Submission on

Draft Guidelines on Abuse of Dominance in the Retail Grocery Industry

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

March 2002

TABLE OF CONTENTS

Submission on
Draft Guidelines on Abuse of Dominance in the Retail Grocery Industry

PREFACE . . . . . **- i -**

I. INTRODUCTION **1**

II. INDUSTRY-SPECIFIC GUIDANCE **1**

III. SCOPE OF THE GUIDELINES **4**

IV. SPECIFIC COMMENTS **5**

A. Canadian Grocery Industry 5
B. Abuse of Dominance Provisions 5
C. Institutional Framework for Enforcement 6
D. Retail and Wholesale Grocery Markets 7
E. Assessing Market Power 9
F. Market Share 9
G. Barriers to Entry 10
H. Anti-Competitive Acts 10
I. Raising Rivals' Costs 11
i) Exclusive Rights 12
ii) Slotting Allowances 13
J. Predatory Conduct 15
K. Interdependence 17
L. Substantial Prevention or Lessening of Competition 18
M. Alternative Case Resolutions 18
N. Limitations and Exceptions 18
O. Definitions 19

V. CONCLUSION **19**

PREFACE

The Canadian Bar Association is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved by the Executive Officers as a public statement by the National Competition Law Section of the Canadian Bar Association.

Submission on
Draft Guidelines on Abuse of Dominance in the Retail Grocery Industry

I. INTRODUCTION

The National Competition Law section of the Canadian Bar Association (the "Section") is pleased to have the opportunity to comment on the Competition Bureau's draft Enforcement Guidelines on the Abuse of Dominance Provisions as Applied to the Retail Grocery Industry (the Guidelines). The Section strongly supports the Competition Bureau's public education program, including guidelines, bulletins and other interpretive aids made widely available to the business community in Canada.

Subject to the general reservation expressed in Part II below, the Section agrees with many of the positions outlined in the Guidelines and compliments the Competition Bureau's efforts. In this submission, we focus on those aspects of the Guidelines which may be improved.

II. INDUSTRY-SPECIFIC GUIDANCE

Before addressing the specific content of the Guidelines, we would like to comment on the general approach to industry-specific guidance.

For the most part, the *Competition Act* is legislation of general application and provisions such as sections 78 and 79 apply in the same manner to numerous industries. Industry-specific guidelines under the *Act* may be appropriate where Parliament has enacted industry-specific provisions, such as those with respect to

airlines. Similarly, bank mergers are potentially subject to exemption under the *Act* and are subject to concurrent review by the Office of the Superintendent of Financial Institutions and the Minister of Finance. Outside of these contexts, industry-specific guidelines risk creating the false perception that the rules, or their application, are different in some industries than others.

The Competition Bureau (the Bureau) should clearly explain why an industry-specific set of guidelines is necessary in this instance. In our view, the lack of a clear rationale leaves it open for speculation as to why the retail grocery industry warrants special attention. It may also create a false impression that the retail grocery industry has been the subject of exceptional Bureau scrutiny or investigation. In addition, the Guidelines may raise expectations that the Bureau is going to take an aggressive stance on abuse of dominance in this industry and thus encourage unwarranted complaints to the Bureau.

Also, in our view, guidelines should be reserved for significant policy statements of general application that serve to bridge gaps or indicate the Bureau's enforcement position with respect to uncertain areas of the law. The word "guidelines" tends to suggest a significant degree of formality and a firmer, more considered and more final position from the Bureau. In our view, the Guidelines do not break sufficient new ground beyond the general Enforcement Guidelines on the Abuse of Dominance Provisions released by the Bureau in August 2001 (the General Abuse Guidelines) to warrant a separate set of guidelines. In our opinion, the relatively few points that are unique to the grocery industry could be dealt with more effectively in an information bulletin or speech, for example.

We are not suggesting that the Bureau should avoid providing industry-specific guidance. In fact, we would welcome more frequent industry-specific guidance from the Bureau in other formats — for example, speeches to industry groups, information bulletins, backgrounders or statements. Indeed, this would be

consistent with past practice, in which Bureau representatives have spoken to industry associations on industry-specific issues recently confronted by the Bureau.[1] Such speeches and statements are now posted on the Bureau website, so they are immediately and widely available.

