Nadeau and Olymel for sales in Quebec.

[347] In cross-examination, Ms. Sanderson conceded that she had no direct evidence of Ontario processors' shipping their products to customers in New Brunswick. She also agreed that Olymel does not have significant sales in New Brunswick. In her report, Ms. Sanderson stated that Olymel makes more sales to customers in the western provinces than it does to customers in the Maritimes.

[348] We find the fact that Olymel sells only a small amount of processed chicken in New Brunswick does not support the position that Ontario is not part of the relevant market. Dr. Ware has defined the relevant market to include both New Brunswick and Quebec so that the lack of sales by Olymel (a Quebec-based processor) in New Brunswick merely emphasizes that a producer in a relevant geographic market need not have sales in every part of it at all times.

[349] It is not disputed that the Applicant ships processed chicken to Quebec and Ontario and that Olymel also does so. There is some evidence that processed chicken is shipped from Ontario to Quebec and the Maritimes. Mr. McHaffie testified that Ontario-based Puddy delivers to [CONFIDENTIAL].

[350] The Brodeur affidavit states that Olymel buys 210,000 birds per week from other primary processors but that the great majority of these purchases are from Exceldor. Mr. Brodeur states that Olymel has purchased chicken for further processing from Ontario processors such as Maple Leaf and from the United States. Ms. Goodz testified that [CONFIDENTIAL].

[351] Mr. Brodeur testified that McDonald's chicken nuggets are all made in Ontario and that Costco in Ontario is supplied by Exceldor.

[352] Based on the above evidence, we find that processed chicken can be and is shipped profitably for fairly long distances, over 1,000 km in one major instance. A considerable fraction of Nadeau's and Olymel's sales are in Ontario's Toronto area. Olymel ships some processed chicken products further still. While there is no reason to believe that processed chicken could

not be shipped equivalent distances to customers east of Ontario, there is less evidence of such shipments.

(viii) Trade views

[353] In her expert report, Ms. Sanderson relies on the Serecon Report to the effect that Nova Scotia must compete in a national chicken market despite being located in a high-cost region. The Serecon Report refers to the fact that current production in Nova Scotia exceeds consumption within the province and that this is why “NS chicken has to compete with production from outside the region not only in NS but also in Quebec and Ontario”.

[354] In cross-examination, Mr. Feenstra agreed that the Applicant competes with Ontario and Quebec processors for its business in the Greater Toronto Area and that it competes with Ontario processors that want to sell into Quebec for the Quebec business. During his examination for discovery, he stated that “[p]rocessed product travels across the country back and forth all the time”.

[355] A number of witnesses testified that they consider Ontario and Quebec to be in the same market. Mr. McHaffie stated that “Ontario processors can sell into Quebec at their whim and Quebec processors can sell here at their whim”. Mr. Brodeur expressed the view that Quebec and Ontario constitute a single market. Mr. Ellis stated that Sunchef competes with processors in Ontario and Quebec.

(ix) Analysis and conclusion

[356] It is not disputed that Quebec and Ontario are in the same geographic market. Counsel for the Applicant conceded this:

We have not suggested that Ontario and Quebec are not in the same market with each other. There’s no question that there’s competition between Ontario and Quebec. And you heard Mr. Lefebvre talk about a central Canada market. That’s right through the evidence, not just of our witnesses but of all of them. Ontario and Quebec compete with each other.

The issue, in my respectful submission, for this Tribunal is not that at all, not this issue, but rather the issue as to whether there is competition between Ontario and New Brunswick, because the question was whether the scope of the geographic market -- we, as I told you at the outset, accept that it’s New Brunswick and Quebec. The question is does it extend as far as Ontario?

[357] As mentioned above, Dr. Ware finds that the relevant geographic market consists of Quebec, New Brunswick, Nova Scotia and Prince Edward Island. Ms. Sanderson is of the opinion that the relevant market consists of Ontario, Quebec and the Maritimes. The experts thus agree that New Brunswick and Quebec are in the same market. Further, the Applicant concedes that Quebec and Ontario are in the same market. If Ontario and the Maritimes are both in the

same market as Quebec, it is difficult to escape the conclusion that they are in the same market as each other. The implication is that Ontario, Quebec, New Brunswick, Nova Scotia and Prince Edward Island are part of the same geographic market.

[358] Put another way, Quebec processors compete with Ontario-based processors as well as with New Brunswick and Nova Scotia-based processors. Quebec processors discipline and are disciplined by both Ontario and Maritime-based processors.

[359] Put yet another way, according to the Applicant's argument, even if Nadeau were to disappear, Olymel would continue to be disciplined by competition from Ontario processors as well as from Exceldor and ACA on the [CONFIDENTIAL]% of its sales that are in Quebec and Ontario. There is nothing on the record to indicate that this competitive discipline would not apply to any sales that Olymel or any other competitor might make to customers located in New Brunswick in the event that Nadeau disappears.

[360] In our view, the evidence relating to both the practical indicia suggested in the *Merger Enforcement Guidelines*, including transportation costs, price relationships, shipping patterns and trade views, and the indicators relied on by Dr. Ware support the argument that the Ontario processors should be included in the relevant geographic market. The relevant geographic market is therefore defined to include processors in New Brunswick, Nova Scotia, Prince Edward Island, Quebec and Ontario.

[361] Having defined the relevant product and geographic market for the purposes of paragraph 75(1)(e), we now turn to the requirement that the refusal to deal is having or is likely to have an adverse effect on competition in a market.

(3) Adverse effect on competition in a market

(a) Meaning of adverse effect on competition

[362] We first consider what is meant by "an adverse effect on competition in a market". We begin with the position advanced by the parties.

[363] The Applicant submits that by deliberately omitting the word "substantial" and using the word "adverse", "Parliament must be taken to have accepted that a remedy should be granted at the suit of a private litigant on a showing of *any* non-trivial adverse effect on *any* market" (emphasis in original).

[364] The Respondent Westco submits that adverse effect, while a lower threshold than substantial effect, must still incorporate a notion of market power or dominant market position; it cannot just be a trivial reduction in competition. Westco contends that the test established in *B-Filer* does not admit a finding of adverse effect on competition if only one competitor is affected and notes that protecting competition cannot be reduced to protecting competitors or a select handful of them.

[365] In *B-Filer*, beginning at paragraph 195, the Tribunal had occasion to consider the final element of subsection 75(1) of the Act. It conducted a comprehensive review of the case law in interpreting the phrase “competition in a market”. It was guided by prior decisions that dealt with how paragraph 79(1)(c) of the abuse of dominance provision of the Act had been interpreted. The Tribunal in *B-Filer* agreed that paragraph 75(1)(e) demands a relative and comparative assessment of the market in two time frames, namely with the refusal to deal and without the refusal to deal. It concluded as follows at paragraph 200 of its decision:

Thus, we conclude that paragraph 75(1)(e) of the Act similarly requires an assessment of the competitiveness or likely competitiveness of a market with, and without, the refusal to deal.

[366] The Tribunal went on to consider what is meant by “competitiveness”. It considered the case law on the issue under the abuse and merger provisions of the Act. The Tribunal noted that adverse effects in a market are generally likely to manifest themselves in the form of an increase in price, the preservation of a price that would otherwise have been lower, a decrease in the quality of products sold in the market or a decrease in the variety of products made available to buyers. The Tribunal noted that these and other competitive factors can only be adversely affected by the exercise of market power. The Tribunal applied this reasoning to the refusal to deal provision and concluded:

Consequently, in our view, for a refusal to deal to have an adverse effect on a market, the remaining market participants must be placed in a position, as result of the refusal, of created, enhanced or preserved market power.

[367] The Tribunal then distinguished between the term “substantial” found in other provisions of the Act and the term “adverse” used in section 75. It found that the difference lies in the degree of the effect and that “adverse”, according to its plain meaning, is a lower threshold than “substantial”.

[368] Regarding the requirement that the refusal to deal “is likely to have” such adverse effect, based on earlier case law, the Tribunal found the requirement to establish the likelihood of an adverse effect requires proof that such an event is “probable” and not merely possible.

[369] We agree with and adopt the approach articulated in *B-Filer*, above, regarding the meaning of adverse effect on a market. Consequently, our analysis under paragraph 75(1)(e) will require consideration of whether the refusal creates, enhances or preserves the market power of the remaining market participants. In *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1, the Tribunal noted that “[m]arket power is generally accepted to mean an ability to set prices above competitive levels for a considerable period”. In that case, the Tribunal recognized that this valid conceptual approach is not one that can be readily applied. It held that the factors that need be considered in evaluating market power will vary from case to case but ordinarily include indicators such as market share and entry barriers. As indicated above in *B-Filer*, the impact on indicators such as price, quality and variety of the product must also be considered in assessing adverse effect. It is also understood that without

market power there can be no adverse effect in a market. Our analysis under paragraph 75(1)(e) will therefore lead us to consider the following indicators in the circumstances of this case:

1. Market share and market concentration;
2. Barriers to entry;
3. Impact on prices;
4. The effect of the refusal on rivals' costs;
5. Impact on quality and variety of the product;
6. Possible foreclosure of supply to other processors in the market; and
7. Impact of possible elimination of an efficient processor.

[370] Before proceeding to our analysis of the above indicators, it is useful to first set out the respective positions of the parties on adverse effect under paragraph 75(1)(e) of the Act.

(b) Positions of the parties on “adverse effect on competition”

[371] The Applicant submits that the evidence adduced establishes the likelihood of many scenarios involving adverse effects on competition in various markets and sub-markets. In its written submissions, the Applicant states that these adverse effects include the following:

- (a) the adverse effect on competition entailed by the increase in “live price” caused by a “premium war”;
- (b) the adverse effect on competition resulting from the “raising of a rival’s costs”, in that it is admitted that Nadeau is a rival of Olymel’s (the Partnership) and the refusal to deal will admittedly (at a minimum) raise its costs;
- (c) the adverse effect on non-price dimensions of competition, namely product quality, product choice and service;
- (d) the adverse effects on the price (money) dimension of competition, given the likelihood that the live cost increases caused by a premium war, if these cannot be passed on by Nadeau and other processors to their customers;
- (e) the likelihood that the elimination of Nadeau would create market power for Olymel in the Maritimes, where it previously had none (“un percée sur le marché des Maritimes”);
- (f) the “raising of rival’s costs” among Nadeau’s customers who are competitors of Olymel’s at the further processing levels of the market;
- (g) Olymel’s enhanced market power *vis-à-vis* the other players in the market, even assuming that the geographic dimensions of the market encompass Ontario; and
- (h) the possible elimination of the most efficient chicken processing plant in Canada.

[372] In the Applicant’s argument, any of the adverse effects listed above would flow from the Respondents’ refusal to supply. We summarize below the Applicant’s explanation of the alleged adverse effects.

[373] The Applicant contends that the resulting premium war amongst processors will lead to an increase in the cost of price of live chickens which will generate “severe repercussions on the price of chicken at the retail level”. The Applicant submits that raising its costs has an anti-

competitive effect because it would weaken the Applicant to the benefit of Olymel. It is further argued that the Respondents' refusal to supply will threaten the Applicant's very viability and that its elimination will have an immediate effect on product quality and availability throughout the Maritimes. The Applicant states that many of its customers are also further processors that compete directly with Olymel. It is argued that the weakening or elimination of the Applicant would prohibitively increase its costs, even if it is able to obtain supply, and thus imperil its businesses. Finally, the Applicant contends that it "operates the most modern and efficient processing plant in Canada" and that for this reason alone, its elimination would have an adverse effect on competition in the market.

[374] In oral argument, counsel for the Applicant argued that except for (g) listed above, which provides for a market power analysis, none of the alleged adverse effects require an exercise of market power by Olymel. It is argued, for instance, that the disappearance of a processor that is unable to remain viable has nothing to do with Olymel's market power but is nonetheless an adverse effect on competition.

[375] In his report, Dr. Ware relies largely on the possible shift in market share from Nadeau to Olymel to support his inference that the alleged refusal to deal would have an adverse effect on competition. He argues that if Olymel were to experience the same increase in market share as a result of a merger or acquisition, the Competition Bureau would deem the merger or acquisition concerned as likely to lessen competition substantially and would challenge it.

[376] The Respondent Westco submits that the guidelines on mergers and abuse of dominant position state that there is no market power where market share is below a threshold of 35%. It argues that Westco's refusal will not create, maintain, or enhance the market power of Westco or any other entity in the relevant market because no entity will have a sufficient market share as a result of the refusal to supply, even if Nadeau ceased its operations. Westco further submits that the evidence shows that the other indicia of market power, be they direct or indirect, have not been met in this case.

[377] Ms. Sanderson focuses on the question of whether Olymel would gain market power or enhance it as a result of the refusal. To answer this question, Ms. Sanderson suggests the following analytical steps: (1) define the relevant market; (2) examine the position of the firm concerned with that of other firms in the market (using market share and concentration); (3) examine the ability of customers to switch suppliers; and (4) examine the ability of rivals to expand their supply. In her view, the inference of an adverse effect cannot be drawn on the basis of market share and concentration evidence alone.

[378] In his reply report, Dr. Ware states that the increase in Olymel's market share coupled with what he calls the degradation in product quality and disruption in supply to certain customers resulting from Nadeau's possible inability to continue to supply them constitutes an adverse effect on competition. Dr. Ware relies on affidavits filed by certain customers of the Applicant to support his conclusion that the refusal will decrease quality and disrupt supply. In support of his conclusion, Dr. Ware points to the Projet Westco Report wherein it is stated that [CONFIDENTIAL].

(c) Analysis

[379] As stated earlier, we adopt the approach set out in *B-Filer*, which provides that for a refusal to deal to have an adverse effect on a market, the remaining market participants must, as a result of the refusal, be placed in a position of created, enhanced or preserved market power. As a consequence we necessarily reject the Applicant’s submission that the exercise of market power need not be established for there to be an adverse effect on competition in a market.

[380] We acknowledge that neither Westco, nor any of the Respondents for that matter, are involved in the slaughter of chickens or the sale of processed chicken. Strictly speaking, the Respondents have no market share in this downstream market. However, the arrangement under which Olymel will process the Respondents’ chickens is a [CONFIDENTIAL]partnership. While the interests of this Sunnymel partnership are not fully aligned with those of Olymel, it is reasonable to treat the Sunnymel partnership and Olymel as a single entity for purposes of the analysis of the competitiveness of the Ontario-Quebec-Maritimes market for processed chicken. We therefore accept that adverse effect under paragraph 75(1)(e) may be analysed by measuring the impact on the market power of the said partnership.

[381] We now turn to the above-mentioned indicators which we will consider in our evaluation of market power.

(i) Market share and market concentration

- *Evidence of the parties*

[382] Having defined the geographic market for processed chicken as Quebec, New Brunswick, Nova Scotia and Prince Edward Island, Dr. Ware calculates the market shares of the processors in Table 4 of his expert report as follows:

Nadeau	[CONFIDENTIAL]%
Olymel	[CONFIDENTIAL]%
Exceldor	[CONFIDENTIAL]%
ACA Co-op	[CONFIDENTIAL]%
Other (Quebec)	[CONFIDENTIAL]%

[383] The Herfindahl-Hirschman Index (“HHI”) is a common measure of industry concentration that takes into account all participants in a relevant market and gives proportionately greater weight to the market shares of larger firms. The HHI is defined as the sum of the squares of the respective market shares of each competitor in the market.

[384] Dr. Ware calculates the HHI for this market to be 3062. He also describes Olymel as “the dominant processor” in that market. Ms. Sanderson correctly points out that the market shares Dr. Ware reports do not support the characterization of Olymel as dominant given Exceldor’s market share of [CONFIDENTIAL]%.

[385] We have concluded that the geographic market is broader than the one defined by Dr. Ware and that it should include Ontario-based processors. This has the effect of reducing both the market shares of the processors listed in Dr. Ware's Table 4 and the market concentration.

[386] We note, however, that even according to his own definition of the geographic market, Dr. Ware's estimates of market share and market concentration are imperfect. The market shares Dr. Ware reports are based on *slaughter* (number of chickens slaughtered) rather than sales of processed chicken to customers in the relevant market. However, slaughter data were the only data available to the experts and the Tribunal.

[387] It is known that [CONFIDENTIAL]% of Olymel's total sales are to customers in Ontario. According to Dr. Ware's definition of the relevant geographic market, these would be "exports". Similarly, the Applicant "exports" [CONFIDENTIAL]% of its sales to Ontario. There is little evidence regarding Exceldor's sales outside the market as defined by Dr. Ware. It is also the case that Olymel, Exceldor, the Applicant and ACA are not the only processors competing in the geographic market as Dr. Ware defines it. There is some evidence that Ontario processors compete in this market. For example, Mr. Feenstra testified that it is safe to assume that the Applicant competes with the Ontario processors that want to sell into Quebec. In addition to excluding the "export" sales of Olymel, Exceldor, the Applicant and ACA, a proper market share calculation would include the share of "imports" from Ontario and elsewhere.

[388] Dr. Ware conceded in cross-examination that including only the sales that were made within the relevant market "might be a better way to do it". He stated, however, that he did not have the necessary data to make those calculations:

Ms. Healey: Right. Okay. So back to the issue of assessing shares of sales in Quebec and the Maritimes: You would only include the sales that were made within those provinces; correct?

Dr. Ware: I would -- I think I would like to have done that. Of course, I didn't have those data.

Ms. Healey: Fair enough, Dr. Ware. I'm not-- I'm not suggesting that you did.

Dr. Ware: But I -- I think I would have preferred that, yes.

[389] We have found that the relevant geographic market for the purposes of paragraph 75(1)(e) includes Ontario processors. Ms. Sanderson examines the market shares in this broader geographic market, but these shares are also based on slaughter and therefore include sales that are made outside the relevant market and ignore sales of chickens that are slaughtered outside the relevant market (imports). However, we find that the misstatement of market shares is likely to be less serious than was the case with the more narrowly defined market advocated by Dr. Ware because exports from and imports to the broader market are absolutely and proportionately smaller. In particular, Olymel makes [CONFIDENTIAL]% of its sales outside of Quebec and the Maritime provinces but only [CONFIDENTIAL]% of its sales outside of Ontario, Quebec and the Maritime provinces. Similarly, Nadeau makes [CONFIDENTIAL]% of its sales outside Quebec and the Maritime provinces but only [CONFIDENTIAL]% of its sales outside of Ontario, Quebec, New Brunswick and Nova Scotia.

[390] Maple Lodge Farms is among the Ontario processors in the relevant geographic market. The Applicant and Maple Lodge Farms are wholly-owned subsidiaries of Maple Lodge. It is clear that as a wholly-owned subsidiary, the Applicant's interests are fully aligned with those of Maple Lodge. It is therefore sensible to assume that Maple Lodge Farms and the Applicant conduct themselves with an eye to their joint profitability and to treat them as a single entity (Maple Lodge) for the purpose of analyzing the state of competition in this market.

[391] The processors' market shares (based on weekly slaughter) in the relevant geographic market in 2007 are found in Exhibit A to Mr. Soucy's affidavit of May 29, 2008. While they have their defects, we accept these data to be an adequate reflection of the market shares of processors in the market for that period. Based on these data, the shares are as follows³:

Maple Lodge Farms/Nadeau	22.6%
Maple Leaf	17.9%
Olymel	17.9%
Exceldor	18.5%
ACA	5.1%
Cargill	5.1%
Port Colborne	3.8%
Grand River	2.6%
Other Ontario	3.8%
Other Quebec	2.6%
(Total	99.9%)

[392] The HHI in the relevant geographic market in 2007 was 1579.⁴ Maple Lodge Farms/Nadeau had the largest market share (over 22%) with Maple Leaf, Exceldor and Olymel all grouped at around 18%. For purposes of comparison, taken by itself, the Applicant's share of this market would have been 7.2%.

[393] As stated above, the Applicant advances a number of scenarios where there would be an adverse effect on competition. Some of these assume that the Applicant will remain a market participant, although with higher costs as a result of the refusal; in other scenarios it is no longer a participant. Dr. Ware acknowledged these scenarios:

And as I say, there are sort of a number of possible scenarios here. One, ranging -- and we already went through this. I don't want to -- perhaps you don't want to spend a lot of time on this, but ranging from Nadeau, ceasing to process -- ceasing to replace, not being able to replace the chicken that it's currently getting from New Brunswick. Two, it being able to -- possibly being able to replace after a delay perhaps but at a significantly higher price. So both those cases, it seems to me, would amount to an adverse effect on competition.

[394] In its analysis, the Tribunal decided that it would be helpful to develop the scenarios described by the Applicant and Dr. Ware to determine the likely impact on market shares and, where possible, on market concentration if the scenarios played out.

- *Possible scenarios and the resulting impact on market share*

[395] We agree that a number of scenarios are possible. The Respondents' refusal to supply takes place against an uncertain backdrop. The Sunnymel partnership has stated its intention to build a processing plant in New Brunswick, but it has not commenced construction, and the Applicant argues that it will not do so. According to the evidence adduced, the Sunnymel partnership is proceeding with certain tests, such as testing the groundwater, to determine the best location for a new processing plant. Witnesses have also testified that ACA may expand its Nova Scotia plant and that Maple Lodge may participate in that expansion. There is also considerable disagreement regarding the success that the Applicant is likely to have in replacing the Respondents' birds, both in terms of the price premium to be paid and the number of birds it will succeed in obtaining. Also in dispute is the point (in terms of weekly slaughter) at which the Applicant's St-François Plant would cease to be a viable operation.

[396] The suggested implication of the foregoing is that the refusal could impact market shares and market concentration in a variety of ways. We agree that a number of scenarios are possible and some are more likely than others. It is therefore useful to consider a number of these scenarios and the resulting impact on market share for each. In considering these alternatives, an analysis of market share and market concentration (as measured by the HHI) is helpful in assessing the market power implications of each scenario.

Scenario 1

[397] One possible scenario is that the Applicant is able to replace all of the Respondents' birds from sources in Quebec. Given the operation of the Quebec supply guarantee (VAG), the net effect of this would be to leave Maple Lodge Farms/Nadeau's market share unchanged while increasing Olymel's market share at the expense of Exceldor and other Quebec processors. In this scenario, given the increase in exports from Quebec to New Brunswick, the VAG allocated to each Quebec processor, including Olymel's allocated share, would be reduced. In this regard, it is difficult to understand the basis for Dr. Ware's assertion at paragraph 14 of his reply report, that "[t]here is every reason to believe that Olymel's production of processed chicken would increase by the volume of redirected chicken". On cross-examination, Dr. Ware acknowledged that he had not taken the VAG into consideration. He also stated that Olymel's market share would, however, increase in this scenario and added that he was not qualified to predict the effect of the VAG on concentration and market shares. We are unable to compute the HHI for this circumstance because of insufficient data.

Scenario 2

[398] Another possibility is that the Applicant is able to replace approximately half of the Respondents' birds from sources in Quebec. [CONFIDENTIAL]. Dr. Ware is of the opinion that 136,000 birds per week is the "absolute maximum" Nadeau would be able to obtain in Quebec. The net effect of this would be to reduce Exceldor's and Maple Lodge Farms/Nadeau's respective market shares and increase Olymel's. Here, too, the data available do not make it possible to compute the HHI.

Scenario 3

[399] Yet another possibility is that the Applicant is unable to replace any of the Respondents' birds but is able to retain the balance of the New Brunswick birds as well as the Prince Edward Island and Nova Scotia birds it is presently processing. According to Mr. Robinson, the Applicant would remain profitable under these circumstances; in his view, the Applicant's earnings would drop from \$[CONFIDENTIAL] to \$[CONFIDENTIAL]. In this case, Olymel would slaughter the Respondents' 271,350 chickens and, as a result, its market share would go up by 3.5 percentage points to 21.4% and Maple Lodge Farms/Nadeau's share would go down to 19.1%. The HHI would decline from 1579 to 1570. That is, by the well-known market concentration measure used by Dr. Ware, the market would become *less* concentrated. The reason for this is that a processor with a smaller market share (Olymel) is increasing its share at the expense of a processor with a larger market share (Maple Lodge Farms/Nadeau). This reduces the share inequality in the market and, in turn, reduces the HHI.

[400] In his discussion of this scenario at paragraph 16 of his reply report, Dr. Ware states that an increase of Olymel's market share by 3.5 percentage points, coupled with evidence on quality degradation and supply disruption, would satisfy the threshold requirement for an adverse effect on competition. Keeping aside the issues of supply disruption and quality degradation for the moment, it does not appear analytically sound to infer an adverse effect on competition on the basis of an increase in the market share of *one firm*, when the *overall* measure of market concentration (the HHI) is decreasing, if only by a small amount.

Scenario 4

[401] Another possibility is that the Applicant is unable to source any birds from Quebec and that it ultimately loses the Prince Edward Island and Nova Scotia birds to ACA. In this event, the St-François Plant would likely be closed and the remaining New Brunswick birds might go to either ACA or Olymel. In this scenario, we assume that the remaining New Brunswick birds go to ACA. In this event, as explained above, Olymel's market share would go up to 21.4%, Maple Lodge Farms/ Nadeau's share would go down to 15.4% and ACA's share would go up to 8.8%. The HHI would fall to 1494. If ACA gets the Prince Edward Island and Nova Scotia birds, but the remaining New Brunswick birds go to Olymel, ACA's market share would be 7.7% and Olymel's 22.5%, and the HHI would be 1524.

Scenario 5

[402] Another possibility is that the Applicant is unable to source any birds from Quebec and ultimately loses its Prince Edward Island and Nova Scotia birds and remaining New Brunswick birds to Olymel. We are of the view that, on a balance of probabilities, this scenario is not likely. The Applicant is more likely to be able to obtain supply to replace at least some of the Respondents' chickens. In this scenario, Olymel's market share would go up to 25.1%, Maple Lodge Farms/Nadeau's share would be 15.4%, and ACA's would remain unchanged. The HHI would be 1615. This could be regarded as the worst-case scenario from a competition perspective. In this scenario, the refusal would result in an increase in the HHI, implying a more concentrated market. The HHI would increase from 1579 to 1615 or 36 points. In their expert

reports, both Dr. Ware and Ms. Sanderson referred to thresholds at which mergers can be challenged or blocked. In this case, to provide a frame of reference, a merger of two firms each of which had a market share of 4.25% would increase the HHI by 36 points. A merger of this nature would be within the safe harbours stated in the *Merger Enforcement Guidelines*⁵. We fully appreciate, however, that the experts' reference to safe harbours is in the context of mergers and that a different threshold applies; namely a "substantial" lessening or prevention of competition and not an "adverse effect" pursuant to paragraph 75(1)(e).

Conclusion

[403] Based on the above, we find that the refusal to supply will likely not have a significant impact on market shares of processors or market concentration. Even the worst case scenario, scenario 5, results in only a very small increase in the HHI.

(ii) Barriers to entry

[404] The assessment of barriers to entry is usually part of the assessment of market power. None of the experts discussed barriers to entry directly. Neither Dr. Ware nor Ms. Sanderson incorporated considerations on barriers to entry into their market power analyses.

[405] There is very little evidence of the kind usually used in the assessment of barriers to entry on the record. We have no systematic information on the historic entry-and-exit pattern, although there are statements to the effect that the chicken processing industry has become more consolidated over time. For instance, in a document prepared by Agriculture and Agri-Food Canada on the Canadian chicken industry, one can read that "the poultry industry has become concentrated over the years" and that "[w]hile the concentration ratio has stabilized in the recent years, concentration in the industry might continue to occur in the future".

[406] Concerns about cost-related barriers to entry normally center on diseconomies of small scale and sunk costs (specialized investments required for entry). We have very little information on these factors, although Dr. Barichello does state that "[c]learly, a processing plant represents a considerable capital investment and therefore business risk". With respect to regulatory barriers to entry, we have some information: given that the supply of live chickens is fixed by the marketing boards, a new entrant abattoir would have to bid against incumbents for live birds. Although some chicken producers may have relationships with co-ops, having to bid against incumbents for birds does not necessarily place an entrant at a disadvantage. The problem for new abattoirs comes with the provincial allocation systems in place in Ontario and Quebec, which allocate incumbents their historic share of provincial slaughter. These allocation schemes provide for some exceptions. Dr. Barichello stated that there is an "open sign-up pool"⁶ in Ontario. Also, new entrants can bid inter-provincially. The impression remains, however, that the provincial allocation schemes make new entry into processing at the abattoir level difficult. Entry into further processing would not be subject to the same regulatory barrier. While there is evidence that there are barriers to entry in primary processing, there is little to indicate that the refusal would increase them or prevent them from eroding.

[407] While it is clear that barriers to entry do exist, they are one of many factors to be considered in assessing market power. In our view, the existence of barriers to entry is not in itself determinative.

(iii) The effect of the refusal on the price of processed chicken

[408] With respect to the link between the Respondents' refusal to supply and the price of processed chicken paid by consumers, four issues are raised in argument, namely (1) the price increase that is implied by the change in Olymel's market share and in the HHI; (2) contractual provisions bearing on the ability of processors to pass premiums along to customers; (3) statements by processors regarding their ability to pass price increases along; and (4) the implications of supply management for processors' ability to raise the price of processed chicken. We will deal with each of these in turn.

- *The effect of the change in market shares and the HHI on the price of processed chicken*

[409] Dr. Ware testified that he did not model the effect of the change in market concentration on the price of processed chicken. He explained that he had not been asked to undertake such an analysis and that he did not have enough data to do so. He explained that "because...we have a standard of the adverse effect on competition rather than a substantial lessening on competition ... any lessening or any change in market structure in the direction of increasing concentration would constitute an adverse effect on competition" and that "if you add that to the increasing costs arising from an increase in premiums and an increase in live transport costs plus the effect on the further processing market, then that would amount to an adverse effect on competition". The first statement would appear to require some qualification. An increase in concentration could be the result of pro-competitive forces at work. For example, an increase in concentration may occur if a more efficient firm attracts customers from a less efficient rival. In any event, as stated above, the refusal in this case could well decrease concentration. In the worst-case scenario, it would increase concentration by a very small amount.

- *Contractual limitations on the ability of processors to pass on increases in premiums to their customers*

[410] Dr. Ware contends that if the Applicant attempted to replace the Respondents' birds by acquiring birds in Quebec, the result would be an increase in premiums paid by the Applicant and other processors, and these premiums would be passed on to consumers. Dr. Ware believes that some of the Applicant's contracts with its customers "are of a cost plus form in which their cost -- Nadeau's cost increase would automatically be represented in their prices to the customers". During her cross-examination of Dr. Ware, counsel for the Respondent Westco made reference to several cost-plus contracts. According to Westco, these contracts do not allow the Applicant to pass on its premiums to its customers. Below, we review the provisions in a number of these contracts.

[411] Clauses [CONFIDENTIAL] of the Applicant's contract with [CONFIDENTIAL] stipulate the following: [CONFIDENTIAL].

[412] [CONFIDENTIAL].

[413] On this evidence, while [CONFIDENTIAL] may be able to pass an increase in the NB Board Price on to [CONFIDENTIAL], it is unclear if any other increase can be passed on.

[414] The Applicant's contract with [CONFIDENTIAL] sets out the following pricing formula: [CONFIDENTIAL].

[415] We have limited evidence to explain how the contracts described above work in practice. On the whole, they appear to provide for prices to be fixed at least for a set time period. It is unclear as to how and when cost increases can be passed on, if at all. There is simply insufficient evidence to determine, based on these contracts, how increases in cost to the Applicant, caused by "premium wars", could be passed on to customers.

- *Processors' statements regarding their ability to pass on cost increases to their customers*

[416] At paragraph 101 of her report, Ms. Sanderson stated that "[t]he record is filled with statements from processors indicating that they have no ability to raise prices to customers". In that regard, she referred to the statements made by Mr. Feenstra and two of the Applicant's customers. Cara, a full-service restaurant operator, indicated in a letter that its business is very price-sensitive and that there is "virtually no room to increase prices to our customers". In a letter addressed to the Applicant, the following concerns are expressed on behalf of La Préférence, another customer:

Eliminating Nadeau from the supply chain, by way of shut down or purchase from a competitor of there's [sic] will only tighten the supply of fresh raw products, and ultimately I foresee an increase in the price of poultry.

An increase in the price of poultry will hurt La Preference's bottom line. Our clients will not pay for the increase in price for simply having fostered a controlled supply.

[417] In her testimony, Ms. Sanderson stated that the fact that costs were going up did not necessarily mean that prices of processed chicken would go up. She expressed the opinion that processors were worried about a premium war because they could not pass the higher premiums on to their customers.

[418] Mr. Brodeur stated that it would be very difficult for a processor to pass these costs on to customers and consumers. In his evidence, he gave three reasons to explain his view. He said:

7.16. À la connaissance du Témoin, advenant une augmentation des coûts d'approvisionnement en poulets vivants causés par une hausse des primes versées aux éleveurs, il serait très difficile pour un transformateur ou un surtransformateur

d'exiger un prix plus élevé de la part de ses clients et ultimement, des consommateurs. Cela s'explique par les trois raisons suivantes :

1ère raison: produits substitués

7.16.1. Il existe une « concurrence croisée » entre le poulet et les autres viandes telles que le bœuf et le porc. Le Témoin a pu constater, au fil de ses années d'expérience dans l'industrie, que lorsque les prix des Produits transformés et surtransformés augmentent, les consommateurs se tournent vers le porc ou le bœuf, ce qui a résulté en une baisse de la demande des clients d'Olymel pour ses Produits transformés et surtransformés. Cette réalité a aussi été constatée dans le rapport des PPC, joint à la présente déclaration à la pièce YB-16, à la page 41. En effet, chez les Canadiens, la consommation d'un type de viande se fait naturellement au détriment d'un autre type.

2e raison: coûts des inventaires

7.16.2. Les coûts associés à la conservation en inventaire des Produits transformés et des Produits surtransformés sont élevés et motivent les abatteurs, transformateurs et surtransformateurs à vendre leurs produits rapidement. De plus, une fois congelé, le produit perd de sa valeur en raison des frais qui devront être encourus pour le décongeler et des limitations concernant l'utilisation de cette viande.

3e raison: augmentation prévisible des contingents

7.16.3. Advenant une hausse des prix de vente, les contingents de production des poulets vivants sont rapidement ajustés à la hausse afin de ramener les « marges viande » des transformateurs à leur niveau historique.

7.16.4. Il faut savoir que les données produites par la firme Express Markets Inc. (EMI), dont les résultats sont utilisés par les organismes de réglementation dans leur évaluation des besoins en poulets de la population canadienne, ne tiennent pas compte des primes payées aux éleveurs dans le calcul de la «marge viande» des transformateurs. Dans les calculs effectués par ces organismes de réglementation, la «marge viande» des transformateurs correspond à l'écart entre les prix de gros moyens (données EMI) et prix de référence du poulet vivant en Ontario.

7.16.5. Or, lorsque cette marge augmente au-delà d'une moyenne historique, ceci peut laisser présager un manque de viande sur le marché domestique et les contingents de production de poulets vivants seront normalement ajustés à la hausse, ce qui aura pour effet d'augmenter la quantité de produit disponible pour les abatteurs et, par le fait même, de réduire les primes versées aux éleveurs.

7.17. Selon l'expérience du Témoin, il n'y a pas de relation directe entre les primes payées aux éleveurs pour les poulets vivants et les prix de vente en gros et au détail des Produits transformés et surtransformés. En effet, la variation des prix de ces produits est principalement causée par les fluctuations de l'offre et de la demande et par les variations de prix des autres viandes transformées. Quant aux primes payées aux éleveurs, celles-ci dépendent notamment de la concurrence entre les abatteurs et de la rentabilité relative de l'industrie.

[419] Some processors stated, however, that they would attempt to pass on the increased costs to their customers. In a letter addressed to the New Brunswick Farm Products Commission, Kevin Thompson, on behalf of the Association of Ontario Chicken Processors, stated that processors would “attempt to [pass] the additional costs on to their customers causing increases in the price of chicken at the retail meat counter and an adverse impact on consumption which will in turn lead to lower production for all chicken farmers”. In his view, “...consumers who already pay higher prices in Canada to support supply management will unjustly pay even more”.

[420] Mr. McCullagh, at paragraph 14 of his affidavit, states that processors will look to and need to pass on the costs to their retail and foodservice customers, who, in turn, will seek to increase prices to consumers.

[421] However, Mr. Feenstra testified that it is very difficult for processors to pass on the costs of a “premium war” to the end consumer as consumers are willing to pay only so much for their chicken. In cross-examination, Dr. Ware responded to Mr. Feenstra's testimony as follows:

Ms. Healey: If Mr. Feenstra were to advise the Tribunal that it is very difficult to pass along the cost of a premium to a consumer or consumers are only willing to pay so much for chicken, would you have any reason to doubt Mr. Feenstra's comments in that regard?

Dr. Ware: Yes, I would because it is possible that economists take a bit more of a detached view of how markets work than people who are embroiled in the everyday decision-making and, as I said, these premiums are not just going up to Nadeau. These premiums are going to go up way across Quebec and if that were to happen, that would be, you know, a market-wide increase in costs and it's hard for me to imagine that a market-wide increase in costs would not be reflected in the price of chicken.

[422] Dr. Ware is distinguishing between the ability of the Applicant or that of any other individual competitor to pass on cost increases that they may have incurred and the ability of processors as a group to pass on a market-wide increase in the premiums they pay for live chicken. Competitive pressure normally limits the ability of individual competitors to pass on cost increases that they have incurred. In the absence of supply management, a market-wide increase in costs is more likely to be passed on as Dr. Ware has stated. It is the Tribunal's view, however, that supply management itself limits processors' ability to pass on even a widespread increase in the premiums they pay for live birds. We will now turn to that issue.

- *Limitations posed by supply management on the ability of processors to increase price*

[423] Supply management reduces the ability of processors to raise the price of processed chicken and also attenuates any link between price and concentration that might otherwise exist. The supply of live chickens in Canada is determined by producer-controlled provincial marketing boards coordinated by a national marketing board, the CFC. Dr. Barichello explains the regulatory process by which the supply of live chickens is determined:

1. Processors calculate their requirements for production.
2. Each province's marketing board aggregates processors' requirements within their province.
3. Provincial marketing boards send their aggregates to the CFC.
4. The CFC makes any necessary adjustments and then authorizes a total production for each province.

[424] According to Dr. Barichello, national chicken quota is set by the CFC for a six- to seven-week production period, and farmers cannot deviate materially from their quota. Thus, there is a continuous flow of live chickens coming to market. The quantity is determined by regulation, and the birds must be processed and sold to consumers. It is normally not possible to sustain a price increase in a market if supply and demand conditions remain unchanged. In the case at hand, it would appear very difficult to raise the price of processed chicken without simultaneously restricting the amount offered on the market. The weekly flow of chicken into the market is not under the control of any one processor.

[425] The evidence also points to a recent instance in which processors jointly lobbied the CFC for a reduction in the national quota and were successful; the CFC reduced the allocation for period A-87. Mr. Landry testified as follows with respect to the request made by the processors:

Mr. Lefebvre: Une des dernières questions que j'ai pour vous. Pourquoi tant vouloir baisser la production de poulets?

Mr. Landry: C'est comme je t'ai expliqué, c'est que le prix de vente, c'est un marché contrôlé, c'est là qu'est la demande. Puis quand le prix vivant du poulet vient trop élevé--

Mr Lefebvre: Oui.

Mr. Landry: --- pour le prix de vente que les abattoirs peuvent faire, les retours sont pas bons. Donc, c'est une des raisons pourquoi que le système est révisé à toutes les huit semaines.

[426] The limited information provided about this one incident is insufficient to support the inference that processors exercise the kind of control over supply management that would be necessary for them to increase the price of processed chicken as and when they wish. This is particularly so given the complex nature of quota adjustments provided for in the supply management system.

[427] As indicated in our earlier review of the supply management system, a “bottom-up approach” is contemplated in order to determine if quota adjustments are required. The mechanism is designed to strike a balance between chicken production and consumer demand. In essence, quotas are adjusted as a result of changes in that demand.

[428] We find that it would normally not be possible to sustain a price increase in a market if supply and demand conditions remain unchanged. In the absence of an increase in consumer demand or a reduction in supply, there is no reason to believe that prices will rise.

[429] The Applicant contends, in essence, that the price increases caused by “premium wars” will be passed on to customers and consumers. In the event that the Applicant is able to obtain all of its replacement birds from Quebec, the concern is that this would result in “premium wars” that would squeeze processor margins. It is argued that processors would then attempt to pass on premium increases to customers. It is our view that other factors, such as consumer preferences, being equal, an increase in the price of processed chicken cannot be sustained in the absence of a further restriction in supply by the marketing boards. Here, any “premium war” would be the result of excess processor demand for live chickens. There is little evidence to suggest that the marketing boards would respond to excess processor demand for chickens by reducing quotas and thus further restricting supply. This would only make things worse, because processors would then be competing for an even smaller supply of chickens. It is our view that it would be more logical for marketing boards to attempt to mitigate any premium increase by increasing quotas to ensure that there would be sufficient chickens for all processors. In that case, prices would fall.

[430] For the above reasons, we find that the price increases to processors caused by “premium wars” are not likely to be passed on to customers or consumers without an accommodating reduction in supply by the marketing boards. We also question whether a further restriction of supply would remedy or even be seen as a remedy for a deterioration of processor margins caused by “premium wars”.

(iv) The effect of the refusal on rivals’ costs

[431] The Applicant further argues that to the extent that processors cannot pass on the increased live costs caused by a “premium war”, their viability will be threatened. It also argues that the refusal will substantially raise the Applicant’s costs and that the raising of these costs would have an anti-competitive effect because it would weaken the Applicant to the benefit of Olymel. Dr. Ware states as follows in his examination in chief:

Ms. Price: Can I just stop you there for a minute and ask a question arising from what you said? This concept of raising rivals’ costs, I believe that there’s been a fair bit of evidence that Nadeau and Olymel do compete in the primary processing market. Does that concept that you’ve just described apply not only to the further processors whose costs might be raised as you’ve described but also to Nadeau itself in the event it has to go into Quebec?

Dr. Ware: It could, yes. Yes, it could. We don’t know -- you’re basically saying does it apply to the processing market, the primary processing market?

Ms. Price: As well.

Dr. Ware: Yes. Well, it certainly could. We don't know -- and I didn't really directly address this, but we don't know how much premiums will be bid up in Quebec to other processors as a result of them being bid up to Nadeau.

Ms. Price: Right.

Dr. Ware: But they certainly will be bid up to some extent because as I was saying before the break, if Nadeau is going to bid 10 percent of the supply of Quebec chicken out of Quebec, it's going to do that by raising the price, and you raise the price -- when you raise the price that they pay, that's going to increase the price to everyone else too.

[432] "Raising rivals' costs" is a term described in section 4.2 of the Competition Bureau's *Enforcement Guidelines on the Abuse of Dominance Provisions* and can be described as a set of anti-competitive strategies that a dominant incumbent firm might use to inhibit the expansion of smaller competitors or the entry of new competitors, thereby entrenching its dominance. The Guidelines note that in order for the raising of rivals' costs to be a profitable strategy for the dominant firm, the burden of the cost increase concerned must fall more heavily on the rivals of the dominant firm than on the dominant firm itself.

[433] The Tribunal has found that, for the purposes of paragraph 75(1)(a), if the Applicant replaced the Respondents' birds with birds from Quebec, its costs would increase and it would be substantially affected as a consequence. The question here is whether the evidence supports that the raising of rivals' costs would be the result of the refusal and, if it does, whether this implies that competition in the Ontario-Quebec-Maritimes market for processed chicken would be adversely affected. The answer is that it does not. The reasons are as follows.

[434] First, the conditions for the successful pursuit of a strategy of raising rivals' costs do not appear to exist in the relevant market. Olymel, the recipient of the Respondents' birds, is not dominant in the relevant market, and the receipt and retention of the Respondents' birds would not come close to making it so. Indeed, there is no dominant firm in the relevant market. There are several other large, if not larger, competitors (Maple Leaf, Maple Lodge, Exceldor) and numerous smaller ones. Second, there is little in the evidence to indicate that a price war for live chickens would be less burdensome to Olymel than to other processors. In his testimony, Dr. Ware refers to a market-wide increase in processors' costs that is the result of their bidding more aggressively for live birds.

[435] To the extent that cost increases resulting from the refusal are confined to the Applicant, it is unlikely that any cost increases experienced by the Applicant could be passed on to consumers in the form of higher prices. Indeed, it is central to the Tribunal's determination under paragraph 75(1)(a) that the Applicant would be substantially affected by the refusal, that it could not simply pass the higher cost of acquiring replacement birds in Quebec on to its customers. The evidence relating to the possibility that costs increases experienced by the Applicant could be passed on to consumers is summarized above. Further, Mr. Robinson assumed that the price at which the Applicant sells processed chicken would remain unchanged in scenario 2, where the Applicant is able to replace the Respondents' chickens with birds from Quebec. The ultimate limitation on the ability of the Applicant or other processors to increase the price of processed

chicken is that they do not control the supply of chickens to the market. Control of supply lies with the marketing boards.

- (v) The effect of the refusal on the quality and variety of processed chicken available to consumers

[436] Dr. Ware states as follows at paragraph 25 of his reply report:

There are compelling reasons also to believe that the refusal to deal will lead to severe declines in quality in some cases, which are sufficient in themselves to constitute an adverse effect on competition.

[437] Dr. Ware cites an example of what he sees as a decline in quality, the evidence of [CONFIDENTIAL], which is that if the Applicant were to close, [CONFIDENTIAL] would lose a source of [CONFIDENTIAL], and replacement sources would be further away and more costly. [CONFIDENTIAL].

[438] Ms. Sanderson responds that if the Applicant were able to replace the Respondents' birds, there is no issue. If the Applicant were unable to replace the Respondents' birds, [CONFIDENTIAL] would still have a variety of realistic alternatives. One possibility is that Sunnymel builds a plant in New Brunswick. Exceldor and ACA could also supply [CONFIDENTIAL] without greatly increasing the shipping distance.

[439] Ms. Gazzard stated in her affidavit that UPGC and Olymel have been in negotiations to replace the Applicant as a source of supply. Olymel has apparently stated that it has the capability of filling UPGC's requirements but has not quoted a price. She stated that they had also approached Exceldor about replacing the lost Nadeau volume. Exceldor believed, however, that their price would not be commercially viable to UPGC.

[440] There is evidence of complaints by certain customers of the Applicant, in particular Puddy, relating to their inability to obtain chickens of the required quality and variety should they no longer be supplied by the Applicant. Mr. McHaffie stated as follows:

By contrast, our purchases from Olymel have declined significantly since 2006. This is because of quality and service problems. The quality problems have included bruising, cuts, neck skin left on, missing parts, (such as wings), and the like. Service problems include late delivery and short delivery. Olymel, for reasons unknown, has been unresponsive to our requests for improvement. As we are unable, in our view, to obtain sufficient supplies to meet our needs from elsewhere in Québec, it has been a major advantage for us to have Nadeau as an alternative source of fresh killed chicken.

[441] Given the distances processed chicken is routinely shipped, a need to find a new (possibly more distant) source of supply does not necessarily qualify as a decline in quality. There are several post-refusal scenarios under which Prizm and Puddy would not experience any need to change suppliers, for instance, if the Applicant were to replace some or all of its lost

supply. In the event that they have to change suppliers, there are several other options open to Prizm and Puddy whereby they need not go much further afield for supply. Nor is it necessarily the case that the need to change suppliers qualifies as an adverse effect on competition. Changing suppliers is part of the normal process of competition. Given the consolidation that has occurred among chicken processors, customers have presumably changed suppliers in the past although there is not much in the way of evidence on this point.

(vi) Possible foreclosure of supply to other processors in the market

[442] Dr. Ware also cites a possible lessening of competition in what he calls the “market for further processed chicken” as another manifestation of the adverse effect on competition flowing from the refusal. He cites the affidavit of Ms. Goodz of Riverview and the affidavit of Mr. Ellis of Sunchef. Both Ms. Goodz and Mr. Ellis express the concern that, as a competitor, Olymel would not supply them or would not supply them on reasonable terms. Also, at paragraph 28 of his report, Dr. Ware cites the affidavit of Mr. McHaffie of Puddy. Mr. McHaffie explains that Puddy has had quality and service problems with Olymel and that Olymel has been unresponsive to its request for improvement. We now turn to the evidence of some of the Applicant’s customers in that respect.

Riverview

[443] Ms. Goodz testified that both Olymel and Exceldor have refused to supply Riverview. She stated as follows at paragraph 17 of her affidavit:

My ability to continue to supply my specialized product at an acceptable price depends on my ability to obtain supplies from Nadeau. Should Nadeau go out of business, reduce its business, or be acquired by Olymel, I foresee that our supplies will be reduced or cut off, and we will no longer be able to continue in this business.

[444] Ms. Sanderson responds to these concerns at paragraph 77 of her report. She states that Ms. Goodz’ concerns would not arise if the Applicant is able to replace the Respondents’ birds. She states that alternate suppliers such as Exceldor, Abattoir Agri and Lilydale are closer to Riverview than Nadeau is and that Maple Lodge Farms and Maple Leaf are not much further away. Lilydale is no longer an alternative for Riverview as it is going out of business, and Exceldor is questionable as Ms. Goodz has testified that it has refused to supply her. Ms. Goodz also stated that some suppliers cannot meet her size requirements. Ms. Goodz conceded under cross-examination that [CONFIDENTIAL]. Ms. Sanderson further stated that even if Riverview were forced out of business, it is small enough that there would be no adverse effect on the market for processed chicken.

Sunchef

[445] Sunchef is a further processor of chicken located in Montreal. [CONFIDENTIAL]

[446] Mr. Ellis states at paragraph 16 of his affidavit that if the Applicant's supplies are cut off or curtailed, its ability to compete with Exceldor and Olymel would be reduced or eliminated:

This would have a major adverse effect at our level of the market. It would permit Olymel to increase its dominance and market power, at the expense of other businesses like ours.

[447] At paragraph 15 of his affidavit, Mr. Ellis makes the same claim as Ms. Goodz as to the crucial role that continued supply from Nadeau at the same level plays with respect to the future of his business:

Should Nadeau go out of business, reduce its business, or be acquired by Olymel, I foresee that our supplies will be reduced or cut off and that we will no longer be able to continue in this business.

Puddy Brothers

[448] Puddy is a further processor located in Mississauga, Ontario. According to Mr. McHaffie, it currently purchases whole birds from Exceldor ([CONFIDENTIAL]%), Nadeau ([CONFIDENTIAL]%) and Olymel ([CONFIDENTIAL]%). According to paragraph 9 of Mr. McHaffie's affidavit, Puddy has been in business since 1884 and began purchasing from the Applicant in about 2004 or 2005. Since 2006, it has reduced its purchases from Olymel because it has not been satisfied with its service. Mr. McHaffie states that Puddy cannot buy from Ontario primary processors, which are much closer than Nadeau, because they are also engaged in further processing, and the requirements of Ontario processors exceed the Ontario slaughter.

[449] Mr. McHaffie states that if the Applicant were unable to continue as a viable business, Puddy would be forced to buy more from Olymel, and its service might be worse. He concludes that if the Applicant were to close or be taken over by Olymel, competition in the market would definitely be hurt. He admitted under cross-examination, however, that he had not taken his concerns regarding inadequate supply up with the CFC.

Desco

[450] Mr. Chevalier testifies that Desco competes directly with Olymel and Exceldor and that they have refused to supply Desco at reasonable prices. At paragraph 7 of his affidavit, he states that if the Applicant's supplies of live chicken were reduced or cut off, Desco's ability to compete effectively against Olymel would be reduced.

[451] Ms. Sanderson responds to Mr. Chevalier at paragraph 78 of her report. She states that there would be no issue if the Applicant is able to replace the Respondents' birds. Ms. Sanderson also calculates that Desco's purchases from Nadeau account for [CONFIDENTIAL]% of its annual chicken purchases, indicating to her that Desco has many other suppliers available to it. She states that Desco currently obtains fresh-killed chickens within 72 hours from the United States and that the Ontario processors as well as ACA could provide chicken within the same

delivery time. Ms. Sanderson also states that if Desco were to go out of business, this does not mean that prices for processed chicken would rise.

[452] In cross-examination, Mr. Chevalier conceded that the Applicant's supply accounts for a small percentage of Desco's supply.

Analysis

[453] We earlier determined that further processed chicken is not a separate product market. We have little evidence regarding the respective market shares of the stated further processors Riverview, Sunchef, Puddy and Desco. We note that Mr. McHaffie stated in cross-examination that further processors are numerous. When questioned on the matter, he stated that he thought that there are more than 50 further processors in Ontario and 5 to 15 in Quebec.

[454] Both Riverview and Sunchef maintain that any diminution of their supply of chicken from the Applicant would be disastrous. Puddy concludes that it would be forced to return to a longstanding supplier, Olymel, with whom it has recently become disenchanted. This assumes, of course, that the Applicant is put out of business. There are many possible scenarios short of the worst-case scenario in which the St-François Plant closes and all the Applicant's birds go to Olymel. In the event of the worst-case scenario where the St-François Plant closes and Riverview and Sunchef are denied chicken from all other sources and are obliged to close, there is insufficient evidence to infer that this would have an adverse effect on competition in the relevant market which is the Ontario, Quebec and Maritimes market for processed chicken. This is essentially because of the size of that market, the apparent number of further processors in the market, the marketing boards' ultimate control of supply in the market and the paucity of evidence to show that complaining further processors cannot obtain supply elsewhere.

[455] We further note that there are several reasons why customer complaints might not be given significant weight in the determination of whether the probable effect of the refusal competition in the market is or is likely to be adverse. First, some of the complaints appear to have been orchestrated. For example, as explained above, some of the letters sent to the Applicant by some of its customers regarding the Respondents' refusal contain paragraphs that are virtually identical to those found in a draft letter prepared by the Applicant. This letter, which was apparently provided to Riverview and Cara, includes the following two paragraphs:

Our business is a "pennies" business. There is virtually no room to increase prices to our customers. Accordingly, any increase in raw price or transportation costs would have an immediate adverse effect on our bottom line.

If the Nadeau plant were to shut down, or even if it were to be acquired by a competitor, I would foresee that prices would rise, and supply problems would occur. We are therefore opposed to any reduced competition.

[456] The evidence adduced shows that similar paragraphs are found in letters sent to the Applicant by Riverview and Cara:

[Riverview]

If the Nadeau plant were to shut down, or even if it were to be acquired by a competitor, I would definitely foresee that prices would definitely rise, and supply problems would occur. We are therefore strongly opposed to any reduced competition in this market.

[Cara]

Our business is very price sensitive. There is virtually no room to increase prices to our customers. Accordingly, any increase in raw price or transportation costs would have an immediate adverse effect on our bottom line.

If the Nadeau plant were to shut down, or even if it were to be acquired by a competitor, I would foresee that prices could rise, and supply problems could occur. We are therefore extremely concerned with any reduced competition.

[457] Second, notwithstanding the evidence adduced on behalf of certain customers, in particular Sunchef and Riverview, that they would be put out of business should the Applicant cease operations, we are not persuaded that this result is likely. Some complaining customers have not attempted to investigate alternate sources of supply and have simply asserted that it would be either unavailable or too costly. While the complaining customers assert that specific suppliers approached were either unwilling or unable to supply chickens to required specifications, there is insufficient evidence to establish that these further processors were unable to obtain the chickens they require from other suppliers in the market. Further, at this time, no one appears to have complained about the situation to the CFC, the regulatory body responsible for determining the supply of chickens available to processors as well as being the most capable of remedying their perceived supply problems.

[458] Third, many customer complaints focus on a limited set of scenarios, to wit, the possibility of the Applicant's closing or being acquired by Olymel. There are many other possible scenarios. A likely scenario is that the Applicant will be able to replace some but not all the Respondents' birds from Quebec sources. It could be business as usual or business on a reduced scale. This reduced scale could be quite consistent with the Applicant's historic supply of chickens, before it added an extra shift to accommodate the Nova Scotia and Prince Edward Island birds. In the event that the Applicant were to operate at a reduced scale, it might well arrange to continue to supply those customers who rely most on it and allow customers that are less concerned about their alternatives to seek supply elsewhere. This could also be true of some complaining customers who have only recently entered into contracts with the Applicant or increased their purchases from the Applicant.

[459] The quality degradation issue appears to be overblown to the extent that it is related to incremental shipping distances. In many cases, complaining customers have alternate sources of supply that are closer than the Applicant. The most common source of concern appears to be the tension between the abattoirs and the further processors rather than distance. This issue is

market-wide and cannot turn on the actions of the St-François Plant. The Applicant itself engages in some further processing (Kentucky Fried Chicken birds) and its sister, Maple Lodge Farms, is also integrated into further processing. There are apparently 50 further processors in Ontario, even though the major abattoirs in Ontario (Maple Lodge Farms and Maple Leaf) are integrated into further processing. It appears that there are market opportunities for specialists in further processing and that these opportunities will not depend on the conduct of or the scale of operations at the St-François Plant.

[460] A need to change suppliers does not necessarily equate with a supply disruption. The aggregate supply of chickens coming to market remains the same regardless of where the Respondents send their birds. The capacity to process chickens would remain the same unless the St-François Plant actually closes. Even then, the Sunnymel partnership may build a new plant, and/or ACA may expand, perhaps with the participation of Maple Lodge. It appears that some of the customers who have submitted evidence in this proceeding have changed their mix of suppliers in the past, some quite recently. This is a normal part of doing business, and it is not clear that any special significance should be attached to the fact that some of the Applicant's current customers are obliged to make further changes in their mix of suppliers.

[461] In the event that the worst-case scenario prevails and some of the Applicant's current customers are adversely affected, the question remaining is whether this can be regarded as an adverse effect on competition in the market. There is no evidence of concern among purchasers of processed chicken who are not current Nadeau customers. Nor is there much in the way of evidence regarding the portion of the market accounted for by Nadeau's complaining customers. Given the limited likelihood of the worst-case scenario prevailing and the lack of evidence regarding the portion of the market that would be affected if it did prevail, the complaints of the Applicant's customers are not sufficient to support an inference that the Respondents' refusal is likely to have an adverse effect on competition in the market.

(vii) Impact of possible elimination of an efficient processor

[462] The Applicant argues that it operates the most modern and efficient processing plant in Canada and that for this reason alone, its elimination would have an adverse effect on competition in the market. In this regard, the Applicant relies on the statistics compiled by Mr. Donahue and the affidavit of Mr. Robinson.

[463] Mr. Donahue, as explained above, works for Agri Stats, a statistical research and analysis firm that offers benchmarking services for the poultry industry across North America. At the Applicant's request, he prepared a report about the St-François Plant. He testified that the Applicant's wage rates [CONFIDENTIAL] and that the Applicant [CONFIDENTIAL].

[464] According to Dr. Ware, [CONFIDENTIAL] are an example of the greater efficiencies obtained by the Applicant. He is of the opinion that any adverse effect on competition will be quantitatively more severe if processing at the St-François Plant were replaced by the processing of chickens at a less efficient plant.

[465] Mr. Robinson, at paragraph 6 of his affidavit, states that [CONFIDENTIAL].

[466] The evidence adduced does not establish that the Applicant operates the most efficient processing plant in Canada. When asked about the findings of his report, Mr. Donahue simply stated that [CONFIDENTIAL].

[467] Further, given the paucity of evidence regarding the efficiency of other processing plants in the relevant market, we cannot agree with Dr. Ware that any adverse effect would be quantitatively more severe if another processing plant processed the Respondents' chickens. As stated earlier, we find it unlikely that the Applicant would close. However, if it were to close, any new plant built by Sunnymel could benefit from the same sources of efficiency [CONFIDENTIAL].

(d) Conclusions for paragraph 75(1)(e)

[468] As stated above, for a refusal to deal to have an adverse effect on a market, the remaining market participants must, as a result of the refusal, be placed in a position of created, enhanced or preserved market power. This analysis requires a relative and comparative assessment of the market with the refusal to deal and that same market without the refusal to deal. The level of competitiveness in the presence of the refusal to deal must be compared with the level that would exist in the absence of the refusal. It must then be determined whether the effect on competition, if any, is "adverse". In *B-Filer*, the Tribunal found that "adverse" is a lower threshold than "substantial".

[469] Paragraph 75(1)(e) refers to two time frames: the present and the future. In the instant case, because of the Interim Supply Order, the refusal to deal is not having an adverse effect on competition at present because the Respondents have not yet ceased supply. Indeed, in their arguments, the parties referred to the likely effects of the refusal to deal.

[470] We are satisfied that neither Olymel nor any other processor in the market currently exercises market power. For comparative purposes, the market we consider at the outset, without the refusal, is a market consisting of numerous processors; many small processors and a number of larger ones including Maple Lodge, Maple Leaf, Exceldor and Olymel. We will now summarize the results of our above analysis of the effect of the refusal to deal.

[471] We have considered a number of different scenarios of the Applicant's circumstances resulting from the refusal. We have compared the effect of the refusal on market shares under five different scenarios and found that the results of this comparison are normally not associated with any concern about enhanced market power. We recognize, however, that the market shares upon which these calculations or other estimates of market concentration are based are not entirely accurate because they are based on slaughter rather than sales of processed chicken to customers in the relevant market. The parties failed to adduce any other evidence regarding market shares.

[472] In assessing market power, we have also considered a number of other factors. The first factor considered is barriers to entry. We find that while barriers to entry into processing at the abattoir level exist, there is little to indicate that the refusal increases them or keeps them from

decreasing. The next factor considered is the likelihood of an increase in the price of processed chicken. We find that there are good reasons to doubt that any increase in costs incurred by processors as a result of increased competition for birds can be readily passed on to consumers. Given the level of demand, it is impossible to sustain an increase in the price of a product without decreasing the quantity of the product offered in the market. Processors can only indirectly influence the supply of chickens through the regulatory process in which they constitute only one group of stakeholders.

[473] With respect to the effect of the refusal to deal on further processors, we find that this does not constitute an adverse effect on competition. If the Applicant is able to replace the Respondents' birds, these processors will not be affected by the refusal. If the Applicant is obliged to reduce the amount it supplies to some further processors, alternative sources of supply exist. In this regard, it is important to re-emphasize that the refusal does not restrict the supply of chickens coming to market. Only the marketing boards can do that. In the event that some of the complaining further processors were to suffer some form of competitive disadvantage, there remains the question of the significance of this to the market as a whole. The Applicant failed to adduce evidence regarding the competitive significance of the complaining further processors. Given the absence of evidence regarding the significance of these market participants from the perspective of competition in the market, we cannot draw the inference that harm suffered by them constitutes an adverse effect on competition in the market.

[474] The Applicant has failed to establish that it is likely that its customers will experience a disruption in supply and a reduction in quality. There are several plausible scenarios in which there are no adverse effects on complaining customers as a result of the refusal. In the event that some of the Applicant's customers actually do experience a decline in the quality of service or a disruption of service that is beyond the adaptation that is part of the normal competitive process, this effect would be confined to a very small fraction of the market and, because of the paucity of evidence in this regard, would not mean that the effect on competition could be qualified as "adverse" from the perspective of the market as a whole.

[475] Based on the above comparative assessment of the market with the refusal to deal and that same market without the refusal to deal, we find that the Applicant has failed to establish that the refusal to deal is having or is likely to have an adverse effect on competition in the market. None of the factors discussed above, taken individually, support a conclusion that the Respondents' refusal is having or is likely to have an adverse effect on competition in the market. We are also of the view that, taken together, these factors lead to the same result. We find that, as a result of the refusal to deal, Olymel would not be placed in a position of created, enhanced or preserved market power. Instead the post-refusal market situation would be fluid, with the potential for a range of possible shifts in market share and changes in market concentration that are ambiguous in their implied effect on competition and, in any case, so small that they would normally pass without notice.

[476] We note that earlier in these reasons, we developed a number of different scenarios to assist us in our analysis under paragraph 75(1)(e). We have found that, in all cases, there would be no adverse effect on competition. It is therefore unnecessary to determine which of the scenarios is most likely. The evidence on many material factors is not conclusive. For instance,

we do not know if the ACA plant in Nova Scotia will expand and if it does, whether Maple Lodge will be involved. Nor do we know whether or when the Sunnymel partnership will build its proposed New Brunswick plant. We would be speculating on such matters. We are, however, as stated earlier, satisfied on the whole of the evidence that the Applicant will likely succeed in obtaining supply to replace at least some of the Respondents' chickens. Therefore to the extent that a finding of a likely scenario is required, we are of the view that the scenarios which provide for the Applicant's being able to replace some of the Respondents' chickens are, on a balance of probabilities, more likely.

[477] Finally, we agree with the Respondents' contention and with the evidence of Ms. Sanderson who is of the opinion that, while the refusal does not have or is not likely to have an adverse effect on competition in the relevant market, a remedial order might have such an effect. The processor allocation systems maintained by provincial marketing boards limit intra-provincial competition for live birds. The allocation systems have the effect of fixing the share of the provincial slaughter accounted for by each abattoir in the province. This reduces the ability of one abattoir to attract business from another. A way around this is for an abattoir to purchase live birds from another province, but processors have generally been reluctant to do this on a significant scale. The tacit arrangement to avoid interprovincial competition for live birds has been justified, as arrangements of this nature so often are, by the argument that interprovincial competition for live birds would raise their price and this would be ruinous to processors. In our view, an attempt by the Applicant to acquire live birds in Quebec can be viewed as a departure from the tacit arrangement not to compete interprovincially for live birds. From this perspective, a remedial order that ties the Respondents' birds to the Applicant and to New Brunswick would be anti-competitive in all of the circumstances.

VII. CONCLUSIONS

[478] For the above reasons, we find that:

- (a) The Applicant has established that it is substantially affected in its business due to its inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;
- (b) The Applicant has failed to establish that it is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;
- (c) The Applicant has established that it is willing and able to meet the usual trade terms of the suppliers of the product;
- (d) The Applicant has not established that the product is in ample supply; and
- (e) The Applicant has not established that the refusal to deal is having or is likely to have an adverse effect on competition in a market.

[479] As a consequence, the application will be dismissed.

[480] These reasons are confidential. To enable the Tribunal to issue a public version of these reasons, the parties shall meet and endeavour to reach agreement upon the redactions that must be made to these confidential reasons in order to protect properly confidential evidence. The

parties are to jointly correspond with the Tribunal by no later than the close of the Registry on Friday, July 10, 2009 setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons.

[481] The issue of costs is reserved. The parties are to meet and endeavour to reach agreement with respect to costs. On or before Monday, July 20, 2009, they should communicate with the Registry in order to advise as to whether they require any further time in order to attempt to agree on costs. If there is no agreement, the Tribunal will receive written submissions as to costs, as it will more particularly direct.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[482] The application is dismissed.

[483] The issue of costs is reserved. On or before Monday, July 20, 2009, the parties shall communicate with the Registry in order to advise as to whether they require any further time in order to attempt to agree on costs.

[484] On or before Friday, July 10, 2009, the parties are to jointly correspond with the Tribunal setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons.

DATED at Ottawa, this 8th day of June 2009

SIGNED on behalf of the Tribunal by the panel members

(s) Edmond P. Blanchard

(s) Henri Lanctôt

(s) P. André Gervais

¹ We note that, where the words “Tribunal” or “we” are used and the decision relates to a matter of law alone, that decision has been made solely by the presiding judicial member.

² Sections 3.5 and 3.6 of the *Merger Enforcement Guidelines* state as follows:

3.5 The market definition analysis begins by postulating a candidate market for each product of the merging parties. For each candidate market, the analysis proceeds by determining whether a hypothetical monopolist controlling the group of products in that candidate market would be able to impose a five per cent price increase assuming the terms of sale of all other products remained constant. If the price increase would likely cause buyers to switch their purchases to other products in sufficient quantity to render the price increase unprofitable, the postulated candidate market is not the relevant market, and the next-best substitute is added to the candidate market. The analysis then repeats by determining whether a hypothetical monopolist controlling the set of products in the expanded candidate market would be able to profitably impose a five per cent price increase. This process continues until the point at which the hypothetical monopolist would impose and sustain the price increase for at least one

product of the merging parties in the candidate market. The smallest set of products in which the price increase can be sustained is defined as the relevant product market.

