International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: Competition Bureau of Canada
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Refusal to Deal

This questionnaire seeks information on ICN members' analysis and treatment under their antitrust laws of a firm's refusal to deal with a rival. The information provided will serve as the basis for a report that is intended to give an overview of law and practice in the responding jurisdictions regarding refusals to deal and the circumstances in which they may be considered anticompetitive.

For the purposes of this questionnaire, a "refusal to deal" is defined as the unconditional refusal by a dominant firm (or a firm with substantial market power) to deal with a rival. This typically occurs when a firm refuses to sell an input to a company with which it competes (or potentially competes) in a downstream market. For the purposes of this questionnaire, a refusal to deal also covers actual and outright refusal on the part of the dominant firm to license intellectual property (IP) rights, or to grant access to an essential facility.

The questionnaire also covers a "constructive" refusal to deal, which is characterized, for the purposes of this questionnaire by the dominant firm's offering to supply its rival on unreasonable terms (e.g., extremely high prices, degraded service, or reduced technical interoperability). Another method of constructive refusal to deal may be accomplished through a so-called "margin-squeeze," which occurs when a dominant firm charges a price for an input in an upstream market, which, compared to the price it charges for the final good using the input in the downstream market, does not allow a rival on the downstream market to compete.

This questionnaire, as well as the planned report, does not encompass conditional refusals to deal with rivals. In the case of a conditional refusal, the supply of the relevant product is conditioned on the rival's accepting limitations on its conduct, such as certain tying, bundling, or exclusivity arrangements (see the recent reports of this Working Group, in particular the *Report on Tying and Bundled Discounting* (June 2009) and the *Report on Exclusive Dealing* (April 2008)).

You should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc. Responses will be posted on the ICN website.

General Legal Framework

1. Does your jurisdiction recognize a refusal to deal as a possible violation of your antitrust law? If so, is the term refusal to deal used in a manner different from the definition in the introductory paragraphs above? Please explain.

A "refusal to deal" consists of a business refusing to supply another business in adequate amounts on the usual trade terms used by that business.

There is no absolute obligation on any business to supply another business. However, under certain circumstances, if a business refuses to supply another business, certain civil provisions of the *Competition Act* (the "Act")[1] may apply. These provisions are exceptions to the general rule that there is no obligation to deal with another business.

Unconditional refusals may be addressed either under a specific provision for refusal to deal (section 75) or under a more general framework for abuse of dominance (section 79). The specific statutory language of section 75 does not require that a business refusing supply to another business be dominant or that it compete in a downstream market with the business refused supply. In practice, however, considerations of dominance and the potential of foreclosing market access to a rival become relevant factors when assessing an adverse effect on competition as required under section 75. The refusal to deal provision does not apply to trademarks and other intellectual property ("IP") rights.

The definition of refusal to deal provided in the introductory paragraph of the questionnaire is compatible with the statutory requirements of the abuse of dominant position provision (section 79).

2. Please state the statutory provisions or legal basis (including any relevant guidelines or formal guidance) for your agency to address a refusal to deal. Are there separate provisions for specific forms of refusal (e.g., IP licensing, essential facilities, margin squeeze)?

Refusal to deal conduct is treated as a civil matter under the Act, rather than criminal. Unconditional refusals to deal may be addressed under section 75 (refusal to deal) or section 79 (abuse of dominant position).

In addition, conditional refusals to deal may be addressed under section 76 (price maintenance), section 77 (exclusive dealing, tied selling and market restriction) and section 79. However, as this questionnaire explicitly excludes conditional refusals from its ambit, these provisions will not be addressed in any more detail.

A private right of access to the Competition Tribunal (the "Tribunal") is available for applications pursuant to sections 75, 76 and 77. However, a section 79 application can only be brought by the Commissioner of Competition (the "Commissioner").[2]

The relevant sections of the Act are included as Appendix A to this questionnaire.

Refusal to Deal – section 75

Section 75 of the Act specifically deals with "pure" (i.e. unconditional) cases of refusal to deal and is designed to address vertical supply arrangements. It has been held not to apply to trademarks and other IP rights.[3]

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[1] *Competition Act*, R.S., 1985, chapter C-34 (hereinafter the "Act").

[2] The Commissioner of Competition is the head of Canada's competition law enforcement agency, the Competition Bureau.

[3] *Canada (Director of Investigation and Research) v. Warner Music Canada Ltd*., Reasons and Order on Respondents' Motion to Strike Director's Application dated December 18, 1997, Competition Tribunal CT-1997-003 (hereinafter "*Warner Music*") at para. 14.

Abuse of Dominance – sections 78 and 79

Refusal to deal may also be addressed under the abuse of dominance provisions of the Act, sections 78 and 79. Section 79 allows the Commissioner to apply to the Tribunal for an order prohibiting anti-competitive acts engaged in by one or more dominant market participants. Before an order can be made, the Tribunal must find that a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business, b) that person or persons have engaged or are engaging in a practice of anti-competitive acts, and c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market. Subsection 79(5) provides an exception for IP rights, specifying that "an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under" Canada's IP legislation is not an anti-competitive act.

Section 78 provides a non-exclusive list of anti-competitive acts that may be the subject of an order pursuant to Section 79. Margin squeezing is explicitly included in subsection 78(1)(a), which lists as a possible anti-competitive act "squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market".

In addition, although subsection 78(1)(e) does not use the term "essential facility", it does refer to the "pre-emption of scarce facilities or resources".

Where IP rights used to restrain trade – section 32

In the case of intellectual property rights, section 32 of the Act may apply. Section 32 gives the Federal Court the power, on application by the Attorney General, to make remedial orders if it finds that a person has used the exclusive rights and privileges conferred by a patent, trademark, copyright or registered integrated circuit topography to unduly restrain trade or lessen competition. Applications are rarely made pursuant to section 32; the last court case dealing with this provision was in 1992.[4] In its *Intellectual Property Enforcement Guidelines* ("IPEGs"), the Bureau has stated that section 32 would be enforced only in narrowly defined circumstances (see response to Question 12).

Bureau Guidelines and Publications

The Bureau has put out a number of guidelines and other publications intended to help firms and members of the public understand its approach to the provisions of the Act, including refusal to deal. In addition to plain-language pamphlets and web documents intended for convenient public reference, the following documents contain more in-depth information concerning the Bureau's approach to refusal to deal, as well as related topics such as competition law issues in the telecom industry (which frequently involves "essential facility"-type problems) and regulated industries:

1) Updated Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) (Draft for Public Consultation) (2009)

2) Enforcement Guidelines on the Abuse of Dominance Provisions (2001)

3) Intellectual Property Enforcement Guidelines (2000)

[4] *Society of Composers, Authors & Music Publishers of Canada v. Landmark Cinemas of Canada Ltd.* (1992), 45 C.P.R. (3d) 346, 60 F.T.R. 161 (T.D.).

4) Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry

5) Technical Bulletin on "Regulated" Conduct

3. Do the relevant provisions apply only to dominant firms or also to other firms?

Section 75 does not require a firm to be dominant, only that the person denied supply cannot obtain supply because of insufficient competition among suppliers of the product.[5] However, if there are multiple suppliers in a market then it is unlikely that the person refused supply could demonstrate that the denial of supply by one supplier would substantially affect his business. Practically, it would be unusual for a supplier to refuse to supply, for anti-competitive reasons, without holding significant market power in the relevant market at the supply level, since the person denied supply could find a substitute with little difficulty.

Similarly, section 32 does not explicitly require that a firm have significant market power before the section applies. However, its requirement that the firm's use of its IP rights have unduly prevented, restrained or lessened trade or competition makes it unlikely that the provision would apply in the absence of significant market power.

In contrast, section 79 only applies to a dominant firm or firms. Subsection 79(1)(a) requires that "one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business". The Tribunal has interpreted this subsection as focusing on market power in the economic sense, with "a class or species of business" being equivalent to the relevant product market[6] and "throughout Canada or any area thereof" being equivalent to the relevant geographic market.

4. Is a refusal to deal a civil/administrative and/or a criminal violation? If it is a criminal violation, does this apply to all forms of refusal to deal?

Refusal to deal is always treated as a civil matter under the Act, whether the refusal is addressed using section 75, section 79, or section 32 of the Act.

Experience

5. How many in-depth investigations (i.e., beyond a preliminary review) of a refusal to deal has your agency conducted during the past ten years (or use a different time frame if your records do not go back ten years)?

Since 1999 there have been a total of ten investigations of refusals to deal, of which seven occurred during 1999 and 2000. Since 2001, there have been three in-depth investigations that could be considered as refusals to deal, although these investigations were also considered more generally as abuse of dominance cases pursuant to section 79.

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[5] *Canada (Director of Investigation and Research) v. Xerox (Canada) Inc.*, Reasons and Order dated November 22, 1990, Competition Tribunal CT-1989-004 (hereinafter "*Xerox*") at 116.

[6] *Canada (Director of Investigation and Research) v. NutraSweet Co.*, Reasons and Order dated October 4 1990, Competition Tribunal CT-1989-002 (hereinafter "*NutraSweet*") at para. 53.

Prior to amendments to the Act in 2002, only the Commissioner could bring applications to the Tribunal for refusals to deal. Since a private right of access for section 75 was introduced in these amendments, complainants can apply directly to the Tribunal in refusal to deal cases. Since 2002, there have been eighteen applicatoins pursuant to section 75 out of twenty private applications for leave to apply to the Tribunal. Of these eighteen applications for leave, six were granted by the Tribunal. Only the Commissioner may make an application pursuant to section 79.

6. In how many refusal to deal cases did your agency find unlawful conduct during the past ten years? Please provide the number of cases concerning IP-licensing, essential facilities, margin squeeze, and all other types separately. For any case, in which your agency found unlawful behavior, please describe the anticompetitive effect and the circumstances that led to the finding.