This format allows the Bureau to provide more timely and less formal advice to an industry (such as the grocery industry), to communicate issues that it is encountering in the industry, and to advise on positions that the Bureau has been taking.[2] The Bureau can also identify areas of uncertainty in respect of which it has not yet reached a view and is seeking submissions. That approach increases transparency and fairness for all industry participants without locking the Bureau into a position that will be difficult to reverse. It permits less formal, less comprehensive and more frequent and timely communication to industries. This raises awareness of the Bureau's activities in that sector and allows the Bureau

---

1 For example, in November 1995, George Addy (then the Director of Investigation and Research) spoke to the Canadian Electrical Association regarding the application, both generally and specifically, of competition law principles to the electricity sector. In his speech, Mr. Addy addressed the potential for abuse of dominance in this sector and gave specific guidance on what types of behaviour could constitute an anti-competitive act for the purposes of section 78. In May 1984, Lawson A.W. Hunter (then the Director of Investigation and Research) spoke to the Canadian Soft Drinks Association regarding the potential application of what was then the *Combines Investigation Act* to buying groups. Mr. Hunter outlined the dangers of buying groups with particular reference to the conspiracy provisions and how the Bureau would apply these provisions. We could provide numerous examples of additional speeches if that would be helpful. Similarly, a series of information documents released on inquiries in the gasoline industry in 1999 and 2000 provided helpful insight into the Bureau's approach to the application of sections 77 and 79 of the Act to that industry.

2 For example, the discussion of loss leaders in Section 5.2.2 of the Guidelines is helpful — in particular the example of a loss leader not having the requisite impact on competition because it sells at a loss only 50 SKUs out of a total of 17-23,000 SKUs. The same can be said with respect to the Bureau's comments on the typical period of time losses are incurred in the context of predatory pricing allegations. This is the type of practical advice that could be effectively communicated in industry speeches or other formats rather than industry-specific guidelines.

more flexibility to adapt its position to particular circumstances,[3] without creating the perception that a particular industry is being singled out for greater scrutiny.

III. SCOPE OF THE GUIDELINES

It is unclear whether the Guidelines are generally intended to encompass the manufacturer/distributor segment of the grocery industry. The title of the Guidelines refers to the "retail grocery industry". We understand that they arose from concerns about alleged dominance by retailers, not grocery product manufacturers.[4] If the Guidelines are intended to encompass distributors and manufacturers, then perhaps the Bureau should consider amending the title of the Guidelines.

Also, if the Bureau decides that industry-specific guidelines are appropriate, then the Guidelines should perhaps be broadened to address additional issues of particular interest to the grocery industry, such as the Bureau's enforcement approach with regard to price discrimination and advertising and display allowances.

---

3 See William Blumenthal, "Clear Agency Guidelines: Lessons from 1982", 68 *Antitrust Law Journal* 5 (2000) at 16-17 and 24-25 for a discussion of the role and effectiveness of guidelines, as opposed to policy statements, interpretations, speeches, testimony, press releases, advisory opinions and other forms of communication by a government agency.

4 In the last session of Parliament, Liberal M.P. Dan McTeague introduced Private Member's Bill C-402, which dealt specifically with retailers. The Bill proposed to amend section 78 of the *Act*, to include the following acts: controlling to whom a supplier sells; selling at a lower price than the acquisition cost to undermine a competitor; requiring a supplier to pay an unjustified fee to the retailer in order to impede or prevent a supplier's entry into or expansion in a market; squeezing, by a vertically integrated retailer, of the margin available to an unintegrated competitor in order to impede or prevent that competitor's entry into or expansion in the market; and unilaterally withholding amounts owing to a supplier without the prior agreement of the supplier in order to discipline the supplier. Bill C-402 died on the Order Paper with the dissolution of Parliament in October 2000.

IV. SPECIFIC COMMENTS

A. Canadian Grocery Industry

The Bureau should clarify the meaning of certain terms which appear in the Guidelines and ensure that these terms are used consistently throughout. For instance, in section 2 the Bureau refers to the "retail food sector", the "retail grocery sector" and the "grocery sector", but it is not clear whether these terms are meant to be interchangeable. Further, to avoid confusion, the word "market" should be used purely in the legal sense throughout the Guidelines.

The first sentence in the fourth paragraph of this section should be revised to read as follows:

> Some of the larger retail chains supplement the recognized brands that they carry with a range of exclusive products that are packaged and marketed under their own brand name (referred to as a 'private label').

This revision would clarify the distinction between manufacturer brands and private label brands.