3.6 The same general approach applies to assessing the geographic scope of the market. In this case, an initial candidate market is proposed for each location where the merging parties produce or sell the relevant products. As above, if buyers are likely to switch their purchases to sellers in more distant locations in sufficient quantities to render a five per cent price increase by a hypothetical monopolist unprofitable, the location that is the next-best substitute is added to the candidate market. This process continues until the smallest set of areas over which a hypothetical monopolist would impose and sustain the price increase is identified.

(emphasis added)

³ Both Ms. Sanderson and Dr. Ware used market shares based on slaughter; shares of further processors are therefore not included in their calculations.

⁴ For purposes of calculating the HHI, the “Other Quebec” processors are treated as one. If there is more than one, this results in a slight overstatement of the HHI. “Other Ontario” processors are treated as three equal sized processors. The reason for this is that the smallest Ontario processor that is identified (Grand River) processes 200,000 birds per week. Unidentified Ontario processors slaughter a total of 300,000 birds per week. It is reasonable to assume that the largest unidentified processor is smaller than Grand River. Given this, the total slaughter by unidentified Ontario processors could be allocated in a variety of ways. The assumption made here is that three unidentified Ontario processors are each slaughtering 100,000 birds per week. Given the very small portion of the market involved, the assumption made regarding the composition of the unidentified segment of the market makes very little difference to the value of the HHI.

⁵ See s. 4.12 of the *Merger Enforcement Guidelines*.

⁶ He explained that the pool “...provides some flexibility for producers to choose the processor with whom they wish to do business as well as allowing some differential growth among processors” and that there “...is no long-term requirement for a producer to continue to sell to the same processor.”

[485] SCHEDULE A

The Applicant's Experts

Dr. Richard Barichello

Dr. Richard Barichello is an associate professor at the University of British Columbia where he teaches in the areas of agricultural policy, food markets and international agricultural development. He was qualified as an expert in the field of agricultural economics with a specialization in regulated markets, especially supply management, quota markets, trade policy and the analysis of government policy. Dr. Barichello testified about the origins and purpose of supply management in the poultry industry and gave his view that the underlying motivation of the supply management system was the protection of the producer. He described the regulations governing the supply management system and described the workings of that system including quota setting and allocation, import control, and price control. He spoke about the barriers to entry in chicken production and he provided his view that competition among producers was limited. He also testified with respect to premiums and the importance of assured continued supply for chicken processors.

Dr. Roger Ware

Dr. Roger Ware is a professor of economics at Queen's University. He was qualified as an expert in the areas of economics, competition policy and industrial organization, including market definition and competitive behaviour of firms. Dr. Ware opined on the product market and geographic market for both the 75(1)(a) analysis and the 75(1)(e) analysis. In respect of paragraph 75(1)(a) of the Act, he referred to the product as being live chickens. Dr. Ware acknowledged the difficulty in obtaining birds that would meet the size and quality requirements of the Applicant's customers. As for the geographic market under paragraph 75(1)(a), Dr. Ware gave his opinion that because of high transportation costs and high premiums to attract Quebec farmers already bound by contracts with Quebec processors, it was neither economic nor efficient for the Applicant to replace the Respondents' supply with supply from greater distances in Quebec.

In respect of paragraph 75(1)(e), Dr. Ware was of the opinion that the product market was processed chickens and that the geographic market consisted of the Maritimes and Quebec. Dr. Ware also testified with respect to the magnitude and dimensions of adverse effects on competition as a result of the refusal to deal. Dr. Ware opined that the increase in market power of Olymel in the processed chicken market would inevitably lead to higher prices and worsening conditions in other dimensions for customers.

Grant Robinson

Mr. Grant Robinson is a chartered accountant who has worked as an outsource chief financial officer for Maple Lodge. He was qualified to give evidence as an accountant, including his expert opinion on the area of the chicken processing industry. Mr. Robinson developed the

following four scenarios to assist the Tribunal in understanding the impact of the removal of the Respondents' birds on the Applicant's operations:

- i. loss of the Respondents' chickens;
- ii. replacement of the Respondents' birds with birds from Quebec;
- iii. loss of the Respondents' birds and Nova Scotia birds; and
- iv. replacement of the Respondents' birds and loss of Nova Scotia birds.

He provided his view that the Applicant would be substantially affected in its business in all of the abovementioned scenarios. In order to develop his scenarios, Mr. Robinson made assumptions regarding transportation costs, shrink, DOAs and premiums which would have to be paid by the Applicant to source replacement supply in Quebec.

The Applicant's Lay Witnesses

Yves Landry

Yves Landry is the general manager of the St-François Plant. He testified about the plant's operations, the requirements of Nadeau's customers and Nadeau's arrangements with its customers. He talked about the range of birds supplied by the Respondents to Nadeau and their refusal to deal. He stated that Nadeau began to receive 25,000 additional birds per week from Nova Scotia in early June 2008 and that on September 15, 2008, Nadeau began to receive 6,250 additional chickens per week from Nova Scotia. He testified that one of the reasons why Nadeau had not made extensive efforts to procure supply in Quebec was the concern that those efforts would lead to a premium war. He also testified about Nadeau's efforts to procure chickens from Quebec. He spoke about Nadeau's transportation costs and DOAs.

Denise Boucher

Denise Boucher is the office manager at the St-François Plant. She is responsible for assembling financial data and is familiar with the records and the operations of the St-François Plant. Ms. Boucher's evidence consisted of adducing a number of financial documents into the record.

Anthony Tavares

Anthony Tavares is the former chief executive officer of Maple Lodge and former president of Nadeau. Mr. Tavares described the supply management system and Nadeau's operations in New Brunswick. He spoke about New Brunswick producers and chicken production in New Brunswick. Mr. Tavares also testified with respect to the Respondents' threat of the removal of their birds from the Applicant and of the Respondents' termination of supply. Mr. Tavares referred to the substantial detrimental effect the refusal to deal would have on the Applicant and to the difficulty the Applicant would have in replacing the Respondents' chickens. Mr. Tavares spoke about the current situation and indicated that the Applicant was willing to continue to meet all of the usual trade terms and to pay fair market price to the Respondents for the continuation of supply of live chickens.

John Feenstra

John Feenstra was the general manager of Nadeau from 1989 to 2006. He talked about Nadeau's initial attempts to obtain supply from New Brunswick producers in the early 1990s, the chicken industry including the legislative scheme in place in New Brunswick and the operations of the St-François Plant. He testified about Nadeau's negotiations with Westco regarding the purchase of the St-François Plant and the effect on Nadeau's business of the Respondents' refusal to supply. Mr. Feenstra explained that an "all-out premium war" would be created if Nadeau were required to purchase chickens from Quebec.

Tina Ouellette

Tina Ouellette is part of the procurement team at the St-François Plant. She testified about her role in the procurement effort to source live chickens from Quebec. She indicated that she was charged with making the initial telephone calls to Quebec producers for the purpose of inquiring as to whether or not they would be interested in meeting with a representative from Nadeau to discuss the possibility of supplying the St-François Plant with live chickens. Ms. Ouellette described the procedure she followed when making the calls to producers. She stated that she contacted 454 producers and that 67 producers were interested in meeting with a Nadeau procurement representative. Ms. Ouellette also indicated that a number of producers could not be reached for a variety of reasons and that others could not supply the Applicant because they produced other types of poultry or had sold their quota.

Léonard Viel

Léonard Viel is the manager of sales, transportation and the garage at the St-François Plant. He stated that he was asked to assist the procurement team to attempt to source chickens from Quebec when another member of the procurement team was on vacation. He testified with respect to his part of the procurement effort, which was to meet with producers who had indicated to Ms. Ouellette that they may be interested in supplying Nadeau with live chickens. He also outlined the pricing arrangements sought by potential Quebec producers before they would consider moving their production to the St-François Plant and the volume of live chickens they were willing to supply the Applicant.

Réjean Plourde

Réjean Plourde is part of the procurement team at Nadeau. He testified with respect to his part of the procurement effort, which was to meet with producers who had indicated to Ms. Ouellette that they may be interested in supplying the Applicant with live chickens. He also testified with respect to the instructions he received from Mr. Landry regarding his task to seek replacement supply in Quebec and stated that he did not have the authority to sign contracts. He indicated that he had met with 39 producers and that he had made detailed notes of these meetings. He testified about the pricing arrangements sought by Quebec producers before they would consider moving their production to the St-François Plant. He also testified with respect to the procedure he followed when meeting with Quebec producers.

Guy Chevalier

Guy Chevalier is the president of Desco, a further processor and distributor of chickens. He stated that Desco competes directly with Olymel and Exceldor in the Quebec market and that as a result it cannot purchase fresh-killed chickens from them at reasonable prices. He further stated that Desco has no difficulty obtaining supply at reasonable prices from Nadeau. Mr. Chevalier indicated that he purchased processed chickens from the United States by purchasing importation quotas from processors that did not utilize them. He further testified about the procedure applicable to processors seeking to obtain supplementary importation quotas from the CFC.

Terry Ellis

Terry Ellis is the president and a major shareholder of Sunchef, a further processor located in Quebec. He described the nature of Sunchef's business and the contractual relationship between Sunchef and Nadeau. He stated that Sunchef entered into a contractual relationship with Nadeau in 2007 in order to ensure sufficient supply for its biggest customer. He further stated that, since their arrangement came into effect, the birds supplied by Nadeau had been of high quality and of the type and size requested. Mr. Ellis also indicated that Olymel was unwilling to supply fresh-killed chickens to Sunchef at a reasonable price and that although he currently purchased processed chickens from Exceldor, it could not meet all of its needs. Mr. Ellis stated that Nadeau had always been an effective competitor to Exceldor and Olymel and said that if Nadeau's supplies of live chickens were cut off or curtailed, its ability to compete with Exceldor and Olymel would be reduced or eliminated. According to Mr. Ellis, this would have a major adverse effect at Sunchef's level of the market. He further stated that should Nadeau go out of business or be acquired by Olymel, he foresaw that Sunchef's supplies would be reduced or cut off and that he would no longer be able to continue in that business.

Lyndsay Gazzard

Lyndsay Gazzard is the senior purchasing manager of UPGC. She testified about UPGC's long and mutually beneficial relationship with Nadeau. She stated that Nadeau had for a long time supplied all of the fresh chickens used in KFC restaurants in New Brunswick, and, in the last two years, supplied 98% of KFC restaurants in Nova Scotia and Prince Edward Island. She further stated that UPGC had no difficulty obtaining all of its requirements for Atlantic Canada from Nadeau at a reasonable price. She testified about UPGC's purchasing requirements and trends, including procurement from Olymel and Exceldor. She also testified about the problems arising from Westco's change in production size. Lastly, she indicated that she remained concerned about UPGC's ability to obtain birds of the required size and specifications in the event that live chicken supply to Nadeau was disrupted.

Corey Goodman

Corey Goodman is the chief purchasing officer for Prizm LP and the general manager of UPGC. Prizm operates about 45 KFC restaurants in New Brunswick and Nova Scotia, and UPGC is a non-profit association that operates as the purchasing agent for all KFC restaurants in Canada. Mr. Goodman stated that he was concerned about the impact of any reduction in the supply of

live chickens to Nadeau, as it would result in increased costs, reduced freshness and operational complexities with respect to obtaining replacement supply. He further stated that Olymel and Exceldor were already very powerful players in the market and that with Nadeau weakened or gone, there would be even less competition.

Debbie Goodz

Debbie Goodz is the president and CEO of Riverview which is a further processor located in Ste-Sophie, Quebec. Ms. Goodz described Riverview's business and its supply requirements and specifications. She indicated that Riverview purchased the vast majority of its supplies from the Applicant and that it had always been content with the Applicant's service, quality and price. Ms. Goodz stated that her ability to continue to supply her specialized product at an acceptable price depended on her ability to continue to obtain supplies from the Applicant. She indicated that she was unable to obtain chickens from Olymel and that she could not obtain alternative supplies from elsewhere because of transportation issues, price concerns and size requirements. Ms. Goodz also indicated that she had never complained to the CFC regarding the unavailability of supplies. Ms. Goodz expressed her view regarding the current state of competition and stated that if the Applicant's supplies of live chickens were cut off or curtailed, its ability to compete with Olymel would be reduced or eliminated, thus causing a major adverse effect at Riverview's level of the market.

Jeffrey Lloyd McHaffie

Jeffrey Lloyd McHaffie is a consultant to Puddy and its *de facto* vice president, in charge of sales and purchases of poultry products. He has over 20 years' experience in the poultry industry. Puddy is a further processor of fresh-killed chickens, specializing in "case-ready" chicken for the retail supermarket. Mr. McHaffie testified about Puddy's strict specifications for its incoming supplies of chickens and stated that Nadeau has consistently been able to meet its exacting quality and freshness requirements. He also testified about Puddy's difficulties in obtaining supply from Ontario and western Canada and he discussed the service and quality problems associated with Olymel's products.

Kevin Thompson

Kevin Thompson is the executive director of the Association of Ontario Chicken Processors ("AOCP"). He has been involved with the Ontario chicken industry since 1978. He stated that maintaining a supply of live chicken was essential for a processor as without supply, processors become less competitive and less able to meet the needs of their customers. He described the plant supply allocation systems in place in Ontario and Quebec and the supply management system in place in Canada. He stated that it was disconcerting to the AOCP that Nadeau's only alternative may be to enter into an interprovincial premium war to try to replace 50% of its live supply if the Respondents were able to unilaterally withdraw their live chicken production from Nadeau. He testified on the detrimental effects of interprovincial trade via premium wars and concluded that the consequences of a premium war for the processor community as a whole, its customers and for consumers were all negative. He indicated that the interprovincial movement of live chickens is really a weakness in the regulated supply system and one that must ultimately

be addressed if supply management is to be sustained. He further stated that if Nadeau elected not to source chickens from Quebec or if it decided to close or to sell to one of the other processors in the region, there would be a substantial adverse effect on competition in the marketplace in Quebec and eastern Canada.

Bruce McCullagh

Bruce McCullagh is the senior vice president and general manager of poultry operations at Maple Leaf. He has over 12 years' experience in the poultry industry. He described the nature of the supply management system including the manner in which the system shields chicken producers from competition. He also testified about the plant supply allocation systems in place in Ontario and Quebec. Mr. McCullagh discussed the detrimental effects of interprovincial trade including the creation of unsustainable premium wars. He stated that interprovincial trade is a systemic problem in the poultry industry and that the government needs to look at possible amendments to the current regulatory regime to address this issue. Mr. McCullagh also testified about Maple Leaf's involvement in the interprovincial procurement of live chickens.

Andre Merks

Andre Merks is a Nova Scotia producer. He has been farming broiler chicken, turkeys and layer eggs for over thirty years. Mr. Merks spoke of the "handshake deal" he entered into with the Applicant following the closure of the Maple Leaf plant in Nova Scotia. He discussed the reasons why he had decided to send his production to the Applicant instead of ACA. Mr. Merks spoke of the concerns expressed by Nova Scotia producers with respect to the chicken industry in Nova Scotia. He also testified with respect to a meeting that took place in October of 2008 between Nova Scotia producers and Maple Lodge concerning Maple Lodge's possible involvement in the modernization of the ACA plant.

Michael Donahue

Michael Donahue is the vice-president of Agri Stats, a company that offers benchmarking services for the poultry industry across North America. He described the procedure used by Agri Stats to collect and analyze data. Mr. Donahue explained the report that he had generated for the St-François Plant and indicated that, in the areas he had examined the St-François Plant would be competitive with the Canadian industry.

Westco's Expert

Dr. Margaret Sanderson

Margaret Sanderson has held a number of positions with the Competition Bureau including the position of Assistant Deputy Director of Investigation and Research for the Bureau's Economics and International Affairs Branch. Ms. Sanderson was qualified as an expert in the area of economics, competition policy and industrial organization, including market definition and the competitive behaviour of firms. Ms. Sanderson testified with respect to paragraphs 75(1)(a) and 75(1)(e) of the Act. With respect to paragraph 75(1)(a), Ms. Sanderson expressed the opinion

that the issue was not in dispute and that the product market was live chickens. To determine whether or not the Applicant would be substantially affected in its business, Ms. Sanderson looked at the cost of replacing the Respondents' birds with birds from Quebec. She was of the opinion that the Applicant could source live chickens from producers in Quebec without being substantially affected and thus concluded that Quebec-based chickens were substitutes for the live chickens supplied by the Respondents.

In respect of paragraph 75(1)(e), Ms. Sanderson was of the opinion that the relevant geographic market for determining whether there was an adverse effect on competition was at least as large as Ontario, Quebec and the Maritimes. She examined Nadeau's and Olymel's historic shipping patterns, shipping distances, transportation costs and prices to make this determination. In Ms. Sanderson's view, the refusal would not provide Olymel with market power and would not cause an adverse effect on competition.

Westco's Lay Witnesses

Thomas Soucy

Thomas Soucy is the president and chief executive officer of Westco. He testified about Westco's activities and operations. He discussed the consolidation of production quota in New Brunswick and Westco's plans for complete vertical integration. He testified about Westco's business relationship with the Applicant and provided his view that the Applicant had abused its monopoly power in New Brunswick. Mr. Soucy described the conception of Sunnymel and discussed Sunnymel's plan to acquire or construct a new processing plant in New Brunswick. He also testified about Westco's negotiations with the Applicant regarding the purchase of the St-François Plant and with respect to the Applicant's ability to obtain replacement supply of live chickens in Quebec.

Bertin Cyr

Bertin Cyr is a Westco shareholder and has been chairman of Westco's Board of Directors since 2003. He testified about the history of the corporation as well as its plans for complete vertical integration. Mr. Cyr described the steps toward vertical integration that had been taken by Westco in the past and he provided his view that complete vertical integration, by acquiring an existing processing plant or by building a new one, was Westco's only way to ensure its long term survival in the poultry industry. Mr. Cyr testified about Westco's business relationship with the Applicant and indicated that Westco's desire to vertically integrate was also motivated by the fact that the Applicant had abused its position. Mr. Cyr also spoke of Westco's past attempts to enter into a partnership with the Applicant.

Yvan Brodeur

Yvan Brodeur is vice-president of procurement at Olymel. He described the nature of Olymel's business including its processing and procurement activities. He described the supply allocation system in place in Quebec and he discussed interprovincial trade of live chickens. Mr. Brodeur also spoke about the conditions of purchase of both live and processed chickens. He discussed

transportation costs associated with transporting live chickens as well as transportation costs associated with transporting processed chickens. Mr. Brodeur also testified about Olymel's clients and their location from Olymel's processing plants.

Julie Desroches

Julie Desroches is an environmental project officer at Olymel. She testified about her involvement in Sunnymel's project to build a new slaughterhouse in New Brunswick and the steps that had been taken to date in the construction project. She also spoke of the circumstances which had led to the project being delayed and she discussed Sunnymel's future construction plans for the new slaughterhouse in New Brunswick.

Richard Wittenberg

Richard Wittenberg is a chicken producer in Nova Scotia. He testified on the closure of the Maple Leaf plant in Nova Scotia and spoke of the "handshake" agreement he entered into with the Applicant following the closure of that plant. He also testified with respect to a meeting that took place on October 15, 2008, between Nova Scotia producers and Maple Lodge concerning Maple Lodge's possible involvement in the modernization of the ACA plant.

Dynaco's Lay Witnesses

Gilles Lapointe

Gilles Lapointe is the director of finance for Dynaco. He testified with respect to Dynaco's corporate structure and the nature of its business. He described Dynaco's production quota and indicated that it consisted of 6.22% of New Brunswick's total production quota. Mr. Lapointe testified about Dynaco's decision to cease supplying the Applicant with live chickens. He also described how co-operatives operate and why it was beneficial for Dynaco to send its production to Sunnymel.

Rémi Faucher

Rémi Faucher is the general manager of Dynaco. He testified about Dynaco's corporate structure and the nature of its business and chicken production. He spoke of the reason why Dynaco decided to cease supplying the Applicant with live chickens and stated that it was essentially based on the deterioration of its business relationship with the Applicant and on the business opportunities offered by Sunnymel.

Acadia's Lay Witnesses

Rémi Faucher

Rémi Faucher is the former president and director of Acadia. He testified about Acadia's corporate structure and the nature of Acadia's business. Mr. Faucher spoke of Acadia's quota and indicated that it consisted of 16% of New Brunswick's total production quota. He also

testified about Acadia's decision to cease supplying the Applicant with live chickens and indicated that it was a business decision. He also spoke about the financial advantages involved in sending Acadia's production to a processing facility owned by Olymel.

[486] SCHEDULE B

Schedule to the *Regulations Amending the Canadian Chicken Marketing Quota Regulations*,
SOR/2009-4

SCHEDULE (*Sections 1, 5 and 7 to 10*)

LIMITS FOR PRODUCTION AND MARKETING OF CHICKEN FOR THE PERIOD
BEGINNING ON JANUARY 4, 2009 AND ENDING ON FEBRUARY 28, 2009

Item.	Province	Column 2 Production Subject to Federal and Provincial Quotas (in live weight) (kg)	Column 3 Production Subject to Federal and Provincial Market Development Quotas (in live weight) (kg)
1.	Ont.	65,725,554	2,920,000
2.	Que.	53,105,045	5,400,000
3.	N.S.	7,014,256	0
4.	N.B.	5,716,109	0
5.	Man.	8,390,996	394,950
6.	B.C.	29,212,807	4,089,793
7.	P.E.I.	754,057	0
8.	Sask.	7,015,829	982,216
9.	Alta.	18,430,359	400,00
10.	Nfld. and Lab.	2,825,158	0
Total		198,190,170	14,186,959

ANNEXE (*articles 1, 5 et 7 à 10*)

LIMITES DE PRODUCTION ET DE COMMERCIALISATION DU POULET POUR LA
PÉRIODE COMMENÇANT LE 4 JANVIER 2009 ET SE TERMINANT LE 28 FÉVRIER 2009

Article	Province	Colonne 2 Production assujettie aux contingents fédéraux et provinciaux (en poids	Colonne 3 Production assujettie aux contingents fédéraux et provinciaux d'expansion du marché (en poids vif)
---------	----------	---	--

	vif) (kg)	(kg)
1. Ont.	65 725 554	2 920 000
2. Qc	53 105 045	5 400 000
3. N.-É.	7 014 256	0
4. N.-B	5 716 109	0
5. Man.	8 390 996	394 950
6. C.-B	29 212 807	4 089 793
7. Î.-P.-É	754 057	0
8. Sask.	7 015 829	982 216
9. Alb.	18 430 359	400 00
10. T.-N.-L.	2 825 158	0
Total	198,190,170	14 186 959

1.

[487] SCHEDULE C

Sections 1 and 2 of Order I - Chicken Farmers of New Brunswick Marketing Plan

- | | |
|---|---|
| <p>1. The object of the marketing plan is to control the number of chickens raised for marketing within the province, in such a manner:</p> <p>(a) As to ensure there is an adequate supply of New Brunswick grown chicken available to the consumer.</p> <p>(b) To provide an opportunity for the maximum number of residents in New Brunswick to earn a living in the marketing of chicken.</p> <p>(c) To ensure a reasonable rate of return from the sale of chicken and to ensure a continuity of supply.</p> <p>(d) To avoid the development of monopolies which could result in excessive cost to the consumers of chicken.</p> <p>(e) To avoid a curtailment of the overall supply in the event one or more producers cease to market chicken.</p> <p>2. There shall be established a periodic marketing limit being the number of kilograms of chicken live weight which can be raised for marketing within the Province in conformity with the objectives of the plan.</p> | <p>1. Le but du plan de commercialisation est de réglementer l'élevage du poulet destiné à la commercialisation dans la province, de façon à :</p> <p>a) assurer au consommateur un approvisionnement adéquat de poulets produits au Nouveau-Brunswick,</p> <p>b) offrir à un nombre maximum de résidents du Nouveau-Brunswick l'occasion de gagner leur vie dans la commercialisation du poulet,</p> <p>c) assurer un profit raisonnable de la vente de poulets et assurer un approvisionnement continu.</p> <p>d) éviter la réalisation de monopoles qui pourraient entraîner un coût excessif au consommateur, et</p> <p>e) éviter une réduction de l'approvisionnement global advenant le retrait d'un ou de plusieurs producteurs de la commercialisation du poulet.</p> <p>2. Une limite de commercialisation périodique est établie, correspondant au nombre de kilogrammes (poids vif) de poulets pouvant être élevés à des fins de commercialisation dans la province, conformément aux objectifs du plan.</p> |
|---|---|

APPEARANCES :

For the applicant

Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited

Leah Price
Ron Folkes
Andrea McCrae
Joshua Freeman

For the respondents

Groupe Westco Inc.

Eric C. Lefebvre
Martha Healey
Denis Gascon
Alexandre Bourbonnais
Geoffrey Conrad

Groupe Dynaco, Coopérative Agroalimentaire

Olivier Tousignant

Volailles Acadia S.E.C. and Volailles Acadia Inc./Acadia Poultry Inc.

Valérie Belle-Isle

TAB 7

Competition Tribunal



Tribunal de la Concurrence

CT-1989-004 – Doc # 88a

IN THE MATTER OF an application by the Director of Investigation
and Research for an order pursuant to section 75 of the
Competition Act, R.S.C., 1985, c. C-34, as amended,
requesting that the respondent accept the Exdos Corporation
as a customer for the supply of a product

B E T W E E N:

The Director of Investigation and Research

Applicant

and

Xerox Canada Inc.

Respondent



REASONS AND ORDER

Dates of Hearing:

June 11 - 20 and July 19-20, 1990

Presiding Member:

The Honourable Madame Justice Barbara Reed

Lay Members:

Dr. Frank Roseman
Mr. Victor L. Clarke

Counsel for the Applicant:

Director of Investigation and Research

James W. Leising
John S. Tyhurst

Counsel for the Respondent:

Xerox Canada Ltd.

Colin L. Campbell, Q.C.
William Donaldson

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COMPETITION TRIBUNAL
REASONS AND ORDER

The Director of Investigation and Research

v.

Xerox Canada Inc.

I. INTRODUCTION

The Director of Investigation and Research ("Director") brings an application seeking an order to require Xerox Canada Inc. ("Xerox") to accept Exdos Corporation ("Exdos") as a customer for the supply of certain Xerox copier parts. This application is brought pursuant to section 75 of the *Competition Act*.

Xerox followed the practice, for a number of years, of freely selling parts for its photocopier machines to any purchasers willing to pay the list price, of whom Exdos was one. Sales were made without regard to the use subsequently made of the parts, whether they be used by the purchasers as end users² of the photocopier machines, or as suppliers of maintenance service to owners of Xerox photocopiers, or as refurbishers of second-hand Xerox machines for resale into the used photocopier market. Then, in August 1988, in response to a policy originating with Xerox Corp. (U.S.) but subsequently adopted by Xerox (Canada), the supply of such parts was curtailed. This was done in order to eliminate competition from organizations which had grown up and were providing maintenance service for Xerox photocopiers. Xerox determined that some of the "margin-rich area" of service revenue was being lost to these competitors. The competitors are referred to in the evidence as independent service organizations ("ISOs"). The curtailment of the supply will also effectively eliminate most of the second-hand market in Xerox copiers, except to the extent that such is controlled by Xerox. Exdos was one of

¹ R.S.C. 1985, c. C-34, as amended.

² The "end user" is the person who, irrespective of ownership, is in possession of and actually uses one or more Xerox copiers.

the organizations caught in this general refusal to supply copier parts. Insofar as the particular position of Exdos is concerned, the relevant facts follow.

II. BACKGROUND AND REFUSAL TO SUPPLY

A. Initiation of the Business Relationship

In 1982 Xerox found itself with an overly large inventory of used photocopiers. It was Xerox's practice, at the time, to either scrap such machines or to refurbish them to an "as new" condition. In the latter case the machines were resold, leased or rented with a "new machine" warranty. Xerox was concerned about the drain the oversupply of used inventory was creating on the financial position of the company.

The oversupply of used machines was the result of a number of factors: there was a general economic downturn in 1980-81; the patent which Xerox held on the photocopier technology had expired in the mid-1970s and, with that expiry, Xerox faced increasing competition from other manufacturers of photocopiers. In addition, Xerox was moving to a new technology, described generally in the evidence as "10 Series copiers", which was eventually introduced in 1983³. It was anticipated that many of Xerox's customers would wish to move to this new technology. Consequently, as a result of both the increased competition which Xerox was facing and the desire of customers to move to the new technology, it was expected that the return of old machines to Xerox would increase.

The normal practice of Xerox, prior to the late 1970s, had been to place machines with customers on a rental basis. Under this practice ownership of the machines remained at all times in the hands of Xerox or returned to Xerox at the end of the lease. In the late 1970s, the practice in the industry began to change to one of selling the machines to customers either by way of an outright sale or through a lease-purchase arrangement.

³ The "10 Series copiers" are also referred to in the evidence as the "Marathon" family of copiers.

With more and more machines owned by customers directly, it was anticipated that a considerable second-hand market in the machines would develop.

In 1982, Terry Reid was an employee of Xerox. Terry Reid subsequently became and remains the president and majority shareholder of Exdos. Xerox and Reid determined that a mutually advantageous arrangement might be created if Reid left the Xerox company and created an independent company which would purchase some of the used copier machines from Xerox in an "as is" condition, refurbish them and sell them into the second-hand market⁴. It was contemplated that this would tap an area of the market not previously served by Xerox. It would also free the Xerox sales force to concentrate on selling the newer model machines. It would give Reid an opportunity to develop his own business and would have a positive effect on the Xerox balance sheet. It was contemplated that Reid would create a dealer network throughout Canada for the purpose of disposing of the used copiers. It was also contemplated that he would himself market some of the machines directly into the end user market.

In May 1983, Exdos (initially carrying the name XDS Corp.) and Xerox entered into a contract pursuant to which Exdos was to be allowed to purchase certain copier models⁵ at specified prices. Delivery of the equipment was taken by Exdos at Xerox's three distribution centres in Toronto, Montreal and Calgary. Exdos was also given, under the May 24, 1983 contract, the right to purchase copier parts for the various second-hand models covered by that contract. Such parts were to be sold to Exdos at 50 percent off list (drums for the machines were to be sold at an even more advantageous price, namely twice the Canadian landed price). The contract was expressed to run for a year or to come to an end at an earlier date should Exdos purchase, by that time, a certain dollar volume of equipment. For four months Exdos was given an exclusive right to purchase the used

⁴ The other options open to Xerox at the time were to: (1) refurbish as many of the machines as the market would bear to an "as new" condition and scrap the remainder (as it had been doing in the past); or (2) develop an in-house second-hand market division.

⁵ Model Nos. 660, 3100, 3103, 3107, 4000, 4500, 2400, 3600, 7000; all were pre-10 Series machines.

copier models (from May 24, 1983 until October 1, 1983). At the time, this arrangement was clearly, in the eyes of Xerox, an experiment; it was designed to determine if a mutually advantageous business arrangement could be developed.

It was recognized from the beginning that there was a potential for Exdos' activity, in moving into or feeding a market for second-hand copiers, to lead to conflict with Xerox's mainline sales activity. Indeed, the initial contract signed by the parties contained an extensive list of Xerox's major customers to which Exdos agreed it would not market the used machines purchased from Xerox. It is clear that Reid understood from the very beginning that if his activities in selling second-hand copier equipment resulted in conflict with Xerox's mainline sales efforts ("raised the field noise level") this could result in the cancellation of his contract.

B. Contract Modifications - Copiers from Sources Other than Xerox - Parts from Xerox

The contract between Exdos and Xerox was extended and modified from time to time. Many of the changes need not be detailed here. Suffice it to say that Exdos' exclusive right to purchase certain used photocopier models from Xerox, which was originally designed to operate for only four months, was extended indefinitely; a reciprocal exclusivity obligation was imposed on Exdos (to purchase the models covered by the contract from Xerox only); the contract was varied to one of indefinite duration, subject to termination by either party at first on 60 days notice and later on 30 days notice. The list of copiers which Reid was entitled to purchase from Xerox under the contract was expanded slightly from time to time to include three or four additional models as such became "obsolete", that is moved off Xerox's active sales list, but this list never included used 9000⁶ or 10 Series machines⁷. The 50 percent discount off list, for

⁶ The 9000 Series of copiers both pre-dated and post-dated 1983 and the introduction of the 10 Series. They were manufactured from 1979 to 1986.

⁷ Some 9000 and 10 Series copiers were acquired by Exdos, at a later period of time, through Xerox sales representatives. Such representatives, when faced with competition from other copier manufacturers for the business of a particular customer, would persuade the customer to buy a new Xerox machine by offering a better price for the old machine. They would contact Reid to buy the customer's machine because Exdos would pay more for the used copier than Xerox allowed on a trade-in. In such cases, Exdos sometimes made the purchase cheque payable to the customer and sometimes to Xerox directly, depending on who actually owned the machine. Reid did not hide from Xerox the fact that this activity was taking place although he did refuse to name the sales representatives who were approaching him. Xerox did not approve of this activity by its sales representatives.

parts for the used machines which Reid obtained from Xerox, was subsequently modified to a 25 percent discount and eventually eliminated. He thereafter paid list price for the parts purchased. The most significant change in the contract arrangement between the parties, for the purposes of this case, however, was the addition of provisions with respect to the purchase and sale of parts for copier models acquired by Exdos from sources other than Xerox, about which more will be said later.

Almost from the beginning Exdos began purchasing second-hand Xerox copier models from sources other than Xerox. These were obtained, for example, from finance companies who had repossessed the equipment for non-payment, or from owners of the equipment who were upgrading to a newer model, or at auction. The used copiers obtained in this way at first included only pre-1983 copier models not covered by the contract⁸. Eventually they also included the newer 9000 and 10 Series models. They never, however, included the 50 Series machines which were introduced by Xerox in 1989.

Reid used Exdos to purchase the second-hand equipment, either from Xerox or other sources. When the copiers were placed directly into the end user market, Reid used a company called Neutron Office Products ("Neutron") to deal with the end user. Reid acquired a 70 percent interest in Neutron shortly after he established Exdos. (In late 1989, Exdos acquired the remaining 30 percent interest.) Exdos also established contacts with existing Canadian ISOs and encouraged the creation of other ISOs in various locations throughout the country, to which Exdos sold used copier equipment. Eventually, equipment was also sold into the United States and abroad.

After a photocopier is sold, there is a continual need to provide maintenance service to support the machine in the customer's hands. Reid used Neutron to support the second-hand machines he placed directly into the end user market. The other ISOs offered service for the machines they placed in that market. Alternatively, the final purchaser could contract with Xerox for service, providing Xerox's terms for dealing

⁸Models Nos. 2300, 2350, 5400, 5600 and the older 9000 Series machines.

with used machines were met. The usual practice in the industry is for the purchaser of a machine to obtain service from the vendor of the machine.

In order to provide service, access to spare parts is of course necessary. From the beginning Reid purchased parts from Xerox for this purpose. The parts purchased related to both the used equipment purchased from Xerox and the used equipment purchased elsewhere. This included parts for the newer copier models (9000 and 10 Series). Some of the ISOs who purchased used equipment from Reid apparently bought at least some Xerox parts through him; several of them also bought parts directly from Xerox.

C. Xerox's Reaction to Exdos' Purchasing Equipment Outside the Initial Contract

Various Xerox employees of Xerox testified that the activity of Exdos (Reid), in purchasing used machines from sources other than Xerox and in purchasing parts from Xerox for those machines, was considered by Xerox from the beginning to be a breach of, at least, the spirit of its May 1983 contract with Exdos. It was contended that Xerox, with one exception, did not knowingly supply Reid with parts for copier models other than those expressly covered by the May 24, 1983 contract (or any successor contract). The one exception was said to be the supply of parts to Reid when these were required for his *own* end use. The evidence does not support that conclusion. While the initial formal written contract between Exdos and Xerox governed only the purchase of parts and supplies for photocopier models sold under the contract, it is clear that from a very early stage Xerox was aware of both Exdos' expansion of its business into other copier models and its purchase of parts for these machines from Xerox.

Insofar as the expansion of the business is concerned Xerox documents record, as early as April 1984, that:

EXDOS may ... source [buy] Xerox equipment that we will not supply him from other sources. There are several models that we will not sell him and these are the units that we are still actively marketing. He buys these from many sources⁹.

⁹ Exhibit A-1, tab 26.

With respect to the purchase of parts for the copier models not covered by the contract, during the first year of the contract orders for such were lumped together by Exdos with orders for the copier parts on which Exdos was entitled to a 50 percent discount under the contract. This was not considered by Xerox to have been intended. Thus, when Xerox conducted

an internal review of the Exdos contract in December 1984, one of the concerns expressed was that:

EXDOS/NEZRON or its agents as a condition of our agreement must be prohibited from ordering parts for any piece of equipment not sold to them by Xerox other than at full retail price at which they are available to any customer. (underlining added)¹⁰

Consequently, Exdos was given separate customer numbers: one under which it was to order parts for copier models pursuant to the May 1983 contract and another under which it could order parts not covered by the contract. The May 1985 version of the contract expressly provided that:

Parts and drums for equipment not listed in Appendix A [Appendix A listed equipment available from Xerox] may be purchased by Exdos (subject to availability and Xerox's right to limit quantities at any one time at standard retail prices in effect at the time of purchase¹¹.

There is no evidence that Exdos (Reid) tried to circumvent or abuse this ordering system, for example, by ordering parts for the newer copier models under the number which was to be used for the ordering of parts on which he was entitled to a discount.

As has been noted, Xerox argues that throughout its relationship with Reid its policy was to sell parts for the newer copier models to the end users of photocopiers only and that it was on this basis that Reid was allowed to purchase parts for models not covered by the contract, including eventually the post-1983 copier models. This is not supported by the weight of the evidence. There is no documentary record of such a

¹⁰ Exhibit A-1, tab 35.

¹¹ Exhibit A-1, tab 56A, clause 12.

restriction having been communicated to or imposed upon Exdos. There is no documentary evidence of such a restriction having been communicated to the employees of Xerox who processed the Exdos orders. There was no monitoring by Xerox of either the volume or type of parts being purchased. And there is no evidence that any monitoring took place with respect to any other customer purchasing Xerox parts. By mid-1985 a monitoring system was easily available to Xerox, as a result of a change made to its parts ordering system at that time.

The volume of 10 Series parts Reid purchased is entirely inconsistent with the suggestion that Xerox was only providing such to Exdos for its own end use. In this regard, Xerox employees were aware of the approximate size and nature of Reid's operation. For example, Mr. Hyde visited the Exdos-Nezron business premises in the late fall of 1984 and saw used 10 Series machines in the showroom at that time. Reid sought and received, from Xerox, copies of both parts price lists and service manuals for the 10 Series machines. Such activity is entirely inconsistent with the suggestion that Xerox was only selling parts to end use customers and that Reid's acquisition of post-1983 copier parts was in some way accomplished through subterfuge. It is clear that post-1983 copier parts were being purchased by Exdos and other independent service organisations openly and without restriction.

Although not directly relevant to the issues in this case, for completeness one further aspect of Reid's expansion of his business during the 1984-1985 period should be referred to. Reid expanded his business into the United States and purchased and resold second-hand copiers and parts in that market. This expansion was with Xerox Canada's knowledge and at least tacit permission. Again there was a need to support the photocopier sales with a supply of spare parts. In this context some of the parts being purchased by Exdos from Xerox at a discount (particularly the drums) found their way into the United States market. The parts, having been purchased from Xerox at 50 percent off list, and the drums at a more advantageous price, could be resold into the United States market at prices which undercut the sales efforts of the marketing arm of Xerox Corp. (U.S.). This entity is referred to in the evidence as the United States Marketing Group ("USMG"). In response to concerns expressed by USMG, the discount to Reid for

parts for the pre-1983 copier models was revised in the May 1985 contract renegotiations; the 50 percent discount was lowered to 25 percent. In addition, the list prices of the parts themselves were raised. These changes led Xerox officials to conclude with respect to the concerns raised by USMG:

The contract has recently been renegotiated with Exdos.
The issues you have alluded to ought not to occur unless
Exdos wishes to take advantage of any currency exchange
Fluctuations¹².

D. Expansion of Exdos and Other ISOs - Consumer Benefit

At the same time that Exdos was expanding its activities in the marketing and servicing of second-hand Xerox equipment, others were doing likewise. A number of ISOs were becoming established in Canada as they had been for some time in the United States. These enterprises provided competition to Xerox with respect to the provision of service for Xerox machines, both second-hand and new. The second-hand machines also provided some competition at the lower end of the market to the sale of new Xerox machines. With respect to this last, however, Reid generally managed to avoid sales conflicts with Xerox. In general there was little "field noise".

Evidence before the Tribunal makes it clear that the second-hand copier market and the option for an alternate source of service provided by ISOs are beneficial to consumers. They allow for customer choice which would not otherwise be available. With respect to the sales of copiers, Exdos-Nezron and other dealers selling second-hand equipment provide the market with machines at a lower price than is the case for a new machine (e.g. \$55,000 for a refurbished model 1090 copier as compared to approximately \$95,000 for a new machine)¹³. Also, the evidence demonstrates that Exdos-Nezron and other ISOs provide service of a quality comparable to that provided by Xerox, and on

¹² Exhibit A-1, tab 55.

¹³ Exhibit A-1, tab 230. These prices are taken from a February 1990 letter soliciting business for Nezron. The Tribunal has taken due account of the fact that this is promotional material.

occasion better and at a lower price. Reid speculated that this was possible, even though the ISOs had to buy the parts for the newer copier models from Xerox at full retail price, because the smaller organizations had less overhead and more flexibility than Xerox. In addition, some customers indicated that they preferred to be free of the rather oppressive overselling of Xerox sales representatives. They were unhappy, for example, with the fact that equipment did not always last the life of a given lease and with the continual pressure from Xerox sales personnel to upgrade even though such might not be in the customer's best interest.

The customers of Exdos who were called as witnesses were operating, in general, under significant cost restrictions (some were described by counsel as "mom and pop businesses"). It is clear that a second source of supply for Xerox machines, albeit used machines, and a second source of supply for maintenance services are extremely important in enabling such individuals to obtain quality machines and quality service at an affordable price. In one instance the evidence indicates that in the absence of Exdos the customer, Raymar Equipment Service of Beaton, Ontario, would not have been able to acquire a Xerox machine because service was simply not provided by the company to that geographical area. (Beaton is about an hour northwest of Toronto.)

The evidence of Mr. Kelly, Director of Purchasing for Humber College, is particularly illustrative. Humber College has a heavy capital investment in its reprographic equipment. During the 1986-87 period it owned approximately sixty Xerox machines. About thirty of these had been purchased two years previously. In 1986, Humber College was receiving less than satisfactory service with respect to these machines:

Everything was fine for the first few years, but service began to deteriorate. ...

You have [to] realize that in an academic institution, a copier is very essential as far as preparation of materials for various classrooms. So, it is a very high priority product in our organization.

Service deteriorated to the point where equipment was down for four and six days at a time. Complaints to service management -- to our marketing rep -- they tried a number of remedies. Nothing seemed to work. They basically explained that it was the high volumes that were causing the problems.

It got to the point where it became critical. ... We had professors going -- walking right into the President's office and throwing it at him. Now, that is something that a President certainly does not need,

We had to start to source some kind of an alternative. We had heard about -- through colleagues in purchasing -- that there were some independent service people out there, so we sourced the marketplace, and found a company by the name of Anco Equipment¹⁴.

Accordingly, Humber College began using Anco Equipment to service its machines:

We found that the independent operators were certainly cheaper. We were very skeptical, though. It was about four months of interviews and reassurances to really separate from Xerox and we started off with just a couple of machines and let Anco look after a couple,

As he progressed and proved that he could look after our equipment, we added more and more equipment to his installed base¹⁵.

Humber College subsequently purchased nineteen used Xerox copiers from this same IS0 to replace some of its existing unsatisfactory machines:

That was very beneficial to the college. We bought them and installed them and, of course, set him [Anco] up as the service agent for that equipment. ...

[With respect to the service received from Anco] we are looking at least 75 per cent better than it was with the same volumes. ... It is much cheaper¹⁶.

E. Photocopiers - Service and Parts Revenue - Xerox's Market Position

Photocopiers, by their nature, require constant service. This is so whether the machine be second-hand or new. Indeed, there was evidence that the purchaser of a machine, either second-hand or new, is unlikely to make a purchase without at the same time making some arrangement for its servicing. Because photocopiers require constant service, the revenue received therefrom rivals, if not exceeds, that obtained from the original sale of the machine.

¹⁴ Transcript at 547-48 (13 June 1990).

¹⁵ *Bid.* at 550.

¹⁶ *Ibid.* at 552.

When buying a machine from Xerox, customers are given several options with respect to a possible service agreement. Customers can choose a full service maintenance agreement under which they pay Xerox an amount which is calculated by reference to the usage which the machine receives. The cost of parts and service are not separated out or identified in the amount paid. For example, Humber College paid Xerox, under its service contract, a certain base charge which was paid as a lump sum at the beginning of each year and then 1.15 cents for each copy produced by the machines. Ninety-five percent of Xerox's customers choose a full service agreement. A second option which customers can choose is a time and materials service agreement. Under this arrangement they pay for parts and service only as and when the machine breaks down. A third option is available for some large volume customers. An employee of the customer can be trained by Xerox to service the photocopiers (at least insofar as the less complicated repairs are concerned). Under this option the customer provides its own service and the required parts are purchased from Xerox. The University of Manitoba, for example, is one customer who chooses this option.

Xerox obtains the parts which it either sells (now only to end users) or provides to its service representatives from Xerox *Cop.* (U.S.). In determining a retail price for these parts there is no evidence that competitive factors are taken into account. Xerox simply uses a grid formula pursuant to which the landed Canadian price, paid by Xerox to its parent, is multiplied by a factor of from two to eight with the multiples being inversely related to the landed price of the parts. Xerox parts are generally more expensive than comparable parts for other copiers. A study of comparable parts was placed in evidence. It shows that prices for Xerox parts are from 198 percent to 951 percent (the median being 389 percent) higher than similar parts used in two equivalent copiers. While Xerox challenges the accuracy of this study it produced no direct evidence to support that challenge. Accordingly, the probative value of that study has not been seriously undermined.

Xerox is the largest supplier of copiers in Canada. In 1989, Xerox had a dominant position in the high-volume end of the market (90 percent share of copier placements) and accounted for almost one-half of the copier placements in the medium volume range¹⁷. It accounts for about one third of the low-volume copier placements but does not compete in the personal copier market. The copier market is described by Professor Wilson, testifying on behalf of the Director, as a differentiated oligopoly with an active competitive fringe. As Professor Wilson stated, and which the Tribunal accepts, while there is obviously competition in the copier market, with success critically dependent upon an ability to sell upgraded equipment from a cost and features standpoint, the evidence does not warrant the conclusion that Xerox has little market power in the copier market.

F. Introduction of an ISO Policy (United States)

In January 1987 a policy respecting ISOs was issued by USMG for the United States market. This was a revised version of an earlier policy which had been developed in April 1984 but which had not been implemented. The policy was to refuse, thereafter, to supply ISOs with 10 Series and any new product parts for resale. Part of the documentation describing the initial policy change in 1984 reads:

We have had a long standing policy of selling parts at commercial list price to all third parties, including direct purchasers of our equipment, third party leasing companies and third party service companies. The establishment of resellers authorized to service Xerox equipment has necessitated a significant change to this policy¹⁸.

The January 1987 policy reads in part:

For 10 Series copiers ... we will not knowingly supply ISOs with parts for resale, technical training, technical documentation, or other resources (not generally available to end-users). When an order for such resources is received, we may require verification that the purchaser is an end-user and that any parts are not intended for resale. (Resources for new Xerox products introduced after the effective date of this policy likewise will not be offered to ISOs.¹⁹)

¹⁷ "Volume" refers to the copier's rate of copy production per minute.

¹⁸ Exhibit A-1, tab 114A.

¹⁹ Exhibit A-1, tab 114E.

The ISO policy for the United States was clearly designed to undercut the viability of the ISOs and to preserve, if not enhance, the revenue derived by *Xerox Corp.* from the service aspect of its business. This policy was subsequently adopted in similar form by Xerox Canada in June 1988 and led to the refusal to supply which is in issue in this case²⁰. Before dealing further with the events which led to the refusal to supply, evidence respecting the Xerox-Exdos business relationship during the April 1987 to August 1988 period will be referred to.

G. Xerox/Exdos' Business Relationship -- April 1987 to August 1988

In April 1987, Reid received notice that Exdos' contract with Xerox for the purchase of used equipment was being terminated as of the end of May. It was the view of the person in charge of dealing with Reid at that time (Mr. Haltigin) that the contract was not profitable from Xerox's point of view. This view was based on Mr. Haltigin's analysis of the difference between the cost to Xerox of scrapping the used machines (including the recoverable metal obtained in that process) and the profit received as a result of selling the machines to Reid. The analysis was successfully challenged by Reid who pointed out that it had not taken into account the revenue received by Xerox from the sale to Exdos of parts and supplies for the machines.

Thus, while Reid's 1983/ 1985 contract was cancelled, subsequent negotiations led in November 1987 to an arrangement whereby he was allowed to purchase second-hand equipment from Xerox on a "one off basis". There was no change, however, in Reid's pattern of purchasing parts from Xerox. He continued to purchase parts for both the used machines which he had purchased from Xerox and for the used copiers, including post-1983 models, which he had purchased elsewhere. Both categories of parts were sold to him at full retail price.

²⁰ Discussed *infra* at 27ff.

Correspondence which documents the agreement clearly provides that:

Parts for Xerox equipment not purchased by EXDOS from XCI [Xerox] (i.e. equipment not listed in Attachment B), will continue to be available for EXDOS purchase at standard retail prices. Order fulfilment will be subject to availability and Xerox's right to limit quantities²¹. (some underlining added)

This portion of the correspondence was a direct response to Reid's May 1987 request for clarification from Xerox of various issues arising from the contract termination:

There are a number of models of Xerox equipment which we service which were not purchased directly from XCI but rather were purchased from XCI customers, through XCI sales representatives, leasing companies and end users directly. We need confirmation that parts for this type of equipment will continue to be available at a standard retail rate²².

All during the May 1987 to August 1988 period parts for both pre-1983 and post-1983 copier models were sold to Exdos.

H. Development of Canadian ISO Policy -- Refusal to Supply Parts

To return to a consideration of the Xerox ISO policy, the evidence establishes that the USMG policy, concerning the refusal to sell 10 Series and newer copier parts to ISOs, would not be effective unless it was implemented by Xerox worldwide. Thus, this ISO policy which originated in the United States was subsequently adopted in Canada. Xerox argued that insofar as Canada was concerned, the implementation of the policy was nothing more than the formalization of what had always been the company policy, that is, that it would only sell post-1983 copier parts to end users of the machines. As has been noted, the evidence does not support that conclusion except, perhaps, with respect to 50 Series parts, which were not on the market until well after the effective date of the Canadian policy.

²¹ Exhibit A-1, tab 153, Attachment A.

²² Exhibit A-1, tab 117.

The first draft of the Canadian ISO policy was prepared by Xerox in December 1987. This policy was modeled on the Xerox Corp. (U.S.) policy. Background documents on the policy provided Xerox employees with the following information:

Senior management is increasingly emphasizing the importance of service revenue to XCI profits. Our challenge is to grow service revenue stream which is essential to Xerox success.

Sale of parts, training documentation and other support requirements for 10 Series, EP, 0s products to ISOs (independent service organizations) is contrary to this Objective²³.

On March 7, 1988, a meeting was held to discuss the final draft and implementation of the policy. As part of that implementation procedure, Xerox compiled a list of its top 150 parts customers for the purpose of identifying those among them who were ISOs. The highest volume parts purchaser identified as an ISO was Exdos. In June 1988 the Canadian ISO policy became effective²⁴. By July 6, 1988, a list of ISOs had been prepared along with a draft letter notifying them of the parts cut off.

On August 26, 1988, a letter was sent to Exdos advising it that Xerox had recently reviewed its product strategy and determined that:

... continuation of a used equipment sales and support channel would conflict with other market initiatives presently underway. As a result, we find it necessary to discontinue the sale of used equipment, supplies and parts to EXDOS
...²⁵.

The cut-off date for used equipment sales was September 26, 1988; parts for resale or service would be unavailable after October 26, 1988. Exdos purchases as an "end user customer" were unaffected.

On August 29, 1988, letters were sent by Xerox to all the other Canadian ISOs announcing the refusal to continue to sell 10 Series parts, 9000 Series parts and parts for various other listed products, other than to end users. For this purpose, ownership of a

²³Exhibit A-1, tab 179.

²⁴ A copy of the policy is included in Exhibit A-1, tab 201.

²⁵ Exhibit A-1, tab 198.

machine was considered to be irrelevant. The person who actually used the machine, regardless of who owned it, was classified as the end user. Thus ISOs who owned used Xerox equipment, which they had placed under rental to customers, were not entitled to parts for even those machines.

III. COMPETITION LAW ISSUES

An order is sought pursuant to section 75 of the *Competition Act* to require Xerox to supply Exdos (Reid) with post-1983 copier parts. For the purposes of the present case, section 75 can be excerpted as follows:

75. (1) Where, on application by the Director, the Tribunal finds that

(a) a person is substantially affected in his business ... due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

(b) the person ... is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person ... is willing and able to meet the usual trade terms ..., and

(d) the product is in ample supply,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer.
(underlining added)

There is no dispute that the parts in question are in adequate supply. There is no dispute that Exdos is willing and able to meet the usual trade terms. There is little doubt that Exdos is unable to obtain adequate supplies of the parts. And, there is little doubt that the inability to obtain supply of the parts has and will substantially affect Exdos' business.

The main competition law issue in this case is the proper product market definition and concomitantly whether it can be said that Exdos' inability to obtain adequate supplies of the product arose because of "insufficient competition among suppliers of the product in the market" ("en raison de l'insuffisance de la concurrence

entre les fournisseurs de ce produit sur ce marché"). More particularly, does section 75 encompass a situation in which the product is proprietary and derives largely from a single source?

A. Inadequate Supply

Prior to Xerox's refusal to sell post-1983 copier parts, except to end users, Exdos could obtain supplies from Xerox itself and from other ISOs either in Canada or the United States. It also could obtain parts from Rank Xerox, the British arm of the Xerox corporate family. Indeed, for some time after the supply of parts had been cut off in both Canada and the United States the supply from Rank Xerox continued. As of February, 1990, however, this source dried up as Rank Xerox implemented the ISO policy which had been adopted previously in the United States and Canada.

Exdos can now obtain Xerox copier parts: (1) from Xerox, to the extent that Exdos is recognized by Xerox as an end user of any given machine; (2) from the "cannibalization" of used machines; and (3) from independent manufacturers of Xerox parts. With respect to the first source of supply, upon being notified of Xerox's refusal to supply parts except to end users, Reid moved a number of different copier models into his showroom. He had them registered with Xerox in the name of Exdos, as an end user. He is receiving through this process a limited number of parts. This source of supply was described by counsel for the Director as a "trickle" of parts.

The second source of supply, the "cannibalization" of machines, is not an adequate source of supply over the long run. Many parts in a photocopier are "consumable" parts. That is, they wear out on a regular basis, after a given amount of use. They must be frequently replaced. Consumable parts which are obtained from used machines automatically have a more limited life than new parts. Thus replacing a worn out consumable part with a used one invites more frequent service calls. In addition, an ISO is left with a stock pile of unused parts (from the rest of the machine) which do not need to be replaced with the same frequency as the consumable parts. The cannibalization of machines is not in the long run an economically viable source for consumable parts.

With respect to the third source of supply, the evidence establishes that there were and are independent manufacturers who make some Xerox copier parts. They manufacture the parts that are in heavy demand but they do not manufacture all the parts necessary to properly service the machines. Some unique parts, which are essential for proper service, cannot be obtained from this source. It is clear on the basis of the evidence, then, that the sources of supply of Xerox parts left, in the face of Xerox's refusal to supply, are inadequate.

B. Business Substantially Affected

The evidence establishes that the Exdos-Nezron business has three overlapping aspects. The first is the purchase and sale of used Xerox photocopiers from a variety of sources and the marketing of them, together with the parts required to refurbish and service them, to customers in Canada and elsewhere. This is sometimes referred to as the "brokering" aspect of the business. The second is the refurbishing of the machines by Exdos-Nezron and the marketing of those machines directly into the end-user market, whether by sale, lease or rental. This involves both the placement of the copiers in the end-user market and the provision of continuing service for the machines in the customers hands, should the customer so wish. The third aspect of the business is the servicing of Xerox copiers independently of the sale of the machines. All three aspects of the business require access to Xerox copier parts for the business to survive.

Xerox argues that since it is still willing to supply Exdos with pre-1983 copier parts there should be a finding of no substantial effect on the Exdos business. This is not convincing both because of the volume of the Exdos-Nezron installed 10 Series customer base and because the pre-1983 copier market is a shrinking one. Xerox further argues that since its policy is to allow end users to purchase parts, there should be a finding of no substantial effect. It argues that Reid's customers can order service from Exdos-Nezron, then order the parts themselves directly from Xerox, after which Exdos-Nezron can complete the service. This is clearly so impractical that it has the appearance of a charade. Customer after customer testified that this was not a viable procedure. In the first place, customers do not want to be involved in the administrative task of ordering

parts. More importantly, however, they will not tolerate the machine down-time which such a process of service and repair would entail.

While it seems axiomatic, from the nature of the Exdos-Nezron business and from the facts set out above, that the refusal to supply will substantially affect if not destroy the Exdos-Nezron business, the Tribunal does not rely solely on the evidence which has already been described. The evidence of Mr. Banks, the accountant who performed an audit of the Exdos-Nezron business for the purpose of assessing the effects of the Xerox refusal to supply, establishes beyond any doubt that the Exdos business will be substantially affected by the refusal. One caveat must be added to this conclusion. No evidence was led with respect to the effect that the non-supply of 50 Series parts would have on Exdos. Mr. Banks did not deal with this matter in his evidence. Mr. Reid did not give evidence with respect thereto. As the Tribunal understands it, the 50 Series operates by means of new technology. They were first marketed in 1989 and parts have apparently never been sold to Exdos or to other ISOs.

C. Product/Market

Section 75 requires that one find that a person is unable to obtain adequate supplies "of a product anywhere in a market". In this case, there is little question about the geographic dimension of the market; it was tacitly assumed to be Canada. The main issue between the parties is the relevant product and, concomitantly, the relevant product market. The Director argues that the relevant product is Xerox copier parts, in particular post-1983 Xerox copier parts. The respondent submits that the relevant product market is that in which Xerox itself competes, namely "the provision of reprographic equipments, parts and service to end use customers."

The various arguments which have been raised before the Tribunal with respect to product definition will be considered in the following order: (1) whether, in the present case, Xerox parts should be considered to be a relevant product market for section 75 purposes; (2) whether vertical integration exists as a norm in the industry and the extent to which such might be relevant in the identification of a relevant market; (3) the

significance of the complainant's conduct to the identification of the relevant market; and (4) whether the respondent need exercise market power in the relevant market in order for section 75 to apply.

(1) Xerox Parts

The parties called various economists to testify on their behalf as to the relevant product market. While the process of product market definition is clearly founded on economic analysis, the question of the "relevant" market for the purposes of section 75 depends largely on the construction of section 75 and the identification of its objectives within the context of the *Competition Act* as a whole. It is clear that much of the difference between the expert economists in this case rests upon differing views as to the objectives of section 75 rather than upon differences regarding the proper economic principles respecting market definition. This is particularly true of the evidence given by Professor Waverman. Whether much of this expert evidence was proper opinion evidence was not raised by counsel. In any event, to the extent that Professor Waverman or any other expert was opining on questions of law or on what they considered to be the proper policy of the legislation rather than giving what can legitimately be classified as expert evidence as an economist, the Tribunal has treated that opinion as the personal policy preference of the witness only.

"Product" is a term of art in competition law²⁶. The determination of what is a relevant product, for any given purpose, carries with it an identification of the relevant product market. The relevant product and product market may be very broad or may be very narrow depending upon the context within which and the purpose for which that identification is required.

The Director argues that section 75 focuses on the objective of promoting efficiency and consumer choice through the enhancement of participation by individual businesses and that, therefore, the product market is most appropriately defined by reference to the acceptable substitutes available to the business refused supply in

²⁶ S. 2(1) of the *Competition Act* defines "product" as "including an article and a service".

satisfying its customers. The Director submits that Exdos must satisfy its customers' demands for the refurbishing, service and sale of used copiers. Those customers own or wish to purchase Xerox machines and therefore, the Director continues, the technical inability to substitute other parts, to make or to keep the machines operational, limits the product definition to Xerox copier parts.

This is consistent with the position taken by the Tribunal in *Director of Investigation & Research v. Chrysler Canada Ltd.*:

Products and markets can only be meaningfully defined in a particular context and for a particular purpose. The approach to defining these terms may be entirely different where, as in the case of a merger, the ultimate test is whether the merger will substantially lessen competition and the definition must be consistent with the attempt to determine whether the merger will result in an increase in prices or in other effects consistent with a lessening of competition. In the case of paragraph 75(1)(a), the ultimate test concerns the effect on the business of the person refused supplies. Where products are purchased for resale, the effect on the business of the person refused supply will depend on the demand of the person's customers and whether substitutes are acceptable to them. Therefore, the starting point for the definition of "product" under section 75 is the buyer's customers²⁷.

The Director's expert economist in the present case, Professor Gillen, defined an economic market by reference to the following criteria:

An economic market is defined as an area in which prices of qualitatively similar goods tend to equality with allowance for transportation or transactions cost. In essence a market defined in this classical economic sense is the set of products within which prices are closely linked to one another by supply and demand and whose prices are relatively independent of prices of goods not in the market. The extent of the market can be measured by the degree of product substitution in the presence of relative price changes [cross elasticity of demand]. ... Products which are close substitutes will exhibit a high cross elasticity of demand or supply and would be included in the same market²⁸.

²⁷ (1989), 27 C.P.R. (3d) 1 at 10.

²⁸ Expert affidavit of D. Gillen at para. 17 (Exhibit A-1, tab 2).

Professor Gillen accepted as a starting point that one possible market definition in this case was the product refused, post-1983 Xerox copier parts. In order to test this hypothesis, he asked: (1) whether a market for parts used by ISOs could be defined separately from a market for a service package demanded by end users; (2) whether parts and service are distinct and separate products; (3) whether other companies' copier parts should be included in the market; and (4) whether Xerox sourced parts alone form the supply side. That is, he asked as a factual matter whether a market existed: whether there were demanders, suppliers, and transactions occurring. Then, he examined the boundaries of that market and since parts for different vintages and models of Xerox equipment cannot be substituted, he concluded that post-1983 Xerox copier parts was a relevant market.

The respondent's expert economist, Professor Waverman, considered this to be an overly simplistic approach. He attempted to demolish the analysis by stating that if post-1983 Xerox copier parts was a market (or submarket) then logically each part for each machine should be considered a separate market because they are non-substitutable one for the other. The Director's expert was not claiming, however, that post-1983 Xerox copier parts was an exclusive definition of the market which might exist in relation to copiers. Rather he was "limiting the scope of the parts under *consideration to those which were refused and which constitute the base of the definition for the market*"²⁹.

This approach is consistent with that which has been articulated in the academic literature. For example, Areeda and Turner emphasize the need to determine products and product markets by reference to the legislative purpose for which such identification is required:

One cannot determine ... the "proper" market definition, without reference to the legal context in which the issue arises. One must consider what is under attack, the substantive rules of liability that govern the particular case, and the relief that is at issue....³⁰

²⁹ Expert affidavit of D.W. Gillen (reply to L. Waverman) at para. 4 (Exhibit A-3, tab 6) (emphasis added).

³⁰ P. Areeda & D.F. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, vol. 2 (Boston: Little, Brown, 1978) at para. 518 [references omitted].

And, in a recent supplement to the same text, the authors note that:

... talk of markets and submarkets is both superfluous and confusing in an antitrust case, where the courts correctly search for a relevant market -- that is a market relevant to the legal issue before the court³¹. (underlining added)

This approach is also consistent with the decision in *R v. J.W Mills & Son Ltd.*³² a decision to which both counsel referred. In *J.W Mills & Son Ltd.*, a conspiracy prosecution, Mr. Justice Gibson stated:

In examining and assessing the competitive feature of the market structure, what is pertinent is the boundaries of the market because the determination of what competition is relevant is one of the key issues,

As a matter of law of course there is no definition of the "market" in relation to which the evidence of any alleged violation ... may be examined. What is the relevant market in every case is a matter of judgment based upon the evidence. ...

But speaking generally, it is of importance to bear in mind that the term "market" is a relative concept. In one sense, there is only one market in an economy since, to some extent, all products and services are substitutes for each other in competing for the customer's dollar.

In another sense, almost every firm has its own market since, in most industries, each firm's product is differentiated, to some extent, from that of all other firms.

Defining the relevant market in any particular case, therefore, requires a balanced consideration of a number of characteristics or dimensions to meet the analytical needs of the specific matter under consideration.

...

For this purpose the dimensions or boundaries of a relevant market must be determined having in mind the purpose for what it is intended. For example, two products may be in the same market in one case and not in another.

And many characteristics or dimensions may be considered in defining the relevant market. All are not of the same order. And, in any particular case, usually, not all of the many characteristics or dimensions will have to be considered. In some instances, the definition may turn on only one characteristic or dimension or two ...³³. (underlining added)

³¹ P.E. Areeda & H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application*, 1989 Supp. (Boston: Little, Brown, 1989) at para. 518.1c [references omitted].

³² [1968] 2 Ex. C.R. 275, aff'd (sub nom. *J.W. Mills & Son Ltd. v. R.*) (1970), [1971] S.C.R. 63.

³³ *Bid.* at 304-6.

Mr. Justice Gibson then listed a number of characteristics which could be used in the definition of a relevant market: actual and potential competition; integration and stages of manufacturers; method of production or origin; physical characteristics of products or services; end users of products; product substitutability; geographic area; relative prices of goods or services. As arranged, the first three characteristics relate primarily to the supply side of the market, and the subsequent three to product substitutability. "Geographic area" is a conclusion rather than a factor in market definition and it would often be established after extensive analysis of the other factors. Price information can be used to draw conclusions about substitutability in supply, between products and over distance.

Professor Waverman for the respondent stated that the relevant product in the present case is the provision of a package of services which leads to the creation of an imaged piece of paper³⁴. He was of the opinion that this definition is consistent with the manner in which the product is purchased by the final consumer. The respondent's expert economist did not deny that Xerox copier parts are products for which an identifiable market exists, a market in which persons wishing to service Xerox machines are customers. However, it was his view that this was not the *relevant* market for section 75 purposes. He argued that the product market which was relevant for section 75 purposes should be determined by reference to the market in which Xerox competes and that that is the end user market:

... the relevant competition is not that for Xerox proprietary parts, but among the providers of photocopying services, of which there are many.

To argue that the market is Xerox parts ignores the manner in which consumers make decisions. End-users (those who want photocopying services) are not indifferent to the prices of Xerox parts since ultimately that price, whether explicit or implicit, is a component of the cost per copy. Competition among providers of photocopying services in the cost per copy provides discipline in the market for parts³⁵.

³⁴ Expert affidavit of L. Waverman at para. 9 (Exhibit A-3, tab 3):

"the provision of the services of imaged pieces of paper with a given set of cost and performance specifications, through the provision of reprographic equipment and the service, parts and supplies, required to enable the equipment to produce copies on a regular basis with minimum interruption from the equipment not working."

³⁵ Expert affidavit of L. Waverman (rebuttal to D.W. Gillen) at para. 9 (Exhibit A-3, tab 4).