   For administrative systems -- i.e., the agency issues its own decision (subject to judicial review) on the legality of the conduct -- please state the number of agency decisions finding a violation, or settlements that were challenged in court and, of those, the number upheld and overturned. For judicial systems -- i.e., the agency challenges the conduct in court -- state the number of cases your agency has brought that resulted in a final court decision that the conduct violates the competition law or a settlement that includes relief.

   Please state whether any of these cases were brought using criminal antitrust authority.

   Please provide a short English summary of the leading refusal to deal cases (including IP licensing, essential facility, and margin squeeze) in your jurisdiction, and, if available, a link to the English translation, an executive summary, or press release.

In the past ten years, the Bureau has not found in its investigations any unlawful conduct related to refusal to deal that would justify application to the Tribunal. However, two of the formal investigations noted in Question 5 are still underway at this time.

No cases were brought using criminal antitrust authority. Refusal to deal is always addressed under the civil provisions of the Act.

The below summarizes the two most recent cases brought by the Commissioner of Competition for judicial review by the Competition Tribunal:1) *Director of Investigation and Research v. Chrysler Canada Ltd.*, and 2) *Director of Investigation and Research v. Xerox (Canada) Inc*. This is followed by summaries of the two most recent cases brought by private applicants: 1) *B-Filer v. The Bank of Nova Scotia*, and 2) *Nadeau Poultry Farm Ltd. V. Groupe Westco*.

Director of Investigation and Research v. Chrysler Canada Ltd. ("*Chrysler*")[7]

In the *Chrysler* case, Richard Brunet ("Brunet") operated a business involved in the export of automotive parts, including Chrysler parts, to South American countries. Chrysler Canada encouraged Brunet to expand the sale of its part in the export market. After a number of years, Chrysler decided to stop supplying Brunet and took active steps to stop Canadian dealers from selling him the parts, on the basis that the parts were for use by Canadian customers only, not for export. The Competition Tribunal held that Brunet was seriously affected in its business due to Chrysler's refusal to deal and ordered Chrysler to resume sales. The long association

[7] *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.*, Competition Tribunal CT-1988-004 (hereinafter "*Chrysler*").

between Brunet and Chrysler, as well as Chrysler's previous encouragement of Brunet's activities, were factors in the Tribunal's decision.[8]

Director of Investigation and Research v. Xerox (Canada) Inc. ("Xerox")[9]

For a number of years, Xerox Canada freely sold parts for its photocopier machines to anyone willing to pay the listed price, including companies that refurbished second-hand machines for resale and provided maintenance services (referred to as independent service organizations ("ISOs")). Xerox eventually decided to stop supplying parts to these companies in an effort to capture the photocopier repair market and eliminate the second-hand market. The Competition Tribunal found that all the elements of section 75 were met and ordered Xerox to keep supplying the complainant, Exdos, and other ISOs. As with the *Chrysler* case, the Tribunal took note of the fact that Xerox had initially encouraged Exdos' activities.[10]

B-Filer v. The Bank of Nova Scotia ("*B-Filer*")[11]

This was a private application brought by B-Filer pursuant to the right of private access under section 103.1 of the Act. B-Filer's business allowed customers who held debit cards to use their cards to pay Internet merchants by debiting the customer's bank account. B-Filer applied to the Tribunal for an Order directing the Bank of Nova Scotia ("BNS") to accept B-Filer as a customer on usual trade terms. The Tribunal dismissed B-Filer's application for multiple reasons, including that B-Filer had failed to prove that it was substantially affected in its business due to its inability to obtain adequate supplies of a product, that this inability was due to insufficient competition among suppliers of the product, or that there was an adverse effect on competition. Furthermore, the Tribunal stated that it would have used its discretion against making an order even if the necessary elements were present because B-Filer's business model would have required BNS to disclose confidential banking information to B-Filer, potentially putting its customers' bank account security at risk. In *B-Filer*, the Tribunal also established that an "adverse effect" on competition, required by section 75, was a lower standard than a "substantial lessening or prevention of competition" used under section 79 but that it also entailed created, preserved or enhanced market power.

Nadeau Poultry Farm Ltd. V. Groupe Westco ("*Nadeau*")[12]

Westco refused to sell live chickens to Nadeau on the basis that it had entered into an agreement with another company to process chickens. Production of live chickens is subject to national and provincial regulation that controls both prices and supply to some extent. The Tribunal rejected the application on the basis that several elements of section 75 were not met. Nadeau failed to show that it was unable to obtain adequate supply due to insufficient competition, that the product was in ample supply, or that the refusal was likely to have an adverse effect on competition. The lack of supply of live chickens was found to be largely due to the supply management system put in place by governmental authorities, and that there were a number of live chicken producers with no one producer exercising significant market power.

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[8] *Ibid.* at 40-41.
[9] *Xerox, supra* note 5.
[10] *Ibid.* at 7.
[11] *B-Filer Inc., B-Filer Inc. doing business as GPay GuaranteedPayment and NPay Inc. v. The Bank of Nova Scotia*, Public Version of Confidential Reasons for Order dated December 20, 2006, Competition Tribunal CT-2005-006 (hereinafter "*B-Filer*").
[12] *Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited v. Groupe Westco Inc. and Groupe Dynaco, Coopérative Agroalimentaire and Volailles Acadia S.E.C. Volailles Acadia Inc./and Acadia Poultry Inc.*, Reasons for Order and Order dated June 8, 2009, CT-2008-004 (hereinafter "*Nadeau*").

"Essential" Facilities

Director of Investigation and Research v. Bank of Montreal et al. ("*Interac*")[13]

The Interac Association ("Interac") and its Charter members (consisting of Canada's major financial institutions) were alleged to have abused their position of joint dominance. Interac provided a shared electronic cash dispensing service whereby cards issued by one member of Interac could be used to obtain cash from an automated banking machine owned by another Interac member, and an electronic funds transfer service at the point of sale allowing consumers to make purchases at participating retail outlets. Individual financial institutions' proprietary networks, and small or regional shared electronic networks were, by comparison with Interac, inadequate substitutes. Financial institutions, and increasingly non-financial institutions, needed to connect to the Interac network to compete effectively in Canada in markets such as retail banking and credit cards. Part of the resolution set out in the consent agreement required Interac to open its network to potential participants on a non-discriminatory basis. However, the Tribunal did not use the term "essential facility" in its reasons for the order.

IP Licensing

Director of Investigation and Research v. Warner Music Canada Ltd. ("*Warner Music*")[14]

In *Warner Music*, the Director sought an order that Warner issue licenses to BMG Direct Ltd., a mail order record club, under usual trade terms so that BMG could make compact discs from Warner master recordings, thus allowing BMG to compete in the mail order record club business in Canada. The only competitor was Columbia House, which was half-owned by Warner and to which Warner had granted licenses for sound recordings made from its master recordings. The Tribunal held that although a copyright license can be a product under the Act, exclusive legal rights over IP cannot be considered a product in the context of section 75. The exclusive nature of IP rights contradicts the section's requirement that there be "ample supply" of a product, and the usual trade terms requirement may not be satisfied since there cannot be usual trade terms when licenses may be withdrawn. Furthermore, the Tribunal noted that there was nothing in the legislative history of section 75 that suggested Parliament intended it to be used as a compulsory licensing provision for IP.

7. Does your jurisdiction allow private parties to challenge a refusal to deal in court? If yes, please provide a short description of representative examples of these cases. If known, indicate the number (or an estimate) of private cases.

Section 103.1 of the Act allows private parties to apply directly to the Tribunal if they are directly and substantially affected by the conduct of another party. Private access to the Tribunal is only available for conduct reviewable under sections 75 (refusal to deal), 76 (price maintenance) and 77 (exclusive dealing, tied selling and market restriction) of the Act. Private parties cannot bring abuse of dominance applications pursuant to section 79.

The private access provisions were added to the Act to complement the Bureau's public enforcement and increase the deterrent effect of the Act. In order to avoid opening the

[13] *Canada (Director of Investigation and Research) v. Bank of Montreal et al.*, Competition Tribunal CT-1995-002 (hereinafter "*Interac*").
[14] *Warner Music, supra* note 3.

floodgates to costly nuisance litigation,[15] Parliament required that parties seeking to advance their own private claims before the Tribunal first obtain leave of the Tribunal. As part of its application for leave, a party must notify the Commissioner. The Commissioner must certify whether or not the matter for which leave is sought is currently under inquiry by the Commissioner, or was the subject of an inquiry that was discontinued pursuant to a settlement. Leave will not be granted by the Tribunal if there is or was such an inquiry.

An applicant for leave must support the leave application with sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in its business. In the case of a section 75 application, the kind of evidence expected by the Tribunal would include profit and loss statements, and comparative sales figures of relevant products before and after the refusal. If the Tribunal believes that there are "reasonable grounds to believe" that the refusal to deal could be the subject of an order under section 75, it may grant leave. The Tribunal has stated that this is a low threshold.

There have been eighteen private access applications for refusal to deal before the Tribunal since section 103.1 came into force in June 2002. In addition to the *Nadeau* and the *B-Filer* cases described in Question 6, representative cases of private applications made to the Tribunal are summarized below.

Sears Canada Inc. v. Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.[16]

Sears Canada Inc. ("Sears") applied to the Tribunal for an order against Parfums Christian Dior Canana Inc. ("Dior") and Parfums Givenchy Canada Ltd. ("Givenchy"). Dior and Givenchy had supplied Sears with their prestigious lines of fragrance and cosmetic products until 2007 when they ended the supply relationship. The Tribunal dismissed the application for leave on the basis that Sears failed to establish a substantial effect on its business as a department store. Evidence presented to the Tribunal showed that Dior and Givenchy products comprised $16 million of Sears' total annual sales revenue of $6 billion.[17] The Tribunal stated that the impact of refusal on the entire business of Sears as a department store retailer should be examined for the purpose of the application as opposed to an individual store segment represented by Dior and Givenchy products.