The same paragraph refers to buying groups. The Bureau should consider adding a footnote to reference the Price Discrimination Enforcement Guidelines and the possible application of section 45 of the *Act* to such arrangements. The current wording could leave the impression that the buying groups referred to in the Guidelines do not raise issues under the *Act*.

B. Abuse of Dominance Provisions

The following statement in the last paragraph of section 3 raises several questions:

> Dominant firms at the manufacturing level may be able to abuse their positions vis-à-vis distributors or retailers to the extent that smaller manufacturers become severely limited in their attempts to enter or expand into the market. Dominant firms in similar circumstances at the retail level may prevent smaller retailers from obtaining the products they require to compete.

First, as mentioned earlier, it is unclear why the Guidelines (if they are directed at the retail grocery industry) comment on the abuse of dominant position by manufacturers. Second, the Bureau should clarify the phrases "severely limited" and "the products they require to compete". Third, while the actions described in the statement above are illustrations of what can constitute an element of abuse of dominance, they do not in and of themselves amount to an abuse of dominance. The Guidelines should clarify that limitations or other negative impacts on competitors, without more, do not provide sufficient grounds for remedial action under the *Act* unless, among other things, the conduct in question is a practice of anti-competitive acts that result in a substantial lessening or prevention of competition.

C. Institutional Framework for Enforcement

Given the pending changes to the *Act* in Bill C-23, we suggest that the first sentence of the second paragraph of this section be revised to read: "Only the Commissioner can make an application to the Tribunal for a remedial order under section 79." In addition, the Guidelines should refer to the scope of the private right of action proposed in Bill C-23.

To reassure readers that information will remain confidential, the fourth paragraph of section 4 should be amended to include the following:

> Inquiries are conducted in private and information provided to the Bureau will be protected in accordance with section 29 of the *Competition Act*, and the Commissioner's (then, the Director's) statement of policy on confidentiality dated May, 1995, as well as in accordance with the *Access to Information Act* and the *National Archives Act*.

We also recommend that the final paragraph of section 4 refer to the use of alternative dispute resolution (ADR) and the Commissioner's Continuum of Compliance.

D. Retail and Wholesale Grocery Markets

In section 5.1.2, the Guidelines state that "no clear cut standard exists to assess products or geographic parameters for relevant markets at the wholesale or manufacturing level. Instead, products vary considerably, as do their manufacture, distribution and marketing." In our view, this statement is not entirely accurate, given that the 'hypothetical monopolist' test is such a standard and is referred to in the General Abuse Guidelines. If the Bureau does not wish to address the 'hypothetical monopolist' test in the Guidelines, then we suggest that the Bureau include a cross-reference to the General Abuse Guidelines and state that the Guidelines do not address this issue.

In the second paragraph of section 5.1.2, the Bureau states that the "product market has traditionally been viewed as a basket of grocery and food products sold in *full-line supermarkets*" (emphasis added). We believe that the phrase "full-line supermarkets" may envision too narrow a product market, especially given the recent emergence of non-traditional forms of grocery retailers. Given the extent of change and innovation in the retail sector, reference to a specific type of grocery retailer might make the Guidelines out of date in the relatively near future.

In the third paragraph of this section, the Guidelines give the minimum size and product offerings before a store will be included in any defined market. The Guidelines should indicate that these are preliminary guidelines only and that the market in any particular case will be determined based on specific facts.

In section 5.1.2, the Bureau discusses the idea of defining relevant product markets using the traditional approach to grocery products and refers to precedents dating back to 1987 and 1990. The Guidelines would be more relevant and persuasive if they referred to more current precedents, such as the recent cases concerning retail grocery sector mergers. In addition, the Guidelines should set out the effects, if any, that emerging non-traditional grocery retailers (for example, Internet retailers, warehouse clubs and general merchandise retailers that carry many grocery products) are likely to have on the Bureau's approach to the definition of markets.

For the purposes of defining the relevant geographic market, section 5.1.3 of the Guidelines states that the Bureau estimates a reasonable *average* travel time when defining a local geographic market for one-stop weekly grocery shopping. However, the Bureau should be assessing the impact of a price increase on the *marginal* customers, not the average customers, in defining the relevant market. This is consistent with the 'hypothetical monopolist' test in the Merger Enforcement Guidelines. In particular, the question is whether a hypothetical significant and non-transitory price