Professor Waverman took the position that Xerox's actions in curtailing supply were motivated by competition in the copier market and would only, in the long run, result in the intensification of that competition. He was of the view that an order under section 75 would cause a welfare loss to consumers by substituting inefficient distribution systems for efficient (as dictated by the market) systems. Therefore, it was argued that the fact situation does not fall within either the spirit or intention of section 75.

Even if this position were correct, however, the evidence in the present case would not support a conclusion that the end-user market provides competitive discipline to the parts market. It is clear that at present Xerox does not price its parts by reference to competitive factors but, rather, sets prices according to an arbitrary "formula". In addition, even if Xerox were forced to price parts competitively in the long run, a present owner of a Xerox machine cannot easily, during the economic life of that machine, switch to another manufacturer's brand of copier. As counsel for the Director argues, it is no answer to Exdos' customers to tell them that "based on some Chicago School of Economics theory ... [they] should wait until the market rights itself' and that in the long term when they purchase their next copier they can purchase from a company that provides better and cheaper parts and service.

To turn then to a consideration of whether or not proprietary replacement parts should ever be categorized as a "product" or as constituting the base of a "product market", it should first of all be noted that the *Competition Act* and, in particular, section 75, is not limited to ensuring the availability of *final* products at competitive prices. The Act itself is not expressly so worded and there is nothing in the statement of its purposes which leads to a conclusion that such a limitation was intended. Indeed one of the purposes set out in section 1.1 of the Act is "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy". This would seem on many occasions to contemplate, if not require, action to preserve the competitive situation in an intermediate market. It was argued to the Tribunal that if the respondent's interpretation of the legislation was correct, it would mean, for example, that because General Motors and Ford compete in the final market for automobiles there

would be no definable market for captive parts for Ford cars. Or, it would mean that for purposes of the *Competition Act*, the concentration of upstream assets in the hands of suppliers, such as oil companies, should be ignored because such companies face retail competition downstream.

In other competition law contexts intermediate markets in proprietary replacement parts have been identified as relevant markets. None of these, of course, relate to section 75 of the *Competition Act*. They can only be cited, and have only been cited, for the purpose of demonstrating that such product markets *may* be relevant for competition law purposes. For example, in *R v Chatwin Motors Ltd.*³⁶, the Crown alleged a conspiracy between franchised dealers with respect to one part of the motor vehicle parts and accessories market: captive parts for Ford and General Motors vehicles and, in particular, those captive parts secured on special orders where the dealer paid the freight charges. The British Columbia Supreme Court held that the only substantial competition in captive parts was between franchised dealers and that, however narrow a field of competition, the public was entitled to have it preserved³⁷.

In *Hugin Kassaregister AB v. Commission of the European Communities*,³⁸ Article 86 of the Treaty of Rome was under consideration. Article 86 provides that any abuse of a dominant position within the European Economic Community ("EEC") or a substantial part of it shall be prohibited insofar as it may affect trade between member states. The Swedish company and its subsidiaries had refused to supply spare parts for Hugin cash registers to a British firm that specialized in the service, reconditioning and renting out of Hugin cash registers. Hugin Kassaregister AB ("Hugin AEY") argued that the supply of spare parts and of maintenance services was not a separate market but rather a component of the cash register market. The headnote describing the Commission's decision that Hugin A13 had infringed Article 86 states in part that:

³⁶ (1978), 37 C.P.R. (2d) 156 (B.C.S.C.). The appeal courts quashed the Crown's appeal on the basis that it involved questions of fact: (1978), 7 B.C.L.R. 171, 40 C.P.R. (2d) 106 (CA.), aff'd [1980] 2 S.C.R. 64.

³⁷ The Court found an agreement between the dealers to levy a freight charge on the special orders but also decided that the agreement had no effect on the competitive nature of their dealings. In fact, the Court accepted the defendants' argument that they were improperly joined in the same conspiracy charge since there was never any competition between Ford and General Motors dealers that could have been restricted by an agreement.

³⁸ (No. 22/78), 119791 C.M.R. 7439 (E.C.J.).

Where a particular brand of a product uses spare parts which are not interchangeable with spare parts of other brands of the same product and cannot otherwise be economically reproduced, and the parts are made to the (non-EEC) manufacturer's design, with tools belonging to the manufacturer and are exclusive to the manufacturer such that the manufacturer controls the supply of all its spare parts throughout the world, it enjoys a monopoly in the parts and thus, with its subsidiaries established in the EEC, holds a dominant position in the Common Market for the supply of such spare parts. It therefore has also a dominant position for the maintenance and repair of the product itself in relation to companies which need a supply of the spare parts. This is so even if the market share of the manufacturer in the product itself does not give him a dominant position in the product.

...

A manufacturer who has a monopoly in the supply of spare parts for his product and who delivers such parts only to his own subsidiaries and authorized dealers for their own use and not for resale abuses his dominant position in that he restricts competition through his refusal without objective justification to supply others³⁹.

In *Image Technical Service, Inc., v. Eastman Kodak Co.*⁴⁰, it was held that a refusal by Eastman Kodak Co. ("Kodak") to sell copier equipment parts to ISOs, after having sold them to such businesses for several years, was a triable issue under section 2 of the Sherman Act⁴¹. Section 2 makes it an offence to monopolize or to attempt to monopolize "any part of the trade or commerce among the several States, or with foreign nations". No definitive ruling was given on the facts of the case because the issue was addressed by the Ninth Circuit Court of Appeals in the context of an appeal from the summary dismissal of the plaintiffs' private antitrust action. In reaching the decision that such a summary dismissal was not appropriate, the Court stated:

... there is logical appeal in Kodak's theory that it could not have monopoly power (let alone market power) in the service market since it lacks economic power *in* the interbrand market. But in light of appellants' evidence we cannot say that this theory mirrors reality⁴².

³⁹ *Liptons Cash Registers and Business Equipment Ltd v. Hugin Kassaregister AB* (1977), [1978] 1 C.M.L.R. D19. The Court of Justice also found that Hugin parts required by independent undertakings constituted a relevant market for the purposes of applying Article 86 to the facts before it and that Hugin had a dominant position in that market. The Court annulled the decision of the Commission on the narrow ground that the actions of Hugin had not affected trade between member states since the servicing, rental and sale of cash registers was a local business by nature.

⁴⁰ No. 88-2686 (9th Cir., 1 May 1990).

⁴¹ 15 U.S.C. 0 1-7.

⁴² *supra*, note 40 at 3643.

The same case also involved an allegation that Kodak had infringed section 1 of the Sherman Act in refusing to sell replacement parts to end users of its equipment except on condition that they not engage ISOs to service the copiers⁴³. Kodak argued that parts and service formed a single product market and that therefore there could be no tying arrangement. The Court held that this argument presented, at best, a disputed issue of fact.

That products must be used together does not eliminate the possibility that they form distinct markets. ... Kodak's policy of allowing customers to purchase parts on condition that they agree to service their own machines suggests that the demand for parts can be separated from the demand for service⁴⁴.

The Court also stated that, assuming a tying arrangement existed, there was an issue of material fact as to whether Kodak had the requisite economic power in the tying product market. Plaintiffs/appellants argued that Kodak had power in the parts market because its parts were unique and because owners of its machinery could not readily switch. Kodak countered that it did not have market power in the interbrand market for copiers and therefore could not have market power in the after-market for spare parts. The Court stated:

We believe that competition in the interbrand markets might prevent Kodak from possessing power in the parts market. ... In this case, Kodak has tied parts to service, not equipment to parts. Interbrand competition in the equipment market does not in the abstract negate appellants' claim that Kodak has power in the parts market.

...
While appellants have not conducted a market analysis and pinpointed specific imperfections in the copier and micrographic markets, a requirement that they do so in order to withstand summary judgment would elevate theory above reality. It is enough that appellants have presented evidence of actual events from which a reasonable trier of fact could conclude that Kodak has power in the interbrand market and that competition in the interbrand market does not, in reality, curb Kodak's power in the parts market⁴⁵.

⁴³ Section 1 of the Sherman Act declares "every contract, combination ... or conspiracy, in restraint of trade or commerce" illegal. The particular restraint alleged in this case was the illegal tying of parts to service. In order to be successful in such a claim, the plaintiff had to prove: (1) that separate markets for parts and service existed and (2) that the defendant had sufficient economic power in the tying product market (parts for Kodak copiers) to restrain competition appreciably in the tied market (service for Kodak copiers).

⁴⁴ *Supra*, note 40 at 3632-33.

⁴⁵ *Bid.* at 3634-36.

In coming to this decision the Court distinguished one of its earlier tying decisions: *General Business Systems v. North American Philips Cop.*⁴⁶

The decision in the *Image Technical Service, Inc.* case has been quoted at length because much of the expert evidence filed by the respondent in the present case seems infused with and based on concepts which exist in United States antitrust jurisprudence and upon arguments which have been made or are being made in relation thereto. These are not necessarily relevant to the interpretation of the Canadian legislation⁴⁷. The case does demonstrate, however, that even in that jurisdiction proprietary replacement parts may be a relevant product market for competition legislation purposes.

In the present case, a determination of the relevant product market and an assessment of the extent of the market in which that product is situated, by reference to the product which has been refused and to factors such as those set out in the decision of Mr. Justice Gibson, are appropriate. The geographical extent of the market is not seriously in doubt; it has basically been assumed to be Canada. Prior to the implementation of the refusal to supply by both Xerox Corp. (U.S.) and Rank Xerox, the market might have been described as larger in extent; parts could, at that time, be imported.

⁴⁶ 699 F. 2d 965 (9th Cir. 1983). The dissenting judge in *Image Technical Service, Inc.* described the argument accepted by the Ninth Circuit in *General Business Systems* as "similar" to the reasoning set out by Judge Posner (of the Seventh Circuit) in dissent in *Pam & Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F. 2d 228 (7th Cir. 1988). The dissenting judge was of the opinion that:

the majority has misconstrued the nature of Kodak's argument. Applying Judge Posner's analysis in *Sterling*, competition in the interbrand market dictates a simple choice: Kodak may either price parts competitively and maintain its interbrand market share, or it may price parts supercompetitively - yielding a short-term gain but over the long term destroying its share of the interbrand market. In either case Kodak is not harming competition: if it adopts the latter strategy, competitive forces will exact a heavy toll in the interbrand market, and profits gained from the short-term parts mark-ups will quickly be eclipsed. The result would be "a brief perturbation in competitive conditions -- not the sort of thing the antitrust laws do or should worry about.

Supra, note 40 at 3646. The dissenting judge considered that the majority in *Image Technical Service, Inc.* had rejected this line of reasoning as too theoretical to serve as a basis for summary judgment.

⁴⁷ Unlike the *Competition Act* the concept of refusal to supply in both US. law and EEC law operates within the framework of provisions preventing abuse of dominant position or monopolization and tied selling and other vertical restraints.

The boundaries of the product market can properly be defined as parts for Xerox copiers. The relevant submarket or class of product falling within that market, for purposes of the present case, is parts for post-1983 model copiers. There is no compelling reason flowing from either the legislative text of section 75 or from general economic principles which requires that proprietary replacement parts should not be considered to be a relevant product for section 75 purposes.

The consumers of the product are Exdos, other ISOs and those Xerox customers who service the machines themselves. While the Director's expert economist's position is that Xerox is the sole supplier, he also notes that this is essentially a factual question rather than one for expert evidence. Professor Gillen identifies Xerox as the sole supplier because other sources of supply located both within Canada and without are qualitatively different from the supply provided by Xerox. In the Tribunal's view, it is more accurate to identify the suppliers, prior to the refusal to supply, as Xerox, other ISOs, Rank Xerox, and the independent manufacturers of parts.

(2) Vertical Integration

The respondent has put forward several arguments with respect to the proper market definition which are based on conclusions of fact not supported by the evidence. For the sake of completeness, however, they will be discussed. One such argument is that the end-user market and not the parts market should be identified as the relevant market because the industry norm is one of vertical integration. It is argued that vertical integration is adopted by firms for reasons of efficiency and that it should be assumed in this case that this is the reason for Xerox's desire to remain with or return to a system of vertical integration.

"Vertical integration" was used by the respondent's expert in a very limited sense, as meaning only that Xerox did not sell parts except to end users, not that Xerox only provided its parts through its own service technicians. It is clear that Xerox, for many years, sold parts freely and openly to anyone who wished to purchase them; sales were not limited to end users. Xerox did not practice a system of vertical integration even in the sense in which that

term has been used in the evidence by Professor Waverman and Xerox does not practice vertical integration in any more comprehensive sense, since it is still willing to sell parts directly to end users. Nor does the evidence establish that vertical integration is the norm in the industry either in this restricted sense or in a more general one.

The respondent's expert stated that firms adopt vertically integrated structures for reasons of economic efficiency⁴⁸ and that if vertical integration is not preserved the benefits which accrue therefrom (e.g. the use of increased service revenues to defray high research and development costs or the ensuring of a consistent quality of service) are denied to consumers. The difficulty with the respondent's expert's argument is that it is entirely hypothetical. While it may be true that firms adopt systems of vertical integration for efficiency reasons, there is no evidence that such is true in the present case.

Whether situations where vertical integration is either the norm in the industry or is dictated by reason of economic efficiency fall within section 75 can only be determined in the context of cases where a relevant factual basis exists. It may be that such factors would lead the Tribunal to conclude that a product market did not exist or it may be that they would lead the Tribunal to conclude that the complainant's inability to obtain supply did not arise "because of insufficient competition among suppliers of the product in the market". But it suffices for present purposes to note that the conclusions of fact which are sought to be drawn, in this case, to support such an argument cannot be substantiated.

(3) Conduct of Complainant/Burden on Xerox

The respondent alleges that no market was established because Reid acquired parts through subterfuge. As has been noted elsewhere, this is not supported by the evidence. *Also*, the evidence does not support a conclusion that Reid was refused supply because of particularly onerous administrative obligations and expenses which arose for Xerox as a result of dealing with him (e.g. inventory costs). Nor is there convincing

⁴⁸ The term "efficiency" has (at least) two meanings in economic literature: (1) welfare benefits (the best allocation of resources in society as a whole); (2) cost minimization by a firm (see J. Tirole, *The Theory of Industrial Organization* (Cambridge, Mass.: MIT Press, 1988) at 16). In the present context "efficiency" is being used as synonymous with the cost-minimizing organization of economic activity. Efficiency gains from vertical integration may arise for technological reasons or because of reduced transaction costs and reduced uncertainty.

evidence that Exdos can "free ride" on Xerox's investments in many areas. There is evidence that many of the ISO dealers who were part of the Exdos network and some of the Nezron service people were ex-Xerox employees who had been trained by Xerox to service Xerox equipment. But this is hardly sufficient to constitute the "free-riding" which is alleged. There is also no convincing evidence that Xerox could be injured because Exdos generally would not, and could not be expected to, take the standard of care in maintenance and repair of Xerox machines that Xerox would. Nor is there evidence to support the assertion that Xerox's reputation suffers every time Exdos is unable to service a photocopier properly or that if Exdos-Nezron is unable to fix a machine it then calls on Xerox to fix the machine. In fact, it might be argued that Exdos, perhaps more than Xerox, has an *immediate* interest in providing timely, high-quality service and repairs since that is its business. In general, it is to be noted that Professor Waverman's expert affidavits are replete with assertions of fact that are entirely unsupported by the evidence.

Whether factors relating to the conduct of the complainant or the administrative burden or other costs placed upon a supplier might be relevant to a determination of the existence and the definition of a product market can only be assessed in the context of a case where factual evidence establishes that *such* factors exist. It may be that the existence of those factors would lead the Tribunal to conclude that a "product market" did not exist, or more likely, it may be that they would lead the Tribunal to conclude that the inability of the complainant to obtain adequate supplies did not arise "because of insufficient competition among suppliers of the product in the market" but rather for objectively justifiable business reasons, or that as a matter of discretion an order to supply should not be given. It suffices for present purposes to note, as with the arguments based on vertical integration, that the conclusions of fact which are sought to be drawn, in this case, to support those arguments, cannot be substantiated.

(4) Market Power of the Respondent

One last consideration respecting the definition of the relevant product market should be considered, that is, whether the market must be one in which the respondent exercises "market power". As will be noticed from the references above to both EEC

competition law and the United States antitrust jurisprudence, this is a question which is relevant in those jurisdictions. A similar argument was addressed by the Tribunal in the *Chrysler Canada Ltd.* decision:

The economist, Professor Ralph A. Winter, who appeared as an expert witness on behalf of the respondent, submits that the Tribunal should approach the definition of product and market not from the point of view of Brunet as a buyer, but from the viewpoint of determining whether Chrysler has substantial market power. This, he submits, can only be done by considering what Chrysler sells and with whom it competes. He concludes that the relevant market is synonymous with the worldwide sale of automobiles since the price of auto parts is established in conjunction with the pricing of vehicles. It is Winter's view that Chrysler's pricing of parts is constrained by the effect this *can* have on the sale of its vehicles and that it faces very stiff competition in the sale of its vehicles. Winter concludes that since Chrysler does not have substantial market power as a seller of vehicles, its decision to discontinue supplying Brunet was motivated by concerns for efficiency and not to increase its market power.

This argument is presented by Winter in relation to the definition of product and market and also in conjunction with the Tribunal's use of its discretion to grant an order in the event that it finds that all of the elements have been satisfied by the applicant. The Tribunal is satisfied that a broad consideration of Chrysler's market power is not required in determining whether the specific elements of section 75 of the Act have been satisfied but may be relevant in the Tribunal's exercise of its discretion⁴⁹.

This argument has already been dealt with to some extent above, in the context of the discussion of what constitutes a relevant product market for section 75 purposes. If the relevant product market is identified as parts, then it is clear that Xerox has almost a monopoly position in that market. If the product market is copiers then Xerox still has substantial power in that market. Whether or not it could be said to have a dominant position was not in issue in this case. In any event, it is useful to stress that the respondent's market power is not an element which need be proven for the purposes of obtaining a section 75 order. It may be that it will be rare to find a situation in which a supplier refuses to supply a would-be purchaser, for anti-competitive reasons, without holding significant market power in the relevant market. It would be counterproductive if

49 *Supra*, note 27 at 12.

the would-be purchaser could easily find an alternate source of supply. Nevertheless, neither the identification of the relevant product nor the definition of the relevant market hinges, for section 75 purposes, on an assessment of the respondent's market power in the relevant market. All that is required is that the complainant's inability to obtain adequate supplies occur "because of insufficient competition among suppliers of the product in the market".

D. Insufficient Competition Among Suppliers of the Product

Although section 75 does not directly demand that the Tribunal find any specified effect on competition in the market resulting from the refusal to supply, it is clear that not all situations where a supplier decides to discontinue selling its products to a customer will fall within the section. Paragraph 75(1)(b) requires that the person who has been refused the product be "unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market".

Thus, a particular market situation must exist at the time of the refusal, a situation that can fairly be described as "insufficient competition among suppliers". How much competition between suppliers is insufficient will depend on the facts of the particular case. Clearly a market composed of numerous suppliers acting independently would not qualify. (It is also very difficult to conceive of a case before the Tribunal where *so* many of a multitude of suppliers would refuse to supply an individual that his business could be "substantially affected. One would postulate that if one supplier did not want the business, another would be more than happy to earn the extra revenue.)

In addition, the refusal to supply must occur "*because* of insufficient competition among suppliers of the product". That is, the overriding reason that adequate supplies are unavailable must be the competitive conditions in the product market.

In this case, the Director submits that since the relevant product market is confined to Xerox parts, the only issue raised by paragraph (b) is whether adequate supplies can be obtained from sources other than Xerox itself. Since, as was discussed

above, the alternative sources are neither adequate nor economically viable, the Director argues that, by definition, the market for these parts is characterized by insufficient competition. On this characterization, this is undoubtedly true, since Xerox is, for all practical purposes, a monopolist in its own proprietary parts.

The respondent's argument on this point is inextricably linked to its position on the question of the definition of the relevant product market for section 75 purposes. The respondent submits that the wording of paragraph (b) contemplates that the "market" should consist of more than one supplier since the word "suppliers" is specifically used. Therefore, the respondent reiterates, the relevant market must be that in which the manufacturers of copiers compete.

In response to questions concerning the proper interpretation of the phrase "because of insufficient competition *among suppliers* in the market", counsel for the Director pointed out that the usage of the word "suppliers" in that phrase can legitimately apply to a situation where the refusal emanates not only from a dominant manufacturer/supplier of parts but also from a single supplier. Subsection 33(2) of the *Interpretation Act*,⁵⁰ clearly establishes at least a presumptive rule that "words in the plural include the singular".

Counsel for the Director further argued that, although such a presumption could be overturned if dictated by the context in which the particular phrase occurred, an interpretation including the singular⁵¹ is supported by reference to the rest of section 75. He submitted that the intent of section 75 was clearly to *catch* rather than to *exclude* the single supplier market. Counsel pointed to subsection 75(2) to support this argument: subsection 75(2) would allow an article differentiated by a trademark or proprietary name to be considered a separate "product" for the purposes of the section *if* the article occupies such a dominant position in the market as to substantially affect the ability of the person

⁵⁰ R.S.C. 1985, c. 1-21.

⁵¹ The words "among suppliers" would have to be read out of the phrase altogether for it to continue to make grammatical sense in the singular.

denied access to carry on business. In appropriate circumstances, he argued, this would lead to a product market definition limited to a proprietary or trademarked article with a dominant position and therefore the order would issue against a sole supplier.

The Tribunal accepts that the use of the plural in paragraph 75(l)(b) includes the singular. There has been no convincing argument before us that would lead us to conclude that the statutory context of that paragraph dictates otherwise. It would import a logical inconsistency into the section to hold that a supplier of the relevant product in, for example, a market with three or four suppliers, could be subject to review by the Tribunal for refusing to supply while a supplier with a monopoly position could not be.

Many arguments were made to the Tribunal concerning the implications an order to supply proprietary replacement parts would have for the future application of section 75. The *Chrysler Canada Ltd.* decision has already established that an order to supply proprietary replacement parts can properly be issued pursuant to section 75. Many of the arguments raised before the Tribunal in this case were also raised in that case; many refer to hypothetical situations which it is suggested might arise in the future and with respect to which it is argued that the Tribunal might, then, have to make a section 75 order if such an order is granted in this case.

As has already been noted, it is difficult to deal with this kind of argument. In the absence of an actual situation establishing the facts which are hypothesized, a conclusion that they might or might not justify a section 75 order is difficult to make. For example, it has been suggested that if an order can be given in the circumstances of this case one might also issue in a situation where a manufacturer/supplier of proprietary parts had never unbundled the sale of its parts from the sale of its machines. Whether such an order could properly be obtained under section 75 is not in issue in this case, but one can ask whether the Director, in such circumstances, would be able to prove the existence of a market for the product in question; one can ask whether a complainant could say that his or her business was substantially affected by such a refusal to supply. It is useful to quote some of the respondent's argument which seems to recognize this:

It was accepted by all the economic experts that from an economic perspective there is nothing either inefficient or anti-competitive about a manufacturer carrying on business within a vertically integrated structure.

...

The only competition issue arises then, when a manufacturer operates in a fashion to "break the bundle" of goods and services and to create a market where none previously existed. The most typical situation in which this occurs is at the dealer level.

If a manufacturer distributes his product through a dealer network then it may be appropriate to look at the competition aspects of this market so created to ensure that as between dealers there is not discrimination and restricted competition.

...

Absent the conduct of the manufacturer which can clearly and unequivocally be said to have created a market for parts at the dealer level there is no competition issue to be dealt with⁵².

In the present situation the manufacturer/supplier did create a market for Xerox copier parts. It created a market for Xerox copier parts not through use of a dealer network but by selling to anyone who wished to purchase.

Another hypothetical situation raised was whether section 75 could catch a manufacturer who refused to supply certain customers merely because he wished to change his distribution system for the product. Again, in the absence of an actual factual situation, it is impossible to conclusively answer such a question. At the same time, one can question whether an inability to obtain supply in such circumstances would necessarily meet the test of occurring "because of insufficient competition among suppliers of the product in the market". It may very well be that the inability to obtain supply in such circumstances could be related to a legitimate business decision unconnected to anti-competitive factors. In any event, the present situation is not one in which the respondent is attempting to change its dealer distribution system. And, it is abundantly clear that the decision was taken for the very purpose of curtailing competition in the after-sale market.

The last consideration which is relevant to this issue is the legislative framework of section 75. Counsel for the Director argues and the Tribunal accepts that section 75

⁵² Written argument of Xerox at paras 148,150,151,160.

must be read in the light of the express purposes of the legislation and the other provisions of the Act. Section 1.1 describes the purposes of the *Competition Act* as including "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy" and "to provide consumers with competitive prices and product choices." Both these purposes would be served by granting an order in favour of Exdos as sought by the Director. Exdos will continue to have an "equitable opportunity to participate" and consumers will have price and product choices available which they would not otherwise have.

IV. CONSTITUTIONAL ISSUES

The constitutional jurisdiction of the Parliament of Canada to enact section 75 is challenged. The respondent argues that if the Tribunal can make an order under section 75 to govern a supplier's conduct without reference to the effect on competition that section is legislation with respect to property and civil rights in the province (subsection 92(13) of the *Constitution Act, 1867*⁵³ and that it is not legislation with respect to any matter falling under Parliament's jurisdiction pursuant to section 91 of the *Constitution Act, 1867*. Even if the section might otherwise be constitutionally valid, counsel argues that it is inoperative with respect to the facts of this case because the facts do not encompass a situation where the refusal to supply is one having anti-competitive effects.

In addition, issues respecting the constitutionality of the Tribunal itself are raised. These last rely on the decision of Mr. Justice Philippon of the Superior Court of Quebec in *Alex Couture Inc. c. P.G. Canada*⁵⁴.

A. Constitutionality of Section 75

The starting point for a discussion of the constitutionality of a provision of the *Competition Act* is the Supreme Court decision in *General Motors of Canada Ltd. v. City National Leasing*⁵⁵. That decision dealt with the constitutionality of section 31.1, added

⁵³ (U.K.), 30 & 31 Vict., c. 3.

⁵⁴ (6 April 1990), Quebec 200-05-001361-877.

⁵⁵ [1989] 1 S.C.R. 641.

to the *Combines Investigation Act* in 1976⁵⁶, which section provided that a person who had suffered damage as a result of conduct contrary to Part V of that Act (the criminal offences) or in breach of an order of the Restrictive Trade Practices Commission or a court, could sue for damages. In the *City National Leasing* decision, Chief Justice Dickson referred to the history of subsection 91(2) (the federal trade and commerce power) of the *Constitution Act, 1867*⁵⁷. He noted that *Citizens Insurance Co. of Canada v. Parsons*⁵⁸ had established three important propositions with regard to the federal trade and commerce power:

... (i) it does not correspond to the literal meaning of the words "regulation of trade and commerce"; (ii) it includes not only arrangements with regard to international and interprovincial trade but "it may be that ... (it) would include general regulation of trade affecting the whole dominion"; (iii) it does not extend to regulating the contracts of a particular business or trade⁵⁹.

The Chief Justice noted that since *Parsons*, the jurisprudence relating to subsection 91(2) had largely consisted of an elaboration of federal authority with respect to "international and interprovincial trade" and that the second branch of federal authority, that with respect to the power over "general trade and commerce affecting Canada as a whole", had remained largely unexplored. He indicated that in assessing the interaction of subsection 91(2), Parliament's authority to legislate in relation to trade and commerce, with subsection 92(13), provincial legislative authority in relation to property and civil rights in the province, a balance must be struck:

... somewhere between an all pervasive interpretation of s. 91(2) and an interpretation that renders the general trade and commerce power to all intents vapid and meaningless⁶⁰.

⁵⁶ R.S.C. 1970, c. C-23 as am. S.C. 1974-75-76, c. 76, s. 12. The same section, slightly modified, appears as section 36 of the *Competition Act*, R.S.C. 1985, c. C-34, as am. *Miscellaneous Statute Law Amendment Act, 1987*, R.S.C. 1985 (4th Supp.), c. 1, s. 11.

⁵⁷ Initially set out in A.G. *Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206.

⁵⁸ (1881), 7 App. Cas. 96 (P.C.)

⁵⁹ Quoted in *General Motors of Canada Ltd. v. City National Leasing*, *supra*, note 55 at 656.

⁶⁰ *Ibid.* at 660.

The Chief Justice cited *MacDonald v. Vapor Canada Ltd.*⁶¹, where three criteria were set out as relevant in assessing the constitutionality of legislation in relation to general trade and commerce under the second branch of *Parsons*: (1) the impugned legislation must be part of a general regulatory scheme; (2) the scheme must be monitored by the continuing oversight of a regulatory agency; (3) the legislation must be concerned with trade as a whole rather than with a particular industry⁶². Chief Justice Dickson also adopted two further criteria, identified in *A.G. Canada v. Canadian National Transportation Ltd.*,⁶³ that were relevant in assessing the constitutional validity of legislation in relation to general trade and commerce; (4) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (5) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country⁶⁴. The five factors thus identified were said to be *indicia* which, however, *did not represent an exhaustive list of traits* which might be relevant for the purpose of characterizing legislation as general trade and commerce legislation. *Also, the presence or absence of any one criteria was held not to be necessarily determinative*, in reaching a decision with respect to the legislation's constitutional characterization.

Throughout its history, various provisions of the *Combines Investigation Act* have been subject to challenge on constitutional grounds⁶⁵. The Act was extensively amended in 1976 and again in 1986 when it was renamed the *Competition Act*. It is unnecessary to describe the substance of these amendments; they are well known. Suffice it to say, they too have given rise to several constitutional challenges.

⁶¹(1976), [1977] 2 S.C.R. 134.

⁶² *General Motors of Canada Ltd. v. City National Leasing*, *supra*, note 55 at 661. In *MacDonald v. Vapor Canada*, paragraph 7(e) of the *Trade Marks Act*, R.S.C. 1970, c. T-10 was found to be invalid federal legislation. That section was a general catch-all section which prohibited a person doing "any act" or adopting any "business practice contrary to honest industrial or commercial usage in Canada". It was not connected to a federal regulatory scheme relating to the general trade and commerce.

⁶³ *supra*, note 57.

⁶⁴ *General Motors of Canada Ltd. v. City National Leasing*, *supra*, note 55 at 662.

⁶⁵ See, e.g., *R. v. Hoffman-La Roche Ltd. (Nos. 1 & 2)* (1981), 33 O.R. (2d) 694, 125 D.L.R. (3d) 607 (Ont. CA.) (predatory pricing offence could be supported under s. 91(2) as well as s. 91(27) and the residual power); *A.G. Canada v. Canadian National Transportation Ltd.*, *supra*, note 57 (the three judges of the Supreme Court who dealt with the issue would have supported the conspiracy provisions under s. 91(2)).

In addition to the Supreme Court decision in *City National Leasing*, several other of the 1976 amendments were challenged and supported. In *P.G. Canada c. Miracle Mart Inc.*⁶⁶, the Court held that the prohibition on making sales above advertised prices (a criminal offence) was constitutionally valid under Parliament's power over trade and commerce. The Federal Court of Appeal in *Re BBM Bureau of Measurement and Director of Investigation and Research*⁶⁷ was of the opinion that the reviewable trade practice of tied selling (previously the jurisdiction of the Restrictive Trade Practices Commission and now within that of the Tribunal) was valid federal legislation under subsection 91(2). Most recently, in *Alex Couture Inc. c. P.G.Canada*,⁶⁸ Mr. Justice Philippon upheld Parliament's legislative authority to enact the civil merger provisions, added to the *Competition Act* in 1986, under the trade and commerce power. He struck down those provisions on the basis that they violated the freedom of association of commercial undertakings subjected to them.

As a result of the various constitutional challenges and particularly the Supreme Court decision in *City National Leasing* it is clear that the general legislative scheme of the *Competition Act* is constitutionally valid. In *City National Leasing* Chief Justice Dickson wrote with respect to the *Combines Investigation Act* as amended up until 1980:

From this overview of the *Combines Investigation Act* I have no difficulty in concluding that the Act as a whole embodies a complex scheme of economic regulation. The purpose of the Act is to eliminate activities that reduce competition in the market-place. The entire Act is geared to achieving this objective. The Act identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition. In my view, these three components, elucidation of prohibited conduct, creation of an investigatory procedure, and the establishment of a remedial mechanism, constitute a well-integrated scheme or regulation designed to discourage forms of commercial behaviour viewed as detrimental to Canada and the Canadian economy⁶⁹

⁶⁶[1982] C.S. 342, (*sub nom. R. v. Miracle Mart Inc.*) 68 C.C.C. (2d) 242 (Que. S.C.) [translation].

⁶⁷(1984), 9 D.L.R. (4th) 600, (*sub nom. BBM Bureau of Measurement v. Director of Investigation and Research under the Combines Investigation Act*) 82 C.P.R. (2d) 60.

⁶⁸*supra*, note 54.

⁶⁹*Supra*, note 55 at 676.

While that decision related to the *Combines Investigation Act* before the amendments of 1986, the reasoning and conclusions are equally applicable to the amended legislation⁷⁰.

Indeed counsel for the respondent does not contest the constitutional validity of the Act as a whole. Rather he argues that section 75 is invalid, if it carries an interpretation which would allow it to apply whether or not there is an effect on competition. Counsel's argument in this regard mirrors Chief Justice Dickson's characterization of the *City National Leasing* case as one where:

The issue is not whether the Act as a whole is rendered *ultra vires* because it reaches too far, but whether a particular provision is sufficiently integrated into the Act to sustain its constitutionality⁷¹.

Counsel for the respondent argues, in addition, that even if section 75 is valid it cannot support an order which affects a manufacturer's legitimate business interests but is not founded upon an effect on competition. That is, the section may be constitutionally valid but still inoperative with respect to certain factual situations. If the section's breadth is such as to encompass both orders directed at the preservation of competition and those which are not, then

⁷⁰ See Memorandum of law (constitutional issue) of the Director at para. 18:

The basic structure of the *Combines Act* referred to by Mr. Justice Dickson was kept intact in the amendments that created the *Competition Act* and *Competition Tribunal Act* in 1986. The major changes implemented in 1986 were:

- (i) insertion of a purpose clause (s. 1.1);
- (ii) provision for application of the Act to crown corporations (s. 2.1);
- (iii) revision of the investigatory powers of the Director to comply with the *Hunter v. Southam* decision and other considerations (ss. 11-20);
- (iv) addition of an offence concerning banking conspiracies (s. 49);
- (v) addition of the civilly reviewable abuse of dominance (s. 78-79) and merger provisions (s. 91-100), including special procedural remedies for mergers such as interim injunctions;
- (vi) addition of a scheme of merger prenotification (sections 108-124);
- (vii) abolition of the RTPC and its jurisdiction over research inquiries and "s. 18" inquiries and its replacement with the Competition Tribunal for adjudication of civilly reviewable matters, and the regular courts for adjudication of search warrants and other investigative applications.

⁷¹ *Supra*, note 55 at 670.

the section might be operative to support the former but inoperative with respect to the latter. This second prong of the constitutional argument is easily disposed of given the findings of fact which have been made. It is clear that the order sought, in the present case, is directly related to the preservation of competition in the service market for Xerox copiers. It is also directed to the preservation of the competition which exists as a result of the existence of a second-hand market for those machines. Thus, if section 75 is valid it is operative to support an order in the present circumstances.

To turn then to the constitutional validity of section 75. The approach to be taken, when an isolated section of an Act is being assessed for constitutionality, was addressed in *City National Leasing*. In that case it was argued that section 31.1 taken alone was clearly unconstitutional because it was legislation in relation to property and civil rights in the province. A contrary argument was put, urging that the section could not and should not be assessed in isolation but had to be considered in the context of the scheme of the Act as a whole. The Chief Justice answered these arguments by stating that if the impugned provision was clearly constitutional as within federal authority and did not intrude on provincial authority, then, no further consideration was needed:

[I]f in its pith and substance the provision is federal law, and if the act to which it is attached is constitutionally valid (or if the provision is severable or if it is attached to a severable and constitutionally valid part of the act) then the investigation need go no further. In that situation both the provision and the act are constitutionally unimpeachable. If, as may occur in some instances, the impugned provision is found to be constitutionally unimpeachable while the act containing it is not, then the act must be assessed on it [*sic*] own. In these instances, it is clear that the claim of invalidity should originally have been made against the act and not against the particular provision⁷².

In most cases, however, it was noted that it was likely that an impugned section could be characterized as being, *prima facie*, in relation to a provincial head of power (intruding to some extent on provincial powers). The degree of "intrusion on provincial powers" is to be assessed not for the purpose of ascertaining the section's constitutionality but in order to weigh this as a factor in assessing the justification of the section as part of the regulatory scheme of the legislation as a whole.

⁷² *Bid.* at 667.

Next, it is necessary to assess the constitutional validity of the legislative scheme as a whole. Once this is done the relationship between the impugned provision and the legislative scheme is to be assessed by reference to a test which is of varying strictness. The strictness of the test varies with the degree of intrusion which the impugned section exhibits with respect to provincial powers. The mere inclusion of a provision in a valid legislative scheme does not *ipso facto* confer constitutional validity upon that provision:

[T]he court must focus on the relationship between the valid legislation and the impugned provision. Answering the question first requires deciding what test of "fit" is appropriate for such a determination. By "fit" I refer to how well the provision is integrated into the scheme of the legislation and how important it is for the efficacy of the legislation. The same test will not be appropriate in all circumstances. In arriving at the correct standard the court must consider the degree to which the provision intrudes on provincial powers. The case law, to which I turn below, shows that in certain circumstances a stricter requirement is in order, while in others, a looser test is acceptable. For example, if the impugned provision only encroaches marginally on provincial powers, then a "functional" relationship may be sufficient to justify the provision. Alternatively, if the impugned provision is highly intrusive *vis-à-vis* provincial powers then a stricter test is appropriate. A careful case by case assessment of the proper test is the best approach.

In determining the proper test it should be remembered that in a federal system it is inevitable that, in pursuing valid objectives, the legislation of each level of government will impact occasionally on the sphere of power of the other level of government; overlap of legislation is to be expected and accommodated in a federal state. Thus a certain degree of judicial restraint in proposing strict tests which will result in striking down such legislation is appropriate⁷³.

The Chief Justice then referred to the various ways the required "fit" or test had been described. He listed these in what appears to be an ascending order of strictness: having a rational and functional connection; ancillary to the main purpose of the legislation; necessarily incidental; truly necessary; having an intimate connection; being an integral part of the scheme.

The Chief Justice found that since section 31.1 of the *Competition Act* constituted a minimal intrusion on provincial authority, it was only necessary to demonstrate that a rational

⁷³*Ibid.* at 668-69.

and functional connection existed between that section and the overall scheme of the legislation. At the same time he indicated that section 31.1 could also have been justified on the basis of a stricter test; it could have been classified as an integral part of the legislative scheme.

What then of section 75. It is obvious that a section 75 order may affect the property and civil rights of the person who is ordered to supply and of the person receiving supply. The effect of the section, however, as an intrusion into a provincial legislature's domain with respect to property and civil rights in the province, is not generally very extensive. The section is not, as the respondent has suggested, aimed primarily at governing or regulating contractual relations. That effect is secondary. The section's impact is limited and carefully constrained to redress conduct which is considered to be of competitive prejudice. Simply refusing to supply is not an offence in itself. Section 75 is one of a group of trade practices that are *reviewable* and that *may* be prohibited if certain conditions are met. The elements of paragraphs 75(1)(a), (b), (c) and (d) limit the application of the section and its effect.

Pre-1976 the only prohibitions in the *Combines Investigation Act* which dealt, indirectly, with refusal to supply, were conspiracy, monopoly and resale price maintenance. It was decided that there was a need to deal with refusal to supply in cases having anti-competitive effects, that is, where a person, because of an uncompetitive supply situation in a market, was unable to obtain adequate supplies of a product essential to the operation of his business. Section 75 provides that this type of refusal may be prohibited by the Tribunal; other, justifiable refusals will not be so prohibited.

Section 75 is not a greater interference with provincial jurisdiction than many other valid remedial or prohibitory provisions of the Act which are directed toward controlling competitively undesirable conduct. Such remedies or prohibitions always affect property and civil rights or local contracts within a province to some extent. Certainly the effect on property and civil rights of an order under section 75 is no greater than one under section 77 of the Act (tied selling) or those which regulate mergers and hence affect contracts that may involve parties wholly within a province.

While section 75, unlike section 31.1, is a substantive provision, it is limited in scope and application. It can only be called into play when the Director, after investigation, initiates an action. There is good reason to conclude, then, that the section attracts a no more stringent test than the rationally and functionally related test which was applied to section 31.1. However, like section 31.1, it could satisfy a more stringent test if required.

Section 75 can certainly be characterized as ancillary to the main purpose of the legislative scheme as well as having an intimate connection thereto. The immediate effect of an order to supply is to open up channels of distribution and free competitive forces hindered by lack of access to supplies. The section's objective is to promote or preserve competition. Section 75 operates within the same regulatory parameters as do the other provisions of Part VI. Only the Director may bring an application to require that an order to supply be issued. The Director does so after investigation and in the context of the common enforcement policy of the Act with which he is charged.

Accordingly, section 75 meets the required test set out in *City National Leasing*.

B. Constitutionality of the Competition Tribunal

The parties filed an agreed statement of facts on which an argument could be founded to challenge the constitutionality of the Tribunal. The argument contemplated would follow that set out in the decision of the Quebec Superior Court in *Alex Couture Inc. c. P.G. Canada*⁷⁴. This argument, however, was being considered by another panel of the Competition Tribunal, insofar as it related to that panel's constitutional validity, in the hearing of the application in *Director of Investigation and Research v. The NutraSweet Company*. The parties to the present proceeding, accordingly, agreed that rather than rearguing the issue in the context of this case, they would be bound by the decision given in *The NutraSweet Company* case. The agreement provides that either party is free to appeal from a finding of the Tribunal as though the constitutional question raised in *The NutraSweet Company* case had been fully argued and decided in the context of this case.

⁷⁴ *supra*, note 54.

The decision in *The NutraSweet Company* case has now been Rendered⁷⁵. The conclusion reached, contrary to that in the *Alex Couture Inc.* case, is that the panel of the Tribunal hearing that case was validly constituted. Pursuant to the agreement of the parties, that decision is taken as also applicable to the panel hearing this case.

V. CONCLUSION

As has been set out above, Xerox followed a practice, for a number of years, of selling parts to willing purchasers. As a result of that practice independent service organizations grew up and a second-hand market in Xerox copiers developed. The refusal of Xerox to supply parts to Exdos and to others (except end users) was specifically designed to eliminate competition in the service market. Xerox's refusal was part of a concerted effort to eliminate such competition. This effort was initiated originally by Xerox Corp. (U.S.). It was subsequently adopted both in Canada and elsewhere, for example, by Rank Xerox in the United Kingdom.

Section 75 of the *Competition Act* states that where, pursuant to an application by the Director, the Tribunal finds that a person is substantially affected in his business due to an inability to obtain adequate supplies of a product in the market and that inability occurs because of insufficient competition among suppliers of the product, the Tribunal may order a supplier to accept the person as a customer.

In the present case, for the reasons which have been given, the Tribunal finds that all the requirements of section 75 have been met. Therefore an order will issue, as requested by the Director, requiring Xerox to accept Exdos as a customer for post-1983 Xerox copier parts. These will not include parts for the 50 Series copiers. As has been noted, there has been no evidence adduced that a lack of supply of those parts would substantially affect the Exdos business.

⁷⁵ (4 October 1990), CT-89/2, Reasons and Order (Competition Trib.).

VI. ORDER

FOR THESE REASONS, THE TRIBUNAL HEREBY ORDERS THAT:

The respondent, Xerox Canada Inc., shall accept the Exdos Corporation as a customer for the supply of Xerox copier parts, manuals and related resources on usual trade terms.

This order does not encompass parts for 50 Series copiers or for any model of copier which has not yet been introduced, with respect to which no evidence was placed before the Tribunal.

DATED at Ottawa, this 2nd day of November, 1990.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) B. Reed

B. Reed

TAB 8

Competition Tribunal



Tribunal de la Concurrence

#185(a)

CT - 88 / 4

IN THE MATTER OF an application by the Director of Investigation
and Research under section 75 of the *Competition Act*,
R.S.C., 1985, c. C-34, as amended;

AND IN THE MATTER OF a refusal to supply automotive parts for
export by Chrysler Canada Ltd. to Richard Brunet.

B E T W E E N :

The Director of Investigation and Research

Applicant

- and -

Chrysler Canada Ltd.

Respondent

REASONS AND ORDER

Date of Hearing:

July 4 - 18 and 21, 1989

Presiding Member:

The Honourable Mr. Justice Max M. Teitelbaum

Judicial Member:

The Honourable Mr. Justice Leonard A. Martin

Lay Member:

Dr. Frank Roseman

Counsel For the Applicant:

Director of Investigation and Research

William J. Miller
John S. Tyhurst
John F. Rook, Q.C.

Counsel For the Respondent:

Chrysler Canada Ltd.

Thomas A. McDougall, Q.C.
Anne Mactavish

Amicus Curiae:

Yves Bériault
Madeleine Renaud

COMPETITION TRIBUNAL
REASONS AND ORDER

The Director of Investigation and Research

v.

Chrysler Canada Ltd.

On December 14, 1988, the Director of Investigation and Research ("Director") filed an application with the Competition Tribunal ("Tribunal") pursuant to section 75 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended ("Act"), requesting the following relief:

1. An order against the Respondent Chrysler Canada Ltd. (Chrysler) requiring that it forthwith and thereafter accept Richard Brunet (Brunet) as a customer on trade terms usual and customary to its relationship with Brunet for the supply of Chrysler Parts (as hereafter defined) to Brunet; and
2. Such other and further orders which in the circumstances may be just, including:
 - a) requiring and directing that Chrysler reverse all steps taken to dissuade any person (including Chrysler franchised dealers) in Canada from conducting business with Brunet with respect to Chrysler Parts;

- b) restraining Chrysler from combining or arranging with any other person to refuse, suppress, hinder or delay the supply of Chrysler Parts to Brunet; and
- c) directing that Chrysler take all such ancillary and necessary steps and actions to restore Brunet to the position he enjoyed before the actions herein complained of.

In 1977 Richard Brunet ("Brunet") opened and began to operate a business in the City of Montreal, Province of Quebec, commonly known as R. Brunet Company ("RBC"). The business was registered as a sole proprietorship.

Brunet's father had operated a similar business in New York City, State of New York, in the United States of America, under the name of G. Brunet Company. This business was involved in the export of automotive parts, including automotive parts of Chrysler Corporation, Ford Corporation and General Motors Corporation. The automotive parts were exported, in the main, to Colombia, Peru and Venezuela. In November 1974, following the death of his father, Brunet took over the operation of his father's business until 1976 when he came to live in Canada.

Brunet, as had his father, exported automotive parts to markets outside of North America, initially to South America, and later to the Middle East, Scandinavia and the United Kingdom.

Although RBC deals with the sale of automotive parts which it purchases from various suppliers, the present application

pertains to the relationship between RBC and Chrysler Canada and the sale by RBC of Chrysler automotive parts in the export market.

Throughout the proceedings, certain terminology relating to the Chrysler parts has been used. The most frequent references are to two groups of Chrysler parts: "A Parts" and "B Parts". On its price lists, Chrysler¹ identifies its parts by a seven-digit number and by one of the above two letters.

B Parts are commonly known as "captive" parts. Mr. Clifford Roy Burnett ("Burnett"), the recently retired Vice-President of Parts and Service and Technical Programs of Chrysler Canada, who since 1974 had the responsibility through various positions for the parts distribution in Canada, testified that some automotive parts that are considered captive parts may in fact be available from a source other than Chrysler. Generally, however, if an owner of a Chrysler motor vehicle must replace a B Part, the part will have to be obtained from Chrysler. Sheet metal parts or interior mouldings were referred to as clear examples of captive parts that could only be supplied by Chrysler.

A Parts are commonly known as "competitive" parts since these parts are available from a variety of automotive parts

¹ "Chrysler" without a modifier refers to the entire Chrysler organization in North America.

manufacturers for a particular application. An example of a competitive part would be a shock absorber or a fan belt.

Automotive parts can also be divided according to the use to which the part is put. When reference is made to "service" parts, this is taken to mean parts that are used to repair a vehicle, consequent upon an accident or some other malfunction, as opposed to "aftermarket" parts which are replaced as a matter of course during routine maintenance. The breakdown according to application relates to the captive/competitive dichotomy in the following way: service parts may be both captive and competitive; aftermarket parts are competitive more than captive.

Certain brand names specific to the Chrysler organization also appear in the evidence. "Autopar" is a line of Chrysler parts which comprises only competitive parts and which is marketed only by Chrysler Canada. "Mopar" is a line of Chrysler parts which, in Canada, includes mainly captive parts.

Finally, mention should be made of the "Interparts" programs of Chrysler U.S. Interparts programs involve a bulk purchase of some minimum quantity of an automotive part from a special production run of that specific part. These programs include both captive and competitive parts and are only available through Chrysler U.S.

RBC had its first dealings with Chrysler Canada in 1977 and continued to buy from them until the events that led to the present application. Apart from selling Chrysler parts Brunet dealt with two major suppliers in the United States (described as "Other U.S." in Table 1 below). He has also purchased small volumes of auto parts from several suppliers in Canada. His principal supplier in the U.S. until 1983 was Ford Corporation. His relationship with this company ended in 1985. The "Other U.S." since 1985 consists, for practical purposes, of purchases from a single source of supply on behalf of a particular customer. The purchases from Chrysler Canada dealers relate to the present proceedings. Table 1 divides the sales of RBC by the aforementioned sources of supply since 1984.

TABLE 1

R. Brunet Company

Gross Sales by Line of Business

<u>Year</u>	<u>Chrys. Canada</u>	<u>Chrys. Canada Dealers</u>	<u>Chrys. U.S.</u>	<u>Inter- parts, M.D.*</u>	<u>Other Canada</u>	<u>Other U.S.</u>
1989 #	-	26,618	67,630	-	21,706	-
1988	-	119,310	52,734	156,464	23,985	376,648
1987	99,154	223,495	24,126	325,872	78,280	140,890
1986	362,245	-	25,180	171,551	50,920	225,207
1985	259,892	-	20,442	95,235	11,984	338,824
1984	300,394	-	27,813	23,631	57,373	508,370

Notes:

* M.D. = Master Distributors

To May 12, 1989 only. Transactions with customers were placed in supplier categories by Mr. Reinke of Arthur Anderson Co. based on the supplier from whom Brunet made the largest purchases in each transaction. As a result, there are some minor discrepancies between the values in the table for 1989 and the actual sources of supply.

Total Gross Sales

<u>Year</u>	<u>Total</u>
1989 #	115,954
1988	729,141
1987	891,817
1986	835,103
1985	726,377
1984	917,581

Notes:

To May 12, 1989 only.

Sources:

Exhibit 10: Statement of Roman Boyko, C.A. / Richard Joly, C.A., Coopers and Lybrand, for the Director of Investigation and Research, Schedules A to H; Exhibit 31: R. Brunet Company Sales, Cost of Sales and Gross Margin for the Period from January 1, 1989 to May 12, 1989, prepared by B.J. Reinke, C.A.

It is uncontested that Brunet was encouraged by Chrysler Canada throughout his association with it to expand the sale of Chrysler Canada auto parts in the export market. A number of actions were taken by Chrysler Canada in its treatment of Brunet to allow for the needs of his customers who faced particular problems of exchange controls and import permits with time deadlines. The details of some of the particular services provided by Chrysler Canada will be discussed in connection with the definition of market. Brunet undertook to represent the Autopar line at trade shows in South America with posters supplied by Chrysler Canada. On occasion Chrysler Canada referred potential customers to Brunet.

On August 29, 1986, Brunet received a telephone call from a Mr. P.R. Williams, National Parts and Sales and Marketing Manager for Chrysler Canada, who informed Brunet that all his orders with Chrysler Canada had been placed on hold. By letter dated October 8, 1986, in reply to a letter from Brunet dated October 2, 1986, sent to Burnett and dealing with a matter referred to as "Requirement for Britain",² Burnett advised Brunet that there was "no longer any organizational responsibility for handling these orders in Canada". This letter went on to state that all orders currently in the system would be processed according to "normal practice and/or availability of supply":

October 8, 1986

Mr. Richard Brunet
R. Brunet Company
Suite 918
360 St. James Street West
Montreal, Quebec
H2Y 1P5

Dear Richard:

Your letter of October 2, 1986 is received and since there is no longer any organizational responsibility for handling these orders in Canada I have referred your request to Mr. B.J. Lerner in the U.S. Chrysler Export Sales Office who will handle all of your requirements.

All orders currently in the system will be filled and shipped as per our normal practice and/or availability of supply.

Thank you for your inquiry. You will hear from Mr. Lerner's office in the near future.

Yours very truly,

(s) C.R. Burnett³

² Exhibit 3, Tab 162.

³ Exhibit 3, Tab 164.

The orders currently in the system were filled by Chrysler Canada over the following five to six months. No new orders were accepted by Chrysler Canada after October 8, 1986 causing Brunet to try to find alternative sources of supply. In January 1987, Brunet approached several Montreal-area Chrysler Canada dealers in order to source parts to service his customers. It did not take long for Chrysler Canada to become aware that Brunet was purchasing parts from its dealers. This information was relayed to Chrysler Canada's head office by Chrysler Canada field representatives through its Montreal office. Suspicion was also aroused by a large order placed by a Chrysler Canada dealer through the Chrysler Canada computer system. This order contained an unusually large number of older automotive parts, far in excess of normal domestic demand. A representative of Chrysler Canada (head office) contacted the Sales Manager of the Regional Office in Pointe Claire, Province of Quebec, a Mr. Jacques St. Pierre, and asked St. Pierre to have his district managers instruct their dealers not to sell Chrysler automotive parts for export.

This initiative was followed up by a bulletin to all Chrysler Canada dealers dated May 8, 1987:

Bulletin No. 87-37
May 8, 1987

TO ALL DEALERS AND AUTOPAR DISTRIBUTORS
OF CHRYSLER CANADA LTD.

EXPORT PARTS SALES

We have received several inquiries recently from Dealers regarding the sale of Chrysler Parts for **Export Sales** purposes. The requests may have resulted from recent articles in the press that Chrysler would be expanding sales of some North American-built products into foreign markets.

The sales of Mopar and Autopar Parts by Chrysler Canada is strictly to service our Canadian customers, not for export. If you receive an inquiry concerning export sales, please contact your Regional Parts Sales Manager, for referral to our Export Sales Office in Detroit. All Chrysler Canada Export Sales will be handled in this manner.

We would appreciate your co-operation in this matter.

(s) P.R. Williams

P.R. WILLIAMS
National Parts Sales
and Marketing Manager⁴

Bulletin n^o 87-37
Le 8 mai 1987

AUX CONCESSIONNAIRES ET DISTRIBUTEURS
AUTOPAR DE CHRYSLER CANADA LTÉE

VENTE DE PIÈCES POUR L'EXPORTATION

Plusieurs concessionnaires nous ont récemment contactés au sujet de la vente de pièces Chrysler **pour l'exportation**. Les demandes sont peut-être reliées à la parution de certains articles dans la presse déclarant que Chrysler étendrait la vente de certains produits de fabrication nord-américaine aux marchés étrangers.

La vente des produits Mopar et Autopar par Chrysler Canada est strictement réservée à nos clients canadiens et non à l'exportation. Pour toute demande concernant la vente pour l'exportation, veuillez communiquer avec votre directeur régional, secteur vente des pièces, qui en référera au bureau des ventes pour l'exportation à Detroit. Toutes les ventes de pièces pour l'exportation de Chrysler Canada seront ainsi traitées.

Votre collaboration dans cette affaire sera grandement appréciée.

Le Directeur national,
vente et commercialisation
des pièces,

(s) P.R. Williams

P.R. Williams⁵

⁴ Exhibit 4, Tab 230 (underlining added).

⁵ *Ibid.* (underlining added).

Despite the general language of this bulletin, the Tribunal is satisfied, from the testimony of Burnett, that the bulletin was aimed at preventing Brunet from obtaining Chrysler parts to service his customers.

Q. Now, in the second sentence in that first paragraph, it says:

"The request may have resulted from recent articles in the press that Chrysler would be expanding sales of some North American-built products into foreign markets."

Given your evidence to this point on this bulletin, would you agree with me that the specific impetus for the bulletin was Mr. Brunet and not any articles that may have appeared in the press?

A. That is true, although there were articles in the press about Chrysler entering the European market.

Q. But I put it to you that, in the absence of Mr. Brunet's activities, you would not have sent this memorandum.

A. Probably not, sir.⁶

Notwithstanding the issuance of the bulletin Brunet was still able to purchase, with difficulty, Chrysler parts from Chrysler Canada dealers. On September 27, 1987 a second bulletin was issued by Chrysler Canada.⁷ This second bulletin was much the same as the first. It emphasized, as did the first, that parts were not to be sold for export and that all requests for parts for export should be

⁶ Cross-examination of Burnett at p. 1534 of the transcript.

⁷ Exhibit 16.

referred to the dealer's Regional Manager who, in turn, would refer the matter to the office of Export Sales in Detroit.

Some time after the May 1987 bulletin, Chrysler Canada commenced a review of all of its dealer agreements which culminated in the re-signing of all the Chrysler Canada dealers to new dealer agreements. A clause was inserted in order to restrict parts sales to the domestic market in the following terms:

Whereas the parties hereto have heretofore entered into a Sales and Service Agreement relating to, among other things, a means for the sale, in Canada, of parts and accessories and other products and services manufactured or distributed by CHRYSLER

And to provide parts to the Canadian domestic market to assure service to those vehicles sold in Canada for the full extent of their service requirements.⁸

Although no sanctions or penalties have as yet been applied against any of its dealers by Chrysler Canada for breach of the clause, Burnett is of the view that the new agreement gives Chrysler Canada the power to terminate the franchise of a dealer who sells parts to Brunet. Changes were also made to the computerized ordering system of Chrysler Canada to flag atypical orders involving large volumes or unusual parts.

⁸ *Parts Wholesale Sales Agreement*, Exhibit 6, Tab 338 (underlining added). See also *Parts Merchandising Sales Agreement*, Exhibit 26.

Section 75 of the *Competition Act*

On the basis of the above facts the Director instituted the proceedings pursuant to section 75 of the Act. Section 75 reads:

75. (1) Where, on application by the Director, the Tribunal finds that

(a) a 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,

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product, and

(d) the product is in ample supply,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

(3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

In order for the Tribunal to exercise its discretion to make an order pursuant to the section the Director must establish all of the elements contained in each of the paragraphs (1)(a) to (1)(d). Paragraphs (1)(c) and (1)(d) are not in serious dispute. The Tribunal is satisfied that Brunet is willing and able to meet the usual trade terms of Chrysler Canada and that the product is in ample supply. No evidence was led to the contrary. Before turning to the determination of whether the elements of (1)(a) and (1)(b) have been met, it is necessary to establish the meaning of "product" and "market".

Product

Is the product in question Chrysler Canada auto parts as submitted by the Director, Chrysler auto parts, or auto parts in general as submitted by the respondent? The definition of market is closely tied to the answer to this question. The Tribunal is satisfied that the relevant product is, for the reasons explained below, Chrysler auto parts.

Products and markets can only be meaningfully defined in a particular context and for a particular purpose. The approach to defining these terms may be entirely different where, as in the case of a merger, the ultimate test is whether the merger will substantially lessen competition and the definition must be consistent with the attempt to determine whether the merger will result in an

increase in prices or in other effects consistent with a lessening of competition. In the case of paragraph 75(1)(a), the ultimate test concerns the effect on the business of the person refused supplies. Where products are purchased for resale, the effect on the business of the person refused supply will depend on the demand of the person's customers and whether substitutes are acceptable to them. Therefore, the starting point for the definition of "product" under section 75 is the buyer's customers.

Although Brunet's business is the export of auto parts, the definition of the product in relation to Brunet's dealings with Chrysler Canada depends on the demand of customers who purchased Chrysler auto parts. The issue is whether they treated Chrysler auto parts as a distinct product or as one for which they would readily accept substitutes. The evidence shows that Brunet responded to direct orders of customers, that customers *specified* that they wanted genuine Chrysler parts, and that they used numerical codes specific to Chrysler's parts system when ordering. There was no question of substituting parts of other suppliers for those of Chrysler. The product in question is thus Chrysler auto parts.

The respondent submits that subsection 75(2) severely constrains the definition of the product as Chrysler auto parts: "the effect of subsection 75(2) with its reference to class of articles is that the Tribunal must define a product by a genus or class or kind

description, unless the product meets the single exception thereto."⁹ The applicant takes the position that the subsection "adds little to the analysis. In a buyer-derived demand situation alternative branded goods are of little utility and the particular sought branded goods will always be of importance."¹⁰

In the view of the Tribunal subsection 75(2) does not enter into the definition of the product as Chrysler auto parts. The product is Chrysler auto parts not "only because it is differentiated from the other articles in its class by a trade mark, proprietary name or the like".¹¹ It is not only the existence of the trademark that determines the definition but rather the demand of Brunet's customers. Subsection 75(2) forecloses reliance being placed on trademarks (save for the specified exception) to define products in spite of the existence of acceptable substitutes to customers. This factor, the presence or absence of acceptable substitutes to customers, is of paramount importance in arriving at the appropriate definition of the "product" and was the determining factor in the present case.

The evidence is that it is primarily service parts and within that group mainly captive parts that are ordered from Brunet. This is consistent with the designation of other parts as competitive

⁹ Respondent's Memorandum of Law at para. 40.

¹⁰ Memorandum of Law of the Applicant at para. 35.

¹¹ *Competition Act*, R.S.C. 1985, c. C-34, as am., s. 75(2) (underlining added).

because for these parts there are numerous alternative sources of supply and active price competition. Looking to the fact that sales by Brunet of the Autopar line, which consists only of competitive parts, were very limited, Chrysler Canada would have the Tribunal exclude the Autopar line from the product definition. The Director has stressed, through the evidence of Brunet, that in Brunet's experience competitive parts are ordered in the same way as captive parts (as a seven-digit number) and with the same insistence on genuine Chrysler parts. Virtually nothing turns on the finding of a distinction; no element of the decision depends on whether the product in question is Chrysler auto parts, captive and competitive, or exclusively captive Chrysler auto parts since the volume of competitive parts ordered from Brunet appears to have been minimal. A finding for Chrysler Canada would require that Brunet's sales and gross profits be modified to exclude sales of Autopar. This was not done by the Respondent's accounting expert. Given the foregoing and the fact that from Brunet's perspective (if not that of his customers insofar as they shop for cheaper sources of supply prior to ordering from Brunet) there is no difference between competitive and captive parts, the Tribunal makes no distinction between captive and competitive Chrysler parts.

The economist, Professor Ralph A. Winter, who appeared as an expert witness on behalf of the respondent, submits that the Tribunal should approach the definition of product and market not from the point of view of Brunet as a buyer, but from the viewpoint

of determining whether Chrysler has substantial market power. This, he submits, can only be done by considering what Chrysler sells and with whom it competes. He concludes that the relevant market is synonymous with the worldwide sale of automobiles since the price of auto parts is established in conjunction with the pricing of vehicles. It is Winter's view that Chrysler's pricing of parts is constrained by the effect this can have on the sale of its vehicles and that it faces very stiff competition in the sale of its vehicles. Winter concludes that since Chrysler does not have substantial market power as a seller of vehicles, its decision to discontinue supplying Brunet was motivated by concerns for efficiency and not to increase its market power.

This argument is presented by Winter in relation to the definition of product and market and also in conjunction with the Tribunal's use of its discretion to grant an order in the event that it finds that all of the elements have been satisfied by the applicant. The Tribunal is satisfied that a broad consideration of Chrysler's market power is not required in determining whether the specific elements of section 75 of the Act have been satisfied but may be relevant in the Tribunal's exercise of its discretion.

Market

Having defined the product as Chrysler auto parts, the Tribunal must now determine the market in which Brunet buys

Chrysler auto parts. The applicant contends that the relevant market comprises Canada, that Chrysler Canada is the sole supplier and Brunet, in the event, is the sole buyer. The respondent submits that the market consists of both the U.S. and Canada, that Chrysler U.S. is the supplier and exporters of Chrysler auto parts are the buyers. The Tribunal is satisfied that the relevant market is Canada, and that the U.S. and Canada are separate markets. This conclusion is discussed in the following section that deals with the differences between purchases from Chrysler Canada and from Chrysler U.S. in small and large volumes.

(a) Parts Purchased in Small Volume

This refers to the number of units of each part and to the fact that the parts are individually packaged. It does not refer to the size of the total order.

The automotive parts purchased from Chrysler Canada or Chrysler U.S. are physically identical. However, Chrysler Canada and Chrysler U.S. each publish separate price lists for these parts. The evidence is that prices in Canada are established with respect to market conditions in Canada. According to the evidence of Burnett, Chrysler Canada used the U.S. price list as a point of departure and made its modifications to price in the light of domestic conditions, subject to meeting the financial tests within Chrysler.

The reason why prices (*denominated in a common currency*) for some parts are cheaper in Canada than in the U.S. was addressed in the evidence of Burnett and, more speculatively, in the evidence of Professors Schwindt and Winter. Burnett states that Canadian prices are primarily cheaper for parts used for older models of cars. He also said that Chrysler Canada tends not to change the prices of inventory until it is necessary to reorder and since the turnover of inventory is much slower in Canada than in the U.S., reordering occurs less frequently and thus price increases lag behind those in the U.S.

Winter hypothesizes that parts prices in Canada fell at the time of the decline in the Canadian dollar as compared to the American dollar in late 1970s. He reasons that Chrysler, in common with other companies, is reluctant to incorporate the effect of exchange rate changes in their prices because this would be too disruptive. Professor Richard Schwindt concludes that prices of vehicles and parts in Canada are more sensitive to import competition than in the U.S. and thus tend to be lower. All the explanations share the common feature that, *whatever the cause, market conditions in the U.S. and Canada are different and the differences are reflected in different parts prices.* The percentage of all Chrysler parts that were priced lower in Canada is not in evidence. The only specific evidence is that it is primarily older parts that are affected.

The evidence generally indicates that customers tended to buy exclusively or primarily from Brunet those parts that were cheaper to source through Chrysler Canada. Parts that were generally less expensive to source in the U.S. were purchased through other suppliers.

In addition to the price differences between Chrysler Canada and Chrysler U.S., there were several other important differences between them as sources of service parts. Chrysler Canada offered Brunet (and thus Brunet's customers) "price protection" against changes in prices between the time of order and delivery. This protection was offered for a period of up to four months, covering two bi-monthly changes in price lists. Only recently, in February 1989, was this protection made available to Brunet by Chrysler U.S.

Furthermore, when an order was sent to Chrysler Canada it responded with an "availability report" which identifies the parts that were immediately available and the length of the delay that would be required in supplying each of the remaining parts.

Brunet also asserts, with some corroboration from correspondence with customers, that Chrysler Canada offered superior service in other ways. Brunet claims that the percentage of orders immediately filled by Chrysler Canada was much higher than was the case with Chrysler U.S. and that the latter tended to fill orders

through a series of relatively small shipments to Brunet's designated port. The result was slower shipment to Brunet's customers and higher costs. Brunet also claims that the accuracy with which orders were filled was higher in Canada than in the U.S. As a result there were fewer customer claims when supply was obtained from Chrysler Canada. The only evidence offered in contradiction is testimony by Burnett to the effect that the "fill rate" on orders received by Chrysler *from dealers* is 95 per cent in the U.S. compared to 96 per cent in Canada. This evidence does not, however, provide any information on Brunet's experience with Chrysler U.S. since Brunet *is not a dealer and does not make typical dealer's orders.*

The Tribunal does not accept Brunet's allegations that it is cheaper to ship to European destinations from a port in Montreal rather than a port in New Jersey. This evidence, given by Brunet, is contradicted by the evidence of a Mr. Jansson, a witness from Sweden who imports Chrysler Canada vehicles and Chrysler parts from Canada.