Sono Pro Inc. v. Sonotechnique[18]

Sono Pro, a company dealing with professional audio products, complained that Sonotechnique refused to sell Dolby products to it. Sonotechnique had established a business policy under which it sold Dolby products only to end-users, and so was willing to sell to Sono Pro only at end-user prices. The Tribunal refused leave to apply pursuant to section 103.1 on the basis that Sono Pro failed to show it was directly and substantially affected in its business by the refusal to deal. Sono Pro painted too vague a picture of its business and did not explain the importance of Dolby products.

Construx Engineering Corporation v. General Motors of Canada[19]

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[15] Competition Bureau submission to OECD, *Roundtable on Refusals to Deal: Note by Canada*, 27 September 2007, para. 8.
[16] *Sears Canada Inc. v.Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.*, Competition Tribunal CT-2007-001.
[17] *Ibid.* at para. 7.
[18] *Sono Pro Inc. v. Sonotechnique P.J.L. Inc.*, Competition Tribunal CT-2007-004.
[19] *Construx Engineering Corporation v. General Motors of Canada*, Competition Tribunal CT-2005-004.

General Motors prohibited its dealers from selling vehicles to Construx on the basis that its policy was to disallow sales to companies in Canada that would resell the vehicles at home or abroad. The Tribunal dismissed the case on the basis that there was insufficient evidence to show that Construx's business had been substantially affected.

Quilan's of Huntsville v. Fred Deeley Imports (aka Deeley Harvey Davidson)[20]

In applications filed in June and July 2004, respectively, Robinson Motorcycle Limited and Quinlan's of Huntsville Inc. alleged that Fred Deeley Imports Ltd. was refusing to supply them with Harley-Davidson products, despite having had a long sales relationship with them. Both retailers sought an order from the Tribunal requiring Fred Deeley Imports Ltd. to accept them as customers and dealers of the products on the usual trade terms.

Leave to apply was granted by the Tribunal. After other procedural issues and an interim order, the parties finally reached an agreement and discontinued the application.

Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.[21]

Morgan's Furniture was a dealer for Laz-Z-Boy furniture for a period of over 25 years. Its sales of La-Z-Boy products had recently been declining, which Morgan blamed on restrictions to access. Laz-Z-Boy terminated the arrangement, citing the low sales figures as evidence that Morgan was not sufficiently promoting its products. Leave to apply under section 103.1 was granted, but the parties settled among themselves and the case was discontinued.

Barcode Systems Inc. v. Symbol Technologies Canada ULC[22]

Barcode alleged that Symbol was refusing to supply it with barcode scanning technology. Barcode was granted leave to apply. However, due to a change in circumstances between the time that leave being granted and the application was filed, Barcode entered receivership and became a shell company. As a result, Symbol successfully applied for summary disposition of the application.

Evaluation of an actual refusal to deal

8. What are your jurisdiction's criteria for evaluating the legality of refusals to deal? You may wish to address the following points in your response.

    a. What are the competitive concerns regarding a refusal to deal? Must the practice exclude or threaten to exclude a rival (or rivals) from the market, or all rivals? If only threatened exclusion is required, how is it determined? If neither actual nor threatened exclusion is required, what other harms are considered?

    b. Must consumer harm be demonstrated? Must the harm be actual or may it be just likely, potential, or some other degree of proof?

    c. Does intent play a role, and if so what role and how is it demonstrated?

[20] *Quilan's of Huntsville v. Fred Deeley Imports,* Competition Tribunal CT-2004-009.
[21] *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd*., Competition Tribunal CT-2003-009.
[22] *Barcode Systems Inc. v. Symbol Technologies Canada ULC,* Competition Tribunal CT-2003-008.

d. Are refusals to deal evaluated differently if there is a history of dealing between the parties? Is a prior course of dealing between the parties a requirement for finding liability?

e. Are refusals to deal evaluated differently if the dominant firm has had a course of dealing with firms that are not rivals or potential rivals? Thus, if a firm sells its product to everyone except its main rival, is that relevant to whether the refusal is unlawful?

Refusal to Deal – section 75

There is no absolute obligation on any business to supply another business. However, under certain circumstances, if a business refuses to supply another business, the Act may apply.

Before the Tribunal will issue an order pursuant to section 75, the Tribunal must be satisfied that (i) the person denied supply is substantially affected in his business or is unable to carry on his business because he cannot obtain adequate supply of the product anywhere in the market under the usual trade terms, (ii) the person denied supply is unable to obtain adequate supply in the market because of insufficient competition among suppliers in the market, (iii) the person denied supply is willing and able to meet the usual trade terms of the supplier, (iv) the product is in ample supply, and (v) the refusal to deal is having an adverse effect on competition in the market. The applicant bears the onus of proof of each of these constituent elements on a balance of probabilities. The criteria are examined below:

Business substantially affected

A customer would be considered to have been substantially affected in his business if the product of which supply is being refused constitutes a large part of the customer's sales and is important to its continued operation. The effect on the entire business' activities must be considered. The Tribunal has provided further guidance on what constitutes a substantial effect in *Chrysler* by identifying the relevant factors that will be considered in gauging the overall effect on business. These factors include the percentage of overall business accounted for by the refused product; whether the product is easily replaced by the sale of other products; whether the sale of the product uses up capacity that could be devoted to other activities; and whether the product is used or sold in conjunction with other products and services thus magnifying the impact on the business in question.[23] The burden of showing that the substantial effect condition is met rests with the applicant.

In *Nadeau*, the Tribunal clarified that in order for a business to be "substantially affected", it does not need to show 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.[24]

Before the Bureau finds that "adequate supplies" of a product are unobtainable, the business that is refused supplies must pursue all reasonable alternate sources of supply, taking into account price, quality, delivery time and profit margin. If the cost of a replacement product makes sales unprofitable, it would not be considered a reasonable alternative.

An article that is different from others by a trade mark or trade name is not a separate product, unless there are no reasonable substitutes for it such that the use of the substitutes

[23] *Chrysler*, *supra* note 7 at 31.
[24] *Nadeau*, *supra* note 12 at para. 131.

substantially affect the buyer's business. Therefore, a refusal to supply a national brand would not raise a concern under the law, if another national or regional brand or generic equivalent were suitable replacements.

Insufficient competition among suppliers in the relevant market

If other suppliers in the market are willing to supply the would-be customer, or if the inability to obtain adequate supplies is the result of a supplier's legitimate business decision and not for anti-competitive reasons, then this element of section 75 may not be satisfied.

The conduct of the person refused supply as well as any anti-competitive motivation for the refusal to deal by the supplier may be relevant to determining whether the inability to obtain supply was because of insufficient competition among suppliers of the product in the market as opposed to objectively justifiable business reasons.[25] Efficiency arguments, the administrative costs and burden of continuing to deal, maintenance of levels and quality of service, or the negative impact on the reputation of the supplier because of performance of the person supplied may constitute relevant justifiable reasons for refusing to deal. However, mere assertions of justifiable business reasons for refusals to deal will not suffice. The burden is on the person denying supply to provide objective evidence to substantiate the justifications relied upon.[26]

Usual trade terms

"Trade terms" is defined narrowly in the legislation to mean "terms in respect of payment, units of purchase and reasonable technical and servicing requirements."[27] A would-be customer's inability to meet the suppliers other usual contractual terms is thus not relevant to an analysis of "usual trade terms" under subsection 75(1)(c). However, failure to meet these terms could indicate that supply is unavailable not because of insufficient competition among suppliers of the product, but rather due to legitimate business reasons (relevant to subsection 75(1)(b)). Such failure may also influence the Tribunal's decision as to whether it should exercise its discretion to order supply.[28]

In *Nadeau*, the Tribunal stated that "usual trade terms" must be determined in reference to the particular market at that particular time. The trade terms to be considered are not those specific to the parties, but rather those that would be seen as usual from the perspective of the majority of market participants.[29]

Usual trade terms are relatively easy to determine where there are multiple suppliers and customers in the market and trade terms can be identified. It becomes considerably more difficult to determine what the usual trade terms of the supplier are, if the supplier is not supplying the product to other persons and there is no pre-existing supply relationship.

Product in ample supply

The Tribunal considered the meaning of "ample supply" in the *Nadeau* case.[30] A product is in ample supply when its availability is not an issue when a supplier considers whether to seek

[25] *Xerox*, *supra* note 5 at 56.
[26] *B-Filer, supra* note 11 at para. 147-148.
[27] *Competition Act, supra* note 1, subsection 75(3).
[28] *B-Filer*, *supra* note 11 at para. 193.
[29] *Nadeau*, *supra* note 12 at para. 139-141.
[30] *Ibid.* at para. 280-281.

new customers or distribution channels. Supply is not ample when an order to supply would inhibit the supplier from growing or changing the nature of its business, or force it to ration supplies between current and potential future customers.

The Tribunal has also interpreted this condition as eliminating copyright and intellectual property from the scope of section 75.[31] While the general definitions found in section 2 of the Act state that "product" encompasses both an article and a service, it remains to be seen whether the Tribunal would consider "product" to include a service for the purposes of section 75.

The Bureau has stated in its publications that if there is a shortage of a product resulting from, for example, a fire at a plant, raw material shortages, limited production capacity or inventories, then the product could be considered to not be in ample supply.

Adverse effect on competition

Subsection 75(e) explicitly requires that the refusal to deal "is having or is likely to have an adverse effect on competition in a market". In *B-Filer*, the Tribunal held that this requirement should be read similarly to the requirement in subsection 79(1)(c) that the alleged practice of anticompetitive acts "has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market". However, "adverse" effect is a lower threshold than "substantial" effect.[32]

In the Tribunal's 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".[33] Relevant indicators include 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 rival.[34]

Any adverse effect on competition is likely to manifest itself in the form of higher prices, preservation of prices when a price decrease would otherwise have resulted, reduced product variety or a decrease in the quality of the products sold in the market. In *Nadeau*, the Tribunal stated that among other indicators, the practical indicia for market definition found in the Bureau's *Merger Enforcement Guidelines* may be used for the purposes of subsection 75(1)(e). These indicia include transportation costs, price relationships, shipping patterns and trade views.[35]

Even if all the elements of section 75 are met, the Tribunal may still refuse to make an order to supply. Section 75 specifies that the Tribunal "may" make an order, granting the Tribunal discretion as to whether to make an order in any particular case. This allows the Tribunal to take into account additional factors that are not reflected in the explicit wording of the provision. The Tribunal may consider the reasons behind the refusal to deal,[36] any previous

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[31] *Warner Music*, *supra* note 3 at 14-15.
[32] *B-Filer, supra* note 11 at para. 211.
[33] *Ibid.* at para. 208, reinforced by the Tribunal in *Nadeau, supra* note 12 at para. 369.
[34] *Nadeau*, *supra* note 12 at para. 369.
[35] *Ibid.* at para. 311.
[36] *Chrysler*, *supra* note 7.

relationship between the supplier and the business that is being refused supply,[37] and public policy considerations.[38]

a) The Tribunal has stated that the creation, enhancement and/or preservation of market power is sufficient to satisfy the requirements of this subsection. As well, in *Nadeau* the Tribunal has stated that a business may be "substantially affected" even if it is not forced or to leave its business. Thus, section 75 does not require that the refusal exclude or threaten to exclude rivals from a market.

b) Section 75 does not make explicit reference to consumer harm. However, in as much as competition is presumed to benefit consumers and subsection 75(1)(e) requires that the refusal result in an adverse effect on competition, harm to consumers is implicit in the requirements of section 75.

c) Intent does not explicitly play a role in section 75. However, as discussed above, the Tribunal will consider whether the refusal was for a legitimate business reason. Moreover, the Tribunal has discretion as to whether or not to make an order compelling supply, even if the elements of the section are met. An anti-competitive intent on the part of the supplier may be one of the factors that the Tribunal might consider when deciding whether to exercise its discretion.

d) Are refusals to deal evaluated differently if there is a history of dealing between the parties? Is a prior course of dealing between the parties a requirement for finding liability?

e) Are refusals to deal evaluated differently if there is a history of dealing between the dominant firm and third parties, such as firms that are not rivals or potential rivals?

Abuse of Dominant Position - section 79

Refusal to deal may also be addressed as abuse of dominance pursuant to section 79 of the Act. Abuse of a dominant position occurs when a dominant firm or firms in a market engage in conduct that is intended to have an exclusionary, predatory or disciplinary effect on existing competitors or potential entrants, with the result that competition is prevented or lessened substantially. Where such anti-competitive behaviour is found, the Tribunal may make an order to remedy the situation.

Subsection 79(1) sets out three essential elements, all of which must be found to exist by the Tribunal for it to grant an order:

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;

(b) that person or these persons have engaged in or are engaging in a practice of anti-competitive acts; and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

Each of these elements is briefly discussed below.[39]

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[37] *Ibid.* and *Xerox, supra* note 5.
[38] In *B-Filer*, *supra* note 11, the Tribunal was concerned that supplying the product would require the Bank of Nova Scotia to disclose its customers confidential banking information, in violation of its own policies.

Substantially or completely control, throughout Canada or any area thereof, a class or species of business

For the purposes of section 79, the Tribunal has interpreted "a class or species of business" as being equivalent to the relevant product market and "throughout Canada or any area thereof" as being equivalent to the relevant geographic market. In defining relevant markets, the Bureau employs a standard economic approach that takes into account a variety of factors, the most important of which are the availability of close substitutes, transportation costs and customer switching costs.

The Bureau considers "substantially or completely control" or "dominance", as it is commonly referred to, to be synonymous with market power. The most straightforward indication of the existence of market power is the ability to profitably raise prices above competitive levels for a considerable period of time. It is sometimes difficult to measure market power directly. Consequently, the Bureau collects evidence and assesses a number of qualitative and quantitative factors, including technological change, recent entry or exit from the market, industry supply capacity, and countervailing market power on the part of buyers and distributors. However, the Bureau places the greatest emphasis on the key factors of market share and barriers to entry. A market share of less than 35% for unilateral conduct will generally not give rise to concerns of market power or dominance.

Practice of anti-competitive acts

Having established market power in the relevant markets, the Bureau must establish that the firm or firms have engaged in a "practice of anti-competitive acts". The word "practice" normally denotes more than an isolated act. The Tribunal in *NutraSweet* held that a "practice" can encompass one occurrence that is sustained or systematic over a period of time, or a number of different acts taken together that have the effect of substantially preventing or lessening competition.[40]

Section 78 provides a non-exhaustive list of anti-competitive acts. The Tribunal has accepted that practices not included in section 78 may constitute anti-competitive acts that can be addressed under section 79. An anti-competitive act is defined as an act whose purpose is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary.[41]

The jurisprudence under section 79 has held that the element of anti-competitive intent or purpose can be established either with direct evidence or by inference, based on the likely effect of a practice on competition in the particular circumstances of the case.

Substantial preventing or lessening of competition

The requirement of "preventing or lessening competition substantially in a market" puts the focus on the impact on competition rather than on competitors. The question is whether the anti-competitive acts engaged in by a firm or firms serve to preserve, entrench or enhance their market power. In *Canada Pipe*, the Federal Court of Appeal stated that the test when determining whether there has been substantial prevention or lessening of competition is to

[39] For a more complete discussion of the Bureau's approach to the enforcement of section 79 of the Act, please consult the Bureau's *Abuse of Dominance Guidelines*.
[40] *Nutrasweet*, *supra* note 6 at 59.
[41] *Canada (Commissioner of Competition) v. Canada Pipe Company Ltd.*, 2006 FCA 233 at para. 64.

ask whether the relevant markets would be substantially more competitive but for the impugned practice of anti-competitive acts.[42]

If it can be demonstrated that, but for the practice of anti-competitive acts, an effective competitor or group of competitors would likely emerge within a reasonable period of time or would remain in the market to challenge the dominance of the firm(s), the Bureau would likely conclude that the practice in question results in a substantial lessening or prevention of competition. The Bureau will also examine such factors as whether or not consumer prices might be substantially lower; product quality, innovation, or choice might be substantially greater; or consumer switching between products or suppliers might be substantially more frequent in the absence of the practice.

Subsection 79(4) states that when considering whether a practice has the effect of substantially preventing or lessening competition, the Tribunal must consider whether the practice is a result of superior competitive performance. Superior performance is only a factor to be considered in determining the cause of the lessening of competition, and not as a justifiable goal for engaging in an anti-competitive act. Having lower costs, better distribution or production techniques, or a broader array of product offerings can put a firm at a competitive advantage that, when exploited, will lessen competition by leading to the elimination of inferior competitors. This is the sort of benefit from competition that the Act seeks to preserve.

Subsection 79(5) provides that the exclusive rights provided by IP law do not of themselves constitute abusive conduct by a dominant firm. However, abuse of those rights could result in a violation of section 79. The same elements and analysis that apply to other markets would be used in a case involving IP rights.

a) As discussed above, section 79 only applies where there is a substantial prevention or lessening of competition. As such, harm to a competitor is insufficient. That said, exclusion of competitor is not necessary to establishing an anti-competitive practice (which may in turn lead to a substantial prevention or lessening of competition). Anti-competitive practices may be aimed at disciplining rival firms. For example, a firm may engage in anti-competitive acts that reduce the competitive effectiveness of rival without actually resulting in its exit. The Federal Court in *Canada Pipe* stated that the practice of anti-competitive acts must have an intended effect on a competitor that is exclusionary, predatory or disciplinary.

b) Section 79 does not make explicit reference to consumer harm. However, in as much as competition is presumed to benefit consumers and subsection 79(1)(c) requires that the practice of anti-competitive acts results in a substantial prevention or lessening of competition, harm to consumers is implicit in the requirements of section 79.

c) Intent plays a role in a section 79 analysis. For an act to be considered anti-competitive, there must be some element of anti-competitive design, purpose or object that is exclusionary, predatory or disciplinary. This requirement is reflected in the list of anti-competitive acts provided in section 78. Each act in the list is linked to an anti-competitive design, such as the elimination, exclusion or disciplining of a competitor.

The presence or absence of anti-competitive intent has been a factor in the Tribunal's past abuse of dominance cases. In *NutraSweet*, the Tribunal stated that for conduct to be considered an anti-competitive act, there must be an "intended negative effect on a competitor

[42] *Ibid.* at paras. 37-38.

that is predatory, exclusionary or disciplinary" and evidence of this purpose is a "necessary ingredient" to any finding that an anticompetitive act has been performed.[43]

The Tribunal in *NutraSweet* stated that the intended negative effect need not be proved by direct evidence of subjective intent, but may be inferred from the circumstances surrounding the act. This was confirmed by the Tribunal in the *Laidlaw* case,[44] where the Tribunal stated that proof of subjective intent on the part of a firm is not necessary to show that a practice of anti-competitive acts has occurred. In the absence of evidence to the contrary, firms and individuals are presumed to intend the consequences of their actions.

Firms may have legitimate business reasons to engage in behaviour that may have anti-competitive effects. However, the Tribunal in *Tele-Direct*[45] held that the legitimate business justification offered must be weighed against any anti-competitive effects in order to establish the overriding purpose of the acts. This analysis must be done on a case-by-case basis.

d) A history of dealing between the parties is not a requirement of either section 75 or 79, nor does the wording of these provisions specifically mention such a history as one of the factors that would determine whether there has been a refusal to supply for the purposes of the Act.

However, section 75 allows the Tribunal discretion in choosing whether to make an order in respect of a refusal to deal. In the past (before there was an element in the provision that required the Tribunal to also consider whether the refusal to deal likely had an adverse effect on competition), the Tribunal has taken account of prior dealings between the parties when it chose whether to exercise its discretion.
In *Chrysler*, the Tribunal took note of Brunet's "long and friendly relationship" with Chrysler.[46] Chrysler had previously encouraged Brunet to expand his sales of Chrysler parts and had even taken steps to accommodate the needs of Brunet's clients to facilitate these sales.