The importance to Brunet's customers of all of the foregoing differences between sourcing from Chrysler Canada and Chrysler U.S. that are not directly related to differences in the price lists cannot be accurately assessed. To do so would require evidence on whether Brunet's customers chose to source from Chrysler Canada when its prices were *higher* than those set by Chrysler U.S. In the absence of evidence of this kind, or at least evidence of customer

statements that they clearly preferred to source from Chrysler Canada, the Tribunal concludes that these factors *alone* do not create two distinct sources of supply. This conclusion is supported by evidence that Brunet's customers tend to buy parts that are cheaper to source from Chrysler U.S. through other exporters than Brunet. This suggests that whatever problems there might have been in sourcing from Chrysler U.S., they could be overcome by price concessions or other advantages that these other exporters offered Brunet's customers. Insofar as Brunet's customers were concerned, he was a preferred source of supply primarily for parts that are cheaper to source in Canada.

Brunet earned a considerably higher profit margin on parts sourced from Chrysler Canada than on U.S. orders as the Canadian price list necessarily included Canadian federal sales tax and duty on parts imported into Canada. The duty and tax did not apply on parts exported from Canada. The duty and sales tax paid by Chrysler Canada were returned to Brunet and constituted the major part of his profit margin. The higher profitability Brunet earned on parts obtained in Canada put him in a position to offer discounts on the published price lists or to absorb some of the cost of higher prices, as may be the case when he buys from dealers. Thus, customers could be encouraged to purchase Canadian-sourced parts when list prices in the U.S. and Canada were similar. Whether discounts were in fact offered by Brunet is less important than his ability to do so.

Schwindt is of the view that the separate price lists in the two countries and the other differences discussed above create a separate "product bundle" with respect to Chrysler parts sourced in Canada and those sourced in the U.S., even though the parts are physically identical. He concludes that the differences are sufficiently great to create two distinct markets:

When sourcing his purchases, Brunet considered a number of elements which were important to his purchase decision. These elements include: the physical characteristics of the automotive part; the delivery point; the probability that the order would be filled in a single delivery; the reliability of the supplier in meeting promised delivery dates; the predictability of trade terms; the probability of unauthorized substitutions; the probability of missing, misplaced or damaged goods; the supplier's cancellation policy; and price. Generally the physical characteristics of Chrysler automotive parts supplied by Chrysler Canada Ltd. were identical to those supplied by Chrysler U.S. However, the other elements of the product bundle could differ significantly between these suppliers.¹²

As indicated above, the Tribunal concludes that the critical difference between the two sources of supply is price.

Winter concludes that the physical identity of the parts obtained from the two sources is critical in establishing market boundaries, and since the only difference between the two sources is price (or other claimed advantages that can be translated into a price

¹² Exhibit 22: Exhibit "A" to the Affidavit of Richard Schwindt, dated June 4, 1989 at p. 7.

difference), parts supplied from Chrysler Canada and from Chrysler U.S. are in the same market:

Products that are physically identical, and are perfectly substitutable in their end uses are properly regarded as in the same market unless geographical distance and directly related costs preclude their substitutability. Almost all of the items that Professor Schwindt lists, such as higher handling costs of U.S. sourced product, less price protection, less accommodation of timing requests, a stricter cancellation policy, and the unilateral substitution of technically equivalent parts, are equivalent to a higher cost of purchasing from Chrysler U.S., or a higher price paid to Chrysler U.S. The physical products from the two sources were identical; from the buyer's point of view all differences in terms of trade are equivalent to differences in price.¹³

He states that to conclude, as does Schwindt, that Chrysler Canada is in a different market than Chrysler U.S., is to arrive at the odd result that there is one supplier and one customer. He states that the effect of denying Brunet supply from Chrysler Canada is to place Brunet on the same footing as exporters operating from the U.S., whereas before he had the advantage of being able to sell from both price lists and to buy from both sources:

The prices paid by Brunet to Chrysler U.S. and the trade terms available to Brunet from Chrysler U.S., were the same terms faced by every other distributor of Chrysler parts for export from North America (*supra*, Section II, paragraph 9). If a buyer of a particular article can obtain perfectly substitutable products at a modest or moderate price or cost increase, which price increase puts the buyer on an equal footing with other buyers of the product, then the substitute products should properly be included in the same market definition. The perfect

¹³ Exhibit 29: Report Prepared by Ralph A. Winter, dated June 20, 1989 at para. 9.

substitutability of the parts from Chrysler U.S. and Chrysler Canada fulfils the essential criterion for inclusion of products in the same market.¹⁴

Whether Brunet is placed on the same footing as exporters in the U.S. (described by Burnett as the "level playing field") is not relevant to a determination of market definition, but may be relevant in deciding whether the Tribunal should exercise its discretion in issuing an order in the event that the applicant is successful in the present proceedings.

The existence of separate price lists in the U.S. and Canada and the fact that they are intended, according to the evidence of Burnett, to respond to different market conditions in the two countries strongly implies the existence of separate markets. No convincing evidence to the contrary has been presented. The price lists are used by the vast dealer networks in the two countries. It is difficult to believe that anyone would question that dealers in the U.S. and Canada are in separate markets with respect to the purchase of their parts. Yet Winter and the respondent submit that Brunet is in the same market as the numerous U.S.-based exporters with whom he competes for non-North American business. The Tribunal does not accept this conclusion, given that Chrysler Canada and Chrysler U.S. are in separate markets.

¹⁴ *Ibid.* at para. 10.

In the case of Brunet it is clear that the market niche he occupies is based on the fact that some Chrysler auto parts are cheaper in Canada than in the U.S. The price differences are maintained by Chrysler for its own purposes. Similarly, the apparently anomalous situation where there is a single seller and a single buyer is also a result of Chrysler corporate policy. The decision to allow Brunet to address the non-North American markets from Canada was taken by Chrysler. It would similarly be able, apart from the question of the application of section 75 of the Act, to decide that all non-North American exports will originate in the U.S.

(b) Interparts - Parts Purchased in Large Volume

Are parts purchased under the Interparts programs in the United States in the same market as service parts purchased from Chrysler Canada? Although they are physically identical, parts purchased through Interparts and parts from Chrysler Canada are not generally substitutes and hence are not in the same market. This conclusion follows from the features of the Interparts programs: very large minimum purchase requirements; orders must be placed in advance for later manufacture and hence it may take considerable time for an order to be filled; parts are packaged in bulk rather than individually; prices are much lower than for parts ordered in small volumes. The dollar value of minimum purchases was recently raised by a large multiple in conjunction with the creation of Master Distributors of Interparts. The effect of this change is the virtual

elimination of any substitution that may have occurred between sourcing of service parts in Canada and from Interparts.

The Law

As previously stated, the present application is made pursuant to section 75 of the Act. In order for the Director to succeed in his present application, he must satisfy the Tribunal of the existence of each element contained in the section.

(a) Business Substantially Affected

The establishment of the product and market as being Chrysler auto parts available in Canada allows a consideration of the element found in paragraph 75(1)(a), that is, whether Brunet was "substantially affected" in his "business" by the refusal of Chrysler Canada to supply Brunet with Chrysler auto parts.

The applicant submits that the "business" in issue relates to the "specific line or product within the overall enterprise affected by the refusal", that is, Brunet's business is exporting Chrysler Canada auto parts.¹⁵ The respondent submits that a broader

¹⁵ Memorandum of Law of the Applicant at para. 42.

interpretation is required in light of the definition of "business" found in subsection 2(1) of the Act which states:

"business" includes the business of
(a) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and
(b) acquiring, supplying and otherwise dealing in services.

The respondent submits that the evidence shows that Brunet's "business" is the "export business" or "conceivably his business of exporting automotive parts".¹⁶

A majority of the Tribunal agrees with the submission of the respondent that the effect on the entire activity of which the refused supplies are a part should be used. It is clear that a fair analysis of the situation in the present case requires that a broader interpretation is required than the one urged by the applicant. The submission of the applicant, if accepted, would be unnecessarily restrictive since this could preclude a proper understanding of the effects of the refusal to supply.

This does not mean, however, that the effect of the refusal to supply can be established solely by examining the overall sales and profit figures. To understand the effect of the refusal to supply, it is necessary to answer the following:

¹⁶ Respondent's Memorandum of Law at para. 25.

- (a) does the product in issue account for a large percentage of the overall business?
- (b) is the product easily replaced by other products sold by the business?
- (c) does the sale of the product use up capacity that could be devoted to other activities?
- (d) is the product used or sold in conjunction with other products and services so that the effect on the overall results of the business may be much greater than indicated by the volume of the product purchased?

Reliance on an examination of the overall business result may be appropriate where it is difficult to do a more disaggregated analysis. This is not necessary in the case of Brunet's business; it is very small, he has few customers and it is possible to inquire meaningfully whether there is a relationship between transactions. Under the circumstances the figures on his overall business provide information for only an initial step in the evaluation. The accountants called as expert witnesses by the parties did not have any particular familiarity with the auto parts export business in

general, or with Brunet's business in particular. They were not, therefore, in a knowledgeable position to give evidence on how the refusal of Chrysler Canada to sell to Brunet affected his overall sales and profits. Similarly, Winter, who stated the hypothesis that the capacity formerly used on the sale of Chrysler Canada-sourced parts was redirected to the sale of parts from other sources, was not in a position to confirm the factual validity of this submission.

The figures placed in evidence by the accountants for the two sides were similar and served to confirm that the records maintained by Brunet fairly represented his business transactions. There is agreement that the few discrepancies in their treatments are not of material importance in determining whether Brunet is substantially affected in his business.

The respondent stresses that Brunet had larger sales and profit after Chrysler Canada refused to supply Brunet in 1986 (referred to by the Director as the "cut-off") than in the years preceding it and therefore Brunet was not substantially affected by his inability to obtain supply from Chrysler Canada. As noted earlier, in some cases this type of evidence might be conclusive, but only where it is not possible to analyze how the separate parts of the business are related. The Tribunal is satisfied, through the evidence of Brunet, that the gross sales and profits earned from the sale of other products is totally unrelated, by way of the utilization of

capacity or by way of demand, to the sale of Chrysler parts. The sale of other parts took very little of Brunet's time or that of his assistant and his business could easily have accommodated these additional sales if he had not lost sales of Chrysler parts as a result of his inability to obtain supplies from Chrysler Canada. Similarly, the demand for Chrysler auto parts was independent of the demand for other parts. Accordingly, any changes in the sales of other parts and the gross margins therefrom would have taken place whether or not Brunet's relationship with Chrysler Canada had changed. The same conclusion is applicable with respect to Interparts since service parts and Interparts represent separate markets. There is no reason to believe that Brunet's customers would be influenced to increase their demand for Interparts as a result of Brunet's inability to obtain supply from Chrysler Canada. If the cut-off had any effect on the sale of Interparts it would be a negative one to the extent that Brunet lost customers as a result of Chrysler Canada's refusal to supply auto parts.

Large sales of other auto parts to a single customer in 1987 and in 1988 virtually disappeared during the first four months of 1989. The large sales and resulting gross profits from these transactions were an essential part in the overall sales and gross profit figures that the respondent relies on to state that the cut-off does not have a substantial effect on Brunet's business because overall sales and gross profits did not fall after 1986. The most

recent figures submitted show that overall sales and gross profits are much lower, on an annual basis, than before the cut-off.¹⁷ This illustrates the danger of relying on aggregate data when more specific and relevant information is available. The Tribunal is satisfied that the evidence shows that both the increase in the sales of other auto parts and the subsequent decline are unrelated to the extent to which Chrysler parts are available to Brunet in Canada.

Following the cut-off Brunet was able to obtain parts from Chrysler Canada dealers. Under his arrangement with them he paid them their acquisition cost plus five per cent. It is noteworthy that Canadian-sourced parts were sufficiently more price attractive than those obtainable from Chrysler U.S. that Brunet and his customers preferred to pay the additional five per cent rather than purchase from Chrysler U.S.

A review of the extent to which Brunet was able to replace Chrysler Canada by its dealers must take into account the steps that Chrysler Canada took to discourage its dealers from selling to Brunet. The verbal warnings to particular dealers, the bulletins to all dealers and, finally the re-signing of all dealers to new contracts with a clause that is designed, according to the evidence of Burnett,

¹⁷ Exhibit 31: R. Brunet Company Sales, Cost of Sales and Gross Margin for the Period from January 1, 1989 to May 12, 1989; Table 1, *supra* at p. 7-8.

to give Chrysler Canada the authority to discontinue supplying a dealer in the event that the dealer sells for export, have progressively changed the conditions under which Brunet can buy from Chrysler Canada dealers. Chrysler Canada has modified its computer software to more readily enable it to detect orders that may be intended for export. As a result of these efforts by Chrysler Canada, Brunet is forced to split his orders and to spread them over some time to attempt to avoid detection. There is evidence that three dealers openly sell to Brunet. The evidence is not clear on whether any of them have wholesale dealer status. If they do not, the prices that they pay for captive parts are more than those which Brunet paid to Chrysler Canada. In addition, it must be assumed that the dealers are earning some profit margin on their sales to Brunet, such as the five per cent referred to previously, thus causing Brunet to pay a substantially higher price for the auto parts than that paid by Brunet to Chrysler Canada.

Table 2 shows Brunet's gross profit and sales resulting from purchases from Chrysler Canada, Chrysler Canada dealers and Chrysler U.S. from 1984 to May 1989.

TABLE 2

Gross Sales and Profit*: Parts Sourced from Chrysler Canada,
Chrysler Canada Dealers and Chrysler U.S.

1984-1989

<u>Year</u>	<u>Chrys.</u> <u>Canada</u>	<u>Chrys.</u> <u>Canada</u> <u>Dealers</u>	<u>G r o s s</u> <u>Profit</u> <u>Chrys.</u> <u>Canada</u> <u>&</u> <u>Dealers</u>	<u>Chrys.</u> <u>U.S.</u>	<u>G r o s s</u> <u>Profit</u> <u>Chrys.</u> <u>U.S.</u>
1984	300,394		49,161	27,813	1,410
1985	259,892		39,407	20,442	1,019
1986	362,245		47,202	25,180	1,885
1987	99,154	233,495	43,554	24,126	1,555
1988	—	119,310	14,706	52,734	4,321
1989**	—	26,618	3,856	67,630	6,140 #

Notes:

* Gross profit (or gross margin or mark-up) is gross sales minus cost of goods sold. The Coopers & Lybrand report prepared on behalf of the applicant uses the terminology "mark-up" rather than "gross margin". There does not in fact appear to be any difference between the two terms except when expressed as a percentage, which involves the use of a different denominator. The principal discrepancy between the gross margins of Arthur Anderson and the mark-up of Coopers & Lybrand is with respect to dealers in 1988. Arthur Anderson arrived at a figure of \$18,495, which compares to \$14,706 in the table. The figures in all other cases are the same or very close. The Arthur Anderson study provided gross margins for fewer years for the categories shown in the table and thus the decision to use the Coopers and Lybrand information was, so to speak, by default.

** January 1 - May 12.

Includes purchases from Chrysler U.S. and from Master Distributors of Interparts.

Sources:

Exhibit 10: Statement of Roman Boyko, C.A. / Richard Joly, C.A., Coopers and Lybrand for the Director of Investigation and Research, Schedules A to D; Exhibit 31: R. Brunet Company Sales, Cost of Sales and Gross Margin for the Period from January 1, 1989 to May 12, 1989.

The effectiveness of Chrysler Canada's efforts in preventing Brunet from exporting from Canada is shown in the above table. There is a marked decline in sales and profits on purchases of Chrysler auto parts in Canada between 1986 and 1988 and on through somewhat more than the first quarter of 1989. The figures for 1989 are taken as providing only an order of magnitude because the period is relatively short. The 1989 figures are based on an analysis by Mr. Reinke of Arthur Anderson & Co. who appeared as an expert witness on behalf of the respondent. Reinke prepared the figures in response to a request made to him during cross-examination. He examined the ledger cards used by Brunet and included only those transactions for which both a purchase and a sale were recorded. In the view of the Tribunal, this was the only reasonable course. Ledger cards on which only one part of a transaction are recorded cannot be included as part of sales for the period in question. Some transactions started in 1988 are part of the partial 1989 figures and it is to be expected that some transactions started between January 1 and May 12, 1989 will be completed and recorded as such after May 12, 1989. There is no obvious bias imported into the 1989 figures by this factor. The only legitimate concern that the volume of sales is understated relates to the possibility that Brunet failed to make entries on the ledger cards for completed transactions. No evidence of this was presented to the Tribunal.

The respondent points to variations in demand that are unrelated to the cut-off as a possible explanation for any decline in sales and gross margins experienced by Brunet. This is a possibility that must be taken into account. Variation in demand certainly accounted for swings in the sale of other auto parts. In considering this factor the Tribunal notes that neither party attempted to provide a benchmark against which the changes in Brunet's sales of service parts might be measured (such as, for instance, the total exports of Chrysler service parts from North America during the years in question). The Tribunal is not satisfied that the large changes in sales experienced by Brunet were caused by variations in demand that are unrelated to the cut-off.

To evaluate the changes in sales and profits experienced by Brunet, it is necessary to determine the meaning of "substantially affected". The applicant submits that "substantially affected" simply means more than a *de minimis* effect. This conclusion is based on the fact that an earlier draft of the Act required only that the person be "adversely affected" which could mean a negative effect to a small degree.

The respondent submits that "substantially" does not simply mean "some" or "to a degree" but rather "major" or "significant". The respondent takes the position that the ordinary dictionary definition should be used in the absence of strong reasons to the contrary. The Tribunal agrees that "substantial" should be given its

ordinary meaning, which means more than something just beyond *de minimis*. While terms such as "important" are acceptable synonyms, further clarification can only be provided through evaluations of actual situations.

The cut-off resulted in a decline of over \$200,000 in sales between 1986 and 1988. 1987 was a year of transition during most of which Brunet was able to obtain parts from Chrysler Canada dealers and Chrysler Canada continued to fill orders received by Brunet before October 1986. The slight rise in 1988 sales of Chrysler U.S.-sourced parts suggests that some substitution may have occurred between Chrysler Canada and Chrysler U.S. sourced parts, perhaps because of the increasing difficulty of obtaining parts in Canada. If such substitution did occur, it was far too limited to alleviate the decline in sales and gross profits from Chrysler auto parts. The decline in profits between 1986 and 1988 from sourcing Chrysler parts in Canada was in excess of \$30,000. Losses of the order of magnitude of \$200,000 in sales and \$30,000 in gross profits constitute a substantial effect for a small business such as Brunet's. The figures for more than a third of 1989 and the fact that Chrysler Canada has put in place contracts that will permit it to discipline dealers who sell for export suggest that even greater losses may be anticipated in the future.

(b) *Inadequate Competition in the Market*

The issue as to whether Brunet is unable to obtain supplies because of inadequate competition in the market turns on whether Chrysler Canada dealers are in the same market as Chrysler Canada as suppliers to Brunet. The Tribunal concludes that the restrictions placed by Chrysler Canada on its dealers clearly make them inferior sources of supply to Brunet and that they therefore do not provide adequate competition to Chrysler Canada.

Exercise of Discretion

The Tribunal is satisfied that the Director has proven, through the evidence presented, all of the elements of section 75 of the Act. Once this prerequisite is met, the Tribunal has the discretion to issue an order requiring Chrysler Canada to resume supplying Brunet with Chrysler auto parts within a specified time on usual trade terms.

There are several areas of evidence and argument that bear on the exercise of the Tribunal's discretion. These are: the reasons behind Chrysler Canada's decision to discontinue supplying Brunet; the market position of Chrysler and the changes that it was making in its distribution system; the long association between Brunet and

Chrysler Canada; the unquestioned encouragement that Chrysler Canada provided Brunet; and the manner in which the cut-off was implemented.

(a) The Decision to Discontinue Supply to Brunet

The respondent takes the position that the decision to no longer permit Brunet to buy from Chrysler Canada was taken in response to Brunet breaking one of the conditions attached to such supply, that Brunet not sell to franchised dealers outside of North America in competition with Chrysler U.S.

The existence of such a condition is in dispute. Burnett alleges that this condition, along with the condition that Brunet not divert supplies into the North American market, were clearly set out in a verbal arrangement between himself and Brunet. There is no written agreement between Chrysler Canada and Brunet. Brunet denies that it was ever understood that he was not to sell to Chrysler dealers outside of North America. The Tribunal accepts his evidence.

Associated documentary evidence supports Brunet's position. Correspondence between Chrysler Canada and Brunet corroborates that Chrysler Canada was concerned that parts sold to Brunet not be diverted into the domestic market. Procedures were established to ensure that such diversion was prevented. In contrast, there is no

mention in any of the correspondence between Brunet and Chrysler Canada prior to 1986 that the latter was concerned about the possibility that Brunet might be selling to franchised dealers outside of North America. Concern about Brunet competing with Chrysler U.S. is first raised in May 1986 in connection with Brunet's approach to an "Interparts distributor" (rather than a franchised dealer) in Peru:

May 1, 1986

Mr. R. Brunet
R. Brunet Company
Suite 918
360 St. James Street West
Montreal, Quebec
H2Y 1P5

Dear Richard:

This letter will serve to confirm our telephone conversation regarding your letter of March 19, 1986, to Colonial Motors in Peru. Your letter suggests that in some cases, it is more advantageous to purchase parts from yourself than it is to purchase from Chrysler Corporation. Colonial Motors is an authorized Interparts Distributor.

I would like to remind you that when you are representing Chrysler Canada Ltd. in the export market, your objective is to compliment (*sic*) the Corporation's Interparts Division's sales activities, not to compete for their Distributors' business. We would appreciate your co-operation in this matter.

Yours very truly,

CHRYSLER CANADA LTD.

(s) P.R. Williams
National Parts Sales
and Marketing Manager

cc: C.R. Burnett¹⁸

The context and the language of the letter create ambiguities. This sole written reference to the claimed Chrysler Canada understanding with Brunet is not persuasive.

Most importantly, sales to a Mr. Karlsson, a franchised dealer in Sweden, took place against a backdrop of a visit by Karlsson to the central Chrysler Canada parts depot. Brunet introduced Karlsson to the manager of the warehouse and sent Burnett a copy of a letter that Brunet sent to the manager following Karlsson's visit. Burnett passed on the letter to Williams, the author of the May 1986 letter referred to above.¹⁹ It is difficult to believe that Brunet would have been so open in presenting and discussing Karlsson if he knew that sales to Karlsson's company would have been in contravention of a condition of purchase from Chrysler Canada. Furthermore, Brunet claims that he was referred to Karlsson by an employee of Chrysler Canada, a Mr. Barton, through a Mr. Hedlund who was acting as Canadian agent for Karlsson. This evidence is not contradicted. It is also undisputed that the same employee, Barton, had referred a Mr. Jansson, a non-franchised dealer in Sweden who had purchased vehicles from Chrysler Canada and needed parts, to Brunet. Burnett states that he did not know that Karlsson was a franchised dealer although Chrysler Canada had access to this information. More critical to the issue is the fact that Burnett never

¹⁹ *Ibid.*

inquired, leaving the impression that whether Brunet was selling to franchised Chrysler dealers outside of North America was of no concern to Chrysler Canada.

(b) Consolidation of Control of Chrysler Exports

Although the evidence does not support the respondent's position that Chrysler Canada had an agreement with Brunet with respect to export to Chrysler franchised dealers, this does not mean that Chrysler was not concerned by such exports. It does not require specific evidence to conclude that the Chrysler export arm would find it embarrassing to have to compete with Brunet for the trade of its dealers. But beyond any such potential embarrassment, it is easy to accept that Chrysler would want to consolidate control of exports in one country and not be concerned with pricing differences between Canada and the United States affecting export markets. One does not have to go so far as Winter and conclude that the motive for consolidating exports is strictly to enhance efficiency in order to conclude that the decision is not solely intended to protect a separate price structure in Canada. Although Burnett denies that the Chrysler organization was in disarray in the early 1980s when Chrysler was in financial difficulty, the evidence shows that plants outside North America were sold off and the sale of Chrysler vehicles through (foreign) Chrysler franchised dealers was stopped. The evidence shows that, in recent years, Chrysler vehicles are once again being sold through (foreign) franchised dealers. It is

easy to understand that Chrysler would want to make organizational changes that can better accommodate its changing distribution system.

The respondent has not attempted to provide a cohesive explanation of the Chrysler distribution system. The principal argument put forward is that Brunet was being placed in the same position as U.S.-based exporters who, according to the evidence of Burnett, numbered somewhat more than one hundred and had combined annual sales of \$80 million (U.S.). No details were provided regarding who these firms are, who they sell to or their relation with Chrysler U.S.

The Tribunal must consider that the respondent has not presented any evidence that the granting of an order pursuant to section 75 of the Act would disadvantage the respondent. A point that has been raised in connection with the attempt to prevent dealers from selling for export is that exporting some parts that are in short supply (this applies particularly to older vehicles) could deprive domestic consumers. It strikes the Tribunal that this concern could most effectively be dealt with by having Brunet deal directly with Chrysler Canada. To the extent that Brunet is successful in buying from dealers, Chrysler Canada cannot identify the orders from dealers that are destined for export, which was not the case when it was selling directly to Brunet.

(c) Brunet's Long Association with Chrysler Canada

It is uncontested that Brunet was encouraged throughout his association with Chrysler Canada. A number of actions were taken by Chrysler Canada to accommodate its treatment of Brunet to allow for the needs arising from dealing with customers who faced problems of exchange controls and import permits with time deadlines. Burnett confirmed that Chrysler Canada had encouraged Brunet in his efforts to expand the sale of Chrysler Canada auto parts. Chrysler Canada on occasion referred potential customers to Brunet. In spite of this long and friendly relationship, no attempt was made by Chrysler Canada to resolve any problems that they perceived in Brunet selling to Karlsson in Sweden or attempting to sell to Colonial Motors, an Interparts dealer in Peru. There was no warning that he might be cut off and there was no face-to-face meeting to discuss the situation. Brunet was shown little consideration apart from Burnett agreeing to fill orders received by him prior to the cut-off date.

Conclusion

Section 75 is different than other sections in Part VIII of the Act. The test for whether the elements in the section are satisfied is not the effect on competition or efficiency. These considerations enter, where applicable, in the exercise of discretion.

The Tribunal accepts that Chrysler or Chrysler Canada does not occupy a very strong market position in the automobile industry (even though, as might be expected, it is in a very strong position with respect to the distribution of its products) and that it may have legitimate business interests that it is trying to protect. Weighing against this consideration is the long relationship between Brunet and Chrysler Canada, the manner in which sales to Brunet were terminated, and the fact that the respondent has not made any effort to establish that the granting of an order by the Tribunal would prejudice it in any way. Brunet has been substantially affected by the denial of supplies. He merits relief and it will be provided in the order.

The Tribunal is of the view that a proper balancing of interests in this case might be better accomplished with an order that was limited with respect to time, or perhaps with respect to the category of buyers that would be open to Brunet. Such an order could probably best be achieved through negotiations between the parties.

The Tribunal is satisfied, however, that its authority under section 75 is limited to the issue of an order that requires the respondent to supply Brunet Chrysler parts under the usual trade terms as it had done up to October 1986. Such an order shall issue.

There shall be no order as to costs. The Tribunal is satisfied that it does not have the jurisdiction to order the payment of costs.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT Chrysler Canada Ltd. accept Richard Brunet as a customer for the supply of Chrysler parts on trade terms usual and customary to its relationship with Brunet as the said terms existed prior to August, 1986.

DATED at Ottawa, this 13th day of October, 1989.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) M.M. Teitelbaum
M.M. Teitelbaum

TAB 9



Citation: *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28

File no.: CT-2004009

Registry Document no.: 0027b

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF applications by Quinlan's of Huntsville Inc. ("Quinlan") for an order pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"), granting leave to bring an application under section 75 of the Act and for an interim order pursuant to subsection 104(1) of the Act;

B E T W E E N :

Quinlan's of Huntsville Inc.
(applicant)

and

Fred Deeley Imports Ltd.
(respondent)



Date of teleconference call: October 21, 2004

Presiding Member: Simpson J. (Chairperson)

Date of Order: November 3, 2004

REASONS FOR THE INTERIM RELIEF ORDER DATED NOVEMBER 3, 2004

I. INTRODUCTION

[1] This is the first application for an interim supply order made by a private party under sections 104 and 75 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”).

[2] Quinlan’s of Huntsville (“Quinlan’s” or the “Applicant”) has been a Harley-Davidson (“H-D”) dealer in Huntsville, Ontario for approximately 17 years. Its most recent dealership or retailer agreement was signed with the respondent on June 9, 1999. It originally expired on July 31, 2001, but was renewed in writing so that it next expired on July 31, 2004 (the “Retailer Agreement”). On December 9, 2003, Quinlan’s was given notice, in writing, that its Retailer Agreement would not be further renewed (the “Non-Renewal”).

[3] Fred Deeley Imports Ltd. (“Deeley” or the “Respondent”), is the exclusive Canadian distributor of H-D motorcycles and related products. Deeley distributes in Canada through a network of independently owned dealerships and the process is governed by retailer agreements between Deeley and its dealers.

[4] On July 5, 2004, Quinlan’s applied to the Competition Tribunal (the “Tribunal”) for leave to seek an order under section 75 of the Act and for an interim supply order under section 104. Leave was granted on August 4, 2004 and, after an interlocutory motion and cross-examinations by both parties on their opponent’s affidavits, this motion for an interim supply order was heard by teleconference on October 21, 2004. Quinlan’s has asked the Tribunal to order that Deeley supply it with H-D motorcycles, parts and accessories for the H-D 2005 product year.

II. THE APPLICANT’S POSITION

[5] The Applicant submitted that section 104 of the Act gives the Tribunal discretion to grant interim orders . . . “having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.” The principles would normally be those set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. However, in the past, mandatory injunctions have been issued only when a higher standard of a strong *prima facie* case was met. In this regard, the Applicant said that, even though the order it seeks is mandatory, decisions in recent cases, see: *Adair v. British Columbia College of Teachers*, [1999] B.C.J. No. 439 (S.C.)(QL) and *Hedstrom v. Manufacturers Life Insurance Co.* (2002), 8 B.C.L.R. (4th) 192, 2002 BCSC 1502, [2002] B.C.J. No. 2463 (QL), have indicated that the test for granting a mandatory injunction is now less onerous. The Applicant says, therefore, that it is only required to satisfy me that its refusal to deal case under section 75 of the Act, “raises a serious issue to be tried” and that the Tribunal should focus on what is just and equitable in all the circumstances.

[6] The Applicant says that, on the evidence, it is clear that its case raises serious issues under section 75 of the Act. It says that, because H-D Products represented 55 to 60 per cent of its business (this figure is admitted), the Non-Renewal will destroy its business. It says that the harm is, therefore, irreparable and that the balance of convenience favours making an interim supply order. The Applicant

asks that the Tribunal order supply under the terms of the Retailer Agreement with some modifications. The Applicant says that the Tribunal should not be deterred from making the Interim Supply Order simply because the Retailer Agreement is complex, gives H-D a great deal of discretion and involves financial institutions and trademark licenses. The Applicant denies that the Tribunal will need to supervise an interim supply order and also denies that it unduly delayed by waiting six months to bring its application for leave to proceed under section 75 of the Act. It says that the prudent course was to try to negotiate a further renewal of the Retailer Agreement before litigating. Finally, the Applicant says that it is entitled to rely on its financial information for the fiscal year ending May 31, 2003, because that was the most current information available when this application was made.

III. THE RESPONDENT'S POSITION

[7] The Respondent submits that, because it seeks a mandatory order, Quinlan's must show that its case under section 75 of the Act is "unusually sharp and clear", that it has a "strong *prima facie* case" or, put another way, that it has a "significant prospect of succeeding at trial". In this regard, see: *Sheppard Homes Limited v. Sandham*, [1970] 3 All E.R. 402, *Ticketnet Corp. v. Air Canada* (1987), 21 C.P.C. (2d) 38, [1987] O.J. No. 782 (H.C.J.)(QL), *Cellular Rental Systems v. Bell Mobility Cellular Inc.* (1994), 116 D.L.R. 4th 514, 56 C.P.R. (3d) 251, *Ausman v. Equitable Life Insurance Co. of Canada* (2002), 46 C.C.L.I. (3d) 14, [2002] O.J. No. 3066 (Sup. Ct.)(QL), *Parker v. Canadian Tire Corp.*, [1998] O.J. No. 1720 (Gen. Div.)(QL) and *Pasknak v. Chura* (1999), 2 B.L.R. (3d) 107, 1999 BCSC 1934, [1999] B.C.J. No. 2851 (QL). Deeley says that the case on the merits does not meet this standard and that the Applicant's financial records are unacceptably out of date. It also says that the Applicant is not facing the loss of its business because it has been approached to discuss representing other brands of motorcycles and is obliged to mitigate its loss by replacing H-D with other brands.

[8] Deeley submits that, because it has already allocated its 2005 motorcycles to its dealers (excluding Quinlan's), the balance of convenience favours Deeley. It further submits that it will be very difficult to supervise an order that takes the form of the complex Retailer Agreement and that Quinlan's should be denied the order because it waited six months to apply to the Tribunal. Deeley says that, had Quinlan's moved promptly for the Interim Supply Order, Deeley could have included Quinlan's requirement for approximately 100 motorcycles when it ordered its H-D products for the 2005 model year.

IV. H-D PRODUCTS

A. Motorcycles for the 2005 Model Year

[9] Deeley orders its motorcycles from the H-D factory in the United States (the "Factory"). The Factory is the only manufacturer of H-D motorcycles for the world market. In March 2004, Deeley "locked in" its order for 10,900 H-D motorcycles for the 2005 model year. In order to improve the mix of available motorcycles, it then supplemented its order in July of 2004 by obtaining a further 300 units from the Factory for a total of 11,200 motorcycles for the 2005 model year.

[10] In July 2004, Deeley held a meeting to announce the 2005 models. Mr. Jim Quinlan, the President of the Applicant, deposed that, at the meeting, individual H-D dealers would have been told the total number of motorcycles they had been allocated by Deeley for the 2005 product year. The allocation would have specified the sub-number of motorcycles a dealer could expect to receive from each of the five groupings or “families” of H-D motorcycles. Thereafter, the dealer would have selected the specific models it wanted within each family up to its allocated sub-number. The 2005 motorcycles began to arrive at H-D dealerships with the delivery of one or two models in August 2004.

[11] Deeley considers its allocation of motorcycles to its dealers for the 2005 model year to be commercially sensitive information. Deeley does not inform its dealers of the number of motorcycles allocated to other dealers. Deeley offered to produce the 2005 national allocation to the Tribunal and to Quinlan’s counsel in confidence. However it was not to be disclosed to Quinlan’s. This offer was not accepted. Accordingly, for the 2005 model year, there is no documentary evidence to show whether or not all of the 11,200 H-D motorcycles ordered by Deeley for Canada have been allocated to dealers. Mr. Quinlan stated during his cross-examination, that he does not know whether there is any excess supply of H-D motorcycles in Canada for the 2005 model year.

[12] In his affidavit of August 16, 2004, Mr. Bremner J. Green, Deeley’s General Manager, deposed that all the motorcycles ordered for the 2005 model year had been allocated to H-D dealers. He stated the following:

Paragraph 24. Accordingly, if the Tribunal orders Deeley to continue to supply motorcycles to Quinlan’s, it will be exceedingly difficult for Deeley to do so. If Deeley cannot obtain additional motorcycles from Harley-Davidson, Deeley will have to reduce the quantity of motorcycles that it has already committed to its dealerships. This will not only harm Deeley, but will harm other independent dealerships as well.

Paragraph 33. In short, if Deeley is ordered to supply Quinlan’s on an interim basis, any motorcycles to be provided to Quinlan’s will have to be taken from those already allocated to dealers. This will result in considerable inconvenience to Deeley and will harm its relationship with its remaining dealers and customers.

[13] In response to this evidence, the Applicant argues that, because it is admitted that there are unsold H-D motorcycles at dealers from earlier model years (approximately 1400 to 1500 across Canada); because Deeley has acknowledged that it has ordered more motorcycles for the 2005 year than it ordered for 2004 and because Mr. Quinlan has been told that many (he named three) H-D dealers in Ontario have asked for, and been granted, reductions in their allocations for the 2005 model year, it can reasonably be inferred that, even if all the 2005 motorcycles have been allocated to dealers, there is a situation of excess supply.

[14] The Applicant submits that dealers are permitted by paragraph D(3)(i) of the Retailer Agreements to transfer motorcycles between themselves with Deeley’s approval and says that Quinlan’s could be supplied in this manner.

[15] The Applicant also submits that the retailer agreements give Deeley the power to reallocate the 2005 models to comply with an interim supply order made by the Tribunal. Paragraph D2 of the Retailer Agreement is entitled “Execution of Orders”. It reads as follows:

...Furthermore, during any period of shortage of any Harley-Davidson Products due to any cause whatsoever, Deeley shall have the exclusive right to allocate Harley-Davidson Products to Retailer and all other retailers and customers based upon such criteria as Deeley may establish in its sole and absolute discretion from time to time, notwithstanding anything herein to the contrary.

[16] Finally, Quinlan’s says that it could be supplied by means of a further order placed by Deeley with the Factory.

[17] The question raised by these facts is whether, in the present situation, in which all of the 2005 H-D motorcycles have been allocated to dealers and in which dealers have been advised of their allocations and have picked the specific motorcycles they want, it is possible to conclude that the 2005 year H-D motorcycles are in ample supply.

[18] There are no cases dealing with the meaning of ample supply in the context of section 75 of the Act. In the only two cases decided under section 75, see: *Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 and *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1, ample supply was not an issue.

[19] In my view, section 75 and, therefore, interim orders under section 75, are meant to deal with situations in which the product is readily available and unencumbered in the sense that it has not been sold or promised to another purchaser. However, in this case, the only situation in which H-D motorcycles for the 2005 model year can definitely be made available to Quinlan’s is one in which the Tribunal makes an interim supply order. It would, in turn, require Deeley to declare a shortage under paragraph D2 of the Retailer Agreement and withhold motorcycles from dealers to whom commitments have been made.

[20] It may be, as the Applicant argues, that a situation of national oversupply will develop or become apparent. However, at this time, the very limited evidence from Quinlan’s is simply that there is a prospect of oversupply. This is not evidence of ample supply. It may also be that Deeley would be able to obtain more motorcycles from the Factory if an interim supply order were made, but that prospect is uncertain. Finally, motorcycles might be available from other dealers but, again, they are not a reliable source of supply because such motorcycles are only available if dealers are willing to transfer them and if Deeley consents. I have, therefore, concluded on the evidence now before this Tribunal, that the only time of year in which H-D motorcycles for the 2005 product year were in ample supply was before Deeley placed its order with the Factory in March of 2004.

[21] Even though Quinlan’s has shown that H-D motorcycles are in ample supply in some months of the year, it is my view, having regard to all the circumstances of the case, that it is not appropriate to

exercise my discretion in favour of ordering Deeley to supply Quinlan's with 2005 model year H-D motorcycles because they are not now in ample supply.

B. Other Products

[22] This application also dealt with other products, including H-D clothing and accessories ("General Merchandise") and motorcycle parts for servicing motorcycles of all model years ("Parts"). According to Mr. Green's affidavit of August 16, 2004, 40 per cent of the General Merchandise is of a seasonal character and is specially ordered by individual dealers at one of the two dealer shows held each year. Quinlan's was not invited to the dealer shows in January and June of 2004 and no seasonal merchandise was ordered for its account. Accordingly, the seasonal General Merchandise is not in ample supply.

[23] The non-seasonal General Merchandise and Parts are ordered on an "as needed" basis and, on the evidence, appear to be in ample supply. In this context, the preliminary question is whether it makes sense to make an Interim Supply Order for the supply of non-seasonal General Merchandise and Parts when Quinlan's may not have 2005 motorcycles for sale. On reflection, I concluded that, because these items are only supplied under the Retailer Agreement if ordered by Quinlan's, there is no reason not to order interim supply. Quinlan's is then free to order or not as it sees fit.

V. THE STANDARD FOR AN INTERIM SUPPLY ORDER

[24] One of the principles applied by Superior Courts in dealing with interim orders requires the Judge to have regard for all the circumstances of the case, including its practical and statutory context. In that regard, it seems wrong to conclude that a private applicant, who has just been granted leave on the basis of the fact that the Tribunal "could" find the facts necessary to prove a section 75 case, must show a strong *prima facie* case in a subsequent motion for an interim order. In my view, the demonstration of a serious issue (in the sense that it is not frivolous or vexatious) is most consistent with the statutory scheme which sets a relatively low threshold for leave. It is also the case that, in the context of an application under section 75, a mandatory order is not an extraordinary remedy. Rather, it is what the section is all about and it seems to me that, in this context, orders which preserve or resume supply should not be viewed as exceptional.

VI. IRREPARABLE HARM

[25] In my view, when bringing a case under section 75 of the Act, there is no duty to mitigate damages by entering into supply arrangements to replace the items at issue in the case. Quinlan's was a H-D dealer and, if it can prove its case, it may continue to be a H-D dealer. It is unrealistic to suggest that, pending a final ruling on its access to H-D products, it is required to make supply agreements with other motorcycle manufacturers. It may choose to do so, but to require it to do so is contrary to the scheme of section 75.

[26] In this case there is no doubt that the loss of its H-D sales and the goodwill of its H-D

customers constitutes irreparable harm.

VII. BALANCE OF CONVENIENCE

[27] In the case of the non-seasonal General Merchandise and Parts, the balance of convenience favours supply, there being no evidence to suggest that these products are not in ample supply.

VIII. CONCLUSIONS

[28] With regard to non-seasonal General Merchandise and Parts, Quinlan's has raised serious issues on the merits of its case under section 75 of the Act and is entitled to an interim supply order.

[29] As noted above, I have concluded that, with regard to motorcycles, an interim supply order is not appropriate. However, there is another approach which may help Quinlan's generate 2005 motorcycles for sale and which I consider appropriate in the circumstances of this case. In this regard, the Tribunal's order will free Quinlan's from the provisions of paragraph D(3)(i) of the Retailers Agreement so that, if Quinlan's can arrange to purchase motorcycles from other dealers, it may do so without Deeley's consent.

IX. ORDER

[30] For all these reasons, an order will be made requiring Deeley to supply Quinlan's with non-seasonal General Merchandise and Parts until a final decision is made by the Tribunal after a hearing on the merits of this application. The order will reinstate a modified version of the Retailer Agreement so that Quinlan's will again be a H-D dealer. As success has been divided, there will be no order as to costs.

DATED at Ottawa, this 3rd day of November, 2004.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Sandra J. Simpson

REPRESENTATIVES

For the applicant:

Quinlan's of Huntsville Inc.

Robert Rueter
Andy Chan

For the respondent:

Fred Deeley Imports Ltd.

R. Seumas M. Woods
Christopher Hersh
Matthew Horner

TAB 10



PUBLIC VERSION

Reference: *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2006 Comp. Trib. 42
File No.: CT-2005-006
Registry Document No.: 0159

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an application by B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. for an order pursuant to section 75 of the *Competition Act*.

B E T W E E N :

**B-Filer Inc.,
B-Filer Inc. doing business as
GPAY GuaranteedPayment and
Npay Inc.**
(applicants)

and

The Bank of Nova Scotia
(respondent)



Dates of hearing: 20060828 to 20060901, 20060905 to 20060908, 20060925 to 20060929,
20061003, 20061005 to 20061006

Before: Dawson J. (presiding), Mr. L. Bolton and Dr. L. Csorgo

Date of Reasons: December 20, 2006

Reasons signed by: Madam Justice E. Dawson, Mr. L. Bolton and Dr. L. Csorgo

PUBLIC VERSION OF CONFIDENTIAL REASONS FOR ORDER

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

[1] The applicants assert that their former banker, The Bank of Nova Scotia, engaged in reviewable conduct by terminating its banking relationship with the applicants, and thus refusing to deal with them. This conduct is said to entitle the applicants to an order pursuant to subsection 75(1) of the *Competition Act*, R.S.C. 1985, c. C-34 (Act). The applicants therefore request that the Competition Tribunal issue an order requiring The Bank of Nova Scotia to supply them with two specific banking services, bill payee services and bank accounts for deposit of e-mail money transfers, that the Bank formerly supplied to the applicants, and which it continues to supply to other banking customers.

[2] In the reasons that follow, the Competition Tribunal finds that:¹

- (1) The applicants have failed to establish that they were substantially affected in their business, or precluded from carrying on business, due to their inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;
- (2) The applicants have failed to establish that they were unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;
- (3) The applicants have failed to establish that the refusal to deal is having, or is likely to have, an adverse effect on competition in a market; and,
- (4) Even if the applicants succeeded in establishing all of the constituent elements of subsection 75(1) of the Act, in any event this would not be a proper case for the granting of discretionary relief to the applicants because they are unable to comply with the contractual terms and conditions pursuant to which the banking services they seek are provided to customers of The Bank of Nova Scotia.

[3] It follows that the application will be dismissed.

[4] The issue of costs will be reserved. If the parties are unable to agree on costs, written submissions are to be filed with respect to costs. The parties are also to file submissions with respect to any required redactions in these reasons for the purpose of publishing forthwith a public version, all as described in more detail later in these reasons.

[5] These issues arise in the following factual context. Unless otherwise noted, the following facts are not in dispute.

II. BACKGROUND FACTS

A. The Parties

[6] The corporate applicants, B-Filer Inc. (B-Filer) and NPAY Inc. (NPAY), are federally incorporated and carry on business in Sherwood Park, Alberta. Their president and controlling shareholder is Raymond Grace. B-Filer carries on business under the name GPAY GuaranteedPayment (GPAY).

[7] Effective December 10, 2002, NPAY entered into a joint venture agreement with UseMyBank Services, Inc. (UMB). The president, chief executive officer and founder of UMB is Joseph Iuso. The profits of the joint venture are split equally between the joint venture partners.

[8] The Bank of Nova Scotia (sometimes Bank or Scotiabank) is one of the five major chartered banks in Canada.

B. The Nature of the Applicants' Business

[9] The applicants describe their business as providing an Internet bank card debit payment service that allows customers to make purchases from participating Internet merchants with payments made directly from the customer's existing bank account (GPAY Services). The principal business of the applicants is the provision of the GPAY Services. The applicants receive all of their significant revenue from the joint venture.

[10] Some of the services needed to provide the GPAY Services are provided by the joint venture partner, UMB. Together, the service provided by the joint venture is referred to as the UseMyBank Service. The joint venture agreement, Exhibit CA-2, delineates the responsibilities of the joint venture partners in the following way. UMB is to: provide facilitation services using existing banking payment systems; provide the front-end interface utilizing components from the NPAY website; direct buyers and sellers to the existing NPAY terms and conditions of use; and, bring on and direct all buyers and sellers who wish to use manual bill payment services to NPAY. NPAY (and through it B-Filer) is to: provide the processing, settlement and reconciliation of all payments processed by UMB; and, bring on and direct all sellers and buyers who wish to use automated bill payment services to UMB.

[11] Mr. Iuso explained that UMB handles the marketing of the UseMyBank Service and the processing of the transactions through the banks. NPAY, and through it B-Filer, handles everything to do with the money, more specifically, the interface with the banks and the settlement with the merchants.

[12] During the applicants' opening statement, through their counsel, they acknowledged, for the first time, that they operate a money services business, as that term is defined in regulations enacted pursuant to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (PCMLTF Act).

C. How the UseMyBank Service Works

[13] The UseMyBank Service operates as follows:

- (i) Online merchants that offer this payment mechanism display the UseMyBank icon on their websites.
- (ii) A customer wishing to use the service selects UseMyBank as his or her payment option, and is then transferred to the UseMyBank website.
- (iii) There, the customer selects his or her bank from a list of banks.
- (iv) To continue, the customer must indicate that he or she has reviewed and agreed to the terms and conditions of use imposed by UseMyBank (whether or not the customer has read those terms and conditions).
- (v) The customer then designates the bank account that he or she wishes to debit and enters the user identification and password they have previously established with their bank (together referred to as the customer's electronic signature). All of this is done on the UseMyBank website, which is protected through encryption.
- (vi) UMB then uses the customer's electronic signature in order to enter into an online banking session on the customer's bank's website. In order for a bank to learn that its own customer is not conducting the banking session, the bank would have to look at the IP address of the communicating party. If it did this, the bank would see that the transaction comes from UMB. UMB states that the customer's electronic signature is not stored on its server, and the electronic signature never resides on the online merchant's server. While the electronic signature is on the UMB server, it is not encrypted.
- (vii) During the course of the online banking session, UMB selects, based on the customer's instructions, which of the customer's bank accounts is to be debited and then directs the payment to GPAY. Where GPAY has bill payee status at the customer's bank (described in more detail below), GPAY is selected as a bill payee and the customer's payment is directed to GPAY as a bill payment. Where GPAY does not have bill payee status, UMB directs an e-mail money transfer (EMT) from the customer's account to one of GPAY's accounts. During the banking session, the UMB server also gathers information from the bank (such as the customer's name, address and telephone number), which GPAY uses for purposes that include the detection of fraudulent transactions.

- (viii) Whether by EMT or bill payment, the money is immediately taken out of the customer's account by their bank, and the funds are placed in an internal bank suspense account.
- (ix) UMB then notifies the merchant that there is a confirmation of payment. Later, GPAY receives the funds from the bank. Subsequently, GPAY pays the money to its merchant, deducting its fee.

[14] Mr. Iuso stated that this type of transaction is "meant to be [a] real-time payment processing, like [a] credit card". He agreed that the joint venture can only offer what it describes as a real-time money transfer because UMB itself effects the transaction on behalf of GPAY using the bank customer's electronic signature. The joint venture cannot operate this money transfer business unless bank customers disclose their online banking password and bank identification number to it.

[15] Of the transactions processed by the UseMyBank Service, 98% involve payments to "payment processor gateways" that have online gambling casinos for clients. Put more simply, the vast majority of the joint venture's business, 98% of it, is to transfer monies in order to fund online gaming accounts at casinos located outside of Canada.

D. The Banking Relationship Between the Applicants and The Bank of Nova Scotia

[16] In August of 1999, Mr. Grace attended at the Sherwood Park branch of The Bank of Nova Scotia and opened a single, small business account in the name of B-Filer Inc. carrying on business as GPAY Guaranteed Payment. The Application for Business Banking Services form signed by Mr. Grace described GPAY's business to be one of "financial collection" and estimated the annual sales of the business to be \$240,000 per year, with a total monthly deposit balance of \$10,000. At that time, Mr. Grace signed and was given a copy of the Bank's Financial Services Agreement. This document set out the terms and conditions related to the operation of the business account.

[17] Exhibits A-33 and A-34 reflect that Mr. Grace also applied in August of 1999 for biller status at The Bank of Nova Scotia. Once accepted, GPAY was listed by The Bank of Nova Scotia as a biller so that the Bank's customers could make online bill payments from their bank accounts to GPAY. Bill payee status is specific to each bank in the sense that, for example, Scotiabank deposit customers can only make online bill payments from their Scotiabank accounts to entities that have obtained biller status from The Bank of Nova Scotia. Similarly, for example, customers of the Royal Bank of Canada (RBC) can only make such payments to entities that have obtained biller status from RBC.

[18] It is agreed that, in 1998 and 1999, GPAY obtained status as a bill payee from each of Canada's five largest chartered banks, as well as from the Alberta Treasury Branches (ATB) and the Fédération des caisses Desjardins du Québec. When the UseMyBank joint venture was launched in December 2002, GPAY used these bill payee facilities to operate the UseMyBank Service as described above. It is also agreed that, at all material times, the applicants maintained business accounts at RBC. The significance of those accounts is that The Bank of Nova Scotia and RBC are the only two banks that permit EMTs to be deposited into small business accounts. The Bank of Nova Scotia does not permit EMT deposits into commercial accounts of entities that are not small businesses. EMT deposits are allowed into personal accounts.

[19] In August of 2003, the Canadian Bankers Association forwarded to a number of banks an Internet alert with respect to the UseMyBank website. The alert originated from the Canadian Imperial Bank of Commerce (CIBC). The concern expressed was the potential for fraud that existed as a result of the disclosure of a bank customer's electronic signature. As a result of this notice, the Bank's security group initiated an investigation. While concern was expressed by representatives of the Bank about the risk posed by the disclosure of a customer's electronic signature, the Bank's response to the investigation was to contact all of its customers who had used the UseMyBank Service in order to warn them that they should not be disclosing their electronic signatures. This response was said by the Bank to reflect the low transaction volumes and low number of customers that were involved.

[20] In December of 2003, GPAY lost the biller status that it held at the Toronto-Dominion Bank (TD), CIBC and ATB. As a result, thereafter, when UMB entered into banking sessions on TD and CIBC websites on behalf of a customer, instead of directing payment to GPAY through a bill payment, UMB would instruct that payment be made to GPAY by way of an EMT. These EMT payments were then deposited into the applicants' business accounts either at The Bank of Nova Scotia or RBC (because, as noted above, these were the only banks which permitted EMT deposits into business accounts).

[21] Both RBC and Scotiabank impose limits on the sending and receipt of funds by EMT. For a send transaction, the limit is \$1,000 per day and \$7,000 over a 30-day rolling period. A recipient is limited to receiving \$10,000 per day and \$300,000 over a 30-day rolling period. The rolling limits are set by Acxsys Corporation. Acxsys Corporation, an incorporated for-profit division of the Interac Association, developed the e-mail money transfer service.

[22] On April 15, 2004, Mr. Grace opened a second account at the Bank in GPAY's name. This account was a Money Master for Business (Money Master) account. Mr. Grace testified that this second account differed from the existing original account in that there was no bank charge levied for depositing EMTs. There was also no charge for transferring money from the Money Master account to the current account, so long as the transfer was done online. A fee of \$0.65 per transaction was applied to EMT deposits made into GPAY's original current account.

[23] Beginning sometime in 2004, the Bank's Sherwood Park branch began receiving notices that some transactions could not be posted into the applicants' account(s).

[24] Mr. Woodrow, the Sherwood Park branch account manager for small business accounts, testified that, as a result of activity in the applicants' accounts, the branch learned in 2004 that, after 100 transactions occurred in a Money Master account, any remaining debits or credits were put into an unpostable suspense account. Mr. Woodrow further recalled that, through the latter part of 2004, unpostable reports showed that the applicants were exceeding the transaction limits on virtually a daily basis.

[25] Mr. Grace agreed that transactions became unpostable after approximately 100 transactions, and agreed that the applicants encountered significant difficulty with this in 2004.

[26] The reason for this increase in unpostable transactions was that, following the loss of biller status at CIBC and TD, for customers of those banks, payments to GPAY were effected by way of EMTs deposited into the applicants' accounts with The Bank of Nova Scotia.

[27] As a result of the unpostable transactions, a number of new accounts were opened by the applicants at The Bank of Nova Scotia during the second half of 2004. Some accounts were opened by Mr. Grace personally at the Sherwood Park branch, while some were opened as a result of telephone calls Mr. Grace placed to the Scotiabank call centre. Exhibit A-35 summarizes the account openings, detailing the date an account was opened, the name of the account holder, whether the account was opened through the branch or the call centre, and the number of accounts opened each day. Exhibit A-35 is reproduced, verbatim, here:

SUMMARY OF ACCOUNT OPENINGS

<u>Date</u>	<u>Plaintiff</u>	<u>Branch</u>	<u>Call Centre</u>	<u># of Accounts</u>
August 6, 1999	B-Filer as GPay	√		1
April 15, 2004	GPay	√		1
June 11, 2004	GPay	√		6
October 7, 2004	B-Filer	√		5
November 15, 2004	NPay	√		15
February 25, 2005	B-Filer		√	30
March 1, 2005	NPay		√	1
March 3, 2005	NPay		√	22
March 8, 2005	GPay		√	10
March 9, 2005	GPay		√	17

[28] Thus, it can be seen that, from April 2004 to March 2005, Mr. Grace caused 107 accounts to be opened at the Bank in the names of various applicants. Of the 107 accounts, 80 were opened in the period from February 25, 2005 to March 9, 2005.

[29] Exhibit CA-69 shows the number of deposits the applicants made into accounts at The Bank of Nova Scotia in each month during the period from September 2003 to July 2006. Exhibit CA-62 depicts the amount of the deposits to Scotiabank accounts made each month from September 2003 to July 2006. In their Statement of Grounds and Material Facts, at paragraph 10, the applicants state that, from June 1, 2004 to May 31, 2005, they deposited approximately \$9,929,881.17 into business bank accounts they held at The Bank of Nova Scotia.

E. The Termination of the Banking Relationship

[30] As a result of being notified of the 15 new accounts opened in the name of NPAY on November 15, 2004, Ms. Parsons, manager of the Sherwood Park branch, became concerned about the number of accounts the applicants were opening. At a meeting with Ms. Gibson-Nault, manager of customer service at Sherwood Park, and Mr. Woodrow, she instructed Mr. Woodrow to find out from Mr. Grace why so many accounts were needed and why there were so many unpostable transactions. She also directed that no new accounts were to be opened for the applicants.

[31] In February 2005, the branch became aware that Mr. Grace was opening accounts through the Scotiabank call centre. As a result, Ms. Gibson-Nault spoke to her contact person at the Bank's Shared Services operation who in turn referred her to the Bank's Security and Investigation division in Calgary. As a result of a conversation with a representative of that department, Ms. Gibson-Nault prepared and forwarded an Unusual Transaction Report. The Unusual Transaction Report referenced the number of accounts opened for GPAY, NPAY and B-Filer, the number of EMTs that exceeded the transaction limits so as to trigger unpostable transactions, and the aggregation and transfer of funds.

[32] Also during February and March of 2005, the Bank received six complaints of fraudulent transactions concerning the applicants' accounts. Mr. Grace explained to Mr. Woodrow that these fraudulent transactions occurred because of one of two possible scenarios. In the first, a customer's account might be compromised by a rogue who would then conduct the transaction. In the second, a person, a spouse for example, would see a transaction on a bank statement and question it. The husband or wife who made the transaction would not wish to admit to it and so would deny the transaction (rather than admit to, for example, Internet gambling). In that instance, the transaction would be reported as fraudulent.

[33] Receipt of the Unusual Transaction Report triggered an internal investigation at the Bank. Further information was sought from the branch by Bank officials in Toronto.

[34] In a two-page memorandum dated March 29, 2005, which reviewed the chronology of events, Ms. Parsons and Ms. Gibson-Nault recommended termination of the banking relationship between the Bank and the applicants. The Bank says that, as a result of its internal investigation, it decided to accept the recommendation and to terminate its banking relationship with the applicants.

[35] By a number of letters dated May 11, 2005, The Bank of Nova Scotia gave written notice to the applicants terminating the banking relationship, effective June 15, 2005. Each letter made reference to clause 12.2 of the Financial Services Agreement which provides that the Bank "may cancel any service to you without a reason by giving you thirty days' written notice". The termination was, in fact, delayed as result of proceedings the applicants brought in the Alberta Court of Queen's bench. After their request for an interim injunction was dismissed by that Court, the applicants' banking services were terminated by the Bank, and their accounts closed on September 28, 2005.

F. Interac Online

[36] On or about May 5, 2005, the Interac Association announced the launch of Interac Online. The service was commenced in June 2005.

[37] Interac Online is a service that also allows customers to purchase products or services through the Internet. If a customer, when on a participating merchant's website, selects Interac Online as the payment option, the customer is directed to an access page which displays the financial institutions that participate in Interac Online. Currently there are three: Scotiabank, RBC and TD. The customer then selects his or her financial institution and is directed to the online banking sign-on page of that financial institution. There, the customer inputs his or her electronic signature. The customer is then directed to a page where he or she selects the account to be debited and confirms the transaction.

[38] Since June 2005, 32 merchants have accepted Interac Online as a payment mechanism.

G. History of this Proceeding and the Relief Sought

[39] This proceeding is brought pursuant to the Tribunal's order of November 4, 2005, which granted the applicants leave to apply for relief under section 75 of the Act. The applicants seek an order requiring Scotiabank to supply them with Scotiabank "Biller Services" and "EMT Business Deposit Accounts". This is the first private application brought before the Tribunal as a result of the amendments to the Act made in 2002, which permitted such private proceedings.

[40] On December 14, 2005, the Tribunal dismissed the applicants' request for interim relief.

III. Applicable Legislation

[41] Subsection 75(1) of the Act contains the refusal to deal provision which is at issue. Subsection 75(1) provides:

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

(a) a 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,

75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut :

a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,

(d) the product is in ample supply, and

(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

b) que la personne mentionnée à l'alinéa a) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;

c) que la personne mentionnée à l'alinéa a) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;

d) que le produit est disponible en quantité amplement suffisante;

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

[42] Subsection 75(1) was amended in June 2002 to allow private access to the Tribunal when leave is granted under section 103.1 of the Act. The amendment made in 2002 also added paragraph (e) to the Act. This is the first case brought before the Tribunal since paragraph (e) was added to subsection 75(1).

[43] For the purpose of this application, subsections (3) and (4) of section 75 are also relevant. Subsection (3) defines the phrase “trade terms”, found in subsection 75(1), to mean “terms in respect of payment, units of purchase and reasonable technical and servicing requirements”. Subsection (4) precludes the Tribunal from drawing any inference from the fact that the Commissioner has, or has not, taken any action in respect of the matter raised by the application. This provision has some relevance because, in January 2004, the Commissioner closed her investigation into the applicants’ allegation that the refusal of CIBC, TD and ATB to allow GPAY to receive bill payments from their customers contravened sections 75 and 79 of the Act. The Tribunal has given no weight to the fact that the Commissioner’s investigation was discontinued. The Commissioner did note that private access to the Tribunal might be available to the applicants.

[44] Section 75 of the Act is set out in its entirety in Schedule A to these reasons.

IV. ONUS AND STANDARD OF PROOF

[45] It is common ground among the parties that the applicants bear the onus of establishing each constituent element contained in paragraphs (a) through (e) of subsection 75(1) of the Act.

[46] The standard of proof to be applied is the civil standard: proof on a balance of probabilities.

V. THE WITNESSES PRESENTED BY EACH PARTY

[47] Before turning to the substance of the analysis of subsection 75(1) of the Act and its constituent elements, it is helpful to identify the witnesses called by each party. A description of the general nature of the testimony they presented in chief is contained in Schedule B to these reasons.

A. The Expert Witnesses

[48] Six individuals testified as experts before the Tribunal, two on behalf of the applicants and four on behalf of the Bank. The applicants’ experts were Mr. Jack Bensimon and Dr. Lawrence Schwartz. The Bank’s experts were Mr. Christopher Mathers, Dr. James Dingle, Mr. David Stewart and Dr. Frank Mathewson.

(1) The Applicants’ Experts

[49] With the parties’ agreement, the Tribunal accepted Jack Bensimon as an expert qualified to give opinion evidence with respect to anti-money laundering programs and policies, and

compliance with anti-money laundering regulations in both Canada and the United States. After hearing examination and cross-examination with respect to his qualifications, he was also found by the Tribunal to be qualified to give opinion evidence with respect to anti-fraud programs and policies.

[50] With the parties' agreement, Dr. Lawrence Schwartz was qualified as an "expert economist with respect to competition economics, in particular to market definition, to the impact on competition and impact on the business of GPAY, at least insofar as an economic matter."

(2) The Bank's Experts

[51] Christopher Mathers was tendered as an expert in matters related to anti-money laundering, fraud, and anti-terrorist financing, particularly in the context of the online gaming industry. His qualification to provide such opinions was accepted by the applicants.

[52] Dr. James Dingle is a retired employee of the Bank of Canada, where he, among other positions, served as the Deputy Chairman of the board of directors of the Canadian Payments Association. He was tendered and accepted as an expert "in respect of matters relating to Canadian chartered bank operations and risks relating to their day-to-day operations, particularly as relating to payment flows and issues relating to electronic banking" as set out in his report.

[53] David Stewart is an attorney practicing in Washington, D.C. He was tendered, and accepted by the applicants, as an expert in United States gaming law, including the federal law of the United States as it relates to Internet gambling. His qualifications to opine on matters relating to state law were put in issue by the applicants, but, after hearing examination and cross-examination on his qualifications, his expertise in this area was accepted by the Tribunal.

[54] Dr. Frank Mathewson is a professor of economics and the Director of the Institute for Policy Analysis at the University of Toronto. His qualifications were conceded as an expert economist, with expertise in industrial organization, and in particular with expertise on matters relating to market power and vertical restraints.

B. The Lay Witnesses

[55] Twelve other individuals testified before the Tribunal.

[56] The applicants called Mr. Joseph Iuso, Mr. Raymond Grace, Mr. Ryan Woodrow, and Mr. Darren Morgenstern. The Bank called Ms. Margaret Parsons, Ms. Sharon Gibson-Nault, Ms. Susan Graham-Parker, Mr. Colin Cook, Mr. Douglas Monteath, Mr. Robert Rosatelli, Mr. Ronald King, and Mr. David Jones.

(1) The Applicants' Lay Witnesses

[57] Joseph Iuso is the President, Chief Executive Officer, and founder of UMB.

[58] Raymond Grace is the President of both GPAY and NPAY.

[59] Ryan Woodrow is an employee of The Bank of Nova Scotia who at all material times was the account manager for small business accounts at the Bank's branch in Sherwood Park, Alberta. He was the officer responsible for the applicants' accounts.

[60] Darren Morgenstern is the owner of the Ashley Madison Agency, an online dating service that caters to the niche market of people who are in a relationship but are "seeking alternative options".

(2) The Bank's Lay Witnesses

[61] Margaret Parsons was at all material times the manager of the Sherwood Park branch of The Bank of Nova Scotia.

[62] Sharon Gibson-Nault was at all material times the manager of customer service at the Sherwood Park branch.

[63] Susan Graham-Parker is Senior Vice President of Retail and Small Business Banking for Ontario for The Bank of Nova Scotia.

[64] Colin Cook is Vice President, Commercial Banking at The Bank of Nova Scotia.

[65] Douglas Monteath is an assistant general manager of the Shared Services operation of the Bank.

[66] Robert Rosatelli is Vice President, Self-Service Banking at The Bank of Nova Scotia.

[67] Ronald King is Vice President and Chief Anti-Money Laundering Officer of the Scotiabank group of companies.

[68] David Jones is Director of Web Business at WestJet.

VI. THE ELEMENTS OF SECTION 75 AND THE ISSUES TO BE DETERMINED

[69] Having set forth the necessary background facts, discussed the applicable legislation, the onus and standard of proof, and identified the witnesses tendered by the applicants and the Bank, we turn to the analysis of whether the applicants have met their onus to establish all of the required elements contained in subsection 75(1). Each element has been put in dispute by the parties. We deal first with paragraph 75(1)(a) of the Act.

A. Have the applicants established that they are substantially affected in their business due to their inability to obtain adequate supplies of a product anywhere in a market on usual trade terms?

[70] There is no suggestion that the applicants have been precluded from carrying on their business. Thus, it is only necessary to consider whether they have been substantially affected in their business. At the outset, we must determine what test the Tribunal should apply in order to define the relevant product market under paragraph 75(1)(a). Before doing so, we note that both the applicants and the Bank addressed the issue of “usual trade terms” under paragraph 75(1)(c) rather than under 75(1)(a). We also address usual trade terms when we consider paragraph 75(1)(c).