In *Xerox*, the president of Exdos, Terry Reid, had previously worked for Xerox. Reid and Xerox had determined it would be mutually beneficial for Reid to create an independent market to capture the second-hand photocopier market, which at that time was largely untouched by Xerox. Xerox continued to support Exdos's operations for a number of years, including granting it an exclusive contract for the purchase of certain used photocopier models from Xerox.[47]

From a practical standpoint, if the customer's business would be "substantially affected" by the refusal to deal, then it will often be the case that the supplier and the customer had been dealing for some time beforehand.

Section 79 does not specifically refer to a history of dealing between the parties when determining whether a dominant firm has engaged in a practice of anti-competitive acts that has substantially prevented or lessened competition.

e) Prior or current dealings with third parties are not explicitly considered under either section 75 or section 79. However, if a firm regularly supplies third parties but refuses to supply a

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[43] *Nutrasweet*, *supra* note 6 at 57.
[44] *Director of Investigation and Research v. Laidlaw Waste Systems Ltd*., Competition Tribunal CT-1991-002 (hereinafter "Laidlaw").
[45] Director of Investigation and Research v. Tele-Direct (Publications) Inc., Competition Tribunal CT-1994-003 (hereinafter "Tele-Direct").
[46] *Chrysler, supra* note 7 at 46.
[47] *Xerox, supra* note 5 at 7.

potential or existing rival, this behaviour may serve as evidence that the refusal to deal stems from an anti-competitive intent rather than a legitimate business reason.

9. Does your jurisdiction recognize a distinct offense of refusing to provide access to "essential facilities"? Your response need not include any offenses that arise from sector-specific regulatory provisions rather than the competition laws.

   If so, how does your jurisdiction define "essential facilities"? Under what conditions has a refusal to deal involving an "essential facility" been found unlawful? Please provide examples and the factors that led to the finding.

The term "essential facilities" is used neither in the *Competition Act* nor in existing jurisprudence. Subsection 78 contemplates that the withholding of "scarce facilities or resources required by a competitor for the operation of a business" may be anti-competitive. The Bureau considers sections 78 and 79 as written and interpreted by the Tribunal to be broad enough to deal with any "essential facility" cases that may arise.[48]

In an allegation of abuse of dominance involving denial of access to a facility, the conduct at issue would be an actual or constructive denial of access to the facility to a competitor.[49] In this context, the denial could refer to a facility that a competitor had access to prior to the denial, or to a facility to which the competitor never had access. Generally speaking, denial of access to a facility is a common practice that will raise issues under the Act only in limited circumstances. For such a denial to raise an issue under the Act, the following conditions must be present:

(i) a vertically integrated firm has market power in the downstream (or retail) market in which the facility is used as an input in the time period following the denial;

(ii) a denial of access to the facility has occurred for the purpose of excluding competitors from entering or expanding in the downstream market or otherwise negatively affecting their ability to compete; and

(iii) the denial has had, is having or is likely to have the effect of substantially lessening or preventing competition in the downstream market.

The Bureau's analysis begins with an assessment of downstream market power, once the denial has occurred. In cases where downstream firms do not currently have access, the ability and incentive of the allegedly dominant firm to impose a small but significant non-transitory increase in price in the downstream market will depend on the extent of barriers to entry, which in turn depends in part on the extent of upstream market power. For example, if upstream market power exists and it is very difficult or impossible for downstream competitors to duplicate the facility or obtain it from other sources, a denial of access to that facility would create a very high barrier to entry at the downstream level, and hence result in downstream market power as a result of the denial. An assessment of downstream market power will also depend on the willingness and ability of consumers to obtain the product or service from alternative downstream providers that do not rely on the facility in question.

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[48] Speaking Notes for Sheridan Scott, Commissioner of Competition, dated September 12, 2006, Abuse of Dominance under the *Competition Act*, Federal Trade Commission/Department of Justice Hearings on Single-firm Conduct, Washington D.C.

[49] Competition Bureau, *Updated Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)*, Draft for Public Consultation, Appendix IV: Denial of Access to a Facility or Service.

Where there is no vertical integration, simply charging a monopoly price for access to a facility, imposing conditions on its use, or choosing not to offer access to downstream purchasers at any price would not, by itself, raise concerns. If a facility owner does not compete in the downstream market(s) in which the facility is used, the Bureau will not consider that supplier to have an incentive to affect downstream competition, and will not consider them to have downstream market power. However, the firm that controls the facility need not be explicitly vertically integrated; it can achieve the same result by contract, such as by designating one downstream firm as its exclusive retailer. Similarly, a firm may operate indirectly in the wholesale market by selling access to a facility to another wholesaler that then supplies the retail market.

With a finding of market power, a denial of access is an anti-competitive act when its purpose is to exclude or impede actual or potential competitors. To infer such a purpose, it must be difficult or impossible for those competitors to substitute to other inputs or to practically or reasonably duplicate the facility. At the same time, the purpose would not be anti-competitive if there is a credible and valid business justification for the denial, such as if the reason access was denied was because it would be prohibitively expensive to build the necessary capacity to supply competitors. The creation or preservation of vertical efficiencies could also qualify as a valid business justification.

Before the Tribunal is able to issue any remedial order under section 79, it must be shown that the practice of anti-competitive acts has had, is having, or is likely to have the effect of preventing or lessening competition substantially in the downstream market. Accordingly, if control of the facility is a source of market power in a downstream market and the denial of access has been for an anti-competitive purpose, the Bureau's "but for" analysis would then focus on whether the denial of access likely leads to substantially less competition downstream than would occur absent the denial.

If, absent the denial, the dominant firm would sell access to the facility because it has no credible and valid business justification for denying access, the "but for" analysis would entail assessing the competitive conditions that would prevail if the dominant firm were charging the profit-maximizing access price to downstream competitors. This analysis identifies a benchmark "but for" profit-maximizing access price for a given scope of relevant markets in which the dominant firm and its input buyers participate. If a dominant facility owner has a profit-maximizing incentive to increase its access price relative to this benchmark, or deny access at any price, often due to a change in the scope of the relevant markets in which the firms compete, the denial may result in a substantial lessening or prevention of competition.

In general, for a denial of access to raise issues under the abuse of dominance provisions, it must be the case that the purpose of the denial is to prevent the emergence of a market structure where there is increased horizontal competition. For example, a dominant facility owner could substantially lessen or prevent competition in a downstream market if, after a merger that allowed the firm to vertically integrate into that market, the merged entity refused to continue to offer competitors access at the pre-merger profit-maximizing price in order to cause their exit from the downstream market. In such a situation, the pre-merger price provides the profit-maximizing "but for" benchmark. If the merger were to provide the dominant firm with the incentive to raise the input price above this level in order to impede or prevent competition from non-integrated rivals, this could raise abuse of dominance issues.

Another example would be a dominant firm that offers access to a facility to competitors that offer a single product to downstream consumers. Suppose a firm that competes (or seeks to compete) with the dominant firm in a second market seeks access to the dominant firm's facility in the first market in order to produce the first product and offer it to a separate market

of consumers wishing to purchase products in both markets. This could include "one-stop shopping", such as where a customer would otherwise require a product or service in multiple locations from suppliers. In such a situation, the dominant firm may have an incentive to charge a higher price or deny access entirely for the facility in one market in order to impede or prevent entry by a competitor into this "one-stop shopping" market. If the competitor could compete in the one-stop shopping market absent the denial, this could result in a substantial lessening or prevention of competition. As noted above, however, the analysis here assumes that such an entrant would not find it feasible to enter, expand, or compete effectively if it had to self-supply the input.

As discussed above, the term "essential facilities" has never been used in Canadian jurisprudence. The Tribunal case that most closely resembles an essential facility-type case is the *Interac* case, previously discussed above in Question 6 of this questionnaire.

Several factors were involved in the Tribunal's decision to approve a consent order requiring the Interac network to remove restrictions on membership and allow indirect access by other commercial entities. In particular, both financial and non-financial institutions were found to require access to the Interac network to compete effectively in Canadian markets such as retail banking and credit cards. Interac was dominant in the relevant market, and placed significant barriers on its membership. Individual financial institutions' proprietary networks and small or regional shared electronic networks were found to be inadequate substitutes. Furthermore, the implementation of an alternative network to rival Interac would have been infeasible. The Commissioner also argued that Interac's practice of anti-competitive acts was having a substantial impact on competition and innovation in the downstream market.

10. Does the analysis differ if the refusal involves intellectual property? If so, please explain.

   a. Does the type of intellectual property change the analysis (e.g., patents versus trade secrets)?

   b. Can a refusal to provide interface information to make a product interoperable constitute a refusal to deal?

In *Warner Music*, the Tribunal found that a copyright license or other forms of IP rights cannot be considered products for the purposes of section 75. Thus, section 75 cannot apply to refusals involving IP.

Subsection 79(5) of the Act specifically provides that the mere exercise of an IP right is not cause for concern under the general provisions of the Act. The Bureau defines the mere exercise of an IP right as the exercise of the owner's right to unilaterally exclude others from using the IP, as well as the owner's use or non-use of the IP.

The general provisions of the Act apply when IP rights are the subject of a transfer, licensing arrangement or agreement to use or enforce IP rights, and when the alleged competitive harm stems from such an arrangement and not from the mere exercise of the IP right. For example, the Tribunal in *Tele-Direct* found that mere selective licensing of a trade-mark, in the absence of evidence of harm to competition, is not an anti-competitive act. If an IP owner licenses, transfers or sells its IP to a firm or a group of firms that would have been actual or potential competitors without the arrangement, and if this arrangement creates, enhances or maintains market power, the Bureau may seek to challenge the arrangement under the appropriate section of the Act.

Section 32 may also be invoked where IP rights are used in an anti-competitive manner. Enforcement under section 32 requires proof of undue restraint of trade or lessened competition. The Bureau expects such enforcement action would be required only in certain narrowly defined circumstances. The Bureau determines whether the exercise of an IP right meets this threshold by analyzing the situation in two steps.

In the first step, the Bureau establishes that the mere refusal (typically the refusal to license IP) has adversely affected competition to a degree that would be considered substantial in a relevant market that is different or significantly larger than the subject matter of the IP or the products or services which result directly from the exercise of the IP. This step is satisfied only by the combination of the following factors:

i) the holder of the IP is dominant in the relevant market; and,

ii) the IP is an essential input or resource for firms participating in the relevant market – that is, the refusal to allow others to use the IP prevents other firms from effectively competing in the relevant market.

In the second step, the Bureau establishes that invoking a special remedy against the IP right holder would not adversely alter the incentives to invest in research and development in the economy. This step is satisfied if the refusal to license the IP is stifling further innovation.

If factors i) and ii) are present then the IP is the source of dominance in a relevant market and other competitors would be able to participate in the relevant market only by having access to that IP. If the refusal is stifling further innovation then the Bureau would conclude that incentives to invest in research and development have been harmed by the refusal and a special remedy would help realign these incentives with the public interest in greater competition.

The Bureau recognizes that only in very rare circumstances would all three factors be satisfied. Network industries are a possible case, as the combination of IP protection and substantial positive effects associated with the size of the network could create or entrench substantial market dominance. In such a situation, IP rights and network externalities can interact to create de facto industry standards. Standardization means that the protected technology is necessary for a competitor's products to be viable alternatives. IP protection can effectively exclude others from entering and producing in the market. However, the Bureau would have to be satisfied that a refusal is stifling further innovation and not simply preventing the replication of existing products before seeking to recommend that the Attorney General bring an application for a special remedy to the Federal Court.

a) The type of IP right involved does not change the Bureau’s approach to refusals to deal involving IP. Neither the general provisions of the Act or the provisions specifically related to IP rights distinguish between copyright, trade-mark, patents, or other forms of IP.

b) Neither the Bureau nor the Tribunal has yet dealt in-depth with a case involving a refusal to provide interface information. A simple refusal to provide interface information to competitors, with nothing more, would likely constitute a mere exercise of IP rights and thus would not be subject to section 79. However, if the interface information somehow formed the basis of arrangement between the interface owner and other parties, then the refusal may be found to be an abuse of dominance pursuant to section 79.

Even where the refusal to provide interface information is a mere exercise of an IP right, the Bureau may address the situation under section 32. An example of the Bureau's likely approach in such a case can be found in its IPEGs. The Bureau would consider whether the refusal adversely affects competition in a relevant market that is different or significantly larger than the subject matter of the interface's IP rights or products which directly result from the exercise of these rights. As well, the Bureau would consider whether there are any other ways to achieve compatibility that would not infringe on the IP rights in question. If these conditions are met and the refusal adversely alters firms' incentives to invest in research and development in the economy, then the Bureau may invoke a special remedy pursuant to section 32.

A refusal to provide interface information that causes significant competitive harm would thus be addressed by the Bureau pursuant to either section 79 or section 32, provided the elements of these provisions are met.

11. Does the analysis change if the refusal occurs in a regulated industry? If so, please explain.

Many Canadian industries are subject to sector-specific regulation. These industries will typically be under the jurisdiction of a specific statute (which can be provincial or federal) and an administrative agency responsible for implementing this statute and overseeing the industry.[50]

Jurisprudence in Canadian competition law has held that specific activity which is authorized or carried out pursuant to a valid scheme of regulation is deemed to be in the public interest. As such, the courts have concluded that such conduct cannot be found to be in violation of the criminal provisions of the Competition Act unless it has involved an attempt to thwart the scheme of regulation. This doctrine has become known as the regulated conduct defense ("RCD"). The law is less clear with respect to civil matters which has resulted in some uncertainty regarding the application of the Act.

Generally, in determining whether conduct regulated by another law will be pursued under the Act, the Bureau will carefully consider the purpose of the Act and any other law said to be applicable to the conduct, the interests sought to be protected by both laws, the impugned conduct, the potentially applicable provision(s) of the Act and of the other law, the parties involved, and the principles of statutory interpretation applicable to the case.

Regardless of whether the RCD or some other doctrine or defense immunizes an impugned conduct from a provision of the Act, the Bureau will always consider the regulatory context in which the conduct is engaged where it is relevant to the application of the provisions of the Act in question, for example, the extent to which a regulatory regime already limits or constrains the exercise of market power in certain areas of competition but not others.

[50] Examples of federally-regulated industries include the telecommunications industry, which is subject to the *Telecommunications Act,* (1993, c. 38), and overseen by the Canadian Radio-television Telecommunications Commission ("CRTC"), and the railway industry, which is regulated through the *Canada Transportation Act,* (1996, c. 10), and overseen by the Canadian Transportation Agency ("CTA"). Provincially-regulated industries include energy and the sale of liquor.

12. Does the analysis change if the refusal is made by a former state-created monopoly? If so, please explain.

The analysis does not change.

Evaluation of constructive refusals to deal

13. Does your jurisdiction recognize the concept of a "constructive" refusal to deal? If so, does it differ from the definition in the introductory paragraphs above? When determining whether the terms of dealing constitute a constructive refusal to deal, how does your jurisdiction evaluate such questions as whether the price is sufficiently high or whether the quality has been sufficiently degraded so as to constitute a constructive refusal?

The concept of a "constructive refusal to deal" is not specifically recognized in the Act. However, the provisions of the Act are worded in such a way that they capture constructive refusals to deal in the form of unreasonable prices or technical and servicing requirements.

Subsection 75(1)(a) requires that a person be substantially affected in his business due to his inability to obtain adequate supplies of a product anywhere in a market "on usual trade terms". "Trade terms" is defined in subsection 75(3) as meaning terms in respect of payment, units of purchase and reasonable technical and servicing requirements. In addition, the Tribunal in *Nadeau* stated that usual trade terms are to be determined in reference to the terms that would be seen as usual from the perspective of market participants. Thus, subsection 75(1)(a) would be satisfied where a supplier was willing to sell the product to the customer only at an abnormally high price or under difficult conditions.

Section 79 does not require an explicit refusal to deal, but rather a practice of anti-competitive acts by a firm with significant market power that substantially prevents or lessens competition in a market. A constructive refusal to deal that meets the elements of section 79 will be treated by the Bureau in the same way as an outright refusal with similar effects. Sections 78 and 79 recognize margin squeeze as a separate reviewable practice that may raise concerns when engaged in by a dominant integrated supplier that aims to foreclose market to competitors to the detriment of competition.

Evaluation of "margin squeeze"

14. Does your jurisdiction recognize a concept of (or like) margin squeeze? If so, under what circumstances and what criteria are applied to determine whether the margin squeeze violates your law?

    You may wish to address the following sorts of issues: the effect the margin squeeze must have on the downstream market to be a violation; must the firm be dominant in both the upstream and downstream markets, or only the upstream market; how, if at all, the criteria are different from determining whether a firm is engaging in predatory pricing; any cost benchmarks used to determine if a margin squeeze exists; how your jurisdiction would treat a temporary margin squeeze; how, if at all, your jurisdiction's analysis of margin squeeze differs from its analysis of a traditional refusal to deal; do the criteria change depending on whether the margin squeeze occurs in a regulated industry or in an industry in which there is a duty to deal imposed by a law other than the jurisdiction's

competition laws?

Competition law in Canada specifically recognizes the concept of "margin squeeze" as an anti-competitive act engaged in by a dominant firm for the purpose of acquiring, enhancing or entrenching market power. The Act defines the concept in section 78 that contains a list of anti-competitive acts reviewable in conjunction with section 79 that deals with abuse of dominance. Margin squeeze is treated as a civil matter, as all acts reviewable under the abuse of dominance provision.

According to the Act, the practice of margin squeeze is defined as follows:

> (*a*) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;[51]

The practice of margin squeeze applies to sales by an upstream supplier to a downstream customer with whom that supplier is in competition. A price squeezing strategy may generally take two forms: upward and downward squeeze. Upward squeeze occurs when the supplier raises the wholesale price relative to the retail price, thus squeezing the competitor's margin between the acquisition and retail prices. Downward squeeze occurs when the wholesale price remains unchanged but the supplier lowers the retail price forcing the competitor to follow suit.

In its enforcement approach, the Bureau exercises care to distinguish between the concept of price squeeze and the notion of profit margin erosion, which may result from the pressures of vigorous competition, lack of demand or changing buying patterns. The Act is aimed at preventing anti-competitive forms of squeezing by a dominant firm or a group of firms[52] that engage in this practice for the purpose of excluding or predating competitors from the market, or disciplining competitors in the market who pose a competitive threat. Thus, an anti-competitive price squeeze must be shown to have the purpose of deterring or preventing entry into the downstream market, confining downstream firms to small niches of the market, or driving downstream competitors out of the market.[53] The anti-competitive intent does not have to be explicitly articulated by the firm engaging in margin squeeze and may be inferred from the circumstances.

In order to distinguish between lawful and unlawful conduct, the Bureau relies on a number of analytical tools to assess whether allegations of margin squeeze raise an issue under the Act. These tools are very much similar to those described in response to question 8 in regard to refusal to deal evaluated under section 79. In particular, the following conditions must be present: the upstream firm engaged in the alleged squeezing has market power in the downstream market; the conduct is engaged in for the purpose of excluding competitors from entering or expanding in the downstream market or otherwise negatively affecting their ability to compete; and the conduct has had, is having or is likely to have the effect of substantially lessening or preventing competition in the downstream market. Also, as in the case of refusal, the ability and incentive of the allegedly dominant firm to exercise market power in the downstream market will depend in part on the extent of upstream market power. If the downstream competitor has a choice of alternative suppliers for the input in question, it is

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[51] *Supra* note 1, subsection 78(1)(a).

[52] Section 79 of the *Competition Act* encompasses conduct by a dominant firm (unilateral dominance) as well as by a group of firms (join dominance). For a detailed discussion on the Bureau's approach to joint dominance consult the Bureau's *Updated Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)*, Draft for Public Consultation, January 2009.