(1) The Test to Define the Product Market

[71] The parties disagree on the proper approach for defining the product market under paragraph 75(1)(a). In Dr. Schwartz’s opinion, the correct approach is the hypothetical monopolist test. Dr. Schwartz stated that he favours this test because it generally avoids the problem of defining markets overly broadly. Dr. Mathewson defines the market based upon the approach adopted by the Tribunal in *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1, aff’d (1991) 38 C.P.R. (3d) 25; [1991] F.C.J. No. 943 (QL) (C.A.). In Dr. Mathewson’s view, “the operative principle is that other products are substitutes if the purchaser’s business is not substantially affected by switching to these other services.” Dr. Mathewson testified that he prefers this test because “[i]n refusal to deal cases, and the abuse cases events have already occurred. And so we do have evidence about how the market has responded. We don’t have to be hypothetical. It seems to me if we’re hypothetical, we’re ignoring information; information that’s at our fingertips, through the evidence of how the market has actually functioned. And thus the words, functional interchange in terms of substitution, are the operative words in my view.”

[72] We find that the proper test is that identified by the Tribunal in *Chrysler* and applied by Dr. Mathewson. We so conclude because this approach is consistent with precedent, and, in our view, is better suited to address the concerns of paragraph 75(1)(a) than the hypothetical monopolist test. Our reasons for these conclusions follow.

(a) Precedent

[73] As the Tribunal noted at page 103 in *Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83, “[w]hile the process of product market definition is clearly founded on economic analysis, the question of the ‘relevant’ market for the purposes of section 75 depends largely on the construction of section 75 and the identification of its objectives within the context of the *Competition Act* as a whole.”

[74] The Tribunal had previously considered the proper approach to the definition of product market in the context of paragraph 75(1)(a) in *Chrysler*. There, the Tribunal wrote, at page 10, that:

Products and markets can only be meaningfully defined in a particular context and for a particular purpose. The approach to defining these terms may be entirely different where, as in the case of a merger, the ultimate test is whether the merger will substantially lessen competition and the definition must be consistent with the attempt to determine whether the merger will result in an increase in prices or in other effects consistent with a lessening of competition. In the case of paragraph 75(1)(a), the ultimate test concerns the effect on the business of the person refused supplies.

[underlining added]

[75] The Tribunal expressly rejected the expert evidence that market definition should be determined from the position of whether Chrysler, the respondent, had substantial market power. Indeed, the Tribunal found that a broad consideration of Chrysler's market power was not required when looking at any specific element of section 75 of the Act.

[76] In *Xerox*, the Tribunal again found, at page 116, that the respondent's market power is not an element that need be established to obtain a section 75 order.

[77] Since the Tribunal's decisions in *Chrysler* and *Xerox*, subsection 75(1) has been amended to include paragraph 75(1)(e), which requires a determination of whether the refusal to deal is having, or is likely to have, an adverse effect on competition in a market. Given this amendment, it is necessary to consider whether the addition of paragraph 75(1)(e) has changed the context and purpose of section 75 such that the test for markets articulated in *Chrysler* is no longer appropriate for the purposes of 75(1)(a).

[78] In our view, while the addition of paragraph 75(1)(e) changes the context and purpose of section 75 to the extent that there is now a focus on determining whether refusals to deal result in adverse effects on competition, this amendment does not change the ultimate concern of 75(1)(a). That concern, as stated in *Chrysler*, is the effect on the business of the person refused supply. Since the market of concern under 75(1)(e) need not be the market of concern in paragraphs 75(1)(a) and 75(1)(b), the market that best suits the particular context and purpose of 75(1)(e) can be separately considered when considering that paragraph of the Act.²

[79] For purposes of clarity, we articulate the "*Chrysler* test" as follows: For the purposes of 75(1)(a), products are substitutes, and so are included in the same market, if a person is not substantially affected in his business (or if the person is not precluded from carrying on business) as result of switching to these other products.

[80] In regard to the meaning of "substantially" as used in paragraph 75(1)(a), as noted by the Tribunal in *Chrysler* at page 23, "[t]he Tribunal agrees that 'substantial' should be given its ordinary meaning, which means more than something just beyond *de minimis*. While terms such as 'important' are acceptable synonyms, further clarification can only be provided through evaluations of actual situations." In our view, for example, a person would be considered substantially affected in his business or precluded from carrying on business if switching to other products resulted in the person's business moving out of the market in which it currently participates.

(b) The Appropriateness of the *Chrysler* Test

[81] In our view, the *Chrysler* test is better suited than the hypothetical monopolist test to address the concerns of 75(1)(a) for two reasons. First, the *Chrysler* test deals directly with the particular person and the business at issue. Second, the *Chrysler* test deals with the effects of a refusal to deal on the affected business rather than the possible effects of a hypothetical price increase in the refused product. Contrary to Dr. Schwartz's opinion, in our respectful view, there is little risk of defining the market overly broadly because the test does not allow for the inclusion of substitutes that have a substantial effect on the business.

[82] Both of these points are elaborated upon below.

(i) Particular Person and the Business at Issue

[83] Dr. Schwartz testified that he relies on the hypothetical monopolist approach to market definition contained in the merger guidelines of the enforcement agencies in Canada and the United States. The *Merger Enforcement Guidelines* of the Canadian Competition Bureau (Bureau) indicate that "a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area in which a sole profit-maximizing seller (a hypothetical monopolist) would impose and sustain a significant and non-transitory price increase above levels that would likely exist in the absence of the merger" (Canada, Competition Bureau, 2004, at paragraph 3.4). The *Merger Enforcement Guidelines* state, at paragraph 3.1, that "[t]he overall objective of market definition in merger analysis is to identify a set of buyers that could potentially face increased market power due to the merger."

[84] However, for the purposes of paragraph 75(1)(a), what is of concern is not a set of buyers but a particular buyer.³ The hypothetical monopolist test is capable of dealing with a particular buyer but doing so requires markets to be defined with reference to the characteristics of that buyer or to the particular locations of that buyer (see *Merger Enforcement Guidelines* at paragraph 3.9). In the case of 75(1)(a), since the only buyer of concern is the one that has been refused supply, in this case B-Filer, there is no need to define a relevant market with reference to the possible particular characteristics of that buyer. In our opinion, it is more appropriate to focus directly and immediately on the buyer that has been refused supply.

(ii) Effects of a Refusal to Deal

[85] The hypothetical monopolist test is ultimately concerned with exercises in market power. To determine the set of products and geographic areas over which a hypothetical monopolist would have market power, a system of determining which products and geographic areas have price constraining effects on each other is carried out. The mechanism is to ask whether a hypothetical monopolist over a postulated candidate market would be able to impose a significant and non-transitory price increase. If yes, the postulated market is not considered the relevant market, and the exercise is repeated with an expanded candidate market. According to the *Merger Enforcement Guidelines*, at paragraph 3.4, "[i]n most cases, the Bureau considers a five per cent price increase to be significant and a one-year period to be non-transitory."

[86] Dr. Schwartz notes that a refusal to supply is akin to an infinite price increase. He is of the further view that defining markets based on switching observed in response to a refusal to deal, or an infinite price increase, is inappropriate because it can lead to overly broad markets because it can include products that were not good substitutes prior to termination. However, not only is the refusal to supply and the effect of the refusal on the business the concern of 75(1)(a), rather than the effect of a significant and non-transitory price increase, but the test used in *Chrysler*, as described above, does not run the risk of finding overly broad markets.

[87] In Dr. Schwartz's view, "when the current product or service is withdrawn completely and no longer available for choice, it is not surprising or helpful to market definition to observe that the buyer chose another alternative." However, this is not the whole of the test. The use of alternatives by the refused business is insufficient to conclude that these alternatives are in the same product market as the refused product. The *Chrysler* test properly applied requires that the use of these alternatives not substantially affect the business at issue. If their use does in fact result in a substantial effect, and they are nonetheless included in the relevant market for purposes of 75(1)(a), the market would be overly broad. The correct application of the test does not allow for this possibility.

[88] Consequently, for the above reasons, we conclude that the correct test for defining markets for the purposes of 75(1)(a) is the *Chrysler* test as we have articulated it at paragraph 79.

(2) The Relevant Product Market

[89] Having determined the appropriate test for the determination of the product market, in our view, application of that test to the evidence before us leads to the conclusion that the relevant product market is comprised of biller status at the Bank and deposit accounts [CONFIDENTIAL] that allow for the deposit of EMTs. Our reasons for this conclusion follow.

[90] The starting point of market definition for the purposes of 75(1)(a) is to determine a set of candidate substitutes for the products that have been refused. In this case, the two products that have been refused (and which the applicants seek) are biller status at the Bank and EMT deposit accounts at the Bank. Having determined the set of candidate substitutes, one then determines whether the use of the substitutes by the applicants results in a substantial effect on the applicants' business. If yes, the candidate substitute is not included in the product market.

[91] The set of candidate substitutes raised by the applicants in regard to biller status at the Bank are (i) biller services at other financial institutions, and (ii) EMTs into deposit accounts (other than Scotiabank deposit accounts since these are unavailable to the applicants), without distinguishing between [CONFIDENTIAL] deposit accounts. The applicants argue that neither of these candidate substitutes is acceptable.

[92] The Bank counters that “the relevant product market is at least as broad as the “Biller Services” of the five major chartered banks (it also includes the Biller Services of Alberta Treasury Branches and the Fédération des caisses Desjardins du Québec) and, in addition, includes EMT payments.” Its expert, Dr. Mathewson, concludes that “Scotiabank Biller Services is not a product market, and the market that includes Biller Services also includes EMT [CONFIDENTIAL] deposit accounts.”

[93] We note that Dr. Mathewson did not opine or testify that biller services at other banks are part of the relevant market. Rather, he appears to conclude that it remains an open question due to a lack of evidence. We also note that Dr. Mathewson clarifies that EMT deposit accounts include [CONFIDENTIAL].

[94] For the purpose of our analysis we consider each of the following candidate substitutes for biller status at the Bank:⁴

- (i) Biller status at financial institutions other than Scotiabank;
- (ii) EMT business deposit accounts at RBC; and,
- (iii) [CONFIDENTIAL].

[95] In our analysis, we include a candidate substitute in the relevant product market if, and only if, in our opinion its use does not substantially affect the applicants’ business. Both parties consider “substantially affected” in regard to the entirety of the applicants’ business.

(a) Biller Status at Financial Institutions Other Than Scotiabank

[96] The applicants contend that biller status at “banks that continue to provide that status to B-Filer is not a good substitute for biller status at Scotiabank. Biller status at those other banks allows B-Filer to process payments for those banks’ depositors but does not allow it to process payments for Scotiabank depositors.” Put more succinctly, the applicants argue that “[t]he fact that GPay has Biller Services from Royal Bank does not assist it in processing bill payments for customers of Scotiabank.”

[97] The applicants’ argument is essentially that biller status at other financial institutions is not functionally interchangeable for biller status at Scotiabank. We accept this; however, it is hypothetically possible that the Bank’s depositors could make use of existing bank accounts or open new bank accounts at other financial institutions where the applicants have biller status and use those accounts, such that the applicants are not substantially affected in their business.⁵

[98] In Dr. Schwartz's view, this type of "shift is unlikely" due to additional inconvenience, additional record-keeping, and increased bank fees. As such, he states that "[i]t is more likely than not that the Scotiabank depositor would choose to bear the price increase that Scotiabank imposes on GPAY Service debit transactions than maintain dual accounts at separate financial institutions." Similarly, he finds it highly unlikely that Scotiabank depositors would close their Scotiabank accounts and switch to another financial institution.

[99] In response, Dr. Mathewson finds that there is no hard evidence of any potential response by consumers: "As any consumer response to a price hike remains an open and unanswered empirical matter, a categorical conclusion which removes all other financial institutions from the market seems unwarranted."

[100] We agree with Dr. Mathewson that consumer response is an open and unanswered question. Consequently, contrary to the Bank's position, due to this lack of information, we find that the relevant product market does not include biller status at other financial institutions. We now turn to the next potential substitute.

(b) EMT [CONFIDENTIAL] Deposit Accounts

[101] In our analysis, we consider EMT business accounts at RBC [CONFIDENTIAL].

[102] Dr. Schwartz concludes that, in regard to the relevant market "in relation to the means of providing online debit payment to Scotiabank depositors", the market includes Scotiabank biller status but excludes business accounts that accept deposits by EMTs. He concludes this on the basis of the hypothetical monopolist test in that "it appears that if Scotiabank had raised the price of biller status to B-Filer by a small but significant amount, B-Filer would have borne this increase rather than switch to processing by way of EMTs because of the costs and disadvantages thereof in comparison to biller processing." While we find that the *Chrysler* test rather than the hypothetical monopolist test is the right one, costs and disadvantages of a candidate substitute are still relevant as these might result in a substantial effect on the business. Consequently, we consider the costs and disadvantages noted by the applicants.

[103] The costs and disadvantages are said by the applicants to be:

- (i) Scotiabank charges \$1.50 to its depositors per EMT;
- (ii) There is a maximum EMT transaction amount of \$1,000 and a further aggregate limit of \$1,000 per day per depositor;
- (iii) There is a 30-minute holding period following an EMT during which a depositor may cancel the EMT;

- (iv) Large volumes of EMTs can cause processing problems. There were processing problems with the Scotiabank accounts that the applicants used for processing EMTs; and,
- (v) Receipt of EMTs is highly constrained in that only Scotiabank and RBC small business accounts can receive them, and there are daily, monthly, and annual limits on EMT deposits. The daily limit is \$10,000.

[104] In contrast, Dr. Mathewson concludes that “Scotiabank Biller Services is not a product market, and the market that includes Biller Services also includes EMT [CONFIDENTIAL] deposit accounts.” He acknowledges that there are differences between processing payments via Scotiabank biller services and EMTs, the primary differences being the \$1.50 fee associated with EMTs, and the \$1,000 per day limit on sending EMTs versus the \$49,999 payment limit applicable to the Bank’s bill payee service. He finds, however, that the effects of the use of EMTs [CONFIDENTIAL] by the applicants cannot be said to be substantial.

[105] We agree with both Dr. Schwartz and Dr. Mathewson that there are differences between Scotiabank biller services and EMTs. The costs and disadvantages asserted by the applicants above are largely not in dispute, with the exception of the asserted disadvantage of the effective degree of constraint on the receipt of EMTs (item v above). With respect to the allegation that large volumes of EMTs can cause processing problems (item iv above), we find that there is no evidence to support this statement other than the evidence of the processing problems that the applicants experienced at Scotiabank. We find that the applicants did experience EMT processing problems in regard to the Money Master accounts that they held at Scotiabank but, on the totality of the evidence, the applicants failed to establish that large volumes of EMTs can cause processing problems more generally.

[106] As noted above, the applicants claim that the receipt of EMTs is highly constrained. It is common ground that there are daily, monthly, and annual limits on the value of EMT deposits that can be received. Those limits are: \$10,000 per day; \$70,000 per seven day period; and \$300,000 per thirty day period. Mr. Grace acknowledged that, since the Scotiabank termination, the applicants have been receiving EMTs, as at June/July 2006, into [CONFIDENTIAL]. Mr. Grace agreed on cross-examination that the use of these [CONFIDENTIAL] accounts has associated with it a capacity to receive EMT deposits of [CONFIDENTIAL] annually, replacing the [CONFIDENTIAL] in capacity the applicants had at the Bank prior to termination. Not only does this represent a [CONFIDENTIAL] increase in deposit capacity, there is some evidence to suggest that this capacity may be greater. Mr. Grace testified that since June/July 2006 he has opened “a few more accounts”. Dr. Mathewson also indicated in his report that “[t]here is no evidence on the record that indicates that there are any limits to the number of profiles under GPay’s control for receipt of EMT transfers. GPay can increase its capacity to accept EMTs [CONFIDENTIAL].” This evidence was not disputed. Consequently, we do not find that “the receipt of EMTs is highly constrained” because of the receiving limits.

[107] Of the differences asserted by the applicants between biller services and EMTs, listed at paragraph 103 above, we find these to be significant only if, as a result of the use of EMTs, the applicants' business is substantially affected. We turn now to the analysis of that issue.

[108] The applicants claim that their business has been substantially affected in two ways. They say they have reduced growth in their revenues and they say there has been a fundamental change in their growth opportunities.

(i) *Reduced Growth in Revenues*

[109] In regard to the claim of reduced growth in revenues, the applicants note that in the month following the Bank's termination, the applicants experienced a 48% (or \$350,000) decrease in the dollar value of the transactions they processed as compared to the month in which the termination took place, i.e., September 2005. The applicants argue that since termination the monthly transaction value for Scotiabank has risen but not surpassed the level in September 2005. By comparison, the applicants assert that the value of transactions from the other five financial institutions have increased markedly since September 2005. In particular, the applicants argue that Bank of Montreal (BMO) dollar value transactions grew at roughly the same rate as those of the Bank prior to the Bank's termination. Since the time of the Scotiabank termination, the transaction values from BMO are said to have grown by 118% relative to September 2005, and by 169% relative to August 2005. By contrast, transaction values from Scotiabank are said to have fallen by 18% as compared to September 2005, and risen by only 13% relative to August 2005.

[110] In his analysis of these same data, Dr. Mathewson notes that the value of Scotiabank transactions in September 2005 was anomalous. He finds, comparing the applicants' average monthly Scotiabank payments from the three month period June-August 2005 to the three month period April-June 2006, that GPAY's Scotiabank payments have now fully recovered their pre-termination levels.

[111] In order to analyse these conflicting submissions, we first consider whether the use of EMT deposit accounts [CONFIDENTIAL] to effect transactions by Scotiabank depositors affected the applicants' business by reducing growth in the dollar value of the applicants' transactions. We then consider whether such use substantially affected the business.

[112] For the reasons that follow, we conclude that, post-termination, the applicants did experience an initial decrease in the total dollar value of their Scotiabank transactions. We find this to have been the case regardless of whether the basis for comparison is September 2005, the month in which the termination took place, or some combination of the months immediately before the termination. Since the dollar value of transactions exhibit volatility from month to month (see Exhibits CA-62 and CA-69), absent further analysis it cannot be known what portion of the observed decline can be attributed to the Scotiabank termination. We find that it is possible that some portion of the observed decline was compensated for by Scotiabank depositors availing themselves of bank accounts at other financial institutions. This, however, might not fully explain the observed period of decline in Scotiabank transactions since there is also evidence of some decline in total transactions. We find, however, that, since the overall

decline appears to be limited, and given the aforementioned data volatility, we are unable, on the evidence before us, to conclude what portion of the observed decline is attributable to the Scotiabank termination.

(1) The Applicants experienced an initial decrease in the total dollar value of their Scotiabank transactions post-termination

[113] If September 2005 is used as the base for comparing subsequent monthly dollar values of Scotiabank transactions, then, as at July 2006, the applicants were yet to achieve similar transaction values.

[114] However, we accept Dr. Mathewson's evidence that September 2005 was an anomalous month. The value of transactions in that month was 15.1% higher than the highest previous month (July 2005), or 29.8% higher than the average of the three previous months (June-August 2005). Month-over-month increases of this size are observed in the data: for example, the payment values of RBC transactions increased by 37.8% from July to August 2005, and the payment values of BMO's transactions increased 23.7% from August to September 2005. However, there is the evidence that one Scotiabank customer accounted for \$141,159, or 20.7%, of the total value of September 2005 Scotiabank transactions. This individual's set of transactions also accounted for 63.4% of the total value of Scotiabank transactions that were over \$1,000 in September 2005. The evidence is that in no previous month for which data are available (June 2004 to September 2005) were Scotiabank transactions for all individuals carrying out transactions over \$1,000 even close to the value of transactions carried out by this one individual in September 2005. The closest monthly transaction total for all individuals who carried out transactions over \$1,000 was \$71,317.57 in August 2005. This is about half the value of the transactions carried out by this one individual in September 2005. Consequently, the evidence establishes in our view that the value of transactions carried out by this one individual in September 2005 was unusual. Since the individual accounted for 20.7% of total transactions in September 2005, we find the total Scotiabank transactions in September to be anomalously high.

[115] Even if we had not found the Scotiabank September transactions to be anomalously high, we would consider comparisons to more than this one month to be informative.

[116] If August 2005 is used as the base for comparing subsequent monthly dollar value of Scotiabank transactions, post-termination, the applicants had lower Scotiabank transaction values each month until and including January 2006. The percentage decline in transaction values comparing October 2005 (the month following termination) to August 2005 is 29.4%. If the three month average transaction value prior to September 2005 is the base for comparison, as was done by Dr. Mathewson, the applicants had lower Scotiabank transaction values each month until and including February 2006. The percentage decline in transaction values comparing October 2005 to the three month average of June-August 2005 is 32.9%.

(2) Since the dollar value of transactions exhibit volatility from month to month, it cannot be known absent further analysis what portion of the observed decline can be attributed to the Scotiabank termination

[117] The business of the applicants is nascent with an established track record that only dates back to September 2003. While the business has exhibited steady, overall growth since that time, the value of transactions at individual financial institutions exhibit significant volatility including significant decreases in dollar value of transactions. For example, transaction values at RBC decreased 29.4% between October and November 2005. Scotiabank itself experienced a 15.7% decrease in the month-over-month value of transactions in the month prior to termination (July to August 2005).

[118] We, thus, find that it is possible that some portion of the observed decline in Scotiabank transactions after September 2005 was attributable to causes other than Scotiabank's termination of the applicants' banking services.

(3) It is possible that some portion of this decline was compensated for by Scotiabank depositors availing themselves of bank accounts at other financial institutions

[119] Mr. Grace testified on cross-examination (without giving the exact number) that as many as half of the Scotiabank customers who transferred more than \$1,000 in September 2005 had accounts at more than one bank, and that there was one Scotiabank customer who used the applicants' service who opened a new account after September 2005 at a bank other than Scotiabank.

[120] A table containing information on the applicants' top 20 customers by total paid in May 2006 indicates that one of these customers had bank accounts at Scotiabank and RBC. This customer had \$65,815 in transactions at RBC and one \$1,000 transaction at Scotiabank in that month.

[121] While there is no direct evidence that any of the Scotiabank depositors who use the applicants' service availed themselves of other bank accounts in response to the Scotiabank termination, we infer from the above evidence that there was a possibility of such action for some unknown portion of Scotiabank depositors. Consequently, we agree with Dr. Mathewson that there is evidence to suggest that "[s]ome customers with an account at both a 'biller services bank' and an 'EMT bank' make GPay payments from both accounts, suggesting that the EMT limits on GPay payments at EMT banks need not have a large negative effect on the total value of GPay payments."

(4) It is possible that Scotiabank depositors availing themselves of other bank accounts might not fully explain the observed period of decline in Scotiabank transactions since there is also evidence of some decline in total transactions over the relevant period

[122] Using September 2005 as the basis for comparison, we find that the applicants experienced a decline in the total dollar value of their transactions, that is, a decline in the total value of transactions processed through all financial institutions, up to December 2005. After that, for each month for which we have data, the total dollar value of the transactions was greater than the total dollar value of transactions in September 2005.

[123] While we have found that September 2005 was an anomalous month in regard to Scotiabank transactions, there is no evidence to suggest this month was anomalous in regard to the applicants' total transactions, and no party suggested any such anomaly. Even though September 2005 was not generally anomalous, it is informative to compare total monthly values post-Scotiabank termination to periods in addition to September 2005. If the comparison is made to August 2005, the only month since the Scotiabank termination that had lower total dollar value transactions was November 2005. If the comparison is made to the three month average of July-September 2005, it remains the case that the only month since the Scotiabank termination that had lower total dollar value transactions was November 2005.

(5) Since the overall decline appears to be limited and given that the data exhibit volatility, we cannot conclude what portion of the observed decline is attributable to the Scotiabank termination

[124] We cannot distinguish between decreases in the dollar value of Scotiabank transactions that are attributable to the Scotiabank termination and those that are attributable to other causes, including fluctuations for which there are no apparent explanations. Nor can we determine the portion of the decrease in Scotiabank transactions that might have been compensated for by Scotiabank depositors availing themselves of accounts at other banks.

[125] As noted above, the applicants' business is a nascent one with little track record and with volatility in growth across financial institutions. In such situations, more analysis is generally required in order to help determine the effect of an inability to obtain supplies of a product.

[126] Analyses that may have shed light on the above were not carried out by the applicants. Such analyses need not be restricted to regression analysis. In this regard, we note that Mr. Grace had the ability to specifically identify and name customers and identify whether they had accounts at more than one financial institution. However, no such evidence was submitted. We agree with Dr. Mathewson that such information would have been valuable. Information that might have proven helpful to the Tribunal includes information on the use of accounts at other banks by Scotiabank depositors to carry out GPAY transactions, any information on regular users who may have stopped using the applicants' services post-termination either permanently or for a significant period of time, or who may have decreased the size of their transactions post-termination. In this regard, information on the average size and distribution of transactions of Scotiabank depositors pre- and post-transactions may have been informative.

[127] For the reasons described in the preceding paragraphs, we find that the applicants' business may not have been affected in regard to reduced growth in the dollar value of transactions due to their inability to obtain Scotiabank biller services and EMT business deposit accounts at Scotiabank. If they were affected, we find that the decline in the dollar value of transactions was temporary. The total dollar value of transactions processed on a monthly basis was as high as pre-termination (i.e., September 2005) by at least January 2006.

[128] It is possible that the observed decline has had longer term ramifications in that the total value of transactions would have been higher even after December 2005 but for the Scotiabank termination. However, we find that there is insufficient evidence on this point. To indicate that, since Scotiabank termination, transaction values have grown at more rapid rates at other financial institutions, with particular comparison made to BMO, is insufficient to make this point because, as noted above, it is possible that Scotiabank depositors availed themselves of accounts at other banks to make their transactions. Moreover, we agree with Dr. Mathewson's analysis that growth in the applicants' transaction values at bill payee banks is not a good predictor of the growth rates from Scotiabank accounts. Dr. Mathewson compares the monthly growth rate of payments from Scotiabank accounts from January 2004 to August 2005 to that from BMO accounts over the same period. He carries out this comparison through the use of a simple linear regression. We are persuaded by his finding that the estimated coefficient on BMO accounts is statistically insignificant, which implies that growth in transaction values from BMO accounts are associated with zero changes in transaction values from Scotiabank accounts. We also note Mr. Grace's testimony on cross-examination that the applicants did not turn away any transactions post-termination, except in the first two days after termination. Despite this, it is possible that Scotiabank account holders wishing to carry out transactions with the applicants in amounts greater than \$1,000 did not do so. We do not, however, have any evidence of this.

[129] In considering whether the applicants were substantially affected in their business due to reduced growth, assuming that there was at least some initial impact, the evidence that the applicants turned away no transactions other than those over a two-day period is relevant. Moreover, the applicants have, without doubt, experienced considerable growth in their transactions since termination. On this last point, Mr. Grace testified on cross-examination that for the 2006 calendar year, he expected that the applicants would process more than \$60 million in transactions. This expectation is an increase of about \$28 million over the \$32.2 million in transactions the applicants processed in 2005. The basis for Mr. Grace's projection is that, as of June 30, 2006, the applicants had already processed transactions (\$29.4 million) almost equal to the value of the transactions they processed in all of 2005.

[130] We also note that even if the applicants had experienced a temporary decrease in transactions, Mr. Grace testified that the joint venture earns about 6% on these in revenue, when earnings are calculated to include both foreign exchange and merchant fee revenues. If only merchant fee revenues are included, Mr. Grace testified that the joint venture's revenues are about 3% of the value of transactions. Once expenses are deducted, the remaining profit is split equally between the joint venture partners. The applicants adduced no evidence concerning the likely impact of any temporary reduction in growth in transactions on profit once all of the above calculations are taken into account.

[131] For the reasons expressed above, we conclude that, on a balance of probabilities, the applicants have not been substantially affected in their business through reduced growth in revenues. We examine next whether they were substantially affected as a result of a fundamental change in growth opportunities.

(ii) *Changes in Growth Opportunities*

[132] The applicants claim that the termination of their banking services by The Bank of Nova Scotia has substantially affected their business by fundamentally changing their growth opportunities. The applicants argue that they are substantially affected in their growth opportunities because of the \$1,000 limit on EMT transfers from Scotiabank (as well as TD and CIBC). The applicants claim that this limitation prevents them from being a viable payment processor for major online merchants, effectively confining them to their present merchant customer base. The applicants concede that, to date, they have been unsuccessful in signing up any significant number of merchants, apart from online casinos and, to a lesser extent, online dating sites. They attribute their initial lack of success to being a new business. They attribute their subsequent lack of success, at least in part, to the TD and CIBC terminations in December 2003, and also the subsequent Scotiabank termination in September 2005 that is the subject of this application.

[133] Mr. Iuso testified that, prior to the termination of biller services by TD and CIBC in December of 2003 (and so prior to the imposition of the \$1,000 transaction limit), UMB made marketing approaches to Grocery Gateway, 407 ETR, Air Transat, Red Seal Vacations, Soft Voyage, Rogers, Air Canada, WestJet, Hudson's Bay Company, Sears, Canadian Tire, Fido and LavaLife. None signed up for the UseMyBank Service. On the evidence before us, we find that the applicants' lack of success in gaining "major" online merchants prior to the termination of banking services by CIBC and TD in December 2003 is likely attributable to a variety of reasons. One reason may well be a lack of a track record as a new business. In this regard, we rely upon the evidence of Mr. Jones that his company, WestJet, would consider the length of time a potential supplier had been in business when considering alternate suppliers. At least one potential merchant client, the Government of Canada, advised that it would not use a payment mechanism that required a payor to disclose his or her confidential electronic signature to the payment service provider. The TD and CIBC terminations may have also played a role after December 2003. Again, we rely upon the evidence of Mr. Jones on this point. Mr. Jones' evidence is that WestJet would wish a payment processor to "handle all transactions", suggesting that once the applicants were limited in processing payments over \$1,000 at even one bank, their services would become unattractive to a major merchant such as WestJet. This evidence is consistent with that of Mr. Iuso. He testified that, after the TD and CIBC terminations, the UseMyBank Service became less attractive to merchants that sold products or services valued at more than \$1,000. The applicants adduced no evidence as to how the Scotiabank termination worsened this situation. Consequently, it is not clear how the Scotiabank termination exacerbated this pre-existing situation such that there was a "fundamental change" in the applicants' growth opportunities caused by the Bank's termination of banking services.

[134] The applicants rely upon the Federal Court of Appeal decision in *Chrysler* to argue that the fact that other factors may have prevented the applicants from attracting major merchants initially does not mean that the applicants' forced reliance on EMTs after the Bank's termination has not substantially affected their business. In this regard, the Federal Court of Appeal wrote, at page 29, that:

It is not a requirement of the provision that the refusal to trade and the resulting inability to obtain adequate supplies be the only factor substantially affecting the business: it is sufficient that it have a substantial effect whatever the impact of other factors.

[135] We, of course, accept this to be a binding statement of legal principle. We take from this, that for the purposes of paragraph 75(1)(a), the factor of concern is an inability to obtain adequate supplies, and whether this has had a substantial effect on the business.

[136] In the present case, we find that there is no evidence to suggest that the inability to obtain adequate supplies of Scotiabank biller services has substantially affected the applicants' business by fundamentally changing their growth opportunities.

(iii) *Conclusion Regarding the Substitutability of EMTs* [CONFIDENTIAL]

[137] To summarize, we find that the use of EMTs [CONFIDENTIAL] by the applicants did not substantially affect the applicants in their business either in terms of revenue growth or growth opportunities. Consequently, we agree with Dr. Mathewson that, by application of the test established in *Chrysler*, deposit accounts [CONFIDENTIAL] that allow for the deposit of EMTs are in the same product market as Scotiabank biller services. [CONFIDENTIAL].

[138] [CONFIDENTIAL]. A substantial increase in the risk to a business can result in a substantial effect on that business.

[139] [CONFIDENTIAL].

[140] [CONFIDENTIAL].

[141] [CONFIDENTIAL].

(3) Conclusion in Regard to 75(1)(a)

[142] In sum, in regard to 75(1)(a), we conclude that the appropriate test for defining markets is that found by the Tribunal in *Chrysler*. In this matter, we find, as a fact, that the relevant product market is biller status at the Bank and deposit accounts [CONFIDENTIAL] that allow for the deposit of EMTs. Upon termination of banking services by the Bank, the applicants replaced these services with EMTs into [CONFIDENTIAL] deposit accounts at other banks, such that, we find, they were not substantially affected in their business either from the perspective of reduced growth in revenues or a change in growth opportunities. It follows that they failed to demonstrate that they are substantially affected in their business due to their inability to obtain adequate supplies of a product anywhere in a market on usual trade terms as paragraph 75(1)(a) of the Act requires.

[143] As noted above, the applicants are required to establish that they meet each requirement of subsection 75(1). Thus, the finding that the applicants were not substantially affected in their business as a result of the Bank's termination of banking services is fatal to the applicants' claim.

[144] However, the parties adduced evidence relevant to the other requirements and made submissions with respect to the remaining requirements. In light of that, and in the event we are wrong in our conclusions with respect to paragraph (a), we continue with our analysis.

B. Have the applicants met the onus to establish that they were unable to obtain adequate supplies of the product because of insufficient competition?

[145] As a matter of law, paragraph 75(1)(b) of the Act contains two requirements. First, there must be insufficient competition among suppliers of the product at issue. Second, the inability of the refused party to obtain adequate supplies of the product must result from that insufficient competition. In the present case, the material consideration is, in our view, whether the refusal of the Bank to provide the applicants with bill payee status and accounts to receive EMTs was because of insufficient competition.

[146] This causal requirement was considered by the Tribunal in *Xerox*, cited above. There, the Tribunal concluded, at page 116, that insufficient competition must be the "overriding reason" for the refusal to deal. The Tribunal also considered that the "conduct of the complainant or the administrative burden or other costs placed upon a supplier" might well lead it to conclude that the inability to obtain the refused product did not result from insufficient competition, but "rather for objectively justifiable business reasons".

[147] We agree that, as a matter of law, any inference that insufficient competition led to a refusal to deal may be rebutted by evidence that shows an objectively justifiable business reason.

[148] Turning to the evidence before us, for the reasons that follow, we are satisfied, and find as a fact, that the Bank's decision to terminate the applicants' banking services was motivated by objectively justifiable business reasons. Those reasons were:

- (i) The use of the UseMyBank Service required the Bank's depositors to violate their Cardholder Agreements. Irrespective of this, the disclosure of a customer's electronic signature exposed the Bank to legal and reputational risks;
- (ii) The applicants at all material times failed to meet all of the obligations imposed upon them as a money services business by the PCMLTF Act and associated regulations. This put the Bank at regulatory and reputational risk; and,
- (iii) The provision of accounts for EMT deposits to the applicants would likely result in the Bank violating Rule E2 of the Canadian Payments Association. This again posed regulatory and reputational risk to the Bank.

[149] Each reason is considered in turn.

(1) The applicants require disclosure of each customer's electronic signature

[150] As noted above, the applicants require disclosure of each customer's electronic signature. Mr. Iuso agreed on cross-examination that such disclosure gave UMB access to all of the banking services that are accessible online to that customer. This could include access to lines of credit, credit cards and all of the customer's bank accounts. Where, for example, the customer had not identified GPAY as a bill payee, UMB would do so on the customer's behalf.

[151] The ScotiaCard Cardholder Agreement provides:

You are responsible for the care and safety of the card and your electronic signature. You will keep your electronic signature confidential; secure from all persons without exception and apart from the card at all times. You are liable for all card transactions incurred using your electronic signature.

[underlining added]

[152] Advice provided to cardholders on Scotiabank's website, on a page dealing with the Bank's online security, is as follows:

Your Scotia OnLine password is confidential and must never be shared with any outside person or company, including:

...

- Services that collect your card number and password, or any other confidential information, to perform transactions on your behalf or to collect payment from you.

...

In divulging your password, you contravene the terms of your ScotiaCard Cardholder Agreement and you will be fully liable for any unauthorized access to your accounts and all associated losses arising from these disclosures.

[153] These provisions, and other steps the Bank takes, as described in more detail by Mr. Rosatelli, reflect the importance to the Bank of keeping a customer's electronic signature confidential. We accept without reservation Mr. Rosatelli's evidence that:

- (i) In the absence of face-to-face transactions and a signature, the password used in conjunction with the ScotiaCard number acts as the authentication of a customer.
- (ii) This method of customer authentication is fundamental to the electronic banking system because it is what ensures the security of customer accounts.
- (iii) If passwords are compromised, there would be a decrease in customer confidence in the electronic payment system.
- (iv) The Canadian Payments Association reports that 20 million electronic payments are processed daily in Canada. Those payments account for approximately \$164 billion being exchanged daily through the electronic network.

[154] Confirmatory evidence of the importance of keeping electronic signatures secure was given by Ms. Graham-Parker and by the applicants' expert Mr. Bensimon. On cross-examination Mr. Bensimon agreed that a breach of confidentiality in respect of banking card customer passwords would result in a significant reputational and legal risk for the Bank.

[155] The applicants argue that the evidence does not support the Bank's assertion that it is a breach of the Cardholder Agreement for a customer to voluntarily disclose his or her electronic signature because:

- (i) The Cardholder Agreement "acknowledges and permits that there may be authorized uses of the cardholder's electronic signature by others".
- (ii) The Bank became aware in 2003 that electronic signatures were being used in the UseMyBank Service, yet it continued to supply banking services to the applicants.
- (iii) The Bank has not barred RBC from receiving bill payments from Scotiabank customers, despite the fact that RBC's account aggregation service, CashEdge, also requires disclosure of a customer's electronic signature.

[156] We deal with each submission in turn. In our view, as a matter of law, the Cardholder Agreement, properly interpreted, does not authorize disclosure of a customer's electronic

signature. In arguing the contrary, the applicants rely upon the portion of the Cardholder Agreement that deals with the cardholder's responsibility for account activity. That portion provides, in material part:

You are liable for all debts, withdrawals and account activity resulting from:

- Authorized use of the card by persons to whom you have made the card and/or electronic signature available.
- Unauthorized use of the card and/or electronic signature, where you have made available for use the card and electronic signature by keeping them together or in such a manner as to make them available for use, until we have received notice of loss, theft or unauthorized use.

You will not be liable for losses in circumstances beyond your control. Such circumstances include:

- Technical problems and other system malfunctions.
- Unauthorized use of a card and PIN
 - after the card has been reported lost or stolen;
 - the card is cancelled or expired or
 - you have reported the PIN is known to another person.

You will be considered as contributing to the unauthorized use of the card and/or electronic signature and will be fully liable for all debts, withdrawals and account activity where:

- The electronic signature you have selected is the same as or similar to an obvious number combination such as your date of birth, bank account numbers or telephone numbers.
- You write your electronic signature down or keep a poorly disguised written record of your electronic signature, such that it is available for use with your card, or
- You otherwise reveal your electronic signature, resulting in the subsequent unauthorized use of your card and electronic signature together.

[157] In our view, this wording is insufficient to contradict the express admonition to keep the electronic signature confidential and secure from "all persons without exception". What the provision does is to make it clear that where the cardholder acts contrary to that obligation, the cardholder will be liable for all resulting transactions, whether specifically authorized or not.

[158] Whether or not, as a matter of law, cardholders indeed breached the terms of the

Cardholder Agreement when authorizing UMB to access their online accounts, the Tribunal, relying upon the evidence of Mr. Rosatelli, Ms. Graham-Parker, and Mr. Bensimon, concludes that the Bank viewed such conduct to pose a material risk to the security of its electronic banking system. The evidence of these witnesses is consistent with the alert issued by the Canadian Bankers Association, referred to above at paragraph 19.

[159] Further support for the view that the Bank had objective and *bona fide* concerns with the applicants' mode of doing business is also found in the potential for fraud in the applicants' accounts. Mr. Grace acknowledged that one potential source of fraud in the applicants' accounts arises when an individual compromises a customer's confidential banking identification and then uses that information to perpetuate frauds through the applicants' accounts.

[160] The legitimacy of the Bank's concern with respect to the potential for fraud is supported by a policy statement of the Canadian Payments Association, approved on December 1, 2004. There, the association noted:

Fraud perpetrated in the on-line environment has the potential to profoundly impact consumers' financial well-being, create lasting negative public opinion of financial institutions and the payments system overall and to ultimately subject the payment system and its participants to possible legal challenges.

[161] The Tribunal accepts the evidence of Messrs. Monteath, Rosatelli and King that the risk the Bank was exposed to as a result of the disclosure of its customers' electronic signatures (including the risk of fraud) constituted an objectively justifiable business reason that led the Bank to terminate the applicants' banking services.

[162] As to the fact that the Bank learned in 2003 that some customers were using the UseMyBank Service and thus compromising their electronic signatures, we accept Mr. Rosatelli's explanation (which was not significantly impugned on cross-examination) that due to the relatively small number of customers and transactions, the Bank chose at that time to deal with the matter by communicating directly with each customer. Such a response does not, in our view, diminish the genuine and serious nature of the Bank's concern.

[163] We acknowledge that the Bank's witnesses agreed that the Bank had not barred RBC from being a bill payee, notwithstanding the Bank's knowledge that RBC's CashEdge service requires disclosure of a customer's banking number and password. However, the evidence is unchallenged that the Bank has written three cease and desist letters to RBC with respect to the use of electronic signature, and that the Bank is searching for a technical solution so as to block the ability of Scotiabank customers to access their Scotiabank accounts through CashEdge. In those circumstances, we find that the Bank's knowledge of how CashEdge works is an insufficient evidentiary basis upon which to conclude that the Bank was not motivated by objectively justifiable business reasons when it relied upon the disclosure of confidential customer information as one reason for terminating the applicants' banking services.

(2) Ability to Meet Legislative and Regulatory Obligations

[164] It is not in dispute that, in regard to money laundering and terrorist financing, the following legislation is applicable to the Bank and the applicants:

- (i) The PCMLTF Act (legislation that is primarily concerned with the disguising of illegitimate funds for use in criminal or terrorist financing);
- (ii) The PCMLTF Regulations, SOR/2002-184;
- (iii) Financial Transactions and Reports Analysis Centre (FINTRAC) interpretative guidelines as they relate to the PCMLTF Act, which, among other things, set out the reporting and record-keeping requirements of financial institutions and money services businesses;
- (iv) Office of the Superintendent of Financial Institutions (OSFI) guidelines, which, among other things, identify some of the steps that federally regulated financial institutions should take to assist their compliance with the various legal requirements related to deterring and detecting money laundering and terrorist financing.

[165] The Bank argues that doing business with the applicants would result in the violation of the following regulations:

- (i) The third party determination rule as contained at section 5.1 of FINTRAC Guideline 6G: this rule provides that when a bank determines its account holders are acting on behalf of a third party, the bank must keep a record that sets out the third party's name, address and the nature of the principal business or occupation of the third party. The Bank contends that its consequent record-keeping obligations would be beyond the scope and ability of its existing systems. In particular, the Bank contends that it would be obliged to keep the name, address, and principal occupation for all customers transferring funds to the applicants through the bill payment system, all of the banking customers sending EMTs to the applicants, and all the merchant clients to whom funds are directed. In regard to this last alleged obligation, the Bank argues that it would be impossible for it to do so since the applicants themselves do not have this information.
- (ii) The PCMLTF Regulations and the Guidelines as they relate to money services businesses, in particular FINTRAC Guideline 6C which sets out the record-keeping and client identification requirements of a money services business: the Bank argues that the applicants, who admitted to being a money service business only at the commencement of this hearing, are unaware of their consequent reporting and record-keeping obligations. The Bank also argues that the reports the applicants currently make to FINTRAC do not come close to meeting their

obligations. In particular, the Bank argues that the applicants are non-compliant because they do not identify banking customers by reviewing an original piece of identification, do not keep a large transaction record when someone is transferring – either receiving or sending – \$10,000 or more using the applicants’ services, and do not meet their third party record-keeping obligations. The Bank argues that any failure of the applicants to meet their record-keeping obligations would prevent the Bank from complying with its own record-keeping obligations.

[166] We begin consideration of the above and related issues by reviewing the evidence of the applicants’ anti-money laundering expert. Mr. Bensimon provided his opinion that:

- (i) The applicants’ business is a money services business as defined in the regulations to the PCMLTF Act.
- (ii) As a money services business, the FINTRAC rules require the applicants to conduct reasonable due diligence in verifying customer identity, to have appropriate compliance policies and procedures, and to develop, implement and maintain an effective anti-money laundering program.
- (iii) The applicants had several anti-money laundering regulatory compliance gaps relating to the following: the lack of a designated compliance officer; the need for enhanced compliance policies and procedures; the need for independent testing of those policies and procedures; and, the need for an ongoing compliance training program.
- (iv) The risks that the Bank is exposed to if it does business with the applicants include: deploying resources to regularly monitor the account for suspicious activity; ensuring the applicants have strong internal compliance controls to mitigate the risk of its employees abusing their access to customer bank card numbers and passwords; and taking reasonable steps to ensure the applicants are complying with FINTRAC requirements as a money services business.
- (v) On balance, “the MSB [money services business] account of the Applicant represents a low inherent risk for the bank as far as AML [anti-money laundering] risk exposure is concerned.”

[167] Mr. Bensimon’s opinion was, however, in our view, substantially modified on cross-examination. There he agreed that:

- (i) In addition to complying with the PCMLTF Act and regulations, the applicants were obliged to follow other applicable guidelines as they relate to money services businesses.

- (ii) Pursuant to Guideline 6C, the applicants had record-keeping and client identification obligations. (We note that Mr. Grace had acknowledged in cross-examination that he was not aware of what the reporting and record-keeping obligations of a money services business were.)
- (iii) When the applicants transfer \$10,000 or more to one of their merchant customers they are obliged to keep a large cash transaction record, identify the recipient and make a third party determination. (We note that there was no evidence that they do so.)
- (iv) Mr. Bensimon had seen no evidence that the applicants complied with their obligation as to proper identification of an individual as articulated in section 4.4 of Guideline 6C.
- (v) When the applicants send \$10,000 or more out of Canada to a merchant customer, they are required to make a report to FINTRAC. (We note that Mr. Grace testified that such an obligation was only imposed upon the bank that transmitted the funds.)
- (vi) For money that is being sent by the applicants to payment processors (which accounts for 98% of the applicants' transactions), the applicants are obliged to record the third party's name, address and principal business or occupation (i.e., to record information with respect to the party to whom the applicants' merchant customer is ultimately transmitting the funds). Mr. Bensimon saw no evidence that the applicants were compliant with this requirement. (We note that Mr. Grace acknowledged on cross-examination that he did not know where the money is sent after it is received by the overseas payment processors.)
- (vii) A money services business should have general familiarity with the watch list of non-cooperative countries and territories published by the Financial Action Task Force on Money Laundering, particularly where the business is transmitting millions of dollars offshore. (We note that on discovery, Mr. Grace had testified that it did not matter to the joint venture in which jurisdiction a merchant management company was incorporated, and that he had never been provided with a copy of the watch list.)
- (viii) The gaps he identified with respect to the applicants' anti-money laundering regime were consistent with a company or companies that really do not understand or take responsibility for their anti-money laundering obligations.
- (ix) If a customer of the Bank did not accept that it was a money services business, and if the customer did not comply with its own anti-money laundering obligations, the Bank could not comply with its own record-keeping and reporting obligations.

(x) With respect to his opinion that the applicants posed a low risk to the Bank if it continued providing services to the applicants, Mr. Bensimon admitted that:

- In preparing his opinion, he had proceeded on the basis that the average transaction processed by GPAY was \$82. He was unaware that RBC customers could transfer up to \$100,000 at a time. This was a material consideration to his opinion.
- He was unaware that U.S. residents with Canadian bank accounts could use the applicants' service. This was a relevant factor he had not considered. The relevance was that the applicants would also have to contend with the U.S. anti-money laundering regime.
- He was not aware that, until his report was received, the applicants had denied that they carried on a money services business. This elevated the risk to the Bank.
- He was unaware that the applicants had not initially responded to the Bank's request for a copy of the joint venture agreement. Not having the joint venture agreement created an elevated risk exposure to the Bank.
- He was unaware that at times Mr. Grace had been unwilling to disclose the identity of the applicants' merchant customers to the Bank, and instead took the position that the Bank's interest should only be with what happens to the money flowing from the Scotiabank accounts. Mr. Bensimon agreed that Mr. Grace's position was contrary to the Bank's legislated obligation to have a verifiable audit trail.
- He did not know that the applicants had refused to produce to the Bank the contracts with their merchant clients. This provided an elevated risk exposure to the Bank.
- He was unaware that Mr. Grace had no idea where the money went after it was sent by the applicants to their merchant customers. This too provided an elevated risk exposure and cause for concern for the Bank.
- He was unaware that the applicants did not know who owned the payment processing companies to which the applicants sent funds, and did not know the actual business of the payment processors. This was a material gap in the applicants' anti-money laundering plan and it too elevated the risk to the Bank.

[168] In our view, Mr. Bensimon's initial view that the applicants' business represented an

overall low risk to the Bank was substantially discredited by the admissions he made during his cross-examination. As well, in our view, he confirmed the veracity of the Bank's concerns in regard to FINTRAC Guidelines 6C and 6G. We give particular weight to his admission that if a Bank's customer does not comply with its own anti-money laundering obligations, the Bank cannot comply with its record-keeping and reporting obligations.

[169] The evidence of the Bank's anti-money laundering expert, Mr. Mathers, also confirmed the legitimacy and *bona fides* of the Bank's stated concerns. We found Mr. Mathers to be a knowledgeable witness. His opinion was cogent, consistent with the regulatory scheme, and was not significantly impugned on cross-examination.

[170] We accept Mr. Mather's opinion that:

- (i) Mr. Grace had provided false information to the Bank when he answered the money laundering question in the course of an account opening. When asked "And will this account be used to conduct business on behalf of someone other than the named account holder?" Mr. Grace had responded "No". (We note that on cross-examination Mr. Bensimon also agreed that this answer was incorrect.) This answer prevented the Bank from meeting its own obligations under the PCMLTF Act and Regulations.
- (ii) The products and services of online gaming websites that offer casino gaming and sports wagering can be, and frequently are, used by criminals to launder the proceeds of crime.
- (iii) The applicants' business model allows customers to transfer funds to unknown entities and, in part, entities that have not been vetted by the Bank. If the Bank allows such transactions to take place, it may be allowing inappropriate or illegal transactions in violation of the PCMLTF Act.
- (iv) Because the applicants' merchant customers are not required to disclose sufficient information to comply with the PCMLTF Act requirements, and because no steps are taken to verify the accuracy of the information provided, the applicants and UMB are at risk of assisting money laundering.
- (v) If the applicants operated accounts at the Bank, both UMB and its customers who used the service to transfer funds, would fall within the definition of a third party in the applicable legislation. As a result, the Bank would be obliged to comply with sections 9 and 10 of the regulations to the PCMLTF Act relating to client identification, third party determination and record-keeping (all as described in FINTRAC Guidelines 6C and 6G as discussed above). In order to comply with those provisions, the Bank would be obliged to obtain information and keep records about all of the applicants' customers, including: the banking customers' name, address, occupation (or the nature of their principal business); and, the nature of the relationship between the banking customer and the applicants.

- (vi) The applicants are a very high risk banking client for any Canadian Schedule 1 Chartered Bank.

[171] Mr. Ronald King, the Chief Anti-Money Laundering Officer for the Scotiabank group of companies also testified in regard to regulatory and legislative issues. His evidence was supported by the contents of the Bank's Anti-Money Laundering Handbook, the PCMLTF Regulations, and FINTRAC and OSFI Guidelines. The Anti-Money Laundering Handbook confirms, in our view, that the Bank takes its regulatory obligations seriously and demonstrates that the Bank has developed a standard approach to all businesses that seek its services. As much of Mr. King's evidence was grounded in the Handbook and the regulatory scheme, we accept it as being cogent and credible. As well, we were impressed by Mr. King's obvious knowledge of the regulatory environment, his professionalism, and the balance or fairness he showed in his evidence. His evidence was not significantly modified on cross-examination and we accept his evidence that:

- (i) The design of the applicants' business model facilitates anonymity in that the applicants remit bulk payments to a third party which often is a money services business. Because the applicants do not transmit funds to the ultimate beneficiary, the audit trail is severed.
- (ii) The Bank's Anti-Money Laundering and Anti-Terrorist Financing Handbook sets out the standards the Bank is expected to apply.
- (iii) Even where a potential customer is a high risk customer, and not a restricted or prohibited customer, the Handbook requires that the Bank not enter into a banking relationship where the legitimacy of the source or ultimate destination of funds passing through an account cannot be determined.
- (iv) There were a number of factors that caused the Bank concern about continuing a relationship with the applicants. In his words:

They involve such things as the nature of the business model, that it involved offshore payments; the nature of the business model and that it seemed to have a high percentage of Internet gambling payments that were of grave concern to us. It was also a concern that their process afforded anonymity to the remitter of the funds which would make it attractive and potentially something that could be abused by the money laundering - - a person wishing to launder money. We were also concerned that the seeming weakness in compliance structure within UseMyBank would make it very difficult for them to effectively manage their risks or meet their compliance obligations.

[underlining added]

- (v) In the course of the 2005 investigation the Bank conducted in connection with the applicants' business, it was the recommendation of the anti-money-laundering group that the Bank terminate its relationship with the applicants.

[172] From all of this evidence, we take the following: the applicants were not compliant with their anti-money laundering obligations when the Bank decided to terminate the banking relationship; in consequence, the Bank probably could not, and it believed it could not, discharge its own legislated and regulated compliance obligations. We, thus, find that the Bank was motivated by an objectively justifiable business reason, namely a concern that it would not be able to meet its regulatory obligations when it decided to terminate the applicants' banking services.

(3) Rule E2 of the Canadian Payments Association

[173] Dr. James Dingle, a former Deputy Chairman of the Board of Directors of the Canadian Payments Association, testified in connection with Rule E2 of the Canadian Payments Association. His evidence was objectively grounded in the contents of Rule E2 and other Canadian Payments Association documentation, and was presented cogently and with consistency. Because of that, and his significant experience, the Tribunal found him to be a knowledgeable, credible and reliable witness. His evidence was not, in our view, diminished in any significant way on cross-examination. We accept his expert testimony that:

- (i) Pursuant to the *Canadian Payments Act*, R.S.C. 1985, c. C-21, the Bank must be a member of the Canadian Payments Association and must adhere to its rules. Those rules govern the exchange, clearing and settlement of various types of payment items.
- (ii) Rule E2 of the Canadian Payments Association, implemented February 3, 2005, deals with the exchange, clearing and settlement of electronic online payment items, including EMTs. Section 5(a) of the Rule states:

In all matters relating to the Exchange, Clearing and Settlement of On-line Payment Items for the purposes of Clearing and Settlement, each Member shall respect the privacy and confidentiality of the Payor and Payee personal and financial information in accordance with applicable Canadian provincial and federal legislation governing the treatment of personal and financial information.

[...]

For greater clarity, the Payor's [i.e. the banking customer's] personal banking information, such as but not limited to the authentication

information (e.g., user identification and password) and account balance, shall not be made available at any time to the Acquirer and/or Payee [i.e. the applicants] during the On-line Payment Transaction session

- (iii) If the Bank were required to continue to offer banking services to the applicants, the Bank either would have to clear the EMTs received from other members of the Canadian Payments Association in breach of Rule E2, or not clear any of the EMTs transferred into the applicants' accounts at the Bank.
- (iv) Breach of Rule E2 would expose the Bank to both regulatory and reputational risk, including the risk of compliance proceedings for breach of Rule E2.
- (v) The Canadian Payments Association has defined a reputational risk as follows:

Reputational Risk is the risk of significant negative public opinion that results in a critical loss of funding or customers. This risk may involve actions that create a lasting negative public image of, or loss of public confidence in, the overall operations of a Financial Institution or the payments system...

[174] The applicants do not appear to challenge this evidence. In closing argument they simply observe, correctly, that this rule, while applying to EMTs, does not apply to bill payments that are processed within the Bank. That is bill payments that move from the Bank's customer to the Bank's bill payee, without entering the Canadian Payments Association's Inter Member Network.

[175] Messrs. Monteath, Rosatelli and King testified that the fact the applicants' business requires disclosure of customers' ScotiaCard number and password was one of the reasons the Bank decided to terminate the applicants' banking services. As set out above, we have accepted that evidence and found that to have been the case. Further, Dr. Dingle's opinion provides objective, independent confirmation of the importance to the Bank of the protection of the confidentiality of its customers' electronic signature. His evidence supports the *bona fides* of the Bank's concern about the disclosure of its customers' private banking information and it goes to establishing to our satisfaction that the decision to terminate the applicants' banking services was based upon an objectively justifiable business reason.

(4) Other Business Justifications Raised by the Bank

[176] The Bank also argues that the following objectively justifiable business reasons existed for terminating the applicants' banking services: the applicants' business is likely in breach of section 202 of the *Criminal Code*, R.S.C. 1985, c. C-46 (relating to illegal gambling) and it is probable that the Bank would in turn be in breach of the *Criminal Code* if it is required to provide accounts and services to the applicants; online gambling is prohibited by the laws of the

United States and this too exposes the Bank to the risk of prosecution; and, the Bank is exposed to reputational risk and potential class actions because the applicants receive a profit on foreign exchange that they do not disclose to either the bank customers for whom they are agents, nor the payment processor companies for whom they are trustees.

[177] We deal with the issue of U.S. law below in the context of the discretionary nature of the relief sought.

[178] With respect to the effect of the *Criminal Code* and foreign exchange profit, we do not find the Bank's arguments to be as cogent as those discussed above. However, we do not find it necessary to reach any final conclusion with respect to these two arguments.

(5) Conclusion with Respect to Paragraph 75(1)(b)

[179] In our view, the impact, or potential impact, upon the Bank caused by the disclosure of its customers' confidential banking information, and the related potential for fraudulent transactions in the applicants' accounts, the regulatory concerns we have found to exist, and the impact of Rule E2 are such that we are satisfied that the Bank's refusal to supply any services and accounts to the applicants was not due to insufficient competition among suppliers in the market. Rather, the termination of banking services was the result of objectively justifiable business reasons.

[180] In concluding our analysis of this issue, we observe that we have been mindful throughout of the timing of the termination of the applicants' services in light of the launch of Interac Online. Aside from the coincidence of timing, we have found no evidence that would enable us to conclude that the existence or pending status of Interac Online was at all a relevant consideration when the decision was made to terminate the applicants' banking services. Rather, we find as a fact that the termination was done for valid business reasons.

C. Have the applicants established that they are able to meet the usual trade terms?

[181] The Bank argues that the applicants are not able to meet the usual trade terms on which EMT accounts and/or bill payee services are offered. Specifically, the Bank argues that:

- (i) EMT accounts are only offered by Scotiabank to small businesses, and the applicants are not now, and at the time of termination were not, a small business.
- (ii) The applicants cannot comply with the terms of the Bank's Bill Payment Agreement.

[182] The applicants argue, correctly, that the expression "trade terms" is defined precisely and restrictively for the purposes of section 75 in subsection 75(3). For ease of reference that subsection provides:

(3) For the purposes of this section, the expression “trade terms” means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

3) Pour l’application du présent article, « conditions de commerce » s’entend des conditions relatives au paiement, aux quantités unitaires d’achat et aux exigences raisonnables d’ordre technique ou d’entretien.

[183] In response, the Bank argues that restricting EMTs to small businesses, and the terms found in its Bill Payment Agreement are “reasonable technical and servicing requirements”.

[184] There are, in our view, two significant difficulties with this submission. First, it is a principle of statutory interpretation that bilingual legislation may be construed by determining the meaning shared by the two versions of a provision. Once a common meaning is found, one must then confirm that such meaning is consistent with the purpose and scheme of the Act. (See Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3d ed. (Toronto: Carswell, 2000) at pages 324, 326-329; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at pages 80-81.)

[185] Dictionaries generally define the word “entretien” as “maintenance” or “upkeep”. See, for example:

- *Le Robert & Collins Dictionnaire Français-Anglais – English-French* defines entretien as :

- (a) (*conservation*) [*jardin, maison*] upkeep; [*route*] maintenance, upkeep; [*machine*] maintenance [...]

- (b) (*aide à la subsistance*) [*famille, étudiant*] keep, support; [*armée, corps de ballet*] maintenance, keep [...]

- (c) (*discussion privée*) discussion, conversation [...]

[4th ed., s.v. “entretien”]

- The *Larousse French English/ English French Dictionary* sets out the following definitions:

“servicing” *n.* 1. [of heating, car] entretien *m.* 2 [by transport] desserte *f.*

“entretien” *nm.* 1. [maintenance] maintenance, upkeep [...] 2. [discussion – entre employeur et candidat] interview – [colloque] discussion [...]

[2003 ed, s.v. “entretien” and “servicing”].

[186] Thus, adopting the shared meaning principle of statutory interpretation, one could reasonably conclude that the terms “servicing” and “entretien” refer to the upkeep or maintenance requirements that a supplier imposes on a purchaser so as to ensure that proper services are available to the ultimate purchaser with respect to the product purchased. We find nothing in that interpretation that is *per se* inconsistent with the scheme or purpose of the Act.

[187] However, that more restrictive interpretation would not, in our view, be broad enough to include the contractual type limitations that the Bank imposes upon its customers by, for example, restricting EMTs to small businesses.

[188] Second, the more restrictive interpretation argued by the applicants appears to be consistent with the legislative history of the provision. We note, parenthetically, that the legislative history, Parliamentary debates, and similar material may properly be considered when interpreting a statute, so long as the history is relevant, reliable and not assigned undue weight. (See Reference re: *Firearms Act (Canada)*, [2000] 1 S.C.R. 783 at paragraph 17; and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 35.)

[189] We find the following comments of the then Ministers of Consumer and Corporate Affairs to be relevant:

- On April 30, 1974, Herb Gray, the then Minister of Consumer and Corporate Affairs, appeared before the Standing Committee on Finance, Trade and Economic Affairs with respect to Bill C-7 (*An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, 2nd Sess., 29th Parl., 1974). The following was said with respect to “usual trade terms”:

Mr. Atkey: Another concern is with the term “usual trade terms”, which appears in proposed Section 31.2(b) on page 16. You made reference in an earlier section to the fact that the “usual trade terms” demanded by a distributor or a manufacturer might not only include aspects of price, it might also involve aspects of technical services as a requirement.

Mr. Gray: That is right.

Mr. Atkey: You say that that would be a reasonable interpretation of the term “usual trade terms”. Would you be willing to consider an amendment to specifically provide that that is what it means, because I would suggest there have been some concerns expressed that where distributors or manufacturers are concerned about selling their product or making it available to various retail outlets that service, the extent and the quality of service that is provided in respect to the sale of that product is sometimes as important, or more important, than the actual price, and there is a great fear abroad right now that the phrase “usual trade terms” only refers to price and if there was a broader definition I think it might allay some of those fears, so that the service element which I would suggest to you is of equal concern to the consumer today would be taken into account by the RTPC by virtue of statutory directives.

Mr. Gray: Frankly, I think the type of thing you are talking about is covered in the present wording of proposed Section 31.2(b):

(b)...is willing and able to meet the usual trade terms of the supplier or suppliers of such product in respect of payment, units of purchase and otherwise...

[underlining added]

However, I would be happy to receive suggestions from the Committee if it is felt that this could be further clarified.

I think one would have to be careful not to insert words that might be considered to be unduly remedying and would prevent the Commission from taking into account what might otherwise be considered to be acceptable definitions of the term “usual trade terms” but would not be covered by it. After all, one of the benefits that I think comes from using a form of civil jurisdiction is that there is the potential for flexibility in looking at the vast range of situations that can arise in an economy as complex as our own. But, as I say, I would be happy to have the views or the suggestions of the Committee on this.

[...]

Mr. Jarvis: [...] Can I go on, for a minute, to usual trade terms? Again, I will relate it to the furniture industry; I think it is a good example because it is a highly competitive industry and generally composed of small businesses even at the manufacturing level:

Often a requirement of a furniture manufacturer is not only usual trade terms in respect of payment units of purchase.

I do not know what “and otherwise” might mean, but it may mean the training of that retailer salesman by the manufacturer’s marketing staff; it may mean an undertaking by the retailer to supply so many square feet of display room; it may also mean his undertaking to warehouse a certain number of units in various colours. My question is: in the opinion of the Minister and his officials, do the words “and otherwise” as purportedly they modify usual trade terms cover that type of conditions of sale, which is a vital thing in many consumer products?

Mr. Gray: In my view they could cover the type of things you mentioned provided, of course, that on the facts they are usual in that market, strictly as a matter of fact.

Mr. Jarvis: My question is dictated, Mr. Minister, because remembering the interpretation of many of these clauses at law, the words “and otherwise” are often taken – I forget the Latin maxim for this – *ejusdem generis*. I have not heard that since law school, *ejusdum generis*. In other words, the words “and otherwise” can only be taken within the context of respect of payment and units of purchase. You cannot go beyond that in a legal interpretation of those words. That is what I am afraid we might be faced with in so far as the Commission is concerned with the words “and otherwise” here.

Mr. Gray: I raised this with our legal draftsmen and they have told me this is not the case. As far as I am concerned, this is an area I am examining for possible clarifying amendment because I personally do not intend the clause to be interpreted in the *ejusdem generis* sense.

[Canada, House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs, Issue no. 9, April 30, 1974, 2nd Sess., 29th Parl., p. 9:24-25, 9:31-32.]

- When André Ouellet, the then Minister of Consumer and Corporate Affairs, appeared before the Standing Committee on Finance, Trade and Economic Affairs on December 3, 1974, he stated as follows with respect to the refusal to deal clause found in Bill C-2 (*An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, 1st Sess., 30th Parl., 1974):

I should like also to remind you that many representations have been made to the effect that a manufacturer may legitimately claim the right to refuse to supply a customer if the latter is not in a position to distribute the product adequately from all points of view. We have therefore made an amendment to recognize this right. The commission will not be able to force a supplier to supply a customer if the latter does not satisfy all professional and other requirements that usually govern the marketing of the article concerned.

[...]

[Canada, House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs, Issue no. 15, December 3, 1974, 1st Sess., 30th Parl., p. 15:12.]

[190] The proposed provision underlined above was ultimately not enacted. This shows an intent to strictly limit what was meant by trade terms. The definition of trade terms is restricted and provides that the phrase “trade terms” “means”, as opposed to “includes”, the three things articulated in the definition.

[191] We take from the debates set out above that the parliamentarians’ attention appears to have been focused upon the situation prevailing between manufacturers and dealers. However, in subsection 2(1) of the Act, “product” is defined to include an article and a service. In our view, the case may be made that the restrictive definition of “trade terms” in subsection 75(3) of the Act is not appropriate where the product at issue is a service. For example, having regard to the use of the word “entretien” in the French version, it is at least arguable that in the context of the provision of services such as banking services the concept of “units of purchase” and “technical and servicing requirements” have little obvious application. Put another way, in the context of the provision of services, it may be unrealistic and not commercially sound to restrict “trade terms” to those relating to payment, units of purchase and the services that surround those units of purchase.

[192] It may be that this is an issue that should be considered if amendments to the Act are contemplated in the future. For our purpose, in view of our findings with respect to paragraphs 75(1)(a) and (b), it is not necessary to reach a final decision on this point.

[193] All of this is not to say that a failure by a person to meet other usual contractual terms that do not fall within the definition of trade terms is irrelevant. Such a failure may establish that the inability to obtain a product is not a result of “insufficient competition” within the meaning of paragraph 75(1)(b). It may also be relevant to the discretionary nature of the relief available under section 75. In the present case, we deal below with the Bank’s restrictions upon EMT accounts and bill payee status when we discuss the exercise of discretion.

[194] It is not necessary for us to consider, and we do not, whether the services are in ample supply as required by paragraph 75(1)(d). We do however wish to turn to the final required element found at paragraph 75(1)(e).

D. Have the applicants established that the refusal to deal is having, or is likely to have, an adverse effect on competition in a market?

[195] We address this requirement first by considering what is meant by “an adverse effect on competition in a market”. We then consider whether the applicants have established that the Bank’s refusal to provide them with bill payee status and EMT deposit accounts is having, or is likely to have, an adverse effect on competition in a market.