[53] Competition Bureau, *Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)*, July 2001, page 33.

unlikely that the margin squeezing will adversely affect that competitor, so it is unlikely there will be any harm to competition in the downstream market. An assessment of downstream market power will also depend on the willingness and ability of ultimate consumers to obtain the product or service from alternative downstream providers that do not rely on the input in question. The Bureau will aim to establish whether an exclusionary margin squeeze has occurred and whether it has been sufficiently sustained and systematic to constitute a practice. Finally, upon establishing that the firm(s) in question has control of the relevant market and has engaged in a practice of margin squeezing, the Bureau will analyse whether the disciplinary, predatory or exclusionary effects of the alleged margin squeeze have resulted in a substantial lessening or prevention of competition.

Generally, the Bureau will examine the extent to which the allegedly squeezing firm can exclude rivals by raising their costs when alleged margin squeezing involves raising wholesale prices. Where price squeezing involves lowering retail pricing only, the Bureau will examine it under a predatory standard.[54]

The criteria for evaluating margin squeeze do not change if the conduct occurs in a regulated industry or an industry where it is otherwise legally authorized. However, as discussed in question 11, prior to pursuing any enforcement activity the Bureau will undertake to determine whether the impugned conduct is immunized under the Regulated Conduct Defense or any other applicable defense or doctrine.

Presumptions and Safe Harbors

15. Are there circumstances under which the refusal to deal (or any specific type) is presumed illegal? If yes, please explain, including whether the presumption is rebuttable and, if so, what must be shown to rebut the presumption.

Section 75 of the Act is a civil provision designed to address unconditional refusal to deal that arises in vertical supply arrangements. As such, refusal to deal or supply is not presumed to be *per se* illegal, rather conduct is reviewed on a case-by-case basis to determine under the rule of reason standard whether the anti-competitive effects of refusal outweigh the pro-competitive benefits. In fact, in explaining its approach to pure refusal to deal cases, the Bureau has clearly stated that there is no absolute obligation on any business to supply, or buy a product from, another business.[55] It is only under limited circumstances outlined in the statutory provision of section 75 that refusal to deal may raise an issue. The Bureau's approach is consistent with the fundamental principle of free markets that protects the right of economic agents to contract freely with each other.

Unconditional refusal to deal came into existence as a civilly reviewable provision in 1976. Significant amendments to the provision took place in 2002 when private access to the Competition Tribunal was allowed and the test on adverse effect on competition was added as a criterion. Prior to 2002, only the Commissioner could bring an application under the refusal to deal provision in front of the Tribunal.

Under certain circumstances refusal to deal may also infringe section 79 of the Act that deals with abuse of dominance. Section 79 is a reviewable civil provision that addresses market

[54] Competition Bureau, *Updated Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)*, Draft for Public Consultation, January 2009, page 21.
[55] Competition Bureau, *Refusal to Supply*, pamphlet, ISBN 0-662-67713-7. Online at: http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/01244.html.

monopolization; practices reviewable under this provision do not constitute conduct that is *per se* unlawful.

16. Are there any circumstances under which there is a safe harbor for a refusal to deal (or any specific type)? Are there any circumstances under which there is a presumption of legality? Please explain the terms of any presumptions or safe harbors.

No, there are no circumstances under which there is a safe harbour for a refusal to deal, nor any other circumstances under which there is a presumption of legality under section 75. As noted above, all matters are assessed on a case-by-case basis.

If the matter is assessed under the abuse of dominance provisions, a firm with a market share of less than 35 percent falls within a safe harbour since such market concentration generally will not give rise to concerns of market power. On the other hand, a market share of 35 percent or more will generally prompt further examination. In the case of alleged joint dominance, a combined market share of less than 65 percent is likely to provide immunity from anti-trust scrutiny, whereas a share equal or exceeding 65 percent will generally prompt further examination.[56]

The safe harbour threshold based on market share applies to all types of conduct that fall within the ambit of abuse of dominant position. Such conduct types non-exhaustively comprise margin squeeze,[57] pre-emption of scares facilities[58] and requiring or inducing a supplier to refuse selling to a competitor.[59]

Justifications and Defenses

17. What justifications or defenses are permitted for a refusal to deal? Are there any particular justifications or defenses for specific types of refusal? Please specify the types of justifications and defenses that your agency considers in the evaluation of a refusal to deal, the role they play in the competitive analysis, and who bears the burden of proof.

Refusal to Deal – section 75

In the case of unconditional refusal to deal captured under section 75, the applicant – the Commissioner or a private party applying for leave to the Tribunal – must show on a balance of probabilities that (a) the person denied supply is substantially affected in his business or is precluded from carrying on his business because of his inability to obtain adequate supply of the product any where in the market on usual trade terms; (b) the person denied supply is unable to obtain adequate supply in the market because of insufficient competition among suppliers in the market; (c) the person denied supply is willing and able to meet the usual terms trade terms of the supplier of the product; (d) the product is in ample supply; and (e) the refusal to deal is having an adverse effect on competition in the market.

[56] Competition Bureau, *Updated Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)*, Draft for Public Consultation, January 2009, pages ii-iii.
[57] *Supra* note 1, subsection 78(1)(a).
[58] *Ibid.*, subsection 78(1)(e).
[59] *Ibid.*, subsection 78(1)(h).

The Tribunal may issue an order compelling the defendant to resume supply only if all 5 elements of section 75 are met. In evaluating the five elements of refusal to deal the Tribunal may take into account relevant pro-competitve reasons and justifications.

Insufficient competition among suppliers

In certain circumstances refusal to supply may stem from a legitimate business decision by a supplier as opposed to anti-competitive intention. Such circumstances generally arise when continuing to deal places a substantial administrative burden and other costs on the supplier. When the inability to obtain adequate supplies by a buyer stems from a supplier's legitimate business decision as opposed to an anti-competitive purpose, the condition of insufficient competition among suppliers may not be satisfied.[60]

Efficiency defences, cost considerations, the quality of service, reputational concerns may constitute relevant justifiable reasons for refusing to supply. The Tribunal may take into consideration these and other relevant arguments in determining whether the inability to obtain supplies by a would-be cutomer is due to insufficient competition among supliers of the product in the market as opposed to "objectively justifiable business reasons".[61] When efficiency arguments are used, the burden of proving the industry norm is likely to rest with the defendant.[62] The existence of an objectively justifiable business reason must be substantiated by objective evidence.[63] Tribunal's reasoning in *Chrysler* and *Xerox* both suggest that the court is prepared to entertain efficiency consideration in future cases on refusal to deal.

Usual trade terms

The definition of "usual trade terms" provided in the Act is restricted to "terms in respect of payment, units of purchase and reasonable technical and servicing requirements."[64] The person or business refused supply bears the onus of proof in demonstrating that he is willing and able to meet the usual terms of trade as required by the supplier(s). Conversely, where the applicant is unable or not willing to meet the usual trade terms, the supplier(s) has a justifiable reason to stop selling to this customer.

Although usual trade terms are rather narrowly defined around payment and purchase requirements, as well as reasonable technical and servicing standards, the Tribunal provided a clarification regarding the relevance of other usual contractual terms. In *B-Filer* the Tribunal explained that a failure to meet other usual contractual terms by a customer "may establish that the inability to obtain a product is not a result of "insufficient competition"" among suppliers of the product.[65]

Product in ample supply

To date there has been little interpretation of "ample supply" provided by the Tribunal. A foreseebale defense under the requirement to show that a product is in ample supply may include a situation where a refusal to deal results from a temporary or permanent shortage of the product. A shortage of product supply may arise as a consequence of, for example, a fire

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[60] Competition Bureau, *Refusal to Supply*, pamphlet, ISBN 0-662-67713-7. Online at: http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/01244.html.
[61] *Xerox*, *supra* note 5 at 56.
[62] *Ibid.* at 113-114.
[63] *B-Filer*, *supra* note 11 at para. 147.
[64] *Supra* note 1, subsection 75(3).
[65] *B-Filer*, *supra* note 11 at para. 193.

at a plant, raw material shortages, limited production capacity or inventories and other circumstances.[66]

The degree of regulation in the supply market may also play a role in identifying whether a product is available in ample supply. In *Nadeau* the Tribunal explained that "ample" means supply that is available in abundance or to the point where it is considered to be excessive, which is more than a sufficient or adequate supply.[67] The Tribunal found in *Nadeau* that the heavy regulatory restrictions that created a quota system for the supply of the relevant product prevented it from being available in ample supply.[68]

Adverse effect of competition

The test of adverse effect on competition was added in 2002 as a result of amendments to section 75 of the Act.[69] Consequential to the amendments, a would-be customer must establish that the refusal to supply not only harms its business, but also that the competitive situation in a market is affected negatively. In other words, unless a refusal to deal leads to the creation, enhancement or preservation of market power[70] of the remaining competitors of the business refused supply, the supplier(s) is unlikely to become the subject of an order by the Tribunal.