(1) The Meaning of an Adverse Effect on Competition in a Market

[196] Because paragraph 75(1)(e) is new, we find it of assistance in interpreting the phrase “competition in a market” as used in paragraph 75(1)(e) to consider how paragraph 79(1)(c) of the abuse provisions of the Act has been interpreted. Paragraph 79(1)(c) requires consideration of whether the impugned conduct “has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market”. This provision was considered by the

Federal Court of Appeal in *Canada (Commissioner of Competition) v. Canada Pipe Corporation Ltd.*, 2006 FCA 233, leave to appeal to the Supreme Court of Canada requested. There, at paragraph 36, the Federal Court of Appeal wrote:

[t]wo aspects of the scope of paragraph 79(1)(c) are immediately evident from the wording. First, the effect on competition is to be assessed by reference to up to three different time frames: actual effects in the past or present, and likely effects in the future. Second, the effect on competition which must be proven to ground an order prohibiting an abuse of dominance is one of substantial preventing or lessening. The requisite assessment is thus a relative one [...].

[197] The similar wording in 75(1)(e) in regard to time frames, albeit limited to two rather than three time frames, and the concern with the effect on competition also suggest, in our view, that the paragraph demands a relative and comparative assessment of the market with the refusal to deal and that same market without the refusal to deal.

[198] Comparative analysis in regard to competition in a market requires consideration of relative competitiveness: "... the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice ...” (See *Canada Pipe*, cited above, at paragraph 37). This relative comparative assessment was, as noted by the Federal Court of Appeal at paragraph 43, also articulated by the Tribunal in *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1; *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 and *Canada (Director of Investigation and Research) v. The D&B Companies of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 (Nielsen).

[199] The *Laidlaw* decision is particularly clear on this point. At page 346, the Tribunal wrote: “[...] the substantial lessening which is to be assessed need not necessarily be proved by weighing the competitiveness of the market in the past with its competitiveness at present. Substantial lessening can also be assessed by reference to the competitiveness of the market in the presence of the anti-competitive acts and its likely competitiveness in their absence.”

[200] Thus, we conclude that paragraph 75(1)(e) of the Act similarly requires an assessment of the competitiveness or likely competitiveness of a market with, and without, the refusal to deal. This raises the question of what is meant by “competitiveness”.

[201] The “competitiveness” of a market under both the abuse and merger provisions of the Act refers to the degree of market power that prevails in that market. In *NutraSweet*, cited above, the Tribunal wrote, in the context of a section 79 matter, (at page 47) that: “[t]he factors to be considered in deciding whether competition has been or is likely to be substantially lessened are similar to those that were discussed in concluding that [Nutrasweet] has market power. In essence, the question to be decided is whether the anti-competitive acts engaged in by [Nutrasweet] preserve or add to [Nutrasweet’s] market power.”

[202] In *Nielsen*, cited above, the Tribunal similarly noted, at pages 266 and 267, that: “to paraphrase the words of the Tribunal in *NutraSweet*, in essence, the question to be decided is whether the anti-competitive acts engaged in by Nielsen preserve or add to Nielsen’s market power.”

[203] In regard to mergers, the Tribunal indicated in *Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289, at page 314, that:

[i]n assessing the likely effects of a merger, one considers whether the merged firm will be able to exercise market power additional to that which could have been exercised had the merger not occurred. A merger will lessen competition if it enhances the ability of the merging parties to exercise “market power” by either preserving, adding to or creating the power to raise prices above competitive levels for a significant period of time. One considers the degree of any such likely increase and whether by reference to the particular facts of the case it should be characterized as substantial.

[204] This approach was confirmed in other merger decisions including *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2000), 7 C.P.R. (4th) 385, rev’d 2001 FCA 104, leave to appeal to S.C.C. refused, [2001] 2 S.C.R. xiii. There, however, at paragraph 302, the Tribunal took issue with whether a merger that merely preserved market power lessened competition.

[205] Aside from the jurisprudence cited above, which indicates that a relative assessment of market competitiveness has to do with an assessment of market power, and how it may have changed, this is also suggested by the very nature of the various means by which firms compete.

[206] Adverse effects in a market are generally likely to manifest themselves in the form of an increase in price, the preservation of a price that would otherwise have been lower, a decrease in the quality of products sold in the market (including such product features as warranties, quality of service and product innovation) or a decrease in the variety of products made available to buyers. The question to be answered is whether any of these or other competitive factors can be adversely affected absent an exercise of market power.

[207] Product variety (including variety in terms of differing geographic locations in which the product is sold) in a market characterized by differentiated products is the most obvious potential factor that might be adversely affected in the absence of an exercise of market power. A business’ product can be eliminated or made less commonly available through a refusal to deal without the remaining market participants exercising market power. However, in a market that remains competitive subsequent to a refusal to deal, the effect of the disappearance of one firm’s product on consumers is negligible. This is the very nature of competitive markets: no single seller has any influence over price or any other factor of competition, including variety. In such a market, one less firm selling a product in a relevant market will either go unnoticed or will allow for a profitable opportunity for entry.

[208] This is similarly the case in regard to the impact of a refusal to deal on price, product quality, and any other factor of competition. Consequently, in our view, for a refusal to deal to have an adverse effect on a market, the remaining market participants must be placed in a position, as result of the refusal, of created, enhanced or preserved market power.

[209] We also note that both Dr. Mathewson and Dr. Schwartz assess the effect on competition as a result of the Scotiabank termination in terms of market power. Dr. Mathewson opined that “[i]n analyzing the potential effect on competition of Scotiabank’s terminating GPay’s banking services, consideration was given to the possible impact of termination on any hypothetical market power accruing to Scotiabank, in particular to its Interac Online Service.” Dr. Schwartz meanwhile noted that the effect of the termination will be insufficient competition and, thus, likely higher merchant fees.

[210] Thus, paragraph 75(1)(e) does not differ from what is contemplated in paragraph 79(1)(c), section 92 (merger provision) and other sections of the Act. The difference lies in the degree of the effect. Under section 75, the effect must be adverse, while under other provisions the effect must be substantial.

[211] From the plain meaning of the words used by Parliament, we find that “adverse” is a lower threshold than “substantial”. As for the requirement that the refusal to deal “is likely to have” such adverse effect, at paragraphs 37 and 38 in *Air Canada v. Canada (Commissioner of Competition*, [2000] C.C.T.D. No. 24; aff’d [2002] F.C.J. No. 424 (FCA), the Tribunal found that a relatively high standard of proof is required to establish the “likely” occurrence of a future event. The Tribunal found that the terms “likely” and “probable” were synonymous. On the basis of the plain meaning of the word “likely”, and on the basis of the Tribunal’s reasoning in *Air Canada*, we find the requirement to establish the likelihood of an adverse effect requires proof that such an event is “probable” and not merely possible.

[212] However, as noted by the Tribunal in *Hillsdown*, at page 314, one cannot consider the degree of any likely increase in market power without reference to the particular facts of a case (including consideration of any facts that may be relevant under section 1.1 of the Act). We now turn to that.

(2) The Effect of Scotiabank’s Refusal to Deal

[213] At the outset we observe that for the purpose of paragraph 75(1)(e), the market at issue need not be, and, in this case, is not the market of concern in paragraphs 75(1)(a) and (b). The market of concern under 75(1)(e) is the market in which the applicants participate. That said, we are satisfied that, in this case, that market need not be defined. We need first only decide whether Scotiabank’s online debit product, Interac Online, and the UseMyBank Service are currently in the same market and/or are likely to be in the same market for future transactions. Absent such actual or expected competition, it is impossible for the refusal to deal to have an adverse effect on competition.

[214] As we stated above, an adverse effect on competition requires that Interac Online’s market power be created, enhanced or preserved. If the two services do not compete, and are unlikely to compete, any market power Interac Online may have will be unaffected by any impact a refusal to deal has on the UseMyBank Service. In this regard, we agree with Dr. Mathewson that “[f]or Scotiabank to enhance its market power (with respect to Interac Online) by weakening GPay, GPay must be an effective competitor to begin with, and it must be a more effective competitor than other suppliers of substitute services, such as credit cards. If these two things do not hold, then Scotiabank’s refusal cannot increase any hypothetical market power.”

[215] We first address the issue of current competition and then turn to potential future competition.

(a) Current Competition

[216] While the applicants concede that a difference between the two services is their respective merchant bases, they contend for the following reasons that Interac Online and GPAY compete:

- (i) The UseMyBank Service and Interac Online are functionally nearly identical; and,
- (ii) There is no technical or operational characteristic pertaining to the UseMyBank Service that would limit its use to online gaming.

[217] In response to the applicants’ submissions on functional substitutability, we note that while functional substitutability is often, if not almost always, a characteristic of products that are in the same product market, functional substitutability alone is not sufficient to support a finding that products compete in the same market. That said, we agree that the UseMyBank Service and Interac Online have at least the potential to compete for at least some subset of merchants. These merchants would have to be Canadian based because, as Mr. Rosatelli testified, Interac Online is only available to such merchants. As to whether Interac Online and the UseMyBank Service currently compete in the same market, both expert economists agree that they do not. We accept that conclusion.

[218] In Dr. Schwartz’s view, as set out in his first report, “[t]he major effect on competition arising from Scotiabank’s terminations relates to the future market for online debit payment service”. In his second report, Dr. Schwartz notes that he agrees “with Professor Mathewson that the GPAY Service and Interac Online are not close “substitutes” currently (although Interac Online’s merchants could switch because GPAY is functionally similar) because of the lack of overlap in their respective merchant bases.” We agree that Interac Online and the UseMyBank Service do not currently compete and so are not in the same market.

(b) Future Competition

[219] The only competition at issue is future competition. Further, it appears from the applicants’ submissions that only a portion of that future competition is at stake: that is

competition for merchants whose transactions include transactions that are over \$1,000 (hereafter referred to as “high-value transaction merchants”).

[220] The applicants argued in their closing submissions that a major effect on competition “relates to the future market for online debit payment services. The various limitations that using EMTs impose on GPAY constrain its ability to participate in the growing online marketplace. The \$1,000 cap that Scotiabank’s termination imposes on payments processed by GPAY makes it unlikely to be adopted by major online merchants such as airlines. The limitations on EMT deposits will ultimately prevent GPAY from increasing its processing capacity.”

[221] Not all merchants are likely to find the \$1,000 limit to be a constraint; for example, the applicants’ witness, Mr. Morgenstern of the Ashley Madison Agency, testified that the agency’s average ticket sale was \$77 and the lifetime revenue per paid member was \$147. Moreover, the applicants did not argue that they are constrained as a result of the Scotiabank termination in their ability to pursue merchants who are unlikely to find the \$1,000 EMT limit to be a constraint. Consequently, in this decision, we limit ourselves to addressing the potential competition between the UseMyBank Service and Interac Online for high-value transaction merchants.

[222] The applicants assert that the consequence of the \$1,000 limit and the associated prevention of competition is likely higher merchant fees.

[223] In response, the Bank argues that “[t]here is no evidence that the payment transfer limit of \$1,000 per day for EMT transfers has had any impact on the Applicants’ ability to attract main stream merchants. Rather, the evidence is that many merchant prospects declined to subscribe to the Applicants’ service because of concerns about the fact that the Applicants’ business is premised on disclosure of a banking customer’s confidential Internet password and card number. Merchants do not wish to be affiliated with a payment processing service that operates in that manner.” Consequently, the Bank contends that it is unlikely that Interac Online and the UseMyBank Service will ever compete, and so it is unlikely the refusal to deal will have an adverse effect on competition.

[224] We find there is no evidence to suggest that the applicants are prevented from competing with Interac Online for high-value transaction merchants as a result of the refusal to deal. As such, the refusal to deal is not likely to have an adverse effect on competition.

[225] In regard to this lack of evidence, Dr. Schwartz noted that “it is not important whether GPAY turns out to be successful or not; competition in the marketplace will decide its future success. The relevant question is whether Scotiabank’s termination has an adverse effect on that competition.” The applicants further argue that “the purpose of the *Competition Act* is to foster the competitive process, not to pick winners or losers. It may well be that GPAY will not succeed in attracting major merchants even if the cap is removed. But it is clear that with the cap in place, it is very unlikely that GPAY would be attractive to any merchant that regularly has transactions worth over \$1,000.”

[226] We agree that the purpose of the Act is not to pick winners and losers, and, in particular, that the purpose of paragraph 75(1)(e) is not to determine whether one party has been wronged by way of a refusal to deal, but rather to determine whether as a consequence of that refusal there is or is likely to be an adverse effect on competition. While evidence on the likelihood of success of a particular participant in a market may not always be necessary for such a determination, we do find that evidence on the likelihood of participation is necessary. It is not sufficient merely to assert an intent to so participate.

[227] We find that there is no evidence to suggest that the applicants are actively seeking new Canadian based merchants whose transactions would likely include transactions valued at more than \$1,000. Nor is there evidence to suggest that the applicants would be actively seeking such merchants but for the Scotiabank termination. We take from Mr. Iuso's cross-examination that there is evidence to suggest that the applicants were seeking such merchants prior to the termination of biller services by TD and CIBC in December 2003. If the Scotiabank termination made a critical difference to whether such merchants continued to be sought, one would expect the applicants to have continued to pursue, at least to some extent, such merchants after the TD and CIBC terminations but not after the Scotiabank termination. As stated earlier in this decision at paragraph 133, there is nothing to suggest that the Scotiabank termination has in any way exacerbated a pre-existing situation.

[228] [CONFIDENTIAL].

[229] To the extent that our finding may be incorrect and Interac Online and the UseMyBank Service would in fact likely compete for large-value transactions but for the refusal to deal, it remains to be shown that they are close competitors in that an important price constraining effect on Interac Online would come from the UseMyBank Service. Out of the possible set of competitors, including credit cards and electronic wallets (such as PayPal), Interac Online and the UseMyBank Service are arguably functionally the most similar but for the important caveat that the UseMyBank Service system requires the disclosure of confidential information. As noted above, not only is functional similarity insufficient to conclude that two products constrain each others' prices, an important functional difference could prove critical to a finding that they do not. We further note Dr. Mathewson's observation that virtually all Interac Online participating merchants accept credit cards. In this context, we observe that the questionable viability of Interac Online suggests the possibility that Canadian Internet merchants are satisfied with these payment means and that these means compete with Interac Online.

(3) Conclusion in Regard to 75(1)(e)

[230] In sum, we find that since Interac Online and the UseMyBank Service are not currently in the same market and they are not, on a balance of probabilities, likely to be in the same market in the future in regard to large-value transaction merchants, the refusal to deal is not likely to have an effect on competition. Since the refusal is not likely to have an effect, it is not likely to have an adverse effect.

E. The Discretionary Nature of the Relief Sought

[231] We have determined that the applicants failed to establish that they are substantially affected in their business due to their inability to obtain adequate supplies of a product. They also failed to establish that any such inability was because of insufficient competition among suppliers of the product, and, that the refusal to deal is having, or is likely to have, an adverse effect on competition. It follows that the application should be dismissed.

[232] However, even if the applicants had succeeded in establishing all of the elements contained in subsection 75(1), we are satisfied that this is not a proper case for the granting of discretionary relief.

[233] The discretionary nature of relief under section 75 was considered by the Tribunal in *Chrysler*, where the Tribunal identified a number of factors relevant to the exercise of that discretion. One factor identified by the Tribunal was the reasons for the supplier's decision to discontinue dealing. In our view, this is the most relevant factor to the proper exercise of discretion in this case.

[234] We have previously found that the Bank's refusal to deal was based upon the legal or reputational risks posed by the disclosure of the Bank's customers' electronic signature, the consequent likelihood of Rule E2 of the Canadian Payments Association being breached, and other regulatory concerns.

[235] In our view, the above risks are legitimate and continue. It would neither be commercially reasonable nor consistent with the purpose of the Act to require the Bank to provide banking services to the applicants when to do so would expose it to such risks.

[236] Further, while the applicants seek biller status and EMT deposit accounts, we are satisfied that they do not comply with the reasonable terms that the Bank imposes upon all of its customers as a condition for receipt of those services. In that circumstance, it would be unreasonable to require the Bank to deliver services other than on the commercially reasonable terms it generally imposes.

[237] In respect of biller status, the conditions found in the Scotiabank Electronic Bill Payment Service Agreement include the following:

- (i) The bill payee shall not require Bank customers to divulge their ScotiaCard number and/or personal identification number, and/or electronic signature.
- (ii) The services provided cannot be used, directly or indirectly, to conduct or act on behalf of a money services business.

[238] The applicants have conceded that they cannot operate their business without bank customers disclosing their confidential banking password and bank card number, that they

operate a money services business, and that they act on behalf of other money services businesses. They cannot, therefore, comply with the terms of the Bill Payment Service Agreement.

[239] We acknowledge that the terms of this agreement have been significantly amended since the applicants first received biller status at the Bank. However, we find that the Bank's amendment of this agreement was not done in any way to target the applicants. We reach this conclusion because we accept as truthful Mr. Rosatelli's evidence that: the agreement was re-drafted in order to allow the Bank to comply with the regulations and additional reporting requirements associated with the new anti-money laundering regulations; the drafting of the new agreement began in late 2003 or early 2004 (significantly before the termination of the applicants' banking services); a number of existing bill payee companies have since been terminated by the Bank because they are not in compliance with the new agreement; and, a number of potential bill payee companies have been declined as a result of being unable to meet the terms of the new agreement.

[240] With respect to EMT deposit accounts, the Bank's evidence that such accounts are only offered to businesses that meet its definition of a small business was not challenged. That definition is a business that does not exceed \$5 million in annual deposits or \$400,000 in monthly deposits, and does not exceed more than 150 transactions through its accounts in a month.

[241] The reason for these limits was explained by Ms. Graham-Parker, who testified on cross-examination that commercial clients are larger than small businesses, are more complex, with more transactions and larger transaction amounts. EMTs in those circumstances are much harder to control, especially with "the number of employees that would need access". The existence of difficulty in allowing businesses to receive and send EMTs even into small business accounts is supported by the fact that RBC is the only other bank to allow this.

[242] Mr. Grace admitted on cross-examination that the applicants are no longer a small business. They cannot, therefore, qualify for the accounts they seek on the terms the Bank generally imposes.

[243] There is a final factor that militates against the exercise of any discretion in the applicants' favour, and that flows from the fact that about 50,000 Bank customers are residents of the United States. Mr. Iuso agreed that U.S. residents with Canadian bank accounts can and do use the UseMyBank Service, and the Bank has affiliated entities with assets in the U.S. These facts make relevant Mr. Stewart's opinion that:

- (i) Online gambling violates both U.S. federal law and the laws of each of the 50 States.
- (ii) The U.S. Justice Department had, in July 2006, arrested a British national and executive of an offshore online sports book when the executive made a stopover at a U.S. airport. The executive has since been indicted for violation of U.S. law by accepting bets from Americans.

- (iii) Any business that knowingly permits its services to be used for the purposes of online betting by residents of the U.S. is at risk of being charged with illegally aiding and abetting Internet gambling.
- (iv) If the Bank were to receive funds into its accounts held in the name of the applicants from American residents to be used for the purpose of online gambling, the Bank would be committing an offense in the U.S. and would be exposed to the possibility of prosecution.

[244] Mr. Stewart's evidence was not diminished on cross-examination and we accept that requiring the Bank to provide banking services to the applicants would put the Bank at some risk for aiding and abetting acts that are in violation of U.S. law.

[245] As a final observation on this point, during final argument the applicants tendered an extensive two-page undertaking to the Tribunal. The undertaking is attached as Schedule C to these reasons. In it, the applicants undertake, among other things:

- (i) To comply with all applicable anti-money laundering legislation in Canada.
- (ii) To submit to periodic audits (not more than annually) upon the request of the Bank, such audits to be conducted by a mutually acceptable anti-money laundering expert. They would remedy any differences found on the audit.
- (iii) To remedy any deficiencies in their computer security procedures identified by any periodic computer security audit requested by the Bank.
- (iv) Not to have biller status with respect to Bank customers not resident in Canada.
- (v) To block payments to online casinos or their management companies where the applicants are able to determine that the account holder is resident in the U.S.

[246] As the undertaking was presented only in final argument, there was no evidence with respect to, for example, the feasibility of not having bill payee status with respect to the Bank's U.S. resident account holders, or to the feasibility of blocking certain online payments. Further, the timing of the presentation of the undertaking does, at least, suggest that the undertaking implicitly recognizes the legitimacy of the Bank's concerns about these matters.

[247] Given the timing of the presentation of the undertaking, and the lack of an evidentiary underpinning for it, we are not inclined to give any weight to it. Our view in this regard also recognizes some degree of prior recalcitrance on the part of the applicants that, in our view, casts at least some doubt on whether the undertaking would be effective. We refer here to the applicants' refusal until their opening statement before us to acknowledge that they are a money services business, and the position they took in this litigation with respect to the relevance of Bank inquiries that were relevant to money laundering and other regulatory concerns.

[248] In sum, the undertaking does nothing to change our view that this is not an appropriate case for the granting of discretionary relief.

[249] We now turn to the reasons for two evidentiary rulings that were dealt with in writing and to certain procedural and closing remarks.

VII. THE RULING IN RESPECT OF THE PROPOSED EVIDENCE OF STANLEY SADINSKY

[250] Rule 47(1) of the *Competition Tribunal Rules*, SOR/94-290 (Rules) requires every party who intends to introduce expert evidence to serve an affidavit of each proposed expert on the other party at least 30 days before the commencement of the hearing. Pursuant to this rule, and the Tribunal's scheduling order, the Bank served the affidavit of Professor Stanley Sadinsky upon the applicants.

[251] In response, the applicants filed a notice of motion, in advance of the commencement of the hearing, in which they sought an order declaring Professor Sadinsky's affidavit to be inadmissible, and awarding them costs. By the agreement of the parties, the motion was dealt with in writing by the presiding judicial member. An order issued, for reasons to be delivered with the Tribunal's final reasons, providing that the affidavit would not be admitted in evidence as the evidence of an expert witness. The issue of costs was reserved until the Tribunal generally addresses costs. What follows are the reasons for that ruling.

[252] After setting out his qualifications, the documentation he had reviewed and the facts that were relevant to his opinion, Professor Sadinsky swore that:

14. In the balance of the Affidavit, I provide my expert opinion with respect to the following overarching issue, namely, whether Scotiabank would be in breach of the *Criminal Code* if it were required to provide banking services to the Applicants. In considering this opinion, it is first necessary for me to consider two preliminary issues:

(a) Is it illegal for Canadians located in Canada to place bets with off-shore internet gambling sites?

(b) Is the activity being conducted by the Applicants and their joint venture partner, UseMyBank, in breach of the provisions of the *Criminal Code*?

[253] It was the position of the applicants that this opinion was inadmissible because opinion evidence concerning the interpretation and application of domestic law is inadmissible in Canadian courts on the ground that it fails to meet the requirement that, to be admissible, expert evidence must be necessary to assist the trier of fact (see *R. v. Mohan*, [1994] 2 S.C.R. 9 at page 20).

[254] In response, the Bank argued that the applicants had failed to cite any authority to support the assertion that the principles articulated in *Mohan* apply to Tribunal proceedings. The Bank submitted that the rules of evidence that apply in court proceedings do not apply in proceedings before an administrative tribunal unless expressly prescribed. The Bank asserted that, for administrative tribunals, relevant expert evidence is admissible, subject to considerations of weight. Further, the Bank argued that, by failing to object to Professor Sadinsky's affidavit when it was filed and considered on the application for interim relief (and by instead producing at that time its own competing expert affidavit), the applicants had waived their right to object. Finally, the Bank argued that the exclusionary rule in *Mohan*, if applicable, did not apply to exclude Professor Sadinsky's affidavit because the Tribunal will admit expert evidence on matters of law when it is logically probative, helpful and will not cause prejudice. Professor Sadinsky's affidavit was said to be helpful because it serves to demonstrate the impact of pertinent provisions of the *Criminal Code* upon the Bank.

[255] Each submission made by the Bank was considered.

[256] As to the applicability of the rules of evidence with respect to the admissibility of expert evidence, the legislative history of the Tribunal reflects an intention to judicialize to a substantial degree the processes of the Tribunal. This is reflected in the Tribunal's establishment as a "court of record" by virtue of subsection 9(1) of the *Competition Tribunal Act*, R.S.C. 1985, c. C-19 (2nd Supp.), the requirement that a judicial member preside over the Tribunal's hearings, and the presence of appeal rights to the Federal Court of Appeal as if a decision of the Tribunal was a judgment of the Federal Court. See, in this regard, the discussion of the Tribunal in *Canada (Director of Investigation and Research) v. Air Canada* (1988), 32 Admin. L.R. 157 rev'd on other grounds [1989] 2 F.C. 88 (C.A.); aff'd [1989] 1 S.C.R. 236. In *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1990), 111 N.R. 368; rev'd [1992] 2 S.C.R. 394 both the Federal Court of Appeal and the Supreme Court of Canada confirmed the Tribunal to be an inferior court of record.

[257] Thus, in a number of decisions the Tribunal has applied the principles articulated by the Supreme Court in *Mohan* when considering the admissibility of expert evidence. For example, in *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2003), 28 C.P.R. (4th) 335 at paragraph 36, the Tribunal rejected expert evidence that consisted essentially of legal argument on the ground that the evidence was not necessary as required by the *Mohan* test. See also the rulings of the Tribunal on March 28, 2006 in *United Grain Growers Limited v. The Commissioner of Competition* and on May 9, 10, and 11, 2006 in *La Commissionnaire de la Concurrence v. Gestion Lebski Inc. et al.*

[258] The Tribunal therefore rejected the Bank's assertion that, as an administrative tribunal, the Competition Tribunal is precluded from applying the principles of evidence that would apply

to court proceedings. Such submission is inconsistent with the judicialized nature of this tribunal, and inconsistent with prior jurisprudence of the Tribunal dealing with the receipt of expert evidence. The fact that the Tribunal is directed in the *Competition Tribunal Act* to deal with proceedings before it “as informally and expeditiously as the circumstances and considerations of fairness permit” is, by itself, insufficient to preclude application of rules of evidence that have evolved, at least in part, so as to ensure fairness. This direction is, rather, consistent with the fact that the Tribunal is not precluded from departing from a strict rule of evidence when it considers that to be appropriate.

[259] Having regard to Professor Sadinsky’s characterization of the overarching issue and the two preliminary issues, as quoted above at paragraph 252, the Tribunal was satisfied that the opinion was in substance an opinion with respect to a matter of domestic law. Thus, the Tribunal was not satisfied that the opinion was necessary, as required by the *Mohan* test. The interpretation of domestic law is within the competence of the Tribunal’s judicial members.

[260] Alternatively, even if a more relaxed standard of admissibility was applied, the Tribunal was not satisfied that the evidence contained in the affidavit would be helpful. There is, apparently, no relevant jurisprudence on the points opined upon by Professor Sadinsky. He therefore couched his opinions in terms that “in my opinion, there is a very strong argument that ...”. Such views would not be sufficiently probative or helpful to warrant their admission into evidence.

[261] With respect to the Bank’s submission that the applicants had waived any right to object to the admissibility of the opinion, the Bank cited no authority to support the view that a failure to object to evidence on an interlocutory motion operates to preclude any objection at trial. Such a result is inconsistent with the fact that the admissibility of evidence is always a matter to be determined by the presiding judicial officer who may raise, on his or her own motion, concerns with respect to the admissibility of evidence.

[262] For these reasons, the evidence of Professor Sadinsky was not received by the Tribunal.

VIII. THE MOTION BY THE BANK TO AMEND ITS RESPONSE TO THE AMENDED NOTICE OF APPLICATION

[263] Prior to the commencement of the hearing, the Bank served the expert affidavit of David Stewart upon the applicants. In this affidavit Mr. Stewart opined that “off-shore on-line gambling violates both federal and state laws in the United States” and that “any business that knowingly permits its services to be used for the purposes of online betting by residents of the United States is at risk of being charged, at a minimum, with illegally aiding and abetting Internet gambling.”

[264] In response, also prior to commencement of the hearing, the applicants sought an order declaring the affidavit to be inadmissible on the basis that it was not relevant to an issue pleaded by the Bank in its response. The Bank took the position that the affidavit was admissible, but it

also filed a notice of motion in which it sought leave to amend its response to the applicants' amended application in two respects. The first was to amend paragraph 19 of the Bank's response to read as follows:

19. Scotiabank has serious and valid concerns about the legality of the activities of the "vast majority" of the users of the service provided by the Applicants. It is not willing to allow its facilities to be used for activities that could be illegal in Canada, or in any other jurisdiction, in particular the U.S.A., where Scotiabank has a business presence and/or where residents of that jurisdiction have Scotiabank accounts that can be used to transfers [sic] funds using the Applicants' services. The association of the Scotiabank brand with the activities of the Applicants could be interpreted by Scotiabank customers as an endorsement of the Applicants' service or suggest legitimization offshore on-line gambling.

[265] The second, but unrelated, amendment sought (foreign exchange profit amendment) was to add as paragraph 21 to the Bank's response the following:

21. The Applicants state that they act as agent for the banking customer for the transfer from the banking customer's account to the Applicants' account through either the Bill Payment System or through EMT. The Applicants state they are a trustee of the monies received into their accounts for the merchant customers, who are the beneficiaries of these funds. The Applicants derive a profit on the conversion from Canada funds into U.S. funds of the monies transferred from the bank accounts of Canadian banking customers. The Applicants do not disclose the fact that they make a profit on the conversion of Canadian funds into U.S. Funds to either their banking customer principals or their merchant customer beneficiaries. Scotiabank cannot continue to offer banking services to the Applicants knowing that the Applicants are making an undisclosed profit in these circumstances.

[266] The parties filed written submissions and advised that they did not wish to make oral submissions. Accordingly, the Bank's motion was dealt with in writing by the presiding judicial member. An order issued, for reasons to be delivered with the final reasons, granting leave to the Bank to amend its response as requested. Thus the evidence of Mr. Stewart would be relevant to the amended pleading and admissible. The issue of costs was reserved until the Tribunal generally addresses costs. These are the written reasons for that ruling.

[267] In approaching the issues raised by the parties, the Tribunal assumed, without deciding, that the evidence of Mr. Stewart was not admissible in the absence of the requested amendment to paragraph 19. The issue then became whether the amendments should be allowed.

[268] All parties agreed that the applicable legal principle was that articulated by the Federal Court of Appeal in *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 (C.A.) at pages 9 and 10. There, the Court wrote:

[...] while it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.

[269] With respect to the requested amendment to paragraph 19 to expressly plead a breach of American law, the Bank submitted that the amendment did not alter the nature of its defence but rather better particularized its pleading. The applicants responded that the amendment expanded the Bank's defence and that non-compensable prejudice would result if the Bank was allowed to amend its response.

[270] The applicants filed no affidavit evidence establishing prejudice.

[271] Paragraph 19 of the Bank's response, as originally filed, set forth its concerns with respect to potential illegality generally. Evidence filed by the Bank on the motion to amend established that the Bank's concern with respect to American legislation was not new, and ought not to take the applicants by surprise. This is seen from the fact that in response to the applicants' request for leave to bring this proceeding, Mr. Rosatelli had sworn an affidavit that stated that the Bank had branches and employees worldwide, that its securities traded on United States securities exchanges, and so the Bank was subject to a wide variety of American legislation.

[272] Mr. Stewart's affidavit was served on the applicants in accordance with the timetable agreed to by counsel. When the applicants raised their concerns with respect to the relevance of the affidavit, the Bank offered the applicants an extension of three weeks in order to allow the applicants to obtain and file a responding affidavit.

[273] Applying the principle that amendments should be allowed at any stage for the purpose of deciding the real questions and controversies, provided that the amendment does not result in non-compensable prejudice and would serve the interests of justice, it was the view of the Tribunal that the amendment would facilitate the admission of relevant evidence. Given that the applicants sought an order requiring the Bank to provide services to them, the interests of justice would not be served if the Tribunal considered making such an order without knowing whether the order would expose the Bank to criminal liability in the United States.

[274] There was no evidence of non-compensable prejudice to the applicants and an adjournment could have been sought by the applicants to allow them to obtain any responding evidence.

[275] In those circumstances, the Tribunal concluded that the interests of justice required that leave be granted to amend paragraph 19 of the Bank's response.

[276] With respect to the foreign exchange profit amendment, the Bank again argued that the amendment simply particularized its defence. The applicants again argued that the Bank had known of the issue since June 22, 2006 so that the requested amendment was sought too late.

[277] The Bank's evidence established that on June 22, 2006 the applicants delivered to it a supplementary affidavit of documents that disclosed the 2004 financial statements for NPAY and GPAY, that they were reviewed by counsel on June 24, 2006, after the Bank filed its response to the amended application on June 22, 2006, that Mr. Grace was examined on these documents on June 27 and 28 of 2006, and that, prior to the hearing, the Bank advised the applicants of the Bank's intent to assert at the hearing that the applicants could not make an undisclosed profit in their capacity as agent of the Bank's customers and trustee to the applicants' own merchant customers.

[278] The amendment raised an issue that was seen to be relevant by the Tribunal and there was no evidence or proper articulation as to what prejudice would flow to the applicants if the amendment was permitted. The amendment was, therefore, allowed.

IX. THE CHESS CLOCK PROCEDURE

[279] This is the first proceeding in which the chess clock procedure with respect to hearing time management was employed by the Tribunal.

[280] The process takes its name from the manner in which the length of play is timed in certain games of chess. Generally, parties are allocated a fixed amount of time in order to present their case and are then timed to ensure that they do not exceed their allotted time. A significant benefit that flows from this type of time management is that hearings will conclude in the time allotted. This better allows the parties to know in advance the cost of the hearing, and avoids the delay and additional expense caused by the extension of hearings beyond their original end dates.

[281] In the present case, as part of the case management process, the parties agreed that each side would be given 45 hours in which to present their case. Specifically, each side had 45 hours for their opening statement, direct, cross- and re-examinations, objections to evidence, oral motions, and closing argument. The parties' consent to this time allocation was embodied in a pre-hearing order of the Tribunal.

[282] During the hearing, the court reporter kept track of the time expended by counsel. Each morning the parties received a statement of the time each side had expended up to the end of the prior day, expressed on both a daily and cumulative basis. The Tribunal advised that any dispute with respect to time allocation had to be raised immediately. There were no such disputes.

[283] In the view of all members of the Tribunal, the procedure worked well. The presiding member is not confident that the hearing would have finished on time in the absence of the use of the chess clock procedure. We have recommended the procedure to other members of the Tribunal.

X. DIRECTIONS TO THE PARTIES REGARDING PUBLIC REASONS

[284] These reasons are confidential. To enable the Tribunal to issue a public version of these reasons, the parties shall meet and endeavour to reach agreement upon the redactions that must be made to these confidential reasons in order to protect properly confidential evidence. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on Friday, January 12, 2007 setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons. (The Tribunal does not anticipate there will be any significant disagreement.)

[285] If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from these reasons. Such submissions are to be served and filed by the close of the Registry on Friday, January 19, 2007.

XI. COSTS

[286] The issue of costs is, as the parties requested, reserved. The parties are to meet and endeavour to reach agreement with respect to costs. On or before Friday, January 19, 2007, they should communicate with the Registry in order to advise as to whether they require any further time in order to attempt to agree costs. If costs cannot be agreed, the Tribunal will receive written submissions as to costs, as it will more particularly direct.

[287] Once the issue of costs has been dealt with, an order will issue dismissing the application and dealing with costs as agreed or as determined by the Tribunal.

DATED at Ottawa, this 20th day of December 2006

SIGNED on behalf of the Tribunal by the panel members

(s) Eleanor R. Dawson

(s) Lorne R. Bolton

(s) Lilla Csorgo

¹ We note that, where the words “Tribunal” or “we” are used and the decision relates to a matter of law alone, that decision has been made solely by the presiding judicial member.

² Paragraph 75(1)(e) refers to “a market” while paragraph 75(1)(b) refers to “the market”. This suggests that while the market considered under 75(1)(b) is that which is defined in 75(1)(a), the market considered under 75(1)(e) need not be.

³ The Tribunal indicated in *Chrysler*, at page 10, that “[w]here products are purchased for resale, the effect on the business of the person refused supply will depend on the demand of the person’s customers and whether substitutes are acceptable to them. Therefore, the starting point for the definition of “product” under section 75 is the buyer’s customers”. We note that this statement was made specifically in the context of products that are purchased for resale. That said, the manner in which an output product may be altered as a result of a change in an input and the consequent impact it may have on demand by the buyer’s customers is always relevant to the extent that it affects the buyer’s business. What is ultimately of concern under 75(1)(a) is the buyer of the product that has been refused.

⁴ Neither the applicants nor the Bank propose any candidate substitutes for EMT deposit accounts that are different to those proposed for biller status. Consequently, we do not separately consider candidate substitutes for EMT deposit accounts.

⁵ We note here that this contemplates switching, not directly by the applicants, but by the applicants’ customers. This type of switching by the applicants’ customers, however, would allow the applicants to make greater use of its bill payee status at other banks in order to serve customers who are, or originally were, Scotiabank depositors.

[288] **SCHEDULE A**

Section 75 of the *Competition Act*:

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

(a) a 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,

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,

(d) the product is in ample supply, and

(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on

75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut :

a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;

b) que la personne mentionnée à l'alinéa a) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;

c) que la personne mentionnée à l'alinéa a) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;

d) que le produit est disponible en quantité amplement suffisante;

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans

usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

(3) For the purposes of this section, the expression “trade terms” means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

2) Pour l'application du présent article, n'est pas un produit distinct sur un marché donné l'article qui se distingue des autres articles de sa catégorie en raison uniquement de sa marque de commerce, de son nom de propriétaire ou d'une semblable particularité à moins que la position de cet article sur ce marché ne soit à ce point dominante qu'elle nuise sensiblement à la faculté d'une personne à exploiter une entreprise se rapportant à cette catégorie d'articles si elle n'a pas accès à l'article en question.

3) Pour l'application du présent article, « conditions de commerce » s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

4) Le Tribunal saisi d'une demande présentée par une personne autorisée en vertu de l'article 103.1 ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

[289] **SCHEDULE B**

The Applicants' Experts

Mr. Jack Bensimon

Jack Bensimon was an expert qualified to give opinion evidence with respect to anti-money laundering programs and policies, and compliance with anti-money laundering regulations in both Canada and the United States. After hearing examination and cross-examination with respect to his qualifications, he was also found by the Tribunal to be qualified to give opinion evidence with respect to anti-fraud programs and policies. Having reviewed the nature of the applicants' business, Mr. Bensimon confirmed that the applicants are operating a money services business as defined in the PCMLTF Regulations. Significant aspects of Mr. Bensimon's opinion were that:

- (i) Overall, the risk posed to The Bank of Nova Scotia through the operation of the applicants' accounts is relatively low;
- (ii) Notwithstanding, there are material gaps in the anti-money laundering policies and procedures of the applicants that need to be remediated as soon as possible; and,
- (iii) The Bank was required, in his view, to take reasonable steps to ensure that the applicants had a basic framework of policies and procedures in place in order to meet the requirements of FINTRAC.

Dr. Lawrence Schwartz

Dr. Lawrence Schwartz was qualified as "an expert economist with respect to competition economics, in particular to market definition, to the impact on competition and impact on the business of GPAY, at least insofar as an economic matter."

In order to determine the relevant product market, the approach used by Dr. Schwartz was the hypothetical monopolist test. He did not prepare his report on the basis that the market referred to in paragraph 75(1)(a) of the Act was, or could possibly be, different from the market contemplated in paragraph 75(1)(e) of the Act.

In Dr. Schwartz's view, there were three product markets where an adverse effect on competition could occur as a result of the Bank's termination of the applicants' banking services. Dr. Schwartz was of the opinion this termination could result in an inadequate supply due to insufficient competition among suppliers. Those product markets were:

- (i) The market for online debit payment service for Scotiabank depositors who purchase at merchant websites, consisting of the UseMyBank Service and Interac Online;

- (ii) The market for merchants, where the applicants compete with Interac Online transaction acquirers to offer payment processing services; and,
- (iii) In relation to the means of providing online debit payment to Scotiabank depositors, biller status at Scotiabank but excluding business accounts that accept deposit by EMTs.

In his initial report, Dr. Schwartz did not carry out an analysis as to whether the applicants' business had been substantially affected by the termination of banking services by the Bank. He disagreed with Dr. Mathewson's approach to this issue because the applicants' behavior after the banking services were terminated is not information to be considered in the hypothetical monopolist approach to market definition. However, even on the approach used by Dr. Mathewson, Dr. Schwartz concluded that the applicants were substantially affected by the termination because GPAY's total payment value did not surpass its September 2005 level until January 2006. This suggested to him that GPAY's business from other banks did not offset the losses of payment volumes from Scotiabank depositors following termination. Scotiabank payment levels had not yet recovered to September 2005 levels up to and including the last month for which data are available.

The Bank's Experts

Mr. Christopher Mathers

Christopher Mathers was qualified as an expert in matters related to anti-money laundering, fraud, and anti-terrorist financing, particularly in the context of the online gaming industry. Mr. Mathers was of the opinion that the applicants, together with their joint venturer UMB, were operating a money services business.

Mr. Mathers described the three stages of money-laundering and the frequent use of online gaming sites to launder the proceeds of crime. He described some sample money-laundering mechanisms that could be applied to online gaming sites. He described an actual situation, recently identified by the Bank, where there was no apparent connection between the source of a Scotiabank customer's winnings and the online betting site where the winning wager was placed. Mr. Mathers provided comments with respect to Mr. Bensimon's report, described his own experience with offshore Internet casinos, and gave his view with respect to the risk posed to The Bank of Nova Scotia if it provides banking services to the applicants.

Dr. James Dingle

Dr. James Dingle is a retired employee of the Bank of Canada, where he, among other positions, served as the Deputy Chairman of the board of directors of the Canadian Payments Association. He was qualified as an expert in respect of matters relating to Canadian chartered bank operations and risks relating to their day-to-day operations, particularly as relating to payment flows and issues relating to electronic banking as set out in his report. Dr. Dingle testified as to

the purpose and importance of the regulatory mechanisms in place for Canadian banks and gave his view that the manner in which the applicants conducted their business was capable of eroding prudent behavior by bank depositors. He provided his view as to the regulatory risks to which the Bank was exposed as a result of the applicants' business model. Dr. Dingle spoke with respect to the development of Rule E2 by the Canadian Payments Association and gave his opinion that such rule would be breached if payments to the applicants pass through the clearing system. He gave his opinion with respect to the risks arising from the OSFI Guidelines on money laundering, the PCMLTF Act, the *Criminal Code*, and risks to which the Bank was exposed if it dealt with the applicants. He also spoke of the reputational risks to the Bank arising from unauthorized or fraudulent transactions.

Mr. David Stewart

David Stewart is an attorney practicing in Washington, D.C. He was accepted as an expert in United States gaming law, including the federal law of the United States as it relates to Internet gambling. His qualification to opine on matters relating to state law was also accepted by the Tribunal. In Mr. Stewart's opinion, online gaming violates the United States federal law and the laws of each of the 50 states. In his further view, any business that knowingly permits its services to be used for the purpose of facilitating online betting by a resident of the United States is at risk of being charged, at a minimum, with illegally aiding and abetting Internet gambling.

Dr. Frank Mathewson

Dr. Frank Mathewson is a professor of economics and the Director of the Institute for Policy Analysis at the University of Toronto. He was qualified as an expert in industrial organization, and in particular with expertise on matters relating to market power and vertical restraints.

In order to determine the relevant product market, Dr. Mathewson applied the test first described by the Competition Tribunal in the *Chrysler* case. In respect of paragraph 75(1)(a) of the Act, he determined that the relevant market is biller services at Scotiabank and EMT deposits [CONFIDENTIAL]. In respect of paragraph 75(1)(e) of the Act, he opined that the UseMyBank Service and Interac Online are not in the same product market, and products such as credit cards and Interac Online e-wallets are likely to be closer substitutes for Interac Online than the UseMyBank Service.

The Applicants' Lay Witnesses

Mr. Joseph Iuso

Joseph Iuso is the President, Chief Executive Officer, and founder of UMB. He identified the joint venture agreement entered into between UMB and NPAY, and described the respective roles of UMB and the applicants. He explained the technical aspects of UMB pushing payment from a customer's bank account to GPAY's account, the security features in place at UMB, the fraud detection system UMB has in place and the steps taken by UMB to market its services to various merchants.

Mr. Raymond Grace

Raymond Grace is the President of both GPAY and NPAY. He testified with respect to his dealings with The Bank of Nova Scotia, including the various bank account openings, obtaining biller status, GPAY's experience with EMT deposits at The Bank of Nova Scotia (particularly the difficulty caused when payment items could not be posted to an account when the quantity of payments exceeded 100 transactions) and the termination of banking services. He confirmed the terms of the joint venture agreement between NPAY and UMB, and the responsibilities of his companies under the joint venture agreement. He described the banking services his companies enjoyed with other banks, as well as the termination of banking services by TD and CIBC. He described the relationship between the customer (the buyer of goods or services), the joint venture's client (the merchant or seller) and the joint venture, and how payment is effected to merchant clients. He described the nature of the security checks that the joint venture conducts in respect of the transactions and the joint venture's experience with fraudulent transactions. He explained how transactions were conducted when merchant clients were to receive monies in U.S. funds and the resulting foreign exchange profit. He described his involvement in marketing on behalf of the joint venture, his involvement in reporting transactions to FINTRAC, and how his companies deal with anti-money laundering concerns. Finally, he discussed the conduct of the joint venture's business since the termination of banking services by The Bank of Nova Scotia.

Mr. Ryan Woodrow

Ryan Woodrow is an employee of The Bank of Nova Scotia who at all material times was the account manager for small business accounts at the Bank's branch in Sherwood Park, Alberta. He was the officer responsible for the applicants' accounts. He testified with respect to the account opening procedure generally applicable for small business accounts, how that procedure was followed in August of 1999, October of 2004 and November of 2004 for the accounts of GPAY, B-Filer, and NPAY. He described the nature of the privileges associated with the accounts operated by the applicants, the transaction limits relevant to EMT payments and receipts, and the practical consequences of exceeding a certain number of EMT transactions per month. He also described the criteria the Bank applied in order to determine whether any particular venture was a small business. He testified about the decision not to open any more accounts for the applicants because they no longer qualified as a small business, and the subsequent inquiry concerning Mr. Grace and his accounts conducted by the head-office of The Bank of Nova Scotia in Toronto.

Mr. Darren Morgenstern

Darren Morgenstern is the owner of the Ashley Madison Agency, which is an online dating service that caters to the niche market of people who are in a relationship but are "seeking alternative options". Since July or August of 2003, the Ashley Madison Agency has used

UseMyBank as a payment option, in addition to credit card and direct deposit payment mechanisms. He explained that the decision to add UseMyBank as a payment option reflected the desire of his company to offer as many payment options as possible. Mr. Morgenstern testified that when his company adopted UseMyBank as a payment option there was an almost instant increase in its sales, so that now approximately 23% of all of Ashley Madison's Canadian online services are paid for through UseMyBank. In his experience, while credit card fraud is "rampant" in online transactions, his company has had little or no fraudulent transactions processed through UMB.

The Bank's Lay Witnesses

Ms. Margaret Parsons

Margaret Parsons was at all material times the manager of the Sherwood Park branch of The Bank of Nova Scotia. She testified with respect to the organization of the branch, the Bank's criteria as to what qualified for service as a small business, and the concept of the "connection" between a small business or businesses and its owner/proprietor. She testified with respect to meeting with Mr. Grace when he first wished to open an account and that she referred Mr. Grace to Mr. Woodrow. She testified that she approved the documentation with respect to the opening of an account in the name of B-Filer, carrying on business as GPAY. She testified that she learned in March or April of 2004 of the number of items that were not postable to the applicants' accounts. She also explained that she learned in November of 2004 of the quantity of new account openings by the applicants and described her resulting concern that led to a meeting with Mr. Woodrow and another Bank employee, Ms. Sharon Gibson-Nault. As a result of the meeting she instructed Mr. Woodrow to find out "what [was] going on", specifically why there were so many items that could not be posted to the applicants' accounts and why the applicants were opening so many accounts. She also instructed Mr. Woodrow that there would be no further account openings for the applicants. Later, she learned that, while she was on vacation, Mr. Grace caused 30 new accounts to be opened through a telephone call centre and that a total of 80 new accounts had been opened in a two-week period. As a result, she and Ms. Gibson-Nault prepared a memorandum recommending that the Bank terminate its relationship with Mr. Grace and his businesses. Finally, she testified that when she made this recommendation she did not know what Interac Online was.

Ms. Sharon Gibson-Nault

Sharon Gibson-Nault was at all material times the manager of customer service at the Sherwood Park branch. She testified with respect to her responsibility to review new account openings, her experience in early 2004 with a number of transactions that could not be posted to the applicants' accounts, her concern in November of 2004 with the number of new accounts the applicants were opening and her resulting conversation with Ms. Parsons. She testified that while Ms. Parsons was on vacation, the issue of the significant number of new account openings was referred by her to the Bank's Shared Services operation and that an investigation was commenced. Finally, she testified as to her role in the recommendation made to terminate the Bank's relationship with the applicants.

Ms. Susan Graham-Parker

Susan Graham-Parker is Senior Vice President of Retail and Small Business Banking for Ontario for The Bank of Nova Scotia. She testified with respect to the regulatory environment in which the Bank functions, and her view of the trust that such an environment engenders in banking customers. She testified with respect to the criteria for small business status at the Bank, and how the criteria applied on a per-connection basis. She described the nature of the Money Master accounts that the applicants operated. She explained the required due diligence at a branch when accounts were opened. She described the transaction limits for sending and receiving EMTs, and testified that for businesses that did not qualify as small businesses, there was no facility for receiving EMTs. She explained the process that is followed when an entity exceeds the small business criteria and how the customer is referred to commercial banking services. She testified with respect to a number of customer security issues, identifying the Scotiabank Cardholder Agreement and the obligation it imposes on customers with respect to the protection of their electronic signatures. She described other documents in which the Bank stresses this obligation to customers. She explained the process when a person holding a valid, written power of attorney seeks electronic access to accounts belonging to the principal. Finally, she expressed her view as to the Bank's concerns with respect to the nature of the business operated by the applicants and the Bank's concerns with the account aggregation service known as CashEdge.

Mr. Colin Cook

Colin Cook is Vice President, Commercial Banking at The Bank of Nova Scotia. He testified as to the process followed when a customer is referred to commercial banking, the criteria that apply to determine when commercial banking services are appropriate, the account opening requirements for a commercial client, and he noted the non-availability of EMT facilities for commercial banking clients. He spoke of his involvement in the development of a project that would enable the Bank to better comply with its Know Your Customer requirements and the due diligence obligations upon the Bank in the ongoing business relationship with a client. He spoke about the flags that should alert the Bank to money laundering concerns, and the nature of the concerns raised by the applicants' business model and their manner of opening accounts. He spoke of the importance of trust in the banking relationship and the key elements of the Know Your Customer rule, identified the Bank's Anti-Money Laundering Handbook and described the Know Your Customer's Customer rule. He concluded by stating that in his view, the applicants would not be accepted as commercial banking clients of the Bank either as of the date of termination, or as of the date of the hearing.

Mr. Douglas Monteath

Douglas Monteath is an assistant general manager of the Shared Services operation of the Bank. He testified as to the nature of the services provided by Shared Services, the involvement of

Shared Services in the decision to terminate the applicants' banking services, the investigation that took place in 2005 into the applicants' business, the concerns that arose as result of that investigation and the factors that led the Bank to its decision to terminate the applicants' banking privileges.

Mr. Robert Rosatelli

Robert Rosatelli is Vice President, Self-Service Banking at The Bank of Nova Scotia. He testified with respect to the significance of the ScotiaCard in electronic banking, described the two constituent elements of a customer's electronic signature, and the steps taken by the Bank to explain to its customers the significance of their electronic signature and the importance of keeping it confidential. He testified with respect to the function of the Interac Association, its network and the security features the network applies to a customer's electronic signature. He testified as to the Bank's efforts to enhance the security applicable to Internet banking, and the steps that the applicants had taken, in his view, to frustrate those enhanced security features. He reviewed the Bank's experience with respect to a number of fraudulent EMT transfers in the applicants' accounts. His testimony then went on to describe the role of CertaPay and Acxsys Corporation with respect to EMTs, the introduction by Acxsys of a 30 minute hold on EMT transactions, and the purpose of this hold. He reviewed the sending and receipt limits applicable to EMTs. Mr. Rosatelli also testified with respect to the development of Interac Online, how it functions from a customer's perspective, the flow of funds, the applicable transaction limits, how Interac Online differs from the UseMyBank Service, and the profitability to date of Interac Online. He identified the merchants that currently use Interac Online as a payment mechanism. He reviewed what is involved in obtaining bill payee status at the Bank, bill payee transaction limits, and he identified both the former and the current Bill Payment Service Agreements, explaining the purpose of the revision to the form of agreement. He described the flow of funds in a bill payment transaction and how, in his view, the applicants are not able to comply with the provisions of the new Bill Payment Service Agreement. Finally, he testified as to his involvement with respect to the applicants' banking services, the investigations of the applicants' accounts that occurred in 2003 and 2005 and the results of those investigations.

Mr. Ronald King

Ronald King is Vice President and Chief Anti-Money Laundering Officer of the Scotiabank group of companies. He testified about the historic money laundering legislative context in Canada, and how money launderers have in the past worked in order to avoid detection. He discussed the creation of the Financial Action Task Force, its annual listing of countries and territories that do not cooperate with anti-money laundering efforts, and the role of OSFI in anti-money laundering efforts. He identified and discussed a number of OSFI and FINTRAC Guidelines. He also described in some detail the Bank's Anti-Money Laundering Handbook, the Know Your Customer's Customer rule, the Bank's obligation to terminate banking relationships in certain circumstances, and the Anti-Money Laundering Handbook's provisions as they apply to money services businesses, unusual transaction reports and suspicious transaction reports. He discussed the role of the Bank's anti-money laundering group in the decision to terminate the

applicants' accounts, and his money laundering concerns with the applicants' business. He concluded with comments on Mr. Bensimon's report and expressed his view that the applicants are not compliant with their own anti-money laundering obligations under the applicable legislation.

Mr. David Jones

David Jones is Director of Web Business at WestJet. He testified with respect to the average dollar purchase of WestJet tickets, the factors that his company would weigh when considering partnering with new payment providers, and his opinion that it would be a "non-starter" for WestJet to partner with an entity that admits that there are periods when the banking customer's password is not encrypted.

[290] **SCHEDULE C**

Undertaking

The applicants undertake that, as a condition of Scotiabank supplying bill payee status, associated bank accounts, and/or accounts for depositing EMTs:

A. Money laundering

1. The applicants will comply with all applicable anti-money laundering legislation in Canada.
2. The applicants will remediate all deficiencies in their anti-money laundering procedures identified by Mr. Bensimon.
3. The applicants will provide copies of all written manuals, procedures, etc, relating to their anti-money laundering procedures to Scotiabank.
4. The applicants will provide the Scotiabank with a list of all current active Merchant Clients.
5. The applicants will provide the Scotiabank with copies of contracts with all new Merchant Clients and the associated industry code and due diligence.
6. The applicants will provide the Scotiabank with a report of the volume of funds sent to each Merchant Client on a frequency to be determined but not more than monthly.
7. The applicants will provide the Scotiabank with annual Financial Statements.
8. The applicants will not process funds where there is reason to believe the funds are destined for a country on the NCCT list.
9. The applicants will submit to periodic audits (not more than annually) upon request of Scotiabank, by an anti-money laundering expert acceptable to both the applicants and Scotiabank.
10. The applicants will remediate any deficiencies in compliance with anti-money laundering legislation identified by such an audit, and, in addition, will adopt any reasonable best practices recommended by such an audit.
10. The applicants will remediate any deficiencies in compliance with anti-money laundering legislation identified by such an audit, and, in addition, will adopt any reasonable best practices recommended by such an audit.

B. Computer security

11. The applicants will submit to periodic computer security audits (not more than annually) upon request of Scotiabank, by a computer security expert acceptable to both the applicants and Scotiabank.

12. The applicants will remediate any deficiencies in their computer security procedures identified by such an audit, and, in addition, will adopt any reasonable best practices recommended by such an audit.

C. Blocking access by persons present in the United States

13. The applicants agree that they will not have bill payee status with respect to customers of Scotiabank that are not resident in Canada.

14. The applicants will block payments to online casinos or their management companies where it is able to determine from the account holder's profile on the Scotiabank online banking website that the account holder is resident in the United States.

General

15. Information provided to Scotiabank by the applicants or UseMyBank is provided on the condition that it be kept confidential by Scotiabank.

DATED AT OTTAWA, ONTARIO this 5th Day of October 2006

B-Filer Inc. NPAY Inc. B-Filer Inc cob GuaranteedPayment GPAY

Per: (s) Raymond Grace Per: (s) Raymond Grace Per: (s) Raymond Grace

Raymond F. Grace, Pres. Raymond F. Grace, Pres. Raymond F. Grace, Pres.

APPEARANCES:

For the applicants:

B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and
Npay Inc.

Michael Osborne
Sharon Dalton
Jennifer Cantwell

For the respondent:

The Bank of Nova Scotia

Paul Morrison
Lisa Constantine
Ben Mills
Tanya Pagliaroli

TAB 11



Reference: *Stargrove Entertainment Inc. v. Universal Music Publishing Group Canada*,
2015 Comp. Trib. 26
File No.: CT-2015-009
Registry Document No.: 079

IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the *Competition Act*, RSC, 1985, c C-34 as amended;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

BETWEEN:

Stargrove Entertainment Inc.
(applicant)

and

**Universal Music Publishing Group Canada,
Universal Music Canada Inc.,
Sony/ATV Music Publishing Canada Co.,
Sony Music Entertainment Canada Inc.,
ABKCO Music & Records, Inc.,
Casablanca Media Publishing, and
Canadian Musical Reproduction Rights Agency Ltd.**
(respondents)



Decided on the basis of the written record.
Before Judicial Member: Barnes J.
Date of Reasons for Order and Order: December 14, 2015

**REASONS FOR ORDER AND ORDER GRANTING AN APPLICATION FOR
LEAVE UNDER SECTION 103.1 OF THE COMPETITION ACT**

I. OVERVIEW

[1] The Applicant, Stargrove Entertainment Inc. (“Stargrove”), seeks leave under section 103.1 of the *Competition Act*, RSC, 1985, c C-34 as amended, to bring an application against the Respondents for the following substantive relief:

- (a) an Order pursuant to subsection 75(1) of the Act requiring the Respondents to accept the Applicant as a customer within 15 days of the Tribunal’s order, on the same standard trade terms applicable to other applicants to the Canadian Musical Reproduction Rights Agency Ltd.;
- (b) an Order pursuant to subsection 76(2) of the Act prohibiting the Respondents from continuing to engage in the practices that form the basis of this Application;
- (c) an Order pursuant to subsection 76(2) of the Act requiring the Respondents to accept the Applicant as a customer within 15 days of the Tribunal’s order, on the same standard trade terms applicable to other applicants to CMRRA;
- (d) an Order pursuant to subsection 76(8) of the Act prohibiting the Respondents from continuing to engage in the practices that form the basis of this Application;
- (e) an Order pursuant to subsection 76(8) of the Act requiring the Respondents to accept the Applicant as a customer within 15 days of the Tribunal’s order, on the same standard trade terms applicable to other applicants to CMRRA;
- (f) an Order pursuant to subsection 77(2) of the Act prohibiting the Respondents from continuing to engage in exclusive dealing;
- (g) an Order pursuant to subsection 77(2) of the Act requiring the Respondents to accept the Applicant as a customer within 15 days of the Tribunal’s order, on the same standard trade terms applicable to other applicants to CMRRA.

[2] In support of the application for leave Stargrove filed an Application Record and a Supplementary Application Record. The Respondents replied with Written Representations. Included with the responding material was an affidavit sworn on behalf of Sony Music Entertainment Canada Inc. (“Sony Canada”) stating that it “does not own or control any copyright rights in musical works”. This was filed in support of Sony Canada’s argument that it is not a proper party to this proceeding. A similar affidavit was filed on behalf of Casablanca Media Publishing (“Casablanca”). Casablanca sought leave to file under Rule 119(3) of the *Competition Tribunal Rules*, SOR/2008-141, but Sony Canada neglected to do so. When Stargrove filed its Reply, it, too, included an affidavit without seeking permission. That affidavit attached a relevant email that was deliberately withheld from the Application Record ostensibly for privacy concerns.

[3] Subsequently the Canadian Musical Reproduction Rights Agency Ltd. (“CMRRA”), asked for leave to file a 10-paragraph sur-reply that, for the most part, repeated arguments it had made in its Written Representations. That submission drew an objection from Stargrove. It, too, took the opportunity to repeat some of its earlier arguments. The CMRRA then filed a sur-sur-sur-reply, this time without the courtesy of seeking leave.

[4] While the *Competition Tribunal Rules* contemplate a degree of informality, they do not countenance unlimited, unrestrained and unauthorized filings. Where leave is required to file affidavit evidence or to make a further submission, it must be sought.

[5] There is similarly no authority in the Rules to file Reply evidence as of right and the only basis to do so is under Rule 2 with leave. This also applies to the filing of arguments in sur-reply, sur-sur-reply and sur-sur-sur-reply.

[6] Notwithstanding the above-noted irregularities, I have considered the additional evidentiary materials received. I have done so on the basis that those affidavits would have been admitted had leave been properly sought.

[7] Leave is denied for the CMRRA’s sur-reply and sur-sur-sur-reply and for Stargrove’s response in sur-sur-reply. Nothing in those submissions adds anything of significance to the issues before me and, on that basis, I have ignored them.

II. BACKGROUND

[8] Stargrove says that, since 2014, it has carried on business as a record label manufacturing and selling competitively-priced musical compact discs (“CDs”). It characterizes the Respondent, CMRRA, as a music licensing collective representing the interests of music publishers on whose behalf it issues licenses for the reproduction of musical works on payment of appropriate fees. The remaining corporate Respondents are said to be record labels and/or music publishers who, in this case, allegedly hold or control copyright in certain musical works for which the issuance of a mechanical license is required before reproduction can take place. Stargrove is aggrieved by the refusal of the Respondents to issue mechanical licenses authorizing the reproduction by Stargrove of five recordings, namely: the Beatles “*Love Me Do*”, the Beatles “*Can’t Buy Me Love*”, the Rolling Stones “*Little Red Rooster*”, Bob Dylan “*It Ain’t Me Babe*” and The Beach Boys “*Fun, Fun, Fun*”. In each case, copyright in the sound recording has expired but copyright in the musical work still exists in favour of at least some of the Respondents.

[9] According to the affidavit of the sole Director and Officer of Stargrove, Mr. Terry Perusini, its business model is based on the production and sale of low-cost CDs for musical works of three types:

- (a) sound recordings for which Stargrove owns the sound recording copyright;

- (b) sound recordings licensed to Stargrove from various independent labels; and
- (c) sound recordings that are now in the public domain and for which master recording licenses are no longer legally required but where mechanical licenses are still required from the publishers.

[10] In early 2015, Stargrove applied to the CMRRA seeking mechanical licenses to reproduce the five titles noted above. It submitted a royalty payment of \$13,799.10 based on a “standard” mechanical royalty rate of \$0.083 per song. The CMRRA cashed Stargrove’s cheque and Stargrove proceeded to produce CDs (12,400 units) for sale through a distributor to Walmart at a retail price of \$5. Sales of some of these CDs were strong.

[11] According to Mr. Perusini, from January 22, 2015 each of the Respondents took steps to refuse or to block the issuance of mechanical licenses to Stargrove or to otherwise discourage the sale of its CDs. On February 25, 2015, the CMRRA returned Stargrove’s royalty payment. At the same time negative reviews began to appear on the Walmart website criticizing the quality of Stargrove’s CDs. According to evidence filed on behalf of Stargrove, these supposed customer reviews were the product of an in-house campaign initiated by the Respondent, Universal Music Canada Inc. (“Universal Canada”), to convince Walmart to remove the Stargrove CDs from its shelves and to thereby protect Universal’s market share.

[12] Stargrove then made efforts to negotiate with CMRRA and with some of the Respondents, (Sony/ATV Music Publishing Canada Co., Sony Canada, ABKCO Music & Records, Inc. (“ABKCO”), Casablanca), to obtain the required mechanical licenses. The CMRRA did obtain authorizations for a few of the songs in issue but not for most of them. Stargrove has been unable to pursue its intended line of business in connection with the protected song titles and Mr. Perusini estimates an immediate loss of \$150,000 in wholesale sales through Walmart.

[13] Mr. Perusini characterizes the overall impact of the Respondents’ conduct in the following way:

Stargrove’s business model relies heavily on producing CD compilations of sound recordings that are in the public domain. The Respondents’ refusal to license Stargrove under usual licensing terms has caused losses to Stargrove and has cut off any future growth of the business.

I estimate that, if Stargrove’s business is able to continue and we are able to sell a mix of licensed sound recordings, our own sound recordings, and public domain sound recordings, we will achieve sales of \$3 to \$5 million per year in Canada.

Under our current business model, without being able to obtain mechanical licences on ordinary terms through CMRRA, Stargrove will go out of business.

[14] The affidavit of Mario Bouchard filed on behalf of Stargrove describes the typical business arrangements that apply to the issuance of mechanical licenses in Canada. Mr. Bouchard is a former general counsel to the Copyright Board. He acknowledges that compulsory licensing to record a musical work ended in 1988 and “in law, a record label [eg. Stargrove] should obtain the necessary mechanical licenses before pressing a CD, let alone releasing it” (see para 29). Nevertheless, according to Mr. Bouchard – and verified by David Basskin in a 2009 affidavit sworn in an unrelated Ontario legal proceeding – in practice record producers routinely release new recordings without first obtaining the requisite mechanical licenses from copyright holders or the CMRRA. When a mechanical license is issued by the CMRRA on behalf of the holder of the copyright, the necessary royalties are paid by the licensee on generally applicable business terms. It is of some additional note that Mr. Basskin’s affidavit also stated that “a given copyright owner is entitled to refuse a license request and might well do so...” (see Application Record at p 381, para 51). On the other hand, music publishers will often be motivated to obtain appropriate royalties for the reproduction of their songs.

[15] The general background to Stargrove’s claim to relief is captured in the first four paragraphs of its Proposed Notice of Application:

1. Stargrove is a record label that manufactures CD compilations of sound recordings of The Beatles, The Rolling Stones, and other artists for sale at low prices (\$5.00) at Walmart stores. It can offer such low prices because the sound recordings it uses are no longer protected by copyright; they are in the public domain. As such, Stargrove does not require a “master sound recording licence” to use the recordings.
2. Although the sound recordings are in the public domain, the musical works (songs) on the recordings continue to be copyright protected. Stargrove requires what are known as “mechanical licences” for each song it seeks to use. In Canada, there are standard industry practices and terms that govern the issuance of mechanical licences; for the songs relevant to this application, these are administered by the Canadian Musical Reproduction Rights Agency. Stargrove is willing to abide by those terms and practices. The Respondents, however, have banded together to shut Stargrove out, having CMRRA deny Stargrove any mechanical licences (not just for the titles in question).
3. Stargrove is being targeted for its low pricing model, but the real victims are consumers; instead of being able to buy popular titles for just \$5.00 per CD, they pay much more.
4. The Respondents have campaigned to block Stargrove by pressuring Stargrove’s distributor, concocting false negative reviews of Stargrove’s CDs, and having CMRRA refuse to deal with Stargrove on standard terms. They have violated sections 75,

76, and 77 of the Competition Act, depriving consumers of competitive prices and artificially extending copyright over public domain recordings. This has negatively affected competition. Stargrove seeks to be treated fairly, in accordance with standard industry terms. Since the Respondents are unwilling to engage with Stargrove, Stargrove asks this Tribunal to order them to do so.

[16] The Respondents oppose the granting of leave on various grounds discussed below.