Abuse of Dominant Position – section 79

The abuse of dominance provision articulated by section 79 of the Act does not set out an explicit defense based on efficiency justifications. It has nevertheless been acknowledged that efficiency motivations are relevant factors in Tribunal's analysis. On the one hand, the existence of efficiency motivations may preclude the finding that a practice has an anti-competitive purpose, thus distinguishing between pro- and anti-competitive acts. The case of *Tele-Direct*[71] is instructive in illustrating this principle. In evaluating the refusal to deal by Tele-Direct with advertising consultants, the Tribunal said that the appropriate approach to evaluate anti-competitive acts would be to "weigh the anti-competitive effects of the acts against the business justifications put forward by the respondents".[72] On the other hand, efficiency considerations are also relevant is assessing whether a practice has the effect of substantially lessening competition in the market. In *NutraSweet*, the Tribunal made it clear that it would take into consideration efficiency arguments when applying the test for substantial lessening of competition.[73]

Efficiency arguments are also contemplated through the recognition of a concept of "superior competitive performance" in the abuse of dominance provision of the Act:

> Superior competitive performance

[66] Competition Bureau, *Refusal to Supply*, pamphlet, ISBN 0-662-67713-7. Online at: http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/01244.html.
[67] *Nadeau*, *supra* note 12 at para. 276.
[68] *Ibid*. at para. 289.
[69] *An Act to amend the Competition Act and the Competition Tribunal Act* (Bill C-23), Statutes of Canada 2002, chapter 16, subsection 11.1(2).
[70] *B-Filer*, *supra* note 11 at para. 208.
[71] *Supra* note 39. The Director of Investigation and Research filed an application on December 22, 1994 under the abuse of dominance, tied selling and refusal to supply provisions of the *Competition Act*; the refusal to supply part of the application was subsequently withdrawn.
[72] *Ibid.* at page 345.
[73] *Supra* note 6.

> (4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.[74]

The wording of the section suggests that superior competitive performance that results from a practice by a dominant supplier or a group of suppliers will be considered as a relevant factor in determining the overall effect of the practice on competition. It is unclear at this point what interpretation the Tribunal will adopt, but the superior performance provision reiterates that efficiency considerations are relevant in analyzing refusal to deal under the abuse of dominance provision.

Remedies

18. What remedies for refusals to deal were applied in the cases discussed in questions 6 and 7? If one available remedy is providing mandated access/rights to purchase, how is the price established for the sale/license of the good or service? How are other terms of the transaction determined?

As mentioned in question 6, the Bureau has not established any unlawful conduct under the refusal to deal provisions in the last ten years. No remedies have been therefore sought before the Tribunal in that time period.

Generally speaking, several remedies are available under the law to address refusal to deal depending on the nature of conduct. The only remedy available to the Tribunal in cases of unconditional refusal to deal provided for in section 75 of the Act is to order one or more suppliers of the product in the market to accept a customer on usual trade terms.[75] Damage payments are not available to an injured competitor or buyer under the civil provisions of the Act.

Under section 79 on abuse of dominance, the Bureau has a wider range of remedies that can be sought. Similar to section 75 refusals, the Tribunal may, on application by the Commissioner, order any supplier to cease the anti-competitive practice and resume supplying a customer.[76] The Tribunal also has the power to require any supplier to take a corrective action to restore competition in addition to or instead of compelling a supplier to accept a customer, which may include the divestiture of assets or shares, as well as any other measure the Tribunal deems appropriate to address competition concerns.[77]

Remedies available under section 79 are directed at restoring competition in the market and are non-punitive in nature. More recently, however, the Act was amended on March 12, 2009 to allow the Commissioner to seek administrative monetary penalties in abuse of dominance cases. Any person or firm found guilty of an offence may face a penalty of up to $10 million when an initial order is issued by the Tribunal, and up to $15 million for any subsequent order.[78] The amount of penalty is determined at the discretion of the Tribunal taking into account such factors as the degree of damage to competition, sales revenues and profit levels

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[74] *Supra* note 1, subsection 79(4).
[75] *Ibid.*, subsection 75(1).
[76] *Ibid.*, subsection 79(1).
[77] *Ibid.*, subsection 79(2).
[78] *Ibid.*, subsection 79(3.1).

affected by the practice, financial solvency of the offender, the history of previous violations and other relevant factors.[79]

It is widely recognized that the length and cost of the litigation process poses a significant concern for parties affected by anticompetitive conduct. In certain instances of denied supplies, a business may suffer substantial damages, face the prospect of insolvency or simply go out of business before a court order is issued.[80] Partially in order to address such concerns, a number of short-term measures are available under the Act.

Prior to making an application under section 75, the Commissioner may apply for a temporary interim order to prohibit refusal to deal in circumstances where the Tribunal is satisfied that:

> a) injury to competition that cannot adequately be remedied by the Tribunal is likely to occur; b) a person is likely to be eliminated as a competitor; or c) a person is likely to suffer a significant loss of market share, a significant loss of revenue or other harm that cannot be adequately remedied by the Tribunal.[81]

In addition, the Tribunal, on application of the Commissioner or a private party, also has the power to issue an interim order to supply that is granted on usual mandatory injunctive principles.[82] An applicant for an injunctive order to prevent discontinuation of supply pending a hearing of the case on its merits must demonstrate that (i) there is a "serious issue to be tried"; (ii) that not granting the interim relief will cause irreparable harm to the applicant; and (iii) that the balance of convenience favours the granting of the relief requested by the applicant.[83] This first order can be critical to the success of a case since an order to continue to supply pending the outcome of the application may lead to a negotiated settlement, while the failure to obtain an interim order may mean the rapid demise of the enterprise such that any final order to supply becomes moot.[84]

Remedies available under section 75 extend over private parties that apply to the Tribunal. To date, there have been eighteen private applications for leave to the Tribunal in relation to refusal to deal since 2002 when private access was allowed. Few of these applications have been granted leave to proceed. As of October 2009, the Tribunal granted leave only in six applications. Even fewer applications proceeded to a hearing as some were discontinued after the parties reached an agreement. Only one contested interim supply order was granted by the Tribunal in *Quilan's*[85] and a very limited interim supply order was granted on consent in *Robinson Motorcycle*.[86] In rare cases the Tribunal exercised its discretion to award costs.[87]

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[79] *Ibid.*, subsections 79(3.2)(a)-(f).
[80] Competition Bureau submission to OECD, *Roundtable on Refusals to Deal: Note by Canada*, 27 September 2007, para. 29.
[81] *Supra* note 1, subsection 103.3(2). For more informaiton pertaining to the
issuance of a temporary interim order refer to Competition Bureau submission to OECD, *Roundtable on Refusals to Deal: Note by Canada*, 27 September 2007, para. 27.
[82] *Supra* note 1, subsection 104(1).
[83] *B-Filer*, *supra* note 11 at para. 3-5.
[84] Competition Bureau submission to OECD, *Roundtable on Refusals to Deal: Note by Canada*, 27 September 2007, para. 26.
[85] *Supra* note 20.
[86] *Robinson Motorcycle Limited v. Fred Deeley Imports Ltd.*, Competition Tribunal CT-2004-007.
[87] The Tribunal awarded costs in dismissing the leave applications in *Sears* and *Sono Pro* and it awarded overall costs in *B-Filer*.

19. If the unlawful refusal to deal arose in a regulated industry, was the remedy available because of the regulatory provisions applicable to the defendant or is the remedy one that could be used for any (non-regulated industry) unlawful refusal to deal?

As mentioned in question 6, the Bureau has not established any unlawful conduct and therefore has not pursued any court action either in a regulated or non-regulated industry under the refusal to deal provisions of the Act in the past ten years.

20. Has your agency considered using any other remedies in refusal to deal cases that are available under your jurisdiction's competition laws and that were not described in your response to Question 18? Did the availability or administrability of a remedy influence the decision whether or how to bring a refusal to deal case? If so, please expain your response.

N/A

Policy

21. What policy considerations does your jurisdiction take into account with respect to a refusal to deal? Do they apply to all forms of refusal? Are there any particular considerations for specific types of a refusal to deal? What importance does your jurisdiction's policy place on incentives for innovation and investment in evaluating the legality of refusals to deal?

The purpose clause of the Act recognizes that besides the overarching goal of maintaining and encouraging competition in Canada, competition law is designed to "ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy".[88] Section 75 arguably plays a role in providing small and medium-sized businesses with an opportunity to seek – either through a private application or on application by the Commissioner – an order from the Tribunal to maintain their discontinued supply arrangements, especially to the extent that they are more likely than large businesses to be affected by a refusal to deal.[89] Recent legislative advances of the refusal to deal provision to include a test on adverse effect on competition have clarified, however, that the scope of section 75 is to capture conduct with an overall negative effect on competition rather than to protect individual competitors.

The Bureau's enforcement approach to refusal to deal cases has been consistent with the overarching principle of stimulating competition and preventing conduct that would lead to the creation, preservation or enhancement of market power to the detriment of competition both under section 75 and 79.

Generally speaking, a refusal to sell or supply may be a natural manifestation of a firm's desire to pursue better business opportunities. Considerations underlying the decision to refuse dealing may relate to pro-competitive reasons such as establishing more efficient distribution channels or reducing costly supply arrangements. The detailed list of criteria under section 75 requires the Bureau to engage in a thorough analysis when evaluating

[88] *Supra* note 1, section 1.1.
[89] Rowley, J.W. and A. N. Campbell, *Refusal to Deal (with Economics): An Assessment of the Competition Tribunal's Decisions in Chrysler and Xerox*, McMillan Binch, 15 December 1992, page 9.

complaints to identify cases where refusal to deal has the potential of adversely affecting competition in the marketplace. The Bureau will usually not pursue a pure refusal to deal situation under section 75 of the Act in the absence a refusal to deal that is, or is engaged in as part of, a practice of anticompetitive acts. The private access provisions of the legislation will generally provide sufficient remedies for specific cases of pure refusals to deal.[90]

Similarly, under section 79 of the Act the Bureau will pursue a refusal to deal case in circumstances where such conduct is engaged in by a dominant supplier or a dominant group of suppliers with the result that competition is lessened or prevented substantially. In assessing the effect on competition, the Bureau will examine such factors as whether or not consumer prices might be substantially lower; product quality, innovation, or choice might be substantially greater; or consumer switching between products or suppliers might be substantially more frequent in the absence of the practice.[91]

22. Please provide any additional comments that you would like to make on your experience with refusals to deal in your jurisdiction. This may include, but is not limited to, whether there have been – or whether you expect there to be – major developments or significant changes in the criteria by which you assess refusal to deal cases.

N/A

[90] Competition Bureau submission to OECD, *Roundtable on Refusals to Deal: Note by Canada*, 27 September 2007, para. 72.
[91] Competition Bureau, *Updated Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)*, Draft for Public Consultation, January 2009, page iv.