The Test for Leave

[17] Subsection 103.1(1) of the *Competition Act*, RSC, 1985, c C-34 as amended (the “Act”) gives any person the right to apply to the Tribunal for leave to make an application under sections 75, 76 or 77 – the three provisions under which Stargrove seeks relief.

[18] Subsection 103.1(7) provides that leave may be granted under section 75 or section 77 if the Tribunal “has reason to believe that the applicant is directly and substantially affected in the applicant’s business by any practice referred to in one of those sections that could be subject to an order under that section”.

[19] Subsection 103.1(7.1) authorizes the Tribunal to grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order. For this provision, the words “substantially affected” are not present.

[20] The general approach to the granting of leave for relief under section 75 was set out by Justice Marshall Rothstein in *Symbol Technologies Canada ULC v Barcode Systems Inc.*, 2004 FCA 339, [2005] 2 FCR 254:

[16] In *National Capital News Canada v. Canada (Speaker House of Commons)* (2002), 23 C.P.R. (4th) 77, Dawson J., in her capacity as a member of the Competition Tribunal, reviewed the test for the granting of leave under subsection 103.1(7). After citing authorities on the term "reasonable grounds to believe" she stated at paragraph 14 of her reasons:

“Accordingly on the basis of the plain meaning of the wording used in subsection 103.1(7) of the Act and the jurisprudence referred to above, I conclude that the appropriate standard under subsection 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a bona fide belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order.”

I agree with Dawson J. and adopt her analysis and conclusion as to the test for granting leave under subsection 103.1(7).

[17] The threshold for an applicant obtaining leave is not a difficult one to meet. It need only provide sufficient credible evidence of what is alleged to give rise to a bona fide belief by the Tribunal. This is a lower standard of proof than proof on a balance of probabilities which will be the standard applicable to the decision on the merits.

[18] However, it is important not to conflate the low standard of proof on a leave application with what evidence must be before the Tribunal and what the Tribunal must consider on that application. For purposes of obtaining an order under subsection 75(1), a refusal to deal is not simply the refusal by a supplier to sell a product to a willing customer. The elements of the reviewable trade practice of refusal to deal that must be shown before the Tribunal may make an order are those set out in subsection 75(1). These elements are conjunctive and must all be addressed by the Tribunal, not only when it considers the merits of the application, but also on an application for leave under subsection 103.1(7). That is because, unless the Tribunal considers all the elements of the practice set out in subsection 75(1) on the leave application, it could not conclude, as required by paragraph 103.1(7), that there was reason to believe that an alleged practice could be subject to an order under subsection 75(1).

[19] The Tribunal may address each element summarily in keeping with the expeditious nature of the leave proceeding under section 103.1. As long as it is apparent that each element is considered, the Tribunal's discretionary decision to grant or refuse leave will be treated with deference by this Court. But the Tribunal's discretion to grant leave is not unfettered. The Tribunal must consider all the elements in subsection 75(1).

[20] The words of subsection 103.1(1) support this interpretation of the requirements of subsection 103.1(7). Subsection 103.1(1) requires that the application for leave be accompanied by an affidavit setting out the facts in support of the application under subsection 75(1). That affidavit must therefore contain the facts relevant to the elements of the reviewable trade practice of refusal to deal set out in subsection 75(1). It is that affidavit which the Tribunal will consider in determining a leave application under subsection 103.1(7). While the standard of proof on the leave application is lower than when the case is considered on its merits, nonetheless, the same considerations are relevant to both and must be taken into account at both stages.

[21] The above discussion also informs the granting of leave under sections 76 and 77 (see also: *Safa Enterprises Inc. v Imperial Tobacco Company Limited*, 2013 Comp. Trib. 19, at para 15).

III. ANALYSIS

[22] I am not satisfied that Stargrove has met its burden for leave to apply for relief under either section 75 or section 77. I am, however, satisfied that it has made a case for leave to seek relief under section 76.

[23] There are two fundamental weaknesses to Stargrove's claim to pursue relief under sections 75 and 77. Standing squarely in the way of a claim to section 75 relief is a decision of the Tribunal in *Canada (Competition Act, Director of Investigation and Research) v Warner Music Canada Ltd*, [1997] CCTD No 53, 78 CPR (3d) 321 ("*Warner Music*"). I do not agree with Stargrove's assertion that this decision can be distinguished or, alternatively, that it should be ignored.

[24] In *Warner Music*, the Commissioner brought an application alleging that the Respondents' (collectively "Warner Music") refusal to grant copyright licenses to a competitor on usual trade terms allowing it to make sound recordings from master recordings contravened section 75 of the Act.

[25] Warner Music successfully moved to strike the application. In striking out the Commissioner's application, the Tribunal said the following:

30 Having considered the submissions discussed here and the additional points in the parties' memoranda, the Tribunal has concluded that on the facts of this case the licences are not a product as that term is used in section 75 of the Act, because on a sensible reading section 75 does not apply to the facts of this case. Although a copyright licence can be a product under the Act, it is clear that the word "product" is not used in isolation in section 75, but must be read in context. The requirements in section 75 that there be an "ample supply" of a "product" and usual trade terms for a product show that the exclusive legal rights over intellectual property cannot be a "product" -- there cannot be an "ample supply" of legal rights over intellectual property which are exclusive by their very nature and there cannot be usual trade terms when licences may be withheld. The right granted by Parliament to exclude others is fundamental to intellectual property rights and cannot be considered to be anti-competitive, and there is nothing in the legislative history of section 75 of the Act which would reveal an intention to have section 75 operate as a compulsory licensing provision for intellectual property.

31 As well, the Tribunal has accepted the respondents' submissions that, when considered in the context of sections 32 and 79(5) of the Act, the term "product" in section 75 cannot be read to include these copyright licences. These submissions are discussed above and need not be repeated here.

32 Although the Tribunal was commenting on section 79 and intellectual property (trade-marks) in *Director of Investigation and*

Research v. Tele-Direct (Publications) Inc., we are of the view that its statement is very compelling in the circumstances of the motion before us:

The respondents' refusal to licence their trade-marks falls squarely within their prerogative. Inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to grant a licence; selectivity in licensing is fundamental to the rationale behind protecting trade-marks. The respondents' trade-marks are valuable assets and represent considerable goodwill in the marketplace. The decision to license a trade-mark -- essentially, to share the goodwill vesting in the asset -- is a right which rests entirely with the owner of the mark. The refusal to license a trade-mark is distinguishable from a situation where anti-competitive provisions are attached to a trade-mark licence.

The *Copyright Act* is similar to the *Trade-marks Act*, in that it allows the trade-mark owner to refuse to license and it places no limit on the sole and exclusive right to license. [Footnotes omitted]

[26] This analysis fully applies to the section 75 relief sought by Stargrove. Relief is simply not available under this provision where the impugned conduct involves the refusal to grant a license over copyrighted material. The ratio in *Warner Music* is further strengthened by the exception found in subsection 76(3) making price maintenance relief available notwithstanding the existence of exclusive intellectual property rights. If Parliament intended that relief under sections 75 or 77 could be had in the face of such an exclusive right, presumably it would have said so just as it did in section 76.

[27] The general concerns expressed by the Tribunal in *Warner Music* also apply to the availability of relief under section 77. There is simply no reasonable interpretation of section 77 that would make it applicable to the factual allegations advanced by Stargrove. Put simply, the conduct Stargrove complains about is not a form of exclusive dealing or tied selling as those terms are defined in the Act.

[28] The second fundamental deficiency in Stargrove's application for leave under sections 75 and 77 arises from its evidence concerning the impact of the alleged conduct on its business. Subsection 103.1(7) requires evidence of a direct and substantial affect. The evidence presented by Stargrove is manifestly insufficient to meet the burden it carries to show a "substantial" affect. Despite Mr. Perusini's acknowledgement that Stargrove's business model includes the sale of musical works it controls or which are now fully within the public domain, he has provided no evidence about the size of that part of its overall business relative to the market for the disputed musical works.

[29] I have no doubt that the copyrighted CDs Stargrove seeks to produce and sell represent a potentially lucrative market but I cannot tell on this record whether access to those products is possibly existential or simply profitable in some largely unsubstantiated

measure. To be substantial there must be an effect that is “important or significant”; it need not be such that the affected party will be unable to carry on: see *Nadeau Poultry Farm Limited v Group Westco Inc. et al*, 2009 Comp. Trib. 6. Mr. Perusini offers the bare conclusion that Stargrove will fail without access to these products but he provides no credible data in support of that opinion or to support his estimates of potential sales going forward. On the whole, this evidence is insufficient to give rise to a *bona fide* belief by the Tribunal that the denial of access to the musical works in issue could substantially affect Stargrove’s business and the application under sections 75 and 77 fails on that basis as well.

[30] I am satisfied that Stargrove has, however, met the threshold for leave under section 76 of the Act. As noted above, subsection 103.1(7.1) only requires that a party has been “directly affected” by the alleged reviewable conduct. For purposes of leave, that requirement is clearly met.

[31] In light of the limited scope of *Warner Music* it remains an open question whether a copyright is, for some statutory purposes, a “product”. In *Warner Music* at para 30 the Tribunal recognized that possibility: also see *Cinemas Guzzo Inc. v Canada*, 2005 FC 691 at para 56 aff’d, 2006 FCA 160.

[32] Perhaps of more significance is the recognition in subparagraph 76(1)(a)(ii) that reviewable price maintenance includes direct or indirect discriminatory conduct motivated by the low-pricing policy of another person.

[33] If Stargrove is able to establish that some or all of the Respondents, singularly or in concert, discriminated against it by refusing to issue mechanical licenses motivated by Stargrove’s low-pricing practices, an argument for section 76 relief could be available. The case for relief could be enhanced by credible evidence that mechanical licenses are routinely granted by music publishers to record labels on standard business terms and that Stargrove was treated differently.

[34] In *The Queen v Royal LePage Real Estate Services Ltd*, [1994] AJ No 823, 27 WCB (2d) 428, the Alberta Court of Queen’s Bench held that discrimination under the earlier equivalent criminal provision meant “treating a person differently than another without proper justification” (see para 25). Similarly, in the text *Competition Law of Canada* (Huntington, New York: Juris Publishing, 2003) (loose-leaf revision 22-2009) (Davies, Ward and Beck), the authors state:

The Background Papers also note with regard to the prohibition on refusing to supply “or otherwise discriminating” in now repealed paragraph 61(1)(b) (currently paragraph 76(1)(a)(ii)) that discrimination may “encompass certain unfair pressures that do not amount to a direct refusal to supply but that have the effect of disturbing the retailer’s suppliers, e.g., line breaking, lost or delayed orders.” [Footnotes omitted]

[35] By virtue of paragraph 76(3)(c), the fact that the impugned conduct is carried out by a party with an exclusive intellectual property right is not a bar to relief. Presumably,

by enacting this provision, Parliament recognized that some forms of anti-competitive conduct should be the subject of relief notwithstanding the existence of intellectual property rights. In the face of this provision, I do not agree that it is clear the authority to order a compulsory license resides only in section 32 of the Act. It also strikes me that discriminatory conduct falling under section 76 may not be “the mere exercise of an intellectual property right” as described in *Apotex Inc v Eli Lilly and Company*, 2005 FCA 361 at paras 28 and 34.

[36] I also agree with Stargrove that it is still an open question whether, in every instance, section 76 requires product resale or that a product input could never be the subject of relief. These are issues worthy of further consideration.

[37] There is also an argument to be made that relief for reviewable conduct under section 76 is not effectively the equivalent of a compulsory licensing regime. If, in a particular case, a breach of section 76 is proven, it is arguably open to the Tribunal to order an appropriate remedy under that provision. This presumably would not open the door to anyone to obtain a copyright license regardless of the basis for its refusal. Where the owner of an exclusive intellectual property right lawfully refuses a license, no compulsory remedy would be available to the party affected.

[38] I am also satisfied that sufficient credible evidence has been produced to support a *bona fide* belief that holding Stargrove out of the market could have an adverse effect on competition in a market. In an email exhibited to the affidavit of Ms. Anna Kusmider, a representative from Universal Canada noted one-week CD sales of Universal content through Walmart of 4,172 units. The author expressed concern about maintaining market share. Other evidence presented by Mr. Perusini speaks to Stargrove’s initial success in the retail market and to Walmart’s continuing interest in Stargrove’s CDs. The Respondents’ alleged denials of meaningful access to the market could also be an indication of their concern about damage to the existing higher-priced market for this music.

[39] I acknowledge that the evidence bearing on each Respondent’s motives is not particularly strong. This is, however, evidence that lies exclusively within the knowledge of the Respondents and they have not produced any evidence in rebuttal. In the face of the unanswered evidence submitted by Stargrove, I am satisfied that it has met the relatively low evidentiary threshold on this point.

[40] Sony Canada argues that Stargrove’s application for leave should be dismissed against it because it is not a music publisher and holds no copyright interests in any of the musical works in issue. Casablanca makes a similar argument. It says that Stargrove has mistakenly attributed to Casablanca copyright over three songs that, until September 30, 2015, was owned or controlled by a third party (Red Brick songs).

[41] In an affidavit sworn by Ms. Jennifer Mitchell – who is the President of both Red Brick Songs and Casablanca – it is asserted that “the Three Songs were never administered by Casablanca”. She also stated that Casablanca “does not have the ability to grant licenses to Red Brick songs”.

[42] This evidence is seemingly contradicted by an email from the CMRRA to Stargrove stating that Casablanca represents the three songs in issue and had instructed CMRRA not to issue any licenses to Stargrove. This apparent contradiction cannot be resolved on the record before me and, until it is, there is no basis for dismissing this application against Casablanca.

[43] I am similarly not persuaded that it is appropriate at this early stage to dismiss the application for leave against Sony Canada. It may well be correct that Sony Canada does not own or control copyright in any musical works. But that fact may not be sufficient on its own to exempt it from any form of section 76 relief. There is evidence in the record that some of the Respondents may have acted in concert to exclude Stargrove. That is an issue deserving of further evidentiary exploration. The same concern arises in connection with the involvement of the CMRRA. It was presumably acting throughout as an agent but its joinder as a Respondent may be necessary to give practical effect to any order that might ultimately be made in favour of Stargrove.

[44] ABKCO argues that this application should be dismissed against it because the Tribunal lacks jurisdiction where service was carried out *ex juris*. Most of ABKCO's arguments, however, go directly to the merits of the application. I agree with Stargrove that the appropriate approach to this issue required a separate motion challenging the Tribunal's jurisdiction. By challenging this application on the merits, ABKCO has consented to the Tribunal's jurisdiction; see *Van Damme v Gelber*, 2013 ONCA 388 at para 22, 363 DLR (4th) 250.

[45] For the foregoing reasons, this application is allowed in part with costs payable to Stargrove at the mid-point of Column IV.

NOW THEREFORE THE TRIBUNAL ORDERS THAT:

[46] The application for leave seeking relief under section 76 of the Act is allowed;

[47] The application for leave seeking leave for relief under sections 75 and 77 of the Act is dismissed; and

[48] The Applicant is awarded costs against the Respondents, jointly and severally, at the mid-point of Column IV.

DATED at Ottawa, this 14th day of December, 2015.

SIGNED on behalf of the Tribunal by the Presiding Judicial Member.

(s) R.L. Barnes

COUNSEL:

For the applicant:

Stargrove Entertainment Inc.

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Scott McGrath
Bronwyn Roe
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Thomas Kurys

For the respondents:

Universal Music Publishing Group Canada
Universal Music Canada Inc.

Donald B. Houston

Sony/ATV Music Publishing Canada Co.
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Mahmud Jamal
Peter Franklyn

ABKCO Music & Records, Inc.
Casablanca Media Publishing

Michael Osborne

Canadian Musical Reproduction Rights Agency Ltd.

Christopher M. Hersh
Casey M. Chisick
Eric Mayzel

TAB 12



Reference: *Safa Enterprises Inc. v. Imperial Tobacco Company Limited*, 2013 Comp. Trib. 19
File No.: CT-2013-007
Registry Document No.: 21

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER of an application by Safa Enterprises Inc., doing business as My Convenience Store for an order pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended, granting leave to bring an application pursuant to section 76 of the *Competition Act*.

B E T W E E N:

Safa Enterprises Inc.
(applicant)

and

Imperial Tobacco Company Limited
(respondent)



Decided on the basis of the written record
Before Judicial Member: Rennie J. (Chairperson)
Date of Order and Reasons: December 9, 2013
Reasons and Order signed by: Justice Donald J. Rennie

REASONS FOR ORDER AND ORDER

I. INTRODUCTION

[1] Safa Enterprises Inc. (the “Applicant” or “Safa”) seeks leave to make an application pursuant to section 76 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”). Safa has also filed a motion seeking permission to be represented by its manager, Mr. Adnan Mustafa.

[2] For the reasons that follow the application for leave is dismissed.

II. BACKGROUND

[3] The Applicant carries on business as My Convenience Store in Vancouver, British Columbia. It sells various products including tobacco products. The Applicant purchases its tobacco products directly from Imperial Tobacco Company Limited (the “Respondent” or “Imperial”), for resale in its store.

[4] Imperial also supplies its products to New Hasty Market, another convenience store located in close proximity to the Applicant. Imperial, however, charges New Hasty Market less for its tobacco products as New Hasty Market is part of Imperial’s “Preferred Pricing Program” (“PPP”). New Hasty Market’s prices on tobacco products are therefore lower than those sold by the Applicant and the Applicant submits that it has, in consequence, been losing customers.

[5] The Applicant has made various attempts to participate in Imperial’s PPP. Recently, Imperial advised the Applicant that it could participate in the Respondent’s “Low Segment Term Program”, which provides it with rebates on certain brands. However, in a letter dated January 17, 2013, Imperial advised the Applicant that it was not eligible to enrol in the PPP.

[6] On September 19, 2013, Safa applied pursuant to section 103.1 of the Act for leave to make an application under section 76, the price maintenance provision. It also filed a motion seeking leave to be represented by its manager.

III. MOTION FOR LEAVE TO BE REPRESENTED BY AN OFFICER

[7] Safa’s Motion is filed pursuant to Rule 34 of the *Competition Tribunal Rules*, SOR/2008-141, and Rule 120 of the *Federal Courts Rules*, SOR/98-106.

[8] In an affidavit filed in support of the Motion, the sole shareholder and director of the Applicant, Ms. Raina Adnan, explains that the Applicant does not have the necessary funds to retain legal counsel. Attached to the affidavit are unaudited financial statements. She further explains that Mr. Adnan Mustafa, her husband, has a background in business studies and that he will ensure that the Tribunal hearing will be conducted in a business-like manner.

[9] Factors that are relevant in determining whether to grant leave include the company’s ability to afford a lawyer, the complexity of the legal issues, the ability of the proposed representative to handle the matter expeditiously; and whether the proposed representative will appear as both advocate and witness (*The Commissioner of Competition v. Fabutan Corporation*, 2005 Comp. Trib. 45).

[10] The Respondent has not opposed the Applicant's motion and, in the circumstances of this case, the motion is granted. The Tribunal finds that there is convincing evidence that the Applicant does not have the ability to afford a lawyer and that Mr. Mustafa is able to handle this case expeditiously and wisely.

IV. APPLICATION FOR LEAVE TO FILE A S. 76 APPLICATION

[11] Subsection 103.1(7) of the Act, reads as follows:

The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.	Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.
---	--

[12] In *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41, the Tribunal interpreted subsection 103.1(7) as follows (at para. 14):

Accordingly on the basis of the plain meaning of the wording used in s. 103.1(7) of the Act and the jurisprudence referred to above, I conclude that the appropriate standard under s. 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a bona fide belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order.

[13] This test was subsequently adopted by the Federal Court of Appeal in *Symbol Technologies Canada ULC. v. Barcode Systems Inc.*, 2004 FCA 339.

[14] In this case, the Applicant is seeking leave to file an application in accordance with section 76. The Tribunal may grant leave pursuant to subsection 103.1(7.1) if it "has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section".

[15] While the language used in subsection 103.1(7.1) differs somewhat from that used in subsection 103.1(7), there are sufficient similarities to apply the principles developed by Justice Dawson in *Milliken*, above. I conclude that under subsection 103.1(7.1), the Tribunal must determine whether the leave application is supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly affected by the conduct referred to in section 76, and that the conduct in question could be subject to an order.

[16] The question at issue in this case is whether there is sufficient credible evidence to support a finding that there are reasonable grounds to believe that Imperial's conduct could be subject to an order under section 76.

[17] In considering this leave application, all the elements of section 76 must be addressed (see: *Barcode*, above, at para. 18-19). For example, with respect to the requirement of the presence of an adverse effect on competition in the market, set out in paragraph 76(1)(b), there must be some evidence led by the applicant and some consideration by the Tribunal of the effect of the conduct on competition in the market (see *Barcode*, above, at para. 23). However, the threshold at the leave stage is low.

[18] In this case, the Applicant asserts that the Respondent has engaged in discriminatory conduct, under subparagraph 76(1)(a)(ii):

76. (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that

(a) a person referred to in subsection (3) directly or indirectly

...

(ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons;
and

(b) the conduct has had, is having or is likely to have an adverse effect on

76. (1) Sur demande du commissaire ou de toute personne à qui il a accordé la permission de présenter une demande en vertu de l'article 103.1, le Tribunal peut rendre l'ordonnance visée au paragraphe (2) s'il conclut, à la fois :

a) que la personne visée au paragraphe (3), directement ou indirectement :

...

(ii) soit a refusé de fournir un produit à une personne ou catégorie de personnes exploitant une entreprise au Canada, ou a pris quelque autre mesure discriminatoire à son endroit, en raison de son régime de bas prix;

b) que le comportement a eu, a ou aura vraisemblablement pour effet de

competition in a market.

nuire à la concurrence dans un marché.

[emphasis added]

[mes soulignements]

[19] There is some debate as to whether section 76 requires an applicant to establish that its low pricing policy is the only cause of the refusal to supply or discrimination, or whether it is sufficient for the applicant to establish that although several proximate causes exist, the low pricing policy is one of them.

[20] It is not necessary to resolve this issue at the leave stage and if there are any facts in the affidavit that might meet the requirement of subparagraph 76(1)(a)(ii), for example some evidence of a nexus between the alleged discrimination and the Applicant's alleged low pricing policy, the benefit of any doubt should work in favour of granting leave (see *Barcode*, at para. 27). In this case, the Applicant has included in its application, letters that it has received from the Respondent and these letters do not clearly explain why the Applicant has not met the eligibility criteria.

[21] There is some evidence that Safa has offered low prices in the past on the Respondent's tobacco products. In an e-mail dated November 14, 2012, addressed to Mr. Rob Laing, the Applicant's Accounts Representative at Imperial, Mr. Mustafa wrote as follows:

As we mentioned during your visit that our pricing for Imperial tobacco products were already one of the lowest in Vancouver. [...] Our neighbour is [...] practicing this policy of selling products at or below our cost to get us out of the business and we believe Imperial Tobacco [is] supporting/helping him indirectly in his cause as he is our direct competition.

[22] Mr. Mustafa states as follows in paragraph 48 of his affidavit:

The conduct of [Imperial] of low pricing policy has had, is having and will be having an adverse effect on [the] Applicant's business and competition in the market.

[23] In its reply, the Applicant explains at paragraph 47 that it had to reduce its prices to or below cost "because PPP was offered to [its] direct competitor":

As far as **low pricing policy** of the Applicant is concerned [Safa] wants to keep the prices of [Imperial]'s products **lower** than the prices of [Safa]'s direct competitor (NHM) to increase sales volume but it cannot be possible if [Safa]'s acquisition cost of [Imperial]'s products is higher or equal to NHM's selling prices of [Imperial]'s products. [Safa]'s prices of other companies' tobacco

products and other products offered are one of the cheapest in Vancouver.

[24] However, it is not the low pricing policy of Imperial which is important at this stage, but that of the applicant who is seeking leave. The Applicant's low pricing policy, described above, is not the policy the legislator had in mind when drafting section 76 of the Act. The mischief to which the provision is directed (to use the example of the present case) would be the refusal of Imperial to supply Hasty New Market because Hasty re-sells Imperial's products at a price to which Imperial objects.

[25] In the circumstances, while the Tribunal understands that the Applicant faces a difficult situation, it finds that there is not, on the record before the Tribunal, reasonable grounds to believe that Imperial's conduct could be subject to an order under section 76. The application will therefore be dismissed.

[26] However, the application will be dismissed without prejudice.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[27] The Applicant's motion for leave to be represented by an officer is granted.

[28] The application for leave to file an application pursuant to section 76 is hereby dismissed without costs and without prejudice.

DATED at Ottawa, this 9th day of December 2013.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Donald J. Rennie

APPEARANCES:

For the applicant:

Safa Enterprises Inc.

Adnan Mustafa

For the respondent:

Imperial Tobacco Company Limited

Michelle Lally

Adam Hirsh

TAB 13



THE FUTURE OF COMPETITION POLICY IN CANADA



Innovation, Science and
Economic Development Canada

Innovation, Sciences et
Développement économique Canada

Canada

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EXECUTIVE SUMMARY

Competition law has been thrust into the centre of Canadian policy debate as concerns mount about affordability, market concentration and the enormous influence of new economic giants. Our economy has changed: the rise of digital commerce has upended the way Canadians do business and consume products, leading to a new class of dominant gatekeepers and uneven growth. Following the COVID-19 pandemic, an increasing cost of living threatens to worsen inequalities and has Canadians worried about their bottom line and the security of supply chains.

With the last comprehensive review of the *Competition Act* in 2007-08, there have been increasing calls to revisit the way this law operates, and how the Government can better protect markets that benefit Canada's economy and its participants. Although reform to this law is only one of several avenues that the Government has pursued to modernize our economic frameworks, it is committed to a renewed role for the Competition Bureau in protecting the public in our modern marketplace, in line with steps taken by many of Canada's key international partners.

In asking ourselves what works and what need improvement with the *Competition Act*, there are four key themes that emerge:

- The often narrow circumstances where the Competition Bureau can intervene;
- The constraints on what the Bureau can do once it does intervene;
- The sometimes unprincipled remedies available to address certain forms of anti-competitive conduct;
- The new challenges posed by how data-driven and digital markets operate.

While amendments to the *Competition Act* contained in 2022 Budget implementation legislation took initial steps to address aspects of the law where solutions to shortcomings in the law were readily identifiable, the Government

now seeks to improve the framework more fundamentally. As it considers further, more substantial reform, the Government is canvassing a wide variety of views on how to improve the framework most effectively.

This paper explores the main pillars of the *Competition Act*, and how its provisions may be modernized to better serve the public interest. Areas where the Government believes reforms may be warranted include the following:

- better addressing **potentially harmful mergers** that currently escape scrutiny or remedy, including through the operation of the efficiencies defence, in a timely fashion;
- ensuring the necessary elements are in place to remedy unilateral forms of anti-competitive conduct, such as **abuse of a dominant position**, notably with regard to large online platforms;
- more broadly recognizing and penalizing coordinated action between businesses that is harmful to competition, such as **competitor collaborations**;
- better considering **effects on labour** throughout the Act;
- taking into account the implications of new technology and business practices for **deceptive marketing** provisions;
- bolstering the effectiveness of the **Competition Bureau's powers** in today's economy, including the limits on its ability to make binding decisions or seek information within and outside enforcement; and
- potentially expanding the scope of **private recourse**, and ensuring the effective operation of the Competition Tribunal.



INTRODUCTION

Competition law and policy are having a moment of reckoning. With views about affordability, concentration, market power and digital platforms regularly featured in the pages of newspaper op-ed sections, vigorous debate in legislatures around the world, and numerous expert reports helping to shape public understanding of an occasionally complicated concept, marketplace framework policies and antitrust law are under the spotlight. This trend has become even more pronounced in the wake of supply chain disruptions, rising costs of staple items, and worries about the fairness and dynamism of markets.

The Competition Policy Review Panel made various recommendations in its landmark report of 2008,¹ which were largely brought into the law the following year. However, the fundamentals of Canadian competition policy were forged in the 1970s and 1980s. The evolution of our world and our economy – the rise of free trade, the Internet, and new multinational giants – has many asking whether the system is still fit for purpose.

Some aspects of competition policy provoke very strong and broad public debate, while other elements of the law are limited to technical disputes among specialists. Competition policy's role in the economy can be simultaneously overstated and understated: although competition law itself seeks to address potentially anti-competitive instances of firm behaviour, a competitive economy depends on the contributions of numerous innovative and effective businesses, as well as appropriate business frameworks and regulations across a wide swath of domains. In discussion of competition, the line can become blurred between government policy on competition, competitiveness, consumer affairs, and market regulation, all of which are subject to various policy levers at different levels of government.

The federal *Competition Act* (the Act), Canada's antitrust statute, occupies only one, but an important, part of this landscape. Canada was the world's first country with antitrust legislation, and its approach has undergone many changes over the years to keep the Act effective and adapted to its environment. The Competition Bureau (the Bureau), as its enforcement agency, has similarly reshaped itself to remain responsive, most recently leveraging a significant

¹ *Compete to Win*, Final Report of the Competition Policy Review Panel, June 2008.

increase in available resources following the 2021 federal Budget to step up its enforcement capacity, including the establishment of a Digital Enforcement and Intelligence Branch.²

The landscape nevertheless continues to change. Digital innovation is transforming Canada's economy and improving Canadians' quality of life by enhancing productivity, diversifying the consumer experience, connecting people, and opening up new markets. The COVID-19 pandemic only reinforced the extent to which Canadian businesses and consumers rely on digital commerce to meet their needs. The rising cost of living has led to appeals for any manner of intervention that may help to keep prices in check. As concerns about inequality and inclusive growth continue to surface, and concentration of economic power raises issues not only with respect to the marketplace, but also the health of Canada's social landscape and democracy, the importance of a fair and trustworthy marketplace, where all Canadians are able to share in the benefits of the traditional and non-traditional economy, remains paramount.

Canada's competition framework, the re-examination of which began in earnest with the launch of the Digital Charter,³ has already come under increased scrutiny in Canada's Parliament, while new legislative approaches are being brought forward in the United States and Europe. The Government is now seeking feedback on Canada's competition law and policy framework. The Government aims to ensure that the regime remains fit for purpose, able to stand up to the new challenges brought about by a changing and more digital economy.

² Government of Canada, *Budget 2021: A Recovery Plan for Jobs, Growth, and Resilience*, April 19, 2021.

³ On May 21, 2019, the then-Minister of Innovation, Science and Economic Development (ISED) wrote to the Commissioner of Competition requesting that the Bureau work with competition policy leads at ISED to examine whether Canada's competition law, policy, and practice are keeping pace with the dynamism of the marketplace and continuing to build a foundation of trust for Canadians. Many of the Department's observations and suggestions in this paper have been informed by this dialogue. See the Honourable Navdeep Bains, *Letter from Minister of Innovation, Science and Economic Development to the Commissioner of Competition*, Innovation, Science and Economic Development Canada, May 21, 2019.



CONTEXT

The Act is one of a number of federal economic framework laws of general application. Its purpose is to maintain and encourage competition in Canada, in order to achieve an interrelated set of economic objectives set out in the Act's purpose clause.⁴ These objectives are: promoting the efficiency and adaptability of the Canadian economy; expanding opportunities for Canadians in world markets while recognizing the role of foreign competition in Canada; ensuring that small- and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and providing consumers with competitive prices and product choices.

As the Act's enforcement agency, the Bureau protects competition and consumers by investigating and pursuing remedies against cartels, abusive conduct by dominant firms, anti-competitive mergers and competitor collaborations, and deceptive marketing. In addition to enforcement, the Bureau promotes competition through its advocacy role under the Act, helping to ensure that policy, legislative and regulatory approaches support competition and innovation as much as possible.

An evolving world

Generally sector-neutral and principles-based, the Act has not, for the most part, been updated in any fundamental respect in response to the digitization of the global economy. Notably, apart from Canada's Anti-Spam Legislation (CASL),⁵ it was not until 2022 that any amendment to the Act directly sought to address digitally-based challenges following the rise of the Internet. Some experts believe the Act's framework of general application is its strength, believing the law and associated policy toolkit to be sufficiently dynamic to address emerging competition law issues regardless of the changing context.

While the law's broad applicability and flexibility may be a strength, there are clear signs that more must be done to ensure that Canada's competition law, policy and tools are optimized and sufficiently agile to keep pace with a rapidly evolving economy. Indeed, internationally, peer countries are already well down the road towards re-examining their frameworks and approaches to competition

⁴ *Competition Act*, s. 1.1.

⁵ *S.C. 2010, c. 23*.

policy in light of the digital economy. The appropriate way forward must be top of mind in Canada as well. Digital markets have seen an unprecedented rise of network effects and the conversion of data into a tool of great commercial value, not only conferring early-mover advantages on incumbents, but also in some cases erecting significant barriers to entry and expansion for competitors. Moreover, large digital firms' expansion into adjacent markets and vertical integration are allowing these players to participate directly in the markets in which they also serve as intermediaries or gatekeepers.⁶

Even the nature of competition itself is changing as firms increasingly compete for consumers in dynamic ways and on features other than price, challenging some of the traditional methods of analysis.⁷ Prominent examples come from two-sided, digital platforms, which often compete for consumers with free digital goods or services that they monetize in other ways, such as advertising, the leveraging of user data to sell products, or sale of the data outright.⁸ Customer data can become akin to a currency, with consumers of a "free" service paying through rights to personal or behavioural data, making privacy safeguards themselves a dimension of competition.⁹

Competition law does not seek to punish success or invalidate the benefits of a free and innovative marketplace, and recognizes that competitive markets can and do yield some barriers to entry such as intellectual property, commercial secrets and network effects. It does, however, serve as a check against forces that may undermine the competitive process and harm consumer interests. As novel practices and new realities shape business and markets in ways that could not have been foreseen when the Act was crafted, it is necessary to ensure that the Act remains well equipped for the future.

Heightened awareness here and abroad

There has been increasing Parliamentary scrutiny of the role of competition policy. In the spring of 2021, the House of Commons Standing Committee on Industry and Technology (INDU) undertook a study of Canada's competitiveness that had numerous stakeholders calling for a review of, and reforms to, the

⁶ See Becky Chao and Ross Schulman, "[Promoting Platform Interoperability](#)", *New America*, May 13, 2020.

⁷ [Non-price effects of mergers](#), OECD Roundtable, June 6, 2018. See also Competition Bureau, "[Highlights from the Competition Bureau's workshop on emerging competition issues](#)", March 2016.

⁸ See Marc Jarsulic, [Using Antitrust Law To Address the Market Power of Platform Monopolies](#), *Center for American Progress*, July 28, 2020.

⁹ Nathaniel Popper, "[A feisty Google adversary tests how much people care about privacy](#)", *New York Times*, July 15, 2019. See also, Katherine DeClerq, "[Billboard toting Apple's privacy policies is put up across the street from Sidewalk Labs](#)", *CTV News*, July 4, 2019.

framework.¹⁰ In June 2021, INDU considered issues in the grocery industry, including the possibility of employer wage coordination, culminating in a report with recommendations touching the Act.¹¹ In February 2022, the same committee met to examine the implications of the proposed merger between Rogers Communications and Shaw Communications, issuing a report in March of that year that expressed concern over the transaction and the framework under which it is reviewed.¹² In the spring of 2022, alongside consideration by several committees of draft amendments to the Act contained in Budget legislation, INDU undertook a study of small and medium enterprises, with a notable focus on the Act.¹³

Competition policy has arisen in other Parliamentary settings as well. The House of Commons Standing Committee on Access to Information, Privacy and Ethics issued a report in December 2018 recommending that potential economic harm caused by data monopolies be studied to determine if the Act remains sufficient to tackle these problems in Canada.¹⁴ Competition issues have also arisen in the INDU Committee's review of the *Copyright Act*.¹⁵ In September 2021, the Senate Action Prosperity Group recommended a review of the Act within one of its reports.

Soon thereafter, Senator Howard Wetston independently commissioned a consultation paper on the topic, authored by Professor Edward Iacobucci, attracting a great many submissions, including by the Bureau itself.¹⁶ That consultation culminated in a report summarizing areas where there was substantial consensus on the need for reform and areas where further

¹⁰ House of Commons Standing Committee on Industry, Science and Technology, [Competitiveness in Canada](#), April 13-22, 2021.

¹¹ [Wage Fixing in Canada: And Fairness in the Grocery Sector](#), Report of the Standing Committee on Industry, Science and Technology, June 2021.

¹² [Proposed Acquisition of Shaw Communications by Rogers Communications: Better Together?](#), Report of the Standing Committee on Industry and Technology, March 2022.

¹³ House of Commons Standing Committee on Industry Technology, [Small and Medium-Sized Enterprises](#), April 26 – June 21, 2022.

¹⁴ [Democracy Under Threat: Risks and Solutions in the Era of Disinformation and Data Monopoly](#), Report of the Standing Committee on Access to Information, Privacy and Ethics, December 2018.

¹⁵ [Statutory Review of the Copyright Act](#), Report of the Standing Committee on Industry, Science and Technology, June 2019, at 82.

¹⁶ Senate Prosperity Action Group, [Rising to the Challenge of New Global Realities](#), September 2021; The Honourable Howard Wetston, [Consultation Invitation - Examining the Canadian Competition Act in the Digital Era](#), October 27, 2021 and Edward M. Iacobucci, [Examining the Canadian Competition Act in the Digital Era](#), September 27, 2021.

consultation was needed.¹⁷ A number of other Canadian commentators and think tanks have made similar recommendations for reform proposals or legislative review.¹⁸

In February 2022, Minister of Innovation, Science and Industry François-Philippe Champagne announced an intention to undertake a review of the Act, and explore more immediate improvements in certain areas where solutions were readily identifiable.¹⁹ Informed by the Bureau's enforcement experience, international best practices, and a multitude of scholarship, articles and submissions to various public fora, including the consultation led by Senator Wetston, these and other areas were ultimately addressed in 2022 Budget legislation.²⁰ These amendments were designed to address concrete and well-recognized challenges in the legislation and to reinforce the Bureau's enforcement capacity following its 2021 budgetary increase. These changes were intended as a "down payment" prior to embarking on broader reforms. Indeed, a number of the consensus areas for reform identified by Senator Wetston were addressed in the amendments, while areas meriting further discussion are included in this consultation. Despite these amendments – outlined below – having already been passed into law, the Government fully expects and welcomes discussion on ways of improving or reinforcing them within the wider conversation on reform.

Interest in Canada to revisit principles of competition policy mirrors a global trend, as numerous other jurisdictions have examined various aspects of their competition frameworks in recent years, usually with a particular focus on digital challenges.²¹ This approach has in many cases led to the development

¹⁷ The Honourable Howard Wetston, "[Commentary on the Public Consultation with Respect to Examining the Canadian Competition Act in the Digital Era](#)", April 2022.

¹⁸ See for example: Derek Ireland and Michael Jenkin, "[Embedding consumer protection in competition policy](#)", *Policy Options*, June 18, 2018; [At the Crossroads: Innovation and Inclusive Growth](#), Remarks by Carolyn A. Wilkins, Senior Deputy Governor of the Bank of Canada at the G7 Symposium on Innovation and Inclusive Growth, February 8, 2018; Public Policy Forum, [A New North Star: Canadian Competitiveness in an Intangibles Economy](#), April 2019; Mowat Centre, [New Rules for the Game: Rebooting Canada's competition regime for the digital economy](#), May 28, 2019; Vass Bednar and Robin Shaban, "[Creating a more competitive country](#)", *National Post*, April 9, 2021.

¹⁹ [Minister Champagne maintains the Competition Act's merger notification threshold to support a dynamic, fair and resilient economy](#), Innovation, Science and Economic Development Canada, February 7, 2022.

²⁰ [Budget Implementation Act, 2022, No. 1](#), assented to June 23, 2022.

²¹ See, for example: [Unlocking digital competition, Report of the Digital Competition Expert Panel](#) [United Kingdom], March 2019 (Furman Report); [Competition policy for the digital era](#), Special Advisers' Report to the European Commission's Directorate-General for Competition, April 2019; [Common Understanding of G7 Competition Authorities on "Competition and the Digital Economy"](#), June 5, 2019; [Digital platforms inquiry - final report](#), Australian Competition & Consumer Commission, July 26, 2019; [Stigler Committee on Digital Platforms - Final Report](#), Stigler Center for the Study of the Economy and the State, September 16, 2019; [Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations](#), Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary [United States], October 2020; [Power to the People: Stronger Consumer Choice and Competition so Markets Work for People, Not the Other Way Around](#), an Independent Report by MP John Penrose [United Kingdom], February 2021. In late 2021 the G7, under the United Kingdom's presidency, published a compendium of member approaches: G7, [Compendium of approaches to improving competition in digital markets](#), November 29, 2021.

of legislative proposals to modernize competition laws or enact new rules governing the conduct of digital giants, the creation of specialized units, as well as numerous high-profile investigations under the existing frameworks.²² Given the worldwide presence of the firms in question, and the borderlessness of their commercial activity, the Canadian marketplace is undoubtedly affected by each of these developments. The issues surfacing in the interconnected, modern economy are global in scope, placing an emphasis on international coordination and convergence. This means that Canada must also do its part to ensure that our rules facilitate not only a dynamic, competitive economy at home, but also equip us to continue as a capable partner in the global push for fairness, inclusion and prosperity in the world's new marketplace.

This groundswell of international interest in the role of competition law and policy in making a better marketplace suggests that a critical examination is timely. The interest with which many Canadians observe the rapidly changing economy, and the impact felt by consumers, businesses and workers in all sectors, has increased the urgency for the Government to take appropriate action. With economic fundamentals being reconsidered and new dynamics apparent in the marketplace, the time to reflect and act is now.

The question at hand

The fundamental question may be: what is competition law for? To some the answer is straightforward (e.g. pursuit of efficiency or a check against market power), while others may perceive competing or diverse goals that may need to be reconciled. The Act's purpose clause, noted above, has established general direction since the law took effect in its current form in 1986. As the Act is opened for comprehensive review, many submissions will undoubtedly explore whether this approach remains fit for purpose, and such views are welcome. That said, debating the purpose clause and its potential impact cannot be divorced from the rules set out in the Act and how they can be enforced. For ease of discussion, this paper assumes that the objectives of the *Competition Act* have for the most part not changed, and focuses on how the substantive provisions of the law could be improved to better achieve them in the current environment.

²² Paul Mozur, Cecilia Kang, Adam Satariano and David McCabe, "[A Global Tipping Point for Reining in Tech Has Arrived](#)", *Competition Policy International*, April 21, 2021; Jonathan Keane, "[The EU's new sweeping rules for Big Tech could soon be reshaped and look different](#)", CNBC, April 21, 2021; Bill Baer, "[How Senator Klobuchar's proposals will move the antitrust debate forward](#)", Brookings, February 8, 2021; Cecilia Kang, "[Lawmakers, Taking Aim at Big Tech, Push Sweeping Overhaul of Antitrust](#)", *New York Times*, June 11, 2021; "[ACCC mandatory code of conduct to govern the commercial relationship between digital platforms and media companies](#)", Joint media release with the Hon. Paul Fletcher MP, Minister for Communications, Cyber Safety and the Arts, April 20, 2020;

In Canada's enforcement framework, the Bureau acts as a law enforcement agency, investigating instances of alleged anti-competitive or otherwise unlawful conduct. In the civil enforcement context, the Bureau's chief, the Commissioner of Competition, seeks remedies as a party to the proceeding before an external adjudicator in a court-like process, while in a criminal context the matter is transferred to the Public Prosecution Service of Canada for prosecution in the criminal court system. Most – but not all – of the Act's enforcement provisions are principles-based, tied to the establishment of harm, or potential harm, to competitive intensity through select forms of conduct. The Act does not proactively dictate how to conduct business, allocate resources among stakeholders, or designate entrants, participants, winners or losers in the free market. Direct management of business conduct, through codified rules or *ex ante* structures or regulation – while tremendously influential to the state of competition – fall generally outside the Act's purview, and in many cases are reserved for provincial and territorial jurisdiction in Canada's federal system.

This consultation considers potential improvements to the above system of competition law enforcement, be it in the content of specific enforcement provisions or within the system as a whole. While competition policy, in today's economy especially, intersects with other areas of focus – privacy, security and disinformation, among others – the required government response to the challenges of the information age is multi-faceted, and happening across numerous areas.

The intersection of privacy, personal information and competition, including data mobility, have long been the subject of interest and debate.²³ The Government's designs on reform to the handling of information in commercial contexts has served as the centrepiece of the Digital Charter, ultimately culminating in the Government's introduction of Bill C-27, the *Digital Charter Implementation Act* to ensure the privacy of Canadians, introduce new rules to strengthen trust in the development and deployment of AI systems, and establish the Personal Information and Data Protection Tribunal.²⁴ Communications policy faces not only questions of a competitive marketplace, but the proliferation of social harms, with some observers suggesting that the market power and opacity

²³ In Canada, compliance with federal privacy law was raised as a potential justification for anti-competitive conduct in a prominent competition law case, *The Commissioner of Competition v. The Toronto Real Estate Board*, 2016 Comp. Trib. 7. In Germany, a breach of privacy rules has been also pursued as a violation of competition law: *Bundeskartellamt prohibits Facebook from combining user data from different sources*, February 7, 2019. See also, *Digital Citizen and Consumer Working Group Report on the Collaboration between Data Protection, Consumer Protection and other Authorities for Better Protection of Citizens and Consumers in the Digital Economy*, International Conference of Data Protection & Privacy Commissioners, October 2018; *Competition Bureau Submission to the OECD Competition Commission*, Roundtable on Consumer Data Rights: Impact on Competition, June 12, 2020; OECD, *Quality considerations in digital zero-price markets*, Background note by the Secretariat, November 28, 2018.

²⁴ Bill C-27, *Digital Charter Implementation Act, 2022*.

of unregulated digital platforms may be contributing factors,²⁵ and calling for the Bureau to be among the agencies involved in a regulatory solution.²⁶ The Government has introduced Bill C-11, the Online Streaming Act, reforming the Broadcasting Act for the Internet age,²⁷ and established an expert advisory group on online safety to provide advice on how to design the legislative and regulatory framework to address harmful content online.²⁸ The Online News Act, Bill C-18, seeks to rebalance the relationship between digital platforms and news providers.²⁹ Competition policy in other specific sectors, such as banking,³⁰ implicates a diverse array of federal, provincial and territorial actors. Even at the macroeconomic level, the Bank of Canada has suggested that the transmission and conduct of monetary policy is linked with the contestability of markets in the digital age.³¹

These issues cross paths with competition policy and may in certain cases be addressed incidentally, or in part, by competition law enforcement.³² As the Government advances its policy objectives in the various forms and fora outlined above, however, the below discussion zeroes in on the Act as the next piece of a holistic puzzle that shapes the way Canadians buy, sell and thrive in today's economy.

A taxonomy of challenges

In launching this consultation, the Government ultimately seeks to identify the best ways to modernize Canada's competition law framework, and address the above challenges in a way that creates the greatest benefit for the greatest number of Canadians – consumers, businesses and workers alike, across sectors. The high level objective of the Act – to maintain and encourage competition in Canada – remains uncontroversial, but the tools and processes in place to realize the end goal remain subject to competing views.

²⁵ *Digital Platforms Inquiry Final Report*, note 21. See also Sally Hubbard, "[Fake News is a Real Antitrust Problem](#)", *Competition Policy International*, December 2017.

²⁶ *What We Heard Report*, Broadcasting and Telecommunications Legislative Review Panel, June 2019.

²⁷ Bill C-11, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, introduced February 2, 2022.

²⁸ *Backgrounder: Government of Canada announces expert advisory group on online safety*, Heritage Canada, March 30, 2022.

²⁹ Bill C-18, *An Act respecting online communications platforms that make news content available to persons in Canada*.

³⁰ *Open Banking: What it Means for You*, Report of the Senate Standing Committee on Banking, Trade and Commerce, June 2019.

³¹ *Why Do Central Banks Care About Market Power?*, Presentation by Carolyn A. Wilkins, Senior Deputy Governor, Bank of Canada, April 8, 2019.

³² See, for example, the 2020 consent agreement between the Bureau and Facebook for misleading claims with respect to its privacy and personal information policies. The settlement concerned deceptive marketing by Facebook about these policies, but not Facebook's handling of this information as such.

The Government wishes to optimize the functioning of this framework, ensuring that the Bureau is in the best position to protect dynamic markets without impinging on the innovation and creativity that shape those very markets. Such markets should also ensure an equitable opportunity for small- and medium-sized enterprises to participate, while providing consumers with the best product choice and quality at reasonable prices, and workers the best prospects of mobility and prosperity.

In considering the need for reform to the Act, four central themes emerge based on enforcement experience to date, stakeholder commentary and international best practices:

- **A high bar for intervention:** the Bureau may not be able to take action against potentially harmful forms of conduct because of the specific legal tests to be met. While overenforcement is not desired, the field cannot be tilted too steeply against necessary intervention if an effective watchdog is to function.
- **The extent of the Bureau's role:** even where the law gives the Bureau licence to investigate and seek remedies, the Bureau remains subject to a number of constraints that limit its ability to act in an authoritative and timely fashion.
- **Consistency in enforcement and remedies:** some forms of conduct can be dealt with criminally or civilly, while others cannot; there are different forms of sanctions and different forms of public and private recourse that should be reconsidered to best serve the public.
- **The challenge of data and digital markets:** unsurprisingly given the above discussion, questions continue to arise with respect to the interaction of a fast-evolving economy and a competition statute that emerged in the 1980s. What new understanding of harmful conduct, if any, must a competition enforcer have?

These themes run throughout the following discussion, which examines various aspects of the law in considering to what extent reform is needed.

Submissions are welcome both on the directions presented and questions raised within this paper, as well as on other suggestions and recommendations that stakeholders may find relevant. Experiences of a wide variety of businesses, consumers and workers, and what impact the current system and potential changes may have upon them, will particularly help inform Government decision-making.

Given the economic interests at stake in competition policy and the many ways in which changes to the framework can affect those interests, the Government does not expect a consensus will be reached among all actors on all elements of reform, and that is not the objective of the consultations undergirded by this paper. Decisions will need to be made as to how best to balance the many interests at stake in a changing economy, with those of Canadians placed at the centre. Consultations will help ensure that reforms are well-considered and well-designed.

After a recap of the 2022 amendments, the following five sections of this paper address the main pillars of the Act: merger review; unilateral conduct; competitor collaborations; deceptive marketing; and administration and enforcement processes. The discussion highlights various issues or shortcomings, particularly as they relate to the rise of new business models and practices. Throughout the discussion, where issues or shortcomings with the Act are identified, proposed pathways forward are discussed, including those drawn from international practice.



2022 AMENDMENTS

Bill C-19, the *Budget Implementation Act, 2022, No. 1*, contained amendments to the Act as “a preliminary phase in modernizing the competition regime” (hereinafter the “BIA Amendments”). Foreshadowed by the Minister’s announcement of February 7, 2022, the amendments sought to address “shortcomings in the Act that can easily be addressed and move Canada in line with international best practices.”³³ The changes built on many years of enforcement experience and public debate to address issues that lessened the effectiveness of competition enforcement and helped make preliminary improvements in advance of consultation on deeper reform. These included:

- Criminalizing naked wage-fixing and no-poaching agreements among employers in recognition of their manifestly anti-competitive effect on the labour market;
- Broadening the definition of an “anti-competitive act” for the purposes of abuse of dominance to ensure that it includes intended harm directed both toward a competitor as well as toward competition itself. This helps capture forms of unilateral anti-competitive conduct that previously could not be addressed due to case law.
- Allowing private parties to bring cases before the Competition Tribunal for abuse of dominance, so as to supplement public enforcement and better hold dominant firms accountable;
- Clarifying that “drip pricing,” where unattainable prices are advertised without obligatory fees, is understood as a form of conduct that can be addressed under the Act’s deceptive marketing provisions;
- Removing the maximum value of criminal penalties for cartel offences, and reformulating civil administrative monetary penalty maximums based on benefit derived, to better reflect the tremendous volumes of commerce that can be affected by anti-competitive or deceptive conduct, removing arbitrary caps;

³³ Bill C-19, *An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures*; Budget 2022: *A Plan to Grow Our Economy and Make Life More Affordable*, section 2.2.

- Adding new considerations for the Competition Tribunal when weighing applications for abuse of dominance, mergers, and competitor collaborations, to explicitly recognize emerging features of the digital economy such as non-price competition, including through consumer privacy, and barriers to entry such as network effects;
- Instituting an anti-avoidance provision for merger notification to respond to transactions structured so as to avoid mandatory notification;
- Ensuring consistency in the application of production orders to foreign corporations and affiliates; and
- Improving clarity in certain areas, such as how time is computed for merger review, or better describing the conditions for an interim merger order.

While making more immediate updates to the Act, several of these changes are associated with broader questions, and potential further avenues of reform, that arise in the following sections.



MERGER REVIEW

Excessive corporate consolidation lessens competition, potentially raising prices and harming consumer choice and innovation. The Act's merger review regime dates from 1986, with the most substantial recent reform related to the process for notifiable mergers, a key part of the 2009 amendments that followed recommendations of the Competition Policy Review Panel.³⁴ While all mergers are reviewable by the Bureau to ensure that they will not cause a substantial lessening or prevention of competition (SLPC), only those that surpass a \$400-million threshold for the size of parties, and an annually-indexed threshold for the size of the transaction (\$93 million in 2022), are required to provide advance notification to the Bureau and delay closing until the lapse of statutory waiting periods.

While mergers are reviewed by the Bureau on a case-by-case basis and competitive threats addressed, lawful concentration can continue to occur in the economy.³⁵ There may be several reasons for this through merger activity, including the cumulative effect of acquisitions that do not surpass the SLPC test on their own, mitigating factors at the time of merger such as market-wide change or potential new entrants, or the operation of the Act's efficiencies defence. Even without mergers, concentration can increase when businesses exit, or when some businesses gain share from others by offering better products and services, a natural and expected result of the competitive process.

Concerns have been raised with respect to the reach of the Act's remedial framework, given the potentially harmful effects of concentration. The more prominent role of innovative start-up firms in the digital economy has also accelerated calls for reform. Non-notifiable, yet ultimately important acquisitions may evade detection, while even known mergers may cause competitive harm that is too difficult to forecast with precision at the time of acquisition, yet too late to remedy once it becomes apparent.

Some considerations that have stoked debate in recent years are outlined below.

³⁴ *Compete to Win*, note 1.

³⁵ See Ray Bawania and Yelena Larkin, "[Are Industries Becoming More Concentrated? The Canadian Perspective](#)", SSRN, March 20, 2019.

FOCUS ON

Acquisition of potential innovators

The digital economy has undoubtedly lowered certain barriers to starting a business, contributing to competition and innovation. For example, a new e-commerce business can “set up shop” online and ship its products directly from manufacturer to client, eliminating the need for a physical location to sell or store its products, and saving significant time and money. Similarly, apps can be developed by small teams with limited overhead and made available to millions of users through mobile devices.

In the face of this reality, however, there is concern that incumbents are seeking to acquire new and potentially innovative firms with the hope that this investment will help them stay on the right side of any disruptive technology or suppress it outright. This may be done when start-ups are still in their early stages with no or minimal revenues, but showing potential for significant growth. Incumbents may acquire these smaller innovative firms in overlapping or adjacent markets, resulting in a loss of existing and/or future competition.

While acquisitions can be used strategically to suppress competition, they can also provide the incentive or capital investment necessary for new firms to innovate in the first place. For example, the prospects of an eventual sale to a large incumbent may be an end-goal and a means by which an innovative start-up intends to gain significant returns for its investors or bring its innovation to a larger customer base.³⁶ The merging of two firms can lead to lower prices and allow for faster adoption of innovative products and services given the incumbent’s financial means, economies of scale, existing distribution networks, as well as brand familiarity. Alternatively, selling one venture could ultimately fund subsequent start-up activity. The concern is not with acquisitions per se, but on their potential to suppress or eliminate competition.

³⁶ The opposite effect on innovation incentives could also be imagined, where a “kill zone” is “established by the large digital firms in which start-ups hesitate to invest due to an anxiety that successful innovation might be copied or bought up easily.” See *Competition policy for the digital era*, note 21, at p. 117.

Ability to Take Timely Action

Evolution of markets

Concern about pre-emptive acquisitions of innovative or disruptive firms is not unique to the digital economy. However, the likelihood that such acquisitions will fall below pre-merger notification thresholds, or otherwise avoid sufficient scrutiny, is particularly acute in this realm.³⁷ A nascent digital competitor may not yet have significant Canadian assets or sales at the time of acquisition but nevertheless be a promising future competitor. While the Bureau may, through its own diligence, identify and thereafter review non-notifiable mergers, timely detection remains an issue, given the Bureau's limited options for redress after the expiration of the one-year statutory limitation period, described below.³⁸ This is compounded by the possibility that firms will behave strategically, for example by not publicly announcing mergers or altering business practices until the capacity of the Bureau to act has expired.

Additionally, even where detection is not an issue, it would seem that there are at least two possible substantive challenges to applying the merger provisions' competitive effects test to acquisitions in fast-moving digital markets. The first concerns where harms to non-price dimensions of competition, such as innovation, may be difficult to quantify and are, accordingly, given less weight by the Competition Tribunal or appeal courts. The second challenge is the substantive requirement that the Bureau show, on balance of probabilities, that harm to competition is "likely" to happen within a "discernible" time frame, and that this harm would likely be "substantial".³⁹ Given the complexity, dynamism and pace of change in many markets, especially digital ones, these specific tests may be highly impractical.

The importance of taking remedial action in advance of a transaction cannot be understated, not only because of the inherent difficulties in unwinding a consummated merger, but also because of the one-year limitation period established by the 2009 amendments. Where harmful competitive effects do not become apparent within the first year after completion, an increasingly likely scenario in the dynamic markets that typify the digital economy, the only means

³⁷ The UK's Furman Report found that the five largest digital firms had made more than 400 acquisitions in the previous decade, with none blocked, and few subject to scrutiny or conditions. See *Unlocking Digital Competition*, note 21, at p. 12; See also Chris Alcantara, Kevin Schaul, Gerrit De Vynck and Reed Albergotti, "[How Big Tech got so big: Hundreds of acquisitions](#)", Washington Post, April 21, 2021.

³⁸ To mitigate this problem, the Bureau has expanded its merger intelligence gathering activities. See, [No River too Wide, No Mountain too High: Enforcing and Promoting Competition in the Digital Age](#), Remarks by Commissioner of Competition Matthew Boswell, Canadian Bar Association Competition Law Spring Conference, May 2019.

³⁹ *Tervita Corp. v. Canada (Commissioner of Competition)*, [2015] 1 SCR 161, at paras 67-79.

to address the consequences of the concentration would arise under the Act's anti-competitive conduct provisions, such as abuse of dominance.⁴⁰ Some have argued that the difficulty of predicting future events necessitates that this be the solution.⁴¹ Note, however, that this approach cannot remedy consequences of concentration, such as higher prices, that are not themselves an abuse. Even in true cases of abuse, the more specific criteria associated with these provisions and their jurisprudence form some of the most complex and costly matters addressed by the Bureau, and contain a three-year limitation period of their own. Moreover, the ability to impose structural remedies such as divestiture is considerably more difficult, as the law requires that abuse orders be limited to what is "reasonable and ... necessary to overcome the effects of [a] practice".⁴²

Some proposals have surfaced to better address the challenge of addressing uncertain competitive harm before it happens. One suggestion put forth by the UK's digital competition expert panel⁴³ is to take a "balance of harms" approach when assessing a merger, where both the likelihood *and* magnitude of the potential impacts of a merger are weighed in considering whether to block or allow a merger. The panel claimed that this approach would allow for a more sound economic assessment of the future impact of digital mergers, although it may not be practical in all cases.⁴⁴ Australia's Digital Platforms Inquiry produced the recommendation that certain considerations be made more explicit in the law's merger review provisions, including the likelihood that the acquisition would result in the removal from the market of a potential competitor, and the nature and significance of assets being acquired, including data and technology.⁴⁵ The outgoing head of its competition authority subsequently made further suggestions, including a more flexible definition for "likelihood" of effects, presumptions for already-dominant firms, and special tests for digital platforms.⁴⁶

⁴⁰ Compare, for example, the litigation launched by the U.S. Federal Trade Commission in December 2020 portraying Facebook's acquisitions of Instagram and WhatsApp as a form of monopolistic strategy, with the transactions already been cleared under merger review. See Federal Trade Commission, "[FTC Sues Facebook for Illegal Monopolization](#)", December 9, 2020; Alexei Oreskovic, "[Facebook says WhatsApp deal cleared by FTC](#)," Reuters, April 10, 2014; Federal Trade Commission, "[FTC Closes its Investigation into Facebook's Proposed Acquisition of Instagram Photo Sharing Program](#)", August 22, 2012.

⁴¹ See C.D. Howe Institute Competition Council, "[Krane, Musgrove – The Danger of Precautionary Principle Challenges to Nascent Mergers](#)", Intelligence Memo, February 24, 2021.

⁴² Compare *Competition Act* s. 79[2] to s. 92[1].

⁴³ *Unlocking digital competition*, note 21.

⁴⁴ Charley Connor, "[CMA responds to Furman report](#)", *Global Competition Review*, March 22, 2019.

⁴⁵ *Digital platforms inquiry - final report*, note 21, at p. 105. The BIA amendments partially embraced this approach in Canada, making certain considerations such as network effects and entrenchment of incumbents explicit.

⁴⁶ Rod Sims, Chair of the Australian Competition & Consumer Commission, "[Protecting and promoting competition in Australia](#)," August 27, 2021.

One of the antitrust reform bills before the U.S. Senate would modify the legal test for merger intervention from substantial lessening of competition to “an appreciable risk of materially lessening competition”.⁴⁷ Some have suggested reversing the burden of proof for certain types of mergers.⁴⁸ In the proposed U.S. Senate bill, these would be based on significant increases in concentration, acquisitions by dominant firms, or mergers with a value that surpasses U\$5 billion. Similar measures could be considered in Canada either for transactions or firms of certain sizes, or in particularly concentrated industries. Alternatively, a more stringent competition test, or threshold for notification, could be the state of affairs for designated sensitive sectors, comparable to the *Investment Canada Act* before 2009 amendments.⁴⁹

Whatever path forward, there would be an accompanying advantage in enabling the Bureau to conduct more merger retrospectives, as a means of refining analytical approaches and applying lessons learned to future cases. This could potentially occur with the aid of new information-collection tools for this purpose.⁵⁰

In considering how merger review law could be modified, expanded or updated to ensure its ongoing relevance in the modern context, care will need to be taken to avoid business uncertainty or the discouragement of investment. Regardless of the approach, the challenge will be to ensure a clear, forward-looking framework to assess mergers that looks beyond current market conditions, and examines how transactions may affect the future welfare of market participants.

Timing and thresholds – revisiting 2009

In spite of the above considerations, in both traditional and emerging markets, advance remedial action will not always be possible, and the Bureau may be required to address a completed merger, as appears to be increasingly the case. In 2009, the limitation period was reduced from three years to one, to complement the new two-stage merger review system that allowed the Bureau to receive more vital information earlier and as a matter of course. However, no such consideration applies to non-notifiable mergers, which also benefited from the shortened period. The result is that parties to non-notifiable transactions need only wait for one year after completion – much of which

⁴⁷ [Competition and Antitrust Law Enforcement Reform Act of 2021](#), SIL21191, 117th Cong. [2021].

⁴⁸ See *Stigler Committee on Digital Platforms - Final Report*, note 21, at p. 98.

⁴⁹ See Innovation, Science and Economic Development Canada, [Investment Canada Act: Annual Report – 2009-10](#).

⁵⁰ Such studies can be resource intensive and difficult to conduct in the absence of good public data or formal information-gathering powers. For some additional considerations, cf. U.S. Federal Trade Commission, [FTC Hearing on Merger Retrospectives](#), Hearings on Competition and Consumer Protection in the 21st Century, April 2019.

may be spent reorganizing the new company in any event – before reaping the benefits of diminished competition, such as by raising prices. It is precisely these structural effects, which may be unreachable by anti-competitive conduct investigations, that merger control is meant to guard against. There is thus a case that the merger limitation period should be readjusted, whether absolutely or conditionally, at least for non-notifiable mergers. One suggestion worth noting would be to make the expiration of a limitation period conditional on notification on a voluntary basis, thus ensuring that the Bureau is either aware of, or will later have the opportunity to address, potentially harmful transactions.⁵¹

Despite the adoption of two-stage merger review in 2009, which conditioned the parties' ability to close a transaction on the fulfilment of a request for more information, remedial timelines remain problematic. By statute, the Bureau only has 30 days from the provision of information to decide whether a merger must be challenged, at which point it can also seek interim relief to prevent the merger pending litigation (s. 104). However, the bottom line is that the increased complexity of mergers has made it challenging or impossible to review all of the new information, prepare court filings, obtain a hearing date, and complete the hearing all within the 30 days, with the result that parties can still close – and potentially harm the market irreversibly – before the opportunity for interim relief even arises. The alternative is to seek, pre-emptively, an interim order that does not depend on an intent to challenge (s. 100), but likely based on insufficient information, and without any certainty that it will be granted or even heard in time. In practice, the statutory timelines offer very little leverage, and the Bureau therefore depends on the willingness of the parties to enter into timing agreements to allow a full review. If the parties are willing to risk an intervention after closing, there may be little that the Bureau can do to safeguard the marketplace.⁵² It is worth investigating whether a more practical mechanism could be put in place for short-term interim relief, from the time that the Commissioner declares an intent to seek an injunction pending a challenge, to the time the injunction is decided.

The BIA Amendments added an anti-avoidance provision to ensure that transactions structured for the purpose of evading notification thresholds are in fact treated as notifiable. Similar anti-avoidance or “creeping acquisition”

⁵¹ Cf. the voluntary notification scheme for airline joint ventures in the *Canada Transportation Act*, S.C. 1996, c. 10, ss. 53.7 – 53.84; see also Aldo González and Daniel Benítez, “[Optimal Pre-Merger Notification Mechanisms: Incentives and Efficiency of Mandatory and Voluntary Schemes](#),” Policy Research working paper no. WPS 4936, World Bank, 2009.

⁵² This was one of the central issues in CT-2021-002, *The Commissioner of Competition v. Secure Energy Services Inc.* While the Federal Court of Appeal would later affirm the Tribunal's jurisdiction to provide short-term interim relief even pending the hearing for an interim injunction under s. 104, the same challenges of needing to build an urgent case in the short time period afforded still apply. See *Canada (Commissioner of Competition) v. Secure Energy Services Inc.*, 2022 FCA 25.

mechanisms can be found in both U.S. and EU law.⁵³ However, the formula for calculating notification thresholds themselves has not been altered since 2009, when the “size of transaction” threshold, based on the assets or revenues (from sales in or from Canada) of the parties being acquired, was indexed to growth in the gross domestic product and updated annually. The “size of parties” threshold remained fixed at \$400 million in assets or revenues in, from or into Canada. The methods of calculation can lead to some unprincipled results, such that a foreign merger that affects a great deal of commerce into Canada may fail to surpass the size of transaction threshold, while a sale to a completely new entrant can be notifiable due to the acquired company alone. When combined with observations that the Canadian thresholds are higher even than in the United States – despite a much smaller economy – it is clearly time to re-examine notification criteria, even beyond the above-noted concerns with respect to nascent firms.⁵⁴

Efficiencies

The Act’s merger efficiencies defence (s. 96), permitting otherwise anti-competitive mergers to withstand legal challenge where they generate sufficient efficiencies to exceed and offset the competitive harm, was adopted with the passage of the Act in 1986.⁵⁵ It was intended to represent a trade-off between domestic concentration and international competitiveness for Canadian firms. It is a provision arguably unique among the competition frameworks of Canada’s peers, the effect of which, owing in part to jurisprudence, is to allow mergers to proceed even where they lead to significant harm to consumers in the form of higher prices and/or reduced choices. Transformation of the Canadian economy through trade agreements and globalization since the mid-1980s, as well as subsequent cases allowing for significant concentration even where the need for a Canadian “champion” in the market was not evident, have undermined a key rationale for the defence. Critics note its potential for adverse impact on consumers without necessarily generating any of the intended benefits in global markets.

Canada is in fact one of only a few countries worldwide where efficiencies are a full defence to otherwise anti-competitive mergers. In the United States, Australia, the European Union and the United Kingdom, efficiencies may be considered as part of the competitive effects of a merger, but efficiency gains do

⁵³ See 16 CFR § 801.90 in the U.S., based on an avoidance purpose, or article 5(2) of the EU’s *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings*, which takes a time-based approach.

⁵⁴ See the [submission of Jason Gudofsky and Kate McNeece to the House of Commons Standing Committee on Industry, Science and Technology’s study, “Competitiveness in Canada”](#), May 28, 2021.

⁵⁵ While the defence exists both for mergers and competitor collaborations, the latter has never been tested since its introduction in 2010, and thus commentary has focused exclusively on the application of the defence in merger review.

not form a full statutory defence.⁵⁶ Additionally, Canada's approach is relatively unique in terms of how the efficiencies are measured and weighted against anti-competitive effects when the defence is invoked – the so-called “welfare standard”.

Price increases following a merger may result both in a deadweight loss to the economy, as well as a transfer of income from consumers to producers. Canada's major trading partners take a “consumer surplus” approach to the welfare standard, under which wealth transfers from consumers to producers are seen as an anti-competitive effect of the merger – *i.e.* a merger's resource savings must ultimately result in an overall consumer benefit (such as strengthening competitive pressure upon a non-merging incumbent) for the merger to proceed.⁵⁷ Until the seminal 2001 *Superior Propane* appeal,⁵⁸ Canada's approach was one of “total surplus”, meaning that the wealth transfer is considered to be a neutral effect. However, the court in *Superior Propane* did not prescribe a single standard, preferring instead to allow for flexibility depending on the facts of a given case.⁵⁹

Canada's unusual approach, and the negative competitive effects that it can promote, became particularly noteworthy following the Supreme Court of Canada's 2015 *Tervita* ruling, which placed a tremendous emphasis on quantification of efficiency considerations, noting that qualitative effects would “assume a lesser role in the analysis in most cases”.⁶⁰ The Court permitted that even marginal efficiencies could salvage an otherwise anti-competitive merger,

⁵⁶ The OECD has produced a direct comparison in [The Role of Efficiency Claims in Antitrust Proceedings](#), May 2, 2013. For example, in the United States, efficiencies must ultimately be pro-competitive: “Efficiencies from the transaction may increase the firm's ability to compete, and may benefit consumers through lower prices, improved quality, enhanced service, or new products” (p. 189); in Australia, efficiencies need not be taken into account although may be considered if they will lead to greater competition (p. 63); in the U.K., efficiencies may be considered at the competitive effects analysis and remedies stages, *e.g.* if rivalry will be enhanced or consumers will benefit, but they do not work as a defence on their own (p. 173); in the EU, the role of efficiencies in competitive effects analysis is circumscribed, and they will generally be required to benefit consumers and not to limit competition (p. 89); in Germany, the effects of efficiencies on the market under scrutiny can be considered, but “[m]ere cost savings or improved capacity utilization are not sufficient” (p. 98).

⁵⁷ The label “consumer” surplus is understood as a rhetorical simplification as it includes not just end consumers, but also business customers. Moreover, competition agencies can and do pursue cases that reduce competition among competing buyers resulting in harm to upstream suppliers. Some have therefore suggested a move to broader, more accurate terminology such as “trading party” standard or “protecting competition” standard to encompass the broad range of competitive injury about which competition law is concerned. See, for example, Carl Shapiro, [“Antitrust: What Went Wrong and How to Fix It”](#), *Antitrust Magazine*, Vol. 35, No. 3, Summer 2021.

⁵⁸ *Commissioner of Competition v. Superior Propane Inc.*, 2001 FCA 104.

⁵⁹ Once reheard, the *Superior Propane* case itself made use of a “balancing weights” standard, which allows for differential weights on the loss in consumer surplus relative to the gain in producer surplus to determine whether the balance is reasonable. See [Competition Bureau submission to the OECD Competition Committee roundtable on Public Interest Considerations in Merger Control](#), June 14, 2016.

⁶⁰ *Tervita Corp. v. Canada (Commissioner of Competition)*, note 39, at paras. 146-151.

despite non-quantified evidence raised. With the added importance of non-price competition in the digital economy, the burden of litigating an efficiencies claim is likely to become even more of a significant challenge for both firms and the Bureau, particularly with more abstract concepts such as privacy or innovation.⁶¹

Unsurprisingly, against this backdrop, the defence continues to be the subject of much debate among observers, striking at the heart of the Act's purpose and enforcement structure, and on whom the benefits versus harm may be conferred.⁶² As a key part of this consultation, the Government is resolved to examine possible reform of the efficiencies defence. Possible ways forward could run a gamut from reform of aspects of the defence to its abolishment. Tailored approaches alone or in combination could include: considering efficiencies within the competitive effects test rather than as a full defence; shifting the elements or procedure required for establishing or contesting efficiencies; weighting the factors differently or fully adopting a consumer surplus standard; increasing the role of unquantified evidence; or limiting the application of the defence only to mergers or markets with certain characteristics.

Merger effects on workers

The Act considers the effect of a merger or proposed merger on competition and, as discussed above, on efficiency gains. With the importance of human capital as a unique input, and Canada's commitment to inclusive growth, one may fairly question whether effects on labour ought to have a more prominent role in the equation.

Across the world, labour effects are seldom examined as determinant or relevant factors in assessing a merger's effect on competition.⁶³ International commentators have noted that traditional competition analysis has focused on consumer welfare and prices in particular, which may represent a narrowing of the original sociopolitical goals that led to the introduction of antitrust policy to

⁶¹ Vass Bednar and Robin Shaban argue that "[n]ot only are many markets different [e.g., zero cost] but notions of efficiency seem outdated in a world with zero or close-to-zero marginal cost and the most valuable capital being intellectual property and human capital." Vass Bednar and Robin Shaban "[The State of Competition Policy in Canada: Towards an Agenda for Reform in a Digital Era](#)", Centre for Media, Technology and Democracy, April 21, 2021.

⁶² See, e.g., Ralph Winter, "[Tervita and the Efficiency Defence in Canadian Merger Law](#)", *Canadian Competition Law Review* 28:2 (October 2015): 133, versus Brian Facey and David Dueck, "[Canada's Efficiency Defence: Why Ignoring Section 96 Does More Harm Than Good for Economic Efficiency and Innovation](#)", *Canadian Competition Law Review* 32:1 (May 2019): 33.

⁶³ According to an OECD study, "In their merger control activity, competition authorities do not seem to have conducted in-depth analysis of monopsony power in labour markets." OECD, [Competition in Labour Markets](#), February 26, 2020, p. 9. A notable outlier is the 2021 challenge of the U.S. Department of Justice to the proposed merger between publishing houses Penguin Random House and Simon & Schuster, which is largely based on concerns of monopsony power affecting authors' benefits. See Joseph M. Miller and Tinny Song, "[Stop the Presses: DOJ Sues to Prevent Monopsony Resulting from Penguin Random House Acquisition of Simon & Schuster](#)", *National Law Review* vol. XI, no. 313, November 9, 2021.

limit corporate concentration. Some have made the case that the overwhelming focus on product markets in antitrust analysis is unprincipled or the product of outdated assumptions.⁶⁴ As concentration in labour markets has been blamed for the failure for wages to keep pace with economic growth following the Great Recession, there have been calls for a more holistic analysis of merger reviews, whether within the existing framework or through new tools.⁶⁵

In a paper commissioned by Innovation, Science and Economic Development Canada, economist Marcel Boyer notes various challenges and pitfalls of applying competition law to labour markets. These include how to integrate the role of technological change and “creative destruction”, which will inevitably have an adverse effect on certain jobs, into the analysis. Another includes how to evaluate wages holistically, including insurance, pensions, training, non-static compensation, and benefits. A third involves market definition where labour is concerned, given the fluidity of labour competencies and worker mobility, among other things. Finally, the role of countervailing worker power, including through unions and recruiters, must be considered.⁶⁶

While thought continues to evolve as to what methodology would be appropriate to evaluate labour effects in merger review,⁶⁷ there are at least two points in the Canadian system where a closer examination of labour effects could occur. First, labour could arise in the evaluation of competitive effects, namely as to whether mergers may result in distortions to the labour market, even if there are no harmful competitive effects downstream (*i.e.* an exercise of monopsonistic power rather than monopolistic). Secondly, it could be relevant in the evaluation of efficiencies, in which reduction of labour may be viewed as efficient or pro-competitive, even though workers may not be as easily redeployed as other inputs and come under obviously different, human pressures.⁶⁸

⁶⁴ See Suresh Naidu, Eric A. Posner and Glen Weyl, “[Antitrust Remedies for Labor Market Power](#),” 132 *Harvard Law Review* 537, 2018.

⁶⁵ See, for example, José A. Azar, Ioana Marinescu, Marshall I. Steinbaum and Bledi Taska, “[Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data](#)”, NBER Working Paper No. 24395, March 2018, Revised February 2019; Hiba Hafiz, “[Interagency Merger Review In Labor Markets](#)”, 95 *Chi.-Kent L. Rev.* 37, 2020; Ioana Marinescu and Herbert J. Hovenkamp, “[Anticompetitive Mergers in Labor Markets](#)”, *Indiana Law Journal* 94:3, Article 5.

⁶⁶ See Marcel Boyer, [Comments on Competition Policy and Labour Markets](#), CIRANO, July 26, 2022, pp. 29-36.

⁶⁷ For example, European consulting firm Oxera highlights how a pure competition policy approach would treat labour markets as analogous to product markets of their own, whereas an industrial policy approach calls for competition authorities to assess the impact of their decisions on workers as citizens and consumers rather than inputs. Oxera, “[Labour markets: a blind spot for merger control?](#)”, September 30, 2019.

⁶⁸ These considerations are explored in greater detail in Russell Pittman and Chris Sagers, “[A Proposed Pro-Labor Step for Antitrust](#)”, *Competition Policy International*, February 2021.

It is worth considering whether amendments to the Act could give labour a more central role in competition analyses. This could include, for example, modifying the Act's purpose clause; the addition of a consideration in the competitive effects test in s. 93 of the Act that would expressly consider monopsony power and labour effects; or modification of the efficiencies defence to address employment-based efficiencies more directly. At the same time, it is important to note that competition policy is but one tool at the Government's disposal. Employment and Social Development Canada is responsible for federal labour policy, while direct regulation occurs primarily at the provincial and territorial level. While the Act recognizes the importance of collective bargaining for the protection of workers, incorporating additional labour considerations into competition policy would be novel and, if pursued, the impact on the Act's traditional focus would need to be considered.

FOR DISCUSSION

The Government is considering the following possible reforms and would welcome input:

- The revision of pre-merger notification rules to better capture mergers of interest.
- Extension of the limitation period for non-notifiable mergers (*e.g.* three years), or tying it to voluntary notification.
- Easing of the conditions for interim relief when the Bureau is challenging a merger and seeking an injunction.
- Changes to the efficiencies defence, *e.g.* restricting its application to circumstances where consumers or suppliers would not be harmed by the merger.
- Revisiting the standard for a merger remedy, *e.g.* to better protect against prospective competitive harm, or to better account for effects on labour markets.



UNILATERAL CONDUCT

The digital economy has given rise to some of the largest corporations on the planet.⁶⁹ These companies have quickly come to populate the upper ranks of stock market capitalizations and command annual profits in the tens of billions of dollars.⁷⁰ Beyond their sheer size and global reach, large digital players are integrated into nearly every facet of our daily social and economic interactions, including how we access information and what information we access on nearly any topic. With digital economic activities in Canada growing roughly 30% faster than the economy as a whole, this trend shows no sign of slowing.⁷¹ The COVID-19 pandemic, in particular, has highlighted the extent to which digital commerce and platforms have been integrated into the mainstream economy and are heavily relied upon to conduct business and procure goods and services. In the face of widespread physical shutdowns and restrictions, e-commerce filled a void that would have been unimaginable in a pandemic response just a generation earlier.⁷²

⁶⁹ Jonathan Ponciano, “[The World’s Largest Technology Companies In 2021: Apple’s Lead Widens as Coinbase, DoorDash Storm into Ranks](#)”, *Forbes*, May 13, 2021.

⁷⁰ Jeff Desjardins, “[How the Tech Giants Make Their Billions](#)”, *Visual Capitalist*, March 29, 2019.

⁷¹ Statistics Canada, [Measuring digital economic activities in Canada, 2010 to 2017](#), May 2019.

⁷² Statistics Canada, [Retail e-commerce and COVID-19: How online shopping opened doors while many were closing](#), July 24, 2020.

FOCUS ON

The rise of ‘Big Tech’

The digital economy and the rise of data as a valuable currency has brought to the forefront concerns that a select few tech firms substantially control a number of core digital markets, such as online search, social media and e-commerce, and that these companies are de facto “gatekeepers” with the power to decide who is allowed to compete in a market and the terms upon which such competition will occur.⁷³ This power has the potential to extend further into the physical economy with the growth of the “Internet of Things”.⁷⁴

Much of the success of large digital platforms is the reward for innovation and producing compelling goods and services, offered in many cases at zero monetary cost to the consumer, and enhanced by critical network effects. While such forms of gaining scale are not problematic, the size and breadth of activities of digital firms raise questions about the efficacy of Canadian competition enforcement in the event of anti-competitive conduct by these firms.

Another issue raised is that these companies have both the means and opportunity to forgo profits to enable aggressive expansion and increased diversification.⁷⁵ While this type of behaviour may benefit consumers in the short run, the impact is less clear in the long run if markets become harder to contest and incentives for innovation dim.

It is still fiercely debated whether digital markets and their ‘Big Tech’ industry leaders present new or unique challenges under the unilateral conduct provisions of the Act. What seems apparent, however, is that some issues previously identified with these provisions may be of even greater concern in the digital era. For instance, a company that controls a platform may also compete on it, and may push users towards purchasing its own products and services, rather than those offered by rivals. This conduct,

⁷³ The UK’s digital competition expert panel recently expressed concern about three distinct forms of gatekeeping power that large digital platforms may have, namely “the ability to control access and charge high fees; the ability to manipulate rankings or prominence; and the ability to control reputations”. See *Unlocking digital competition*, note 21, at p. 41. See also Lina M. Khan, “[The Separation of Platforms and Commerce](#)”, *Columbia Law Review* 119:4 (2019): 973.

⁷⁴ Louis Columbus, “[2018 Roundup of Internet of Things Forecasts and Market Estimates](#)”, *Forbes*, December 13, 2018; *Unlocking digital competition*, note 21, at 47; *Competition policy for the digital era*, note 21, at 33-34, 105-06.

⁷⁵ Lina M. Khan, “[Amazon’s Antitrust Paradox](#)”, *Yale Law Journal* 126:3 (February 2016): 710. See also *Stigler Committee on Digital Platforms - Final Report*, note 21.

known as “self-preferencing”, is likely to be one of the most hotly contested competition law issues in the coming years with respect to digital platforms. It is notable that the potential for this form of conduct may take on added importance for the Bureau when considering vertical mergers that lead to common ownership of different stages of a supply chain, in recent decades often considered by many to be benign.⁷⁶

The current state of play has led to international debate not just about market power in a strictly economic sense, but also its spillover into other realms and the negative externalities of having large amounts of influence concentrated in the hands of a very few firms. Indeed, it has been suggested that the potential may exist for a pernicious cycle in which such power can be wielded at the policy level to gain further economic advantage.⁷⁷ Given the indispensability of the Internet as a medium for modern-day commerce, the situation has been likened to the early railroad oligopoly in the United States that led to the advent of antitrust law.⁷⁸

The Act addresses unilateral conduct that may distort markets in a variety of ways. First and foremost is the general provision on abuse of a dominant position in ss. 78 and 79, setting out principles-based limits on the behaviour of firms that hold substantial market power. However, other provisions of the Act specifically address refusal to deal (s. 75) and price maintenance (s. 76), as well as exclusive dealing, tied selling and market restriction (s. 77). Not all of these provisions have a rich history of judicial consideration, but at present all are subject to civil enforcement, with some variation of a competitive effects test.

Some issues for potential reform in the area of unilateral conduct follow.

⁷⁶ See, e.g., Jeffrey Church, “[Vertical Mergers](#)”, *Issues in Competition Law and Policy* 2: 1455 (ABA Section of Antitrust Law 2008).

⁷⁷ For example, in his recent book, *The Curse of Bigness* (Columbia Global Reports, 2018), Tim Wu (now advising the Biden administration) argued that increasing corporate concentration contributes to regulatory capture, the process by which private interests are able to unduly influence the direction of public policy.

⁷⁸ Rana Foroohar, “[Big Tech is America’s new ‘railroad problem’](#)”, *Financial Times*, June 16, 2019. See also, Alex Boutilier, “[Freeland says today’s big tech firms are like the monopolies of a century ago](#)”, *The Star*, May 1, 2019.

The legal underpinnings of abuse of dominance

Abuse of a dominant position, alternately referred to as monopolistic conduct, may be the most inaccessible aspect of antitrust policy to lay observers, and the most liable to be misunderstood. Shaped in Canada by an atypically detailed set of statutory provisions and interpreted through a thick lens of case law, administration of this part of the Act can depend heavily on complex economic modelling and the making of distinctions that may seem, to some, arbitrary or unduly narrow.

On its face, s. 79 of the Act requires the fulfilment of a three-part test before a remedial order can be issued: (i) substantial or complete control of a market; (ii) a practice of anti-competitive acts; and (iii) an actual or likely SLPC. An illustrative, non-exhaustive list of anti-competitive acts is set out in s. 78, helping to inform the second part of the test.

When brought before the Competition Tribunal and courts, the criteria for each of these elements have been extrapolated further, as now reflected in the Bureau's *Abuse of Dominance Enforcement Guidelines*.⁷⁹ A dominant market position concerns a substantial degree of market power in a product and geographic market as established through, for example, market share and barriers to entry. In rare cases, this can be jointly held by more than one firm. Following the BIA Amendments, an "anti-competitive act" that could form part of the practice in the second part of the test is now explicitly defined as an "act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition". This drew from, and broadened, prior case law, while continuing to list illustrative examples in s. 78. Both subjective intent and reasonably foreseeable consequences are relevant, and distinguish truly anti-competitive behaviour from justifiable business decisions that nevertheless may prejudice a competitor. Finally, the SLPC test is conducted similarly to other effects analyses in the Act, such as for mergers, comparing the level of competition with and without the alleged conduct.

Before the BIA Amendments, the second part of the s. 79 test was likely the most problematic, given the need to demonstrate an intention of harm to a competitor in order to establish a practice of anti-competitive acts.⁸⁰ Despite the plain text

⁷⁹ Competition Bureau, *Abuse of Dominance Enforcement Guidelines*, March 7, 2019.

⁸⁰ See Ralph Winter, "The Gap in Canadian Competition Law Following Canada Pipe", *Canadian Competition Law Review* 27:2 (Fall 2014). See also *A New Competition Act for a New Federal Government*, Eleventh Report of the C.D. Howe Institute Competition Policy Council, April 28, 2016.

of the provision, this interpretation unduly limited the Bureau from taking action against recognized anti-competitive conduct where it was not strictly directed against a competitor.⁸¹

For instance, “facilitating practices” arise where firms take unilateral steps to soften the relationship with competitors without necessarily requiring an agreement. This may include the publication of price lists, or the use of price-matching guarantees or most-favoured-nation clauses. Some such practices may be pro-competitive, but they can also serve to dampen competition in certain settings, at the expense of consumers or suppliers rather than fellow competitors.⁸²

While recent case law even before the BIA Amendments broadened the interpretation of abuse slightly,⁸³ the three steps taken together can result in a relatively onerous burden on the Competition Bureau, and this may limit the Bureau’s ability to consider seeking remedies in cases where competition appears to be threatened.⁸⁴ There are regularly calls for the Bureau to intervene in areas where certain businesses believe they are less able to compete due to the actions of powerful competitors, suppliers or customers. However, the specific circumstances often do not lend themselves to the entirety of the three-part test needed to demonstrate abuse of dominance within the Act’s meaning.⁸⁵

There are, of course, valid reasons to limit grounds for intervention in private commerce, even where certain parties may be aggrieved. However, the very narrow application of these provisions may become more problematic as the economy grows more complex and intertwined, with the rise of digital commerce and its new forms of competition. This includes up-to-the-minute pricing adjustments and heavily personalized algorithms, in addition to non-

81 A notable case where the Competition Tribunal recognized conduct that was anti-competitive, yet the Bureau was powerless to address it under s. 79 at the time, was its 2013 case against Visa and Mastercard. This involved each company imposing restrictive terms of service on its merchant clients, with consumer harm resulting. The BIA Amendments have filled this gap. See *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 10, at paras. 137-39.

82 See Edward M. Iacobucci and Ralph A. Winter, “[Abuse of Joint Dominance in Canadian Competition Policy](#)”, *University of Toronto Law Journal* 60:2 (Spring 2010): 219.

83 Since a case against the Toronto Real Estate Board in 2016, even an entity that does not strictly compete in a market, but has a “plausible competitive interest” in adversely impacting competition, can find itself subject to an order. See *The Commissioner of Competition v The Toronto Real Estate Board*, note 32, at paras 279-282.

84 Former Commissioner of Competition Melanie Aitken has described the Act as “code-like” and unnecessarily technical versus a broader, more principles-based approach under which businesses manage to operate without undue uncertainty in jurisdictions such as the U.S. or EU. Note, for example, comments made at the [Competition and Growth Summit](#), June 2, 2021.

85 Note, for example, key findings in the Bureau’s investigation of Loblaw, or the Competition Tribunal’s ruling in the matter taken against the Vancouver Airport Authority. See Competition Bureau, [Alleged anti-competitive conduct by Loblaw Companies Limited](#), November 21, 2017; *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6.

price competition discussed above, all of which are likely to obfuscate traditional competition analysis.⁸⁶ In order to emphasize their increasing importance, the BIA Amendments enshrined the notion of non-price elements of competition as factors for the Competition Tribunal to consider, including the emerging dimension of competing on the basis of protecting consumer privacy. This makes it no less a challenge to measure or appraise them, however. The public interest is not well-served if competitive harm is identifiable but the Bureau is not sufficiently empowered to intervene, or if the prospects for success in any enforcement action are too low, as cases become more costly and time-consuming to carry out.

Increasingly, legislators are turning to the possibility of preventive rules or presumptions applied to dominant firms or platforms, with respect to both acquisitions and business practices such as self-preferencing and data use, rather than conducting extensive economic analyses in each case.⁸⁷ Indeed, in a paper commissioned by Innovation, Science and Economic Development Canada, scholars David Wolfe and Mdu Mhlanga go further, distinguishing between the traditional focus of antitrust enforcement on preventing anti-competitive conduct, versus the need for more proactive encouragement of competitive alternatives, such as through the growth and scale-up of new firms. This, they argue, may be what is necessary “to counter the inherent tendency of the platform economy towards producing winner-take-most results in digitally intensive sectors of the economy.”⁸⁸ While such structural and proactive approaches remain under consideration in Canada, the below discussion concerns the elements of the current abuse of dominance approach in s. 79.

⁸⁶ Consider predatory pricing, which requires below-cost pricing with the plan of recouping losses once market competition is weakened. In many digital markets prices may be dynamic and difficult to track; the nature of product markets may be unclear; firms often have very low marginal costs; they may sacrifice recoupment in favour of expansion; and may choose to offer some of their products and services below cost or for free for reasons unrelated to recoupment. It may therefore be especially difficult to apply the law or distinguish predatory pricing from normal competition on the merits. Another matter to consider is firm intent, an element of the test for a practice of anti-competitive acts, when conduct is algorithmic or automated.

⁸⁷ Five bills introduced in the U.S. in June 2021 (see Kang, note 22) would restrict the types of business a dominant firm could own, outlaw discriminatory or self-preferencing behaviour by them, make their acquisitions rebuttably unlawful, and impose data portability standards upon them, among other things. See Lauren Feiner, “[Lawmakers unveil major bipartisan antitrust reforms that could reshape Amazon, Apple, Facebook and Google](#)”, CNBC, June 11, 2021. See also European Commission, “[The Digital Services Act package](#)”, updated July 5, 2022; *Competition and Antitrust Law Enforcement Reform Act of 2021*, note 47.

⁸⁸ David A. Wolfe and Mdu Mhlanga, *The Platform Economy and Competition Policy: Options for Canada*, Innovation Policy Lab Working Paper Series 2022-02, Munk School of Global Affairs & Public Policy, University of Toronto, April 2022, at pp. 18-19.

Dominance

Harm to competition can arise through the actions of firms that may not be unmistakably dominant, but together exert substantial influence on the market, whether as vendors or purchasers.⁸⁹ Where coordinated behaviour arises from an agreement or arrangement, the Act can address this as a competitor collaboration. However, reduced competition in a market may instead be the product of copycat strategies, conscious parallelism (where reciprocal action is expected but not enforced), or through “facilitating practices”, discussed above. The Act recognizes the possibility of multi-firm dominance, but as illustrated in the Bureau’s enforcement guidelines, this requires more than simply parallel or similar cases of unilateral conduct, and in practice has rarely been identified.

The civil enforcement scheme within the Act is primarily geared toward correcting competitive harm for the good of the market; in contrast to criminal enforcement or tort law, assigning responsibility for its origins is secondary, and tied chiefly to being able to direct a remedial order appropriately. In certain other unilateral conduct provisions, for example, even the fact of conduct being “widespread in a market” without a solely responsible party is sufficient grounds for intervention. As long as firm actions are able to limit competition, a certain degree of influence in the marketplace is implied, and it may be fairly asked how laborious the dominance test need be.⁹⁰

Substantial lessening or prevention of competition

The requirement for the Commissioner to prove that the anti-competitive practice is resulting in, or likely to cause, an SLPC may be unduly strict. For similar reasons that market dynamics in an evolving economy may complicate merger analysis (such as disruptive but small start-ups, zero-revenue or low-asset models), the assumptions behind competitive effects may need to be revisited.

In a paper commissioned by Innovation, Science and Economic Development Canada, authors Vass Bednar, Ana Qarri and Robin Shaban considered various unilateral actions that dominant firms and platforms may take in a data-driven economy that can ultimately entrench their market power and harm competition,

⁸⁹ Note concerns raised by food suppliers with respect to the practices of retail grocers enabled by high concentration. See Food, Health and Consumer Products of Canada, *Priorities for healthy homes, healthy communities, and a healthy Canada*, September 2020.

⁹⁰ The Act has, since 2009, permitted administrative monetary penalties to accompany remedial orders against dominant firms for abuse, designed to promote future compliance. While the fixed maximum amounts were replaced in the BIA Amendments by three times the value of benefit derived (or potentially 3% of revenues of the firm targeted by the order, where benefit cannot be reasonably calculated), the penalty amount is subject to various statutory considerations to ensure that it is appropriate. In the event that a test for dominance were relaxed, the application of penalties could be tailored as necessary.

such as imposing limits as a gatekeeper, self-preferencing, or duplicating the products of platform users with their own. The authors express concern about the reach of the current Act, noting that

it may be difficult to establish anti-competitive effects from some behaviours given the high evidentiary standards needed to establish a substantial lessening or prevention of competition. [...] At present, the Commissioner is required to show, on a balance of probabilities, that the abusive conduct has led to specific negative outcomes (the consequentialist approach). The effects that are typically considered include higher prices, lower quality, or less innovation. However, the law in other jurisdictions, particularly the EU, requires that authorities show primarily that the conduct in question has taken place, and there is less emphasis on demonstrating that the conduct has caused certain harms (the deontological approach, or what some in Canada call a *per se* approach).⁹¹

Inspired by the European example, an alternative approach the Government intends to examine would involve showing only that conduct is *capable* of having anti-competitive effects, or *has as its very object* an anti-competitive outcome, regardless of whether it is achieved. EU law recognizes some circumstances where forms of exclusionary conduct are presumptively unlawful, whereas Canadian law includes both intent and (likely) effect as elements of the test in every case. Indeed, some have suggested removing examination of intent entirely, merely defining an anti-competitive act with reference to its SLPC.⁹² The reference to an “appreciable risk” of competitive harm, in the U.S. Senate proposal aimed at dominant American firms, is also worth noting as a possible model.

Other restraints of trade

As noted above, the Act contains other provisions that address specific forms of conduct that may constitute restraints of trade or harm competition, in ss. 75-77 and 80-81. Some of the activity that they cover may also constitute an abuse of dominance where the relevant conditions are met, although some substantive differences include alternatives to the need for a fully dominant firm; non-application to purchaser activity; and a less stringent test than an SLPC. Procedurally, the key difference from s. 79 is that only abuse can lead to administrative monetary penalties (AMPs). Prior to the BIA Amendments,

⁹¹ Vass Bednar, Ana Qarri and Robin Shaban, *Study of Competition Issues in Data-Driven Markets in Canada*, Vivac Research, January 2022, at p. 24.

⁹² *Undo Haste: Rushed Competition Act Reforms Warrant Further Examination*, Twenty-third Report of the C.D. Howe Institute Competition Policy Council, June 7, 2022, at p. 3.

uniquely ss. 75-77 allowed for the possibility of privately-initiated cases brought before the Competition Tribunal, although such a procedure is now available for abuse as well.

SECTION	ACTIVITY	VERTICAL DIRECTION	DOMINANCE THRESHOLD	COMPETITIVE EFFECTS TEST	REMEDY	PRIVATE TRIBUNAL ACCESS
75	Refusal to deal	Supply-side	N/A	Adverse effect on competition	Accept customer	Y
76	Price maintenance	Supply-side	N/A	Adverse effect on competition	Prohibition order/accept customer	
77	Exclusive dealing, tied selling or market restriction	Supply-side	Major supplier or widespread in a market	Substantially lessen competition	Prohibition order, or order to "restore or stimulate competition"	Y
79	Abuse of dominance	Supply-side or buy-side	Substantial or complete control of class or species of business	Substantially lessen or prevent competition	Prohibition order/prescriptive remedy (incl. divestiture), AMPs	Y as of 2022
81	Delivered pricing	Supply-side	Major supplier or widespread in a market	N/A	Prohibition order	N

The resulting patchwork raises questions as to the usefulness of the multitude of provisions or whether their prescriptive nature may lead to narrower interpretations of Parliamentary intent when applying the various provisions.⁹³ Practitioners have debated whether the best approach is to consolidate the existing unilateral conduct provisions along with abuse of dominance into a singular, broadened unilateral conduct provision, more akin to the U.S. and Europe.⁹⁴ Alternatively, some have expressed concerns about gatekeeping industry giants being able to leverage their market power in ways viewed as unfair or damaging to less powerful businesses, even where a strict antitrust approach may not provide a remedy.⁹⁵

⁹³ Paragraphs 110-139 of the Visa/Mastercard decision (note 81) are devoted to establishing the boundaries of s. 76 of the Act through statutory interpretation, including citing the principle that words must be read in their entire context, including "harmoniously with the scheme of the Act".

⁹⁴ *A New Competition Act for a New Federal Government*, note 80.

⁹⁵ Complaints have arisen in the global grocery and media sectors in recent years, while some third-party vendors have accused digital platforms of unfair or capricious treatment. See "[Disfunction in Canadian grocery business 'needs attention,' government probe finds](#)" *Financial Post*, March 4, 2021; Rosa Saba and Alex Boutilier, "[Canada watching 'closely' after Google ordered to work out repayment to French news organizations, publishers](#)" *Toronto Star*, April 13, 2020; Aditya Kalra, "[Amazon documents reveal company's secret strategy to dodge India's regulators](#)", Reuters, Feb. 17, 2021.

Noting the Act's multi-faceted purpose clause, including the participation of small and medium enterprises in the economy, the Government believes it would be worth exploring whether these (or potentially other) provisions may be repositioned as "fair competition" provisions with less focus on competitive effects, in the interests of maintaining a level playing field and checking gatekeepers with monopolistic or monopsonistic power. It is worth noting that not all civil provisions in the Act require proof of broader competitive harm, including deceptive marketing, delivered pricing and, before 2002 amendments, refusal to deal,⁹⁶ while some foreign competition authorities administer "unfair competition" provisions, such as with respect to unconscionable conduct in Australia, or abuse of superior bargaining position in several jurisdictions.⁹⁷

FOR DISCUSSION

As the world's largest companies grow ever more powerful, the Act's abuse of dominance legal tests are ripe for re-examination. The Government is considering the following possible reforms and would welcome input:

- Better defining dominance or joint dominance to address situations of *de facto* dominant behaviour, such as through the actions of firms that may not be unmistakably dominant on their own, but which together exert substantial anti-competitive influence on the market.
- Crafting a simpler test for a remedial order, including revisiting the relevance of intent and/or competitive effects.
- Creating bright line rules or presumptions for dominant firms or platforms, with respect to behaviour or acquisitions, as potentially a more effective or necessary approach, particularly if aligned with international counterparts and tailored to avoid over-correction.
- Condensing the various unilateral conduct provisions into a single, principles-based abuse of dominance or market power provision. Alternatively, the unilateral conduct provisions outside of abuse of dominance could be repositioned for different objectives of the Act, such as a fairness in the marketplace.

⁹⁶ *An Act to amend the Competition Act and the Competition Tribunal Act*, S.C. 2002, c. 16.

⁹⁷ *Competition and Consumer Act 2010*, Schedule 2, Chapter 2, Part 2-2; *Differences and Alignment: Final Report of the Task Force on International Divergence of Dominance Standards of the ABA Antitrust Law Section*, September 1, 2019, pp. 73-81.



COMPETITOR COLLABORATIONS

The 2009 amendments to the Act divided Canada's enforcement approach to horizontal competitor collaborations into a *per se* criminal regime for "hardcore cartel" conspiracies, and a civil competition review for all other forms of collaboration. The first category encompassed bid-rigging, price-fixing, market allocation and output restriction coordination on the supply side, and punishes such conduct in itself with substantial penalties, without requiring any proof of competitive effects. The latter category included all other forms of agreement, such as buy-side coordination or joint ventures, reviewing them to ensure that competition is not harmed as a result of otherwise lawful activity. The BIA Amendments created a new *per se* criminal offence to address certain forms of employer collusion, namely agreements or arrangements to fix wages and similar terms of employment, or not to poach employees. However, other purchase-side coordination remains outside the scope of criminal or *per se* prohibition.

Some additional issues in the area of competitor collaboration are discussed below.

FOCUS ON

Algorithmic conduct

A prominent feature of the digital economy is the growing use and increasing sophistication of artificial intelligence (AI), including algorithms, automation, machine learning and language recognition. AI has the potential to foster innovation in virtually every industry. Alongside its benefits, however, AI raises new challenges for competition law.

One of the most prominent theoretical challenges discussed to date relates to potential for “algorithmic collusion” – the idea that automation could make it easier for firms to arrive at or sustain collusive outcomes with no or minimal human interaction.⁹⁸ Companies may be able to cloak agreements to collude in complex computational patterns, making detection a challenge. This threat has some suggesting that algorithms should be subject to some oversight or audit,⁹⁹ while practitioners are already developing compliance tips for businesses.¹⁰⁰ In Canada, the role of the AI and Data Commissioner, currently contemplated in Bill C-27, will provide a complementary framework by requiring ongoing mitigation measures for certain organizations and enabling the government to seek further information and corrective measures when necessary.

As ways of doing business continue to evolve rapidly, so too must all forms of competition analysis, as some suggest that traditional approaches may need to be reconsidered or refocused on outcomes.¹⁰¹

⁹⁸ See Ariel Ezrachi and Maurice E. Stucke, “[Artificial Intelligence & Collusion: When Computers Inhibit Competition](#)”, *University of Illinois Law Review* (March 2017): 1775. See also OECD, [Algorithms and Collusion: Competition Policy in the Digital Age](#), June 2017.

⁹⁹ See the U.S. bills in each chamber of Congress, [H.R.6580](#) and [S.3572](#), *Algorithmic Accountability Act of 2022*; see also UK Competition and Markets Authority, [Pricing algorithms research, collusion and personalised pricing](#), October 8, 2018.

¹⁰⁰ [Algorithms: Challenges and Opportunities for Antitrust Compliance](#), ABA Compliance and Ethics Spotlight Special Report, Fall 2018.

¹⁰¹ See Terrell McSweeney and Brian O’Dea, “[The Implications of Algorithmic Pricing for Coordinated Effects Analysis and Price Discrimination Markets in Antitrust Enforcement](#)”, *Antitrust* 32:1 (Fall 2017); Rosa M. Abrantes-Metz, “[Pricing Algorithms and Implications for Competition](#),” *Competition Policy International* (May 2019).

Horizontal coordination without an agreement

Conduct by non-human actors may raise a number of enforcement challenges. While it is clear that the law would apply where competitors agree to fix prices using an algorithm – indeed such conduct has already been prosecuted in the U.S.¹⁰² – it is less clear how traditional cartel concepts such as “agreement” and “intent” would apply to situations where algorithms learn through mere trial-and-error to achieve joint profit-maximizing outcomes, absent any human involvement. The criminal standard of proof for the Act’s conspiracy and bid-rigging provisions (ss. 45 and 47) require not only an agreement between competitors, but as with criminal offences generally, also require *mens rea*, an intention to agree to target these outcomes. This can lead to evidentiary obstacles where AI has undertaken much of the process. While human action is required to set some chain of events in motion, it is not clear that programming an algorithm merely capable of initiating coordination with competitors could always be addressed under these criminal provisions, and upcoming AI legislation may be better positioned to address concerns.¹⁰³

The concept of agreement also spills over into civilly-reviewable coordination under s. 90.1 of the Act. While intent is not an element in this case, an “agreement or arrangement” is still required. This gives rise to a broader question that goes to the heart of civil enforcement: should it matter whether a discrete meeting of the minds can be clearly established?

The argument has been made that the introduction of algorithms may necessitate a shift toward addressing more tacit forms of collusion.¹⁰⁴ While non-human actors may pose legal and philosophical challenges to criminal prosecutors, civil enforcement is instead mostly focused on the health of the market, rather than on what its participants were trying to do. If harmful competitive effects can be established from coordinated firm conduct whatever the origin (including via algorithms), the case can be made that the Bureau should have grounds to intervene to protect the marketplace. If the law were to deem or infer the existence of an agreement in more circumstances,

¹⁰² *Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division’s First Online Marketplace Prosecution*, US Department of Justice, April 2016.

¹⁰³ The *Artificial Intelligence and Data Act*, if passed by the enactment of Bill C-27, may provide an avenue to address harm caused by algorithms even where criminal intent cannot easily be proven under the Act. That law would define harm as including economic loss, and require those responsible for “high-impact systems” to assess and mitigate the risk of such harm, monitor compliance with mitigation measures, and undertake transparency safeguards. The future AI and Data Commissioner, if so designated ministerially, will be able to seek records or order an audit to ensure compliance with the law and harm prevention. Both civil and criminal penalties are available for non-compliance, and the AI and Data Commissioner will be empowered to disclose information to the Bureau as necessary.

¹⁰⁴ Emilio Calvano, Giacomo Calzolari, Vincenzo Denicolò, Sergio Pastorello, “*Algorithmic Pricing: What Implications for Competition Policy?*”, *Review of Industrial Organization* 55:1 (August 2019).

competitive harm could be addressed more flexibly. Algorithmic conduct is an obvious candidate for such a reform, but potentially other horizontal “facilitating practices”, alluded to above, could be addressed between firms of any size sufficient to affect the marketplace.¹⁰⁵ Alternatively, this may once more be an area where AI legislation provides a better form of oversight.

The scope of civil enforcement

Unlike the Act’s other civil enforcement provisions, s. 90.1 only applies to ongoing and future conduct, but not past events. In principle, this approach is consistent with the civil approach to protect markets rather than discipline its actors. However, while s. 90.1 can apply even to purely unintentional conduct, it remains relevant for more deliberate actions as well.

Not all anti-competitive forms of collaboration are necessarily caught by the criminal conspiracy provisions in s. 45, which is tightly circumscribed to avoid unintended criminal consequences. Civil enforcement thus remains an important tool to address other forms of anti-competitive collaboration. Firms may be well aware that their anti-competitive behaviour would be remediable under the civil provisions of the legislation, but so long as the Act cannot examine past behaviour or impose penalties, they may be incentivized to cross the line until required to stop. Even then, only the breach of a fully litigated s. 90.1 remedial order or consent agreement will incur legal consequences, and thus a return to ceased anti-competitive conduct may also be invited in many cases. An additional concern is that a future-looking prohibition order may not easily be tailored to address all forms of coordination, such as an agreement among competitors to cease certain behaviour. The ability to address past conduct, and impose penalties appropriate to the form of conduct, therefore must be considered.

Another question that arises concerns the strictly horizontal scope of s. 90.1. The Act’s former conspiracy provision that was amended in 2009 applied to agreements between any two or more persons. Following the amendments, which took effect in 2010, both the revised s. 45 and s. 90.1 were then limited to coordination between competitors specifically. In the criminal context, this requirement may help to ensure that vertical coordination – such as resale price maintenance – is not treated as a naked cartel under the law. Civilly, however, the limit to horizontal coordination generally falls outside the norm of international practice.¹⁰⁶ This requirement shields potentially anti-competitive conduct in

¹⁰⁵An efficiencies defence in s. 90.1(4), paralleling that of merger review, ensures that net economic positives will be taken into account, even when a distortion is observed.

¹⁰⁶ Consider, for example, s. 1 of the *Sherman Act* in the U.S., [article 101 of the Treaty on the Functioning of the European Union](#), or s. 45 of Australia’s *Competition and Consumer Act 2010*.

vertical contexts (such as supply, licensing or franchise agreements) from the Bureau's scrutiny, unless they fall under a different provision of the Act, such as tied selling. There is thus a case for the expansion of s. 90.1 to encompass more than just direct competitor collaborations.¹⁰⁷

Finally, much as in the merger context, detection of anti-competitive collaborations remains a challenge, particularly as the only formal notification mechanism concerns airline joint ventures, which is a voluntary path to gain public interest consideration by the sector regulator. One notable area that the Bureau has highlighted for a number of years is that of patent litigation settlement agreements in the pharmaceutical industry, or so-called "pay for delay" arrangements between patent-holders and generic manufacturers.¹⁰⁸ Given the substantial commercial impact of such instruments, and noting the mandatory notification system in the U.S.,¹⁰⁹ this and other areas could benefit from being subject to a notification, or potentially a voluntary clearance, mechanism.

Buy-side coordination

In the summer of 2020, allegations were examined in Parliament with respect to the major retail grocers all ending their COVID-19 pay bonuses for employees on the same date, and this led to calls for Bureau intervention.¹¹⁰ As labour is an input to production rather than a good or service offered by vendors, coordination to suppress its cost – such as through wage-fixing or "no poaching" agreements – is known as "buy-side" coordination. The purest forms of supply-side collusion, *i.e.* vendor cartels, have been treated as *per se* criminal violations under s. 45 of the Act since 2010, following the 2009 amendment package. However, the Bureau ultimately issued a statement recognizing that the narrowed version of s. 45 that stemmed from those amendments – the ones creating the two-track civil/criminal approach – excluded "buy-side" coordination.

The result is that such agreements were left to the realm of civil review, and remediable only where competition is harmed – an interpretation since confirmed by the courts.¹¹¹ This outcome led to an INDU report recommending

¹⁰⁷ See the submission of Jason Gudofsky and Kate McNeece, note 54.

¹⁰⁸ Competition Bureau, "[Patent Litigation Settlement Agreements: A Canadian Perspective](#)," prepared for the Global Antitrust Institute, George Mason University School of Law Conference: Global Antitrust Challenges for the Pharmaceutical Industry, Tuesday, September 23, 2014.

¹⁰⁹ Brad Albert, Armine Black and Jamie Towey, Federal Trade Commission Bureau of Competition, "[MMA Reports: No tricks or treats—just facts](#)", October 27, 2020.

¹¹⁰ "[Enough evidence for Competition Bureau to investigate grocers for ending pandemic pay, MP says](#)", *Financial Post*, July 14, 2020.

¹¹¹ *Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements*, November 27, 2020; *Latifi v. The TDL Group Corp.*, 2021 BCSC 2183; *Mohr v. National Hockey League*, 2021 FC 488.

the reinsertion of buy-side collusion into the criminal conspiracy provision in s. 45.¹¹² Ultimately, to address the committee's direct concern over wage-fixing, the BIA Amendments added a provision specifically on employer collusion into that section. The provision is targeted and there are clear exemptions and defences for legitimate agreements that arise from a collective bargaining process, or that are ancillary to a broader collaboration among employers. Other forms of buy-side collusion still remain subject only to civil review.

It should be clarified that while buy-side agreements (including with respect to labour) were formerly under the purview of s. 45, they have never been *per se* unlawful under Canadian law, even prior to the 2009 amendments. The former s. 45 still required the establishment of undue harm to competition, and beyond a reasonable doubt moreover. The effects analysis (sometimes known as "rule of reason") has since been adapted to civil enforcement, while the new *per se* conspiracy provision was limited to the worst forms of supply-side cartel conduct that never hold an economic justification.¹¹³ Buy-side coordination, by contrast, presents different incentives for participants and more economic ambiguity, as such activity may be seen to reduce costs, increase efficiency and deliver consumer benefit.¹¹⁴

The BIA Amendments have addressed certain forms of labour collusion, but the optimal approach to these and other forms of buy-side coordination continues to stoke debate, and there appears to be no global consensus in enforcement.¹¹⁵ Labour market restraints have been found capable of economic harm comparable to those in product markets, even though a traditional focus on price may sometimes seem to place consumer and worker interests at odds with one another.¹¹⁶ It is not a stretch to apply the same logic to other forms of naked buy-side coordination that distort markets to the detriment of suppliers.

¹¹² See *Wage Fixing in Canada: And Fairness in the Grocery Sector*, note 11.

¹¹³ See, for example, Competition Bureau, *Frequently asked questions—Amendments to the Competition Act*, March 2009.

¹¹⁴ Peter C. Carstensen, "Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy", 1 *Wm. & Mary Bus. L. Rev.* 1 (2010), pp. 20-33.

¹¹⁵ OECD, *Competition in Labour Markets*, note 63.

¹¹⁶ Herbert Hovenkamp, *Competition Policy for Labour Markets*, OECD Roundtable on Competition Issues in Labour Markets, June 5, 2019. Note also that the U.S. Department of Justice maintains that labour market distortions represent the same form of marketplace threat as those in product markets, and have begun to pursue criminal cases against them. See [Remarks of Richard A. Powers, Acting Assistant Attorney General of the Department of Justice, Antitrust Division, U.S. Department of Justice](#), Fordham Competition Law Institute 48th Annual Conference on International Antitrust Law and Policy, October 1, 2021; Karen Sharp and Jeff VanHooreweghe, "Update on DOJ 'No-Poach' and 'Wage-Fixing' Criminal Antitrust Prosecutions", Wilson Sonsini Alert, December 7, 2021.

Conversely, others have cautioned that buy-side agreements, even with respect to labour, can be economically ambiguous and should still be approached with more caution than traditional cartels.¹¹⁷

The appropriate treatment of buy-side collusion therefore remains an open question. S. 45 could be returned to its former scope of including all forms of buy-side agreements, now under the *per se* offence. Such a modification would likely subsume the employer-specific amendments of 2022. To alleviate concerns over forms of collaboration that may be seen as pro-competitive, appropriate exemptions could be fashioned – e.g. where group purchasing is conducted openly and made known to the vendor, and does not generate dominance. Conversely, a civil approach that does not require proof of an SLPC – a true non-criminal counterpart to the *per se* conspiracy prohibition – may strike the balance of addressing problematic conduct more nimbly without introducing criminal consequences.

FOR DISCUSSION

The Government is considering the following possible reforms and would welcome input:

- Deeming or inferring agreements more easily for certain forms of civilly reviewable conduct, such as through algorithmic activity, especially given the difficulty of applying concepts like “agreement” and “intent” in the age of AI.
- Broadening and/or strengthening the Act’s civil competitor collaboration provisions to discourage more intentional forms of anti-competitive conduct, including through examining past conduct and introducing monetary penalties.
- Making collaborations that harm competition civilly reviewable even if not made between direct competitors.
- Introducing mandatory notification or a voluntary clearance process for certain potentially problematic types of agreement.
- Reintroducing buy-side collusion – beyond only labour coordination – into the Act’s criminal conspiracy provision, or considering a civil *per se* approach to it.

¹¹⁷ John M. Taladay and Vishal Mehta, “[Criminalization of wage-fixing and no-poaching agreements](#)”, *Competition Policy International*, August 24, 2017; see also Alan B. Krueger and Eric A. Posner, “[A Proposal for Protecting Low-Income Workers from Monopsony and Collusion](#)”, *The Hamilton Project*, February 27, 2018, at pp. 12-13.



DECEPTIVE MARKETING

The emergence of new technologies and digital platforms in recent years has created new opportunities for businesses to sell their products, while also giving rise to the potential for novel deceptive marketing practices. While deceptive marketing is by no means unique to the digital economy, the limitless volume and numerous forms of data that can be communicated to any number of users at any moment via the Internet, combined with the added dimension of interactivity that did not exist in more traditional media, means that new avenues of concern arise.

When online price comparisons can be made by consumers in a matter of minutes or less, simply by opening multiple windows, even a small distinction, whether by way of a specific representation or a general impression conveyed, may ultimately serve as a 'tie-breaker'. Vendors have an added incentive to ensure that their price appears to be the lowest by any means possible in this dynamic environment, and this may include misleading approaches to marketing their goods and services.

For instance, "drip pricing" misleads consumers by advertising prices that ultimately do not take into account additional compulsory fees that are only revealed later in the purchasing process, sometimes even after the transactions have been processed. The BIA Amendments helped to address this practice by designating the representation of prices that are unattainable in light of mandatory fixed fees as a form of false or misleading representation under the Act's existing provisions. However, some additional forms of potentially deceptive conduct include:¹¹⁸

- when information is actually advertising (e.g. native advertising; influencer marketing; online reviews);
- hiding the true cost of a product (e.g. fine print disclosure); and
- inadequately disclosing terms and conditions (e.g. subscription traps; free trial offers; deception for the purpose of collecting consumer data).

¹¹⁸ See Competition Bureau, *The Deceptive Marketing Practices Digest*, Volume 1, June 2015.

The line between the Act's provisions on deceptive marketing in the promotion of a product, provincially-regulated consumer protection measures,¹¹⁹ communications regulation, and outright fraud under the *Criminal Code* is blurred at times, and any or all of these may be implicated in any given case. Nevertheless, the Act's deceptive marketing provisions have been interpreted broadly and apply to all manner of business promotion in Canada, and in this sense can serve as a powerful tool in the digital economy.

The passage of CASL, which took effect in 2014, inserted civil and criminal deceptive marketing provisions specific to electronic media into the Act for the first time. Given the breadth of the Act's existing deceptive marketing provisions on which they were based, however, these amendments did not dramatically alter the legal landscape with respect to false and misleading representations.¹²⁰ The tackling of drip pricing in the BIA Amendments, similarly, largely enshrined the Bureau's existing approach,¹²¹ helping to simplify enforcement by removing doubt about the misleading nature of the practice while otherwise maintaining the existing requirements of the provisions, such as materiality and consideration of the general impression given. The question is therefore raised whether the Act may benefit from further clarifications such as these, or newer tools or conceptions of deceptive conduct altogether.

FOR DISCUSSION

The Government is considering reforms in the following areas and would welcome input:

- Adopting additional enforcement tools suited for modern forms of commerce, given the nature and ubiquity of digital advertising. For example, further amendments to better define false or misleading conduct, such as the 2022 drip pricing amendments, could be considered.

¹¹⁹ In general, the *Competition Act* could be said to approach deceptive marketing from the standpoint of preserving the integrity of the market, in that the competitive process can be disrupted by misinformation, while pure consumer protection rests with the provinces.

¹²⁰ The legislation did, however, include provisions for information sharing and coordination between the Competition Bureau, the CRTC and the Office of the Privacy Commissioner, as well as relevant authorities in foreign jurisdictions. See CASL, ss. 56–61.

¹²¹ See Competition Bureau, "[Discount car rental penalised for advertising unattainable prices](#)", news release, October 11, 2018; Competition Bureau, "[StubHub to pay \\$1.3 million penalty for advertising unattainable prices for event tickets](#)", news release, February 13, 2020.



ADMINISTRATION AND ENFORCEMENT OF THE LAW

The consideration of new regulatory schemes and oversight roles continues to form a part of Canada's strategy for the largest actors in the modern, data-driven economy, including reform to commercial privacy law, a framework for remuneration of news publishers by digital platforms, and the development of an Artificial Intelligence and Data Commissioner.¹²² Ongoing debate nevertheless continues internationally as to the reach and deterrent value that competition enforcement may have, often tied to calls for *ex ante* regulatory rules or calls to "break up" digital giants.

In its present form, the Act does not permit the Bureau to impose or enforce mandatory codes of conduct for industries. Divestitures, meanwhile, are limited to select circumstances, most notably in merger review.¹²³ There are nevertheless a number of corrective orders and monetary sanctions at the disposal of the state.

In an age of ever more well-resourced and sophisticated global firms, there is a growing need to consider whether the Act's investigative procedures, remedies and private enforcement mechanisms are fit to hold these organizations and the individuals who run them accountable. Consequences for anti-competitive conduct, whether in the form of monetary sanctions, behavioural or structural remedies or damages, must be meaningful to the parties involved, feasible to administer, and proportionate to the negative impact of the conduct identified. Any change in approach would also have to consider important issues such as clarity, predictability, ease of compliance for businesses, and the enforcement agency's transparency and accountability. The possibility of balancing any increase in enforcement flexibility in specific instances against new or different accountability measures for the Bureau's overall activity, *e.g.* to the Department or to Parliament, could be explored.

¹²² See notes 24 and 29; see also Prime Minister of Canada, "[Minister of Innovation, Science and Industry Mandate Letter](#)", December 16, 2021.

¹²³ Although theoretically possible as a remedy for abuse of dominance if "reasonable and necessary" to overcome the effects of the practice, this has never occurred before the Competition Tribunal.

The BIA Amendments made two important changes to the Act's sanctions regime to remove fixed maximums that could limit the effectiveness of a remedy. For criminal cartel matters, the \$25-million maximum fine was removed, instead allowing the court to set an amount in accordance with usual sentencing principles, as was the case for bid-rigging. This prevents the imposition of an arbitrary limit in cases where immense volumes of commerce may be affected, such as international cartels.

For civil AMPs (both abuse of dominance and deceptive marketing) the fixed maximums were replaced by a more principled calculation similar to the model in Australia, namely three times the benefit derived from the conduct. If such an amount cannot be reasonably determined, the maximum is instead set at 3% of annual worldwide revenues, mirroring sanctions proposed in the *Digital Charter Implementation Act, 2022*.¹²⁴ Once more, the reformulation prevents the constraint of an artificial cap where a higher amount may be needed to ensure compliance rather than absorption as a cost of doing business. Despite concerns over AMPs reaching disproportionate or punitive levels,¹²⁵ it must be stressed that the actual amount of an AMP remains set by the Competition Tribunal or court based on the circumstances and criteria set out in the law, and not simply inferred from the maximum allowable.

In an era of cross-border conduct and investigations, both the means and pace of enforcement take on added importance, as competition authorities must often work together to coordinate investigative activity. This may be, for example, through cooperation instruments or mutual legal assistance agreements, but the ability to amass evidence and respond quickly relies on a dependable domestic enforcement framework. Ineffective or inefficient procedures can risk making Canada a weak link in the global effort.

The BIA Amendments improved the Bureau's ability to seek information from foreign affiliates, better aligning the threshold for, and content of, orders with those of target firms. They also added clarity as to the applicability of information-seeking orders to firms located abroad. However, many more questions remain about optimizing investigative and enforcement mechanisms. A discussion about the adequacy of the Act's processes ensues.

¹²⁴ *Digital Charter Implementation Act, 2022*, note 24, s. 95(4). Note also that where the calculation in question leads to a maximum lower than the current fixed amounts (generally \$10 million for a first order or \$15 million for a subsequent one), then those fixed maximums remain in place instead.

¹²⁵ See, for example, *Undo Haste: Rushed Competition Act Reforms Warrant Further Examination*, note 92.

Enforcement Mechanisms

Competition law enforcement, in most cases conducted *ex post facto* and dependent on a plethora of economic evidence, does not generally provide a rapid response to urgent marketplace issues. If enforcement moves too slowly in dynamic digital markets, in particular, the harm resulting from the conduct may be irreversible.

In a prosecutorial system such as Canada's, the pace of enforcement is dictated not only by the length of time it takes the Competition Bureau to investigate matters but also the length of time it takes for matters to work their way through the Competition Tribunal and court system, including appeals as necessary.¹²⁶ The slow pace of competition law enforcement is one reason why some jurisdictions are considering strengthening or making greater use of "interim measures" – available but seldom used under the Act – to halt potentially anti-competitive conduct pending a final decision.¹²⁷ The pace of competition law enforcement has undoubtedly contributed to leading some jurisdictions, such as the European Union, toward clear *ex ante* regulatory rules for large digital platforms (e.g. codes of conduct) to complement its antitrust approach.¹²⁸

Canada's system is highly adversarial and adjudicative: the Bureau must seek authorization to compel any form of information other than a supplementary information request in merger review, and it has no ability to render binding decisions or set down rules. Such measures are the exclusive purview of the Competition Tribunal or court system, or must be the product of a party's consent. In any disputed civil matter, the Bureau acts as a pure litigant. For criminal matters, it leaves the fate of the matter to the discretion of prosecutors, who must balance it against a host of other priorities.

The limits on the Bureau's room to manoeuvre stand in contrast to many important international comparators, such as the European Commission, which acts as the decision-maker of first instance on both interim and remedial measures, and has extensive powers to collect information.¹²⁹ The U.S. antitrust agencies likewise hold wide-ranging information-collection powers, including

¹²⁶ By way of illustration, three consecutive fully litigated unilateral conduct cases under the Act have taken approximately 7 years (*Toronto Real Estate Board*), 3 years (*Visa and Mastercard*) and 5 years (*Canada Pipe*) to reach final decisions, respectively.

¹²⁷ Rochelle Toplensky, "[Vestager revives dormant antitrust weapon against tech groups](#)", *Financial Times*, June 27, 2019. See also Competition and Markets Authority, [Letter from the Chair of the UK Competition and Markets Authority to the Secretary of State for Business, Energy and Industrial Strategy outlining proposals for reform of the competition and consumer protection regimes](#), February 25, 2019.

¹²⁸ European Commission, "The Digital Services Act package", note 87.

¹²⁹ [Council Regulation \(EC\) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty](#), articles 7-10, 17-24.

subpoenas and civil investigative demands for information, without third-party authorization, while the Federal Trade Commission can even set out enforceable marketplace rules with respect to deceptive practices or unfair methods of competition.¹³⁰ In Australia, the competition authority can receive applications for certain forms of conduct that may harm competition, and independently authorize them on a public interest basis.¹³¹

The experience of peer jurisdictions suggests the Bureau could be afforded greater leeway to intervene as necessary to protect the marketplace. Negotiation of consent agreements and the granting of advance ruling certificates for mergers that it does not intend to challenge are currently two of the few resources it has at its disposal, but an ability to act decisively or provide more certainty without resorting to litigation may be beneficial.

Relatedly, ways to expedite litigation before the Tribunal and courts will always be a topic for inquiry, and suggestions have traditionally included limiting the circumstances where an appeal lies to the Federal Court of Appeal, different mediation procedures and more rigid timelines. The Tribunal's 2019 Practice Direction on an Expedited Proceeding Process took some steps in this direction.¹³² The addition of more civil forms of enforcement (such as through per se civil prohibitions, as discussed above), as an alternative or complement to cumbersome or potentially undesired criminal enforcement, may also be worth exploration.

Another important consideration for effective enforcement stems from how cases are initiated, whether through private action or public enforcement by the Bureau. While jurisdictions such as the United States allow private actors to bring competition law matters directly to court separately from state or federal regulators,¹³³ the opportunity to do so is significantly constrained in Canada.

Since 2002, private parties have been able to bring cases directly to the Competition Tribunal when granted leave, under certain, limited reviewable conduct provisions of the Act. This process does not afford the applicant any compensation for damages, but rather simply takes the Commissioner's place in initiating a proceeding that may ultimately result in a remedial order. No successful case has been mounted by a private party to date, and one significant reason is that private access was not historically available for abuse of

¹³⁰ See 15 U.S. Code § 1312; U.S. Federal Trade Commission, "[A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority](#)", revised May 2021.

¹³¹ See Australian Competition & Consumer Commission, "[Guidelines for Authorisation of conduct \(non-merger\)](#)", March 5, 2019.

¹³² Competition Tribunal, [Practice Direction Regarding an Expedited Proceeding Process Before the Tribunal](#), January 2019.

¹³³ For example, see Lauren Feiner, "[App makers sue Apple and claim it uses 'monopoly power' to charge fees](#)", *CNBC*, June 5, 2019.

dominance cases,¹³⁴ widely regarded as the Act's cornerstone unilateral conduct provision. The BIA Amendments have now permitted such private cases, which may help alleviate hardship suffered by aggrieved parties in compelling dominant firms to alter their behaviour. Absent the possibility of damages, however, a strong incentive for private cases does not appear to be present.

The Act's s. 36 allows a civil cause of action for damages suffered due to conduct that is subject to criminal prosecution, such as cartels or deceptive telemarketing, or the breach of an order. There is no equivalent to s. 36 for civilly reviewable conduct, however, and the fact that such conduct is not actually deemed unlawful under the Act (merely subject to a remedial order upon review) prevents civil recovery in tort for losses suffered.

A more robust framework for private enforcement, encompassing both 'private access' to the Competition Tribunal and 'private action' to provincial and federal courts for damages, would complement resource-constrained public enforcement by the Bureau, clarify aspects of the law through the development of jurisprudence, and lead to quicker case resolutions.¹³⁵ It may also lessen the effect of any strategic litigation on public resources. At the same time, changes in this regard would have to be designed to avoid unmeritorious or strategic litigation, or an unmanageable number of actions for the Competition Tribunal or courts to process.

Collection of information outside of enforcement

While most of the above discussion concerns enforcement of the law against potentially anti-competitive or deceptive conduct, the importance of the Bureau's role as competition advocate should not be understated, and markets both in Canada and abroad have often been well served by timely interventions outside of pure enforcement action.

For example, the absence of public information on the conduct of digital platforms and the functioning of digital markets is a challenge for effective advocacy as much as enforcement, where grounds for an inquiry may not easily arise in the absence of critical information voluntarily provided by a source in possession of it. This challenge has prompted competition authorities in other countries, on their own initiative or at the request of government, to conduct market studies into digital markets as a means of uncovering possible

¹³⁴ *Damage Control: Abuse of Dominance and the State of Private Remedies in the Competition Act*, 12th Report of the C.D. Howe Institute Competition Policy Council, October 2016. See also Paul Erik Veel, "[Private Party Access to the Competition Tribunal: A Critical Evaluation of the Section 103.1 Experiment](#)", *Dalhousie Journal of Legal Studies* 18 (2009).

¹³⁵ See the [submission of David Vaillancourt to the House of Commons Standing Committee on Industry, Science and Technology's study, "Competitiveness in Canada"](#), April 26, 2021, as well as the submission of Jason Gudofsky and Kate McNeece, note 54.

competition problems, proposing pro-competitive solutions, and at minimum informing public debate through an airing of evidence.¹³⁶ Market studies can be equally valuable in other sectors where competition does not appear to be working well but where root causes are not obvious, or where identified market failures would require a regulatory solution. While the Bureau has conducted market studies without compulsory powers, the Organisation for Economic Co-operation and Development (OECD) and other commentators have recommended the Bureau be granted formal market study powers like its G7 counterparts.¹³⁷ Others (including former Commissioners and some private practitioners) have cautioned that such powers could result in increased burden on business or protracted litigation.¹³⁸ Formal study powers were removed from the Act's predecessor law once the new Act came into effect in 1986.¹³⁹

Canada could join its peers in accepting such potential risks as part of the functioning of a healthy economy. Alternatively, the collection of information outside of the enforcement context need not be an all-or-nothing affair. Study powers could be made subject to specific triggers or oversight mechanisms, such as a request from an outside authority or judicial authorization, as with section 11 orders. Likewise, the manner, quantity or use of information collected could be circumscribed. Studies could also be subject to statutory notice requirements, published terms of reference and timeframes for completion. There is no shortage of international practice to draw from in this regard.

¹³⁶ See, for example: *Digital Platforms Inquiry*, note 21; Competition and Markets Authority [United Kingdom], [Online Platforms and Digital Advertising Market Study](#), July 3, 2019; and European Commission Directorate-General for Competition, [Commission Decision of 6.5.2015 initiating an inquiry into the e-commerce sector pursuant to Article 17 of Council Regulation \(EC\) No 1/2003](#).

¹³⁷ See, for example, James Mancini, [Market studies: Time for Canada's Competition Policy Framework to Catch Up](#), C.D. Howe Institute, January 10, 2019.

¹³⁸ [Competition Bureau Should Not Have Power to Compel Information for Market Studies](#), 13th Report of the C.D. Howe Institute Competition Policy Council, May 4, 2017.

¹³⁹ Joshua Krane, Mark Opashinov and William Wu, "[Vigorous enforcement, not studies, are what Canada's competition laws need](#)", *National Post*, April 13, 2021. The authors note that studies under the previous statute "led to multi-year investigations into industries perceived to be the giants of the day — most famously the petroleum inquiry — but produced few economically positive outcomes."

FOR DISCUSSION

The Government is considering reforms in the following areas and would welcome input:

- Making the administration of the law, and enforcement before the Competition Tribunal or courts, more efficient and responsive whether public or private, without unreasonably compromising procedural fairness. For example:
 - Giving the Bureau more leeway to act a decision-maker, *e.g.* through simplified information-collection, or a first-instance ability to authorize or prevent forms of conduct;
 - Introducing new forms of civil enforcement as alternatives to criminal prosecution for certain actions;
 - Allowing private parties to seek compensation for damage suffered from civilly reviewable (non-merger) conduct under the Act.
- Pursuing a reasonable path with respect to the collection of information outside of the enforcement context, such as for the purpose of market studies, taking both public value and private burden into account.



CONCLUSION AND NEXT STEPS

The Government is resolved to ensure that the Canadian competition framework is fit for purpose and sufficiently agile to govern a modern and rapidly evolving economy. It seeks to create a principled, evidenced-based approach to competition law, policy and practice that balances the need to encourage innovation and the need to ensure a level competitive playing field. All input is welcome on the analyses and proposals set out in this paper. It is recognized that not all feedback may relate directly to the *Competition Act* or to competition enforcement policy, but will be valued for its contribution to Departmental and governmental priorities and undertakings, including other evolving areas of federal policy.

Court File No.: _____

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.C.S. 1985, c. 34 (the “**Act**”)

AND IN THE MATTER OF an application by 8X Labs Inc. for an order pursuant to Section 103.1 of the Act granting leave to bring an application under Sections 75, 76, 77 and 79 of the Act;

AND IN THE MATTER OF an application by 8X Labs Inc. for one or more orders pursuant to section 75 of the Act;

AND IN THE MATTER OF an application by 8X Labs Inc. for one or more orders pursuant to section 76 of the Act;

AND IN THE MATTER OF an application by 8X Labs Inc. for one or more orders pursuant to section 77 of the Act;

AND IN THE MATTER OF an application by 8X Labs Inc. for one or more orders pursuant to section 79 of the Act;

BETWEEN:

8X LABS INC.

Applicant

-and-

VISTAR MEDIA INC.

Respondent

**BOOK OF AUTHORITIES OF THE APPLICANT
8X LABS INC.**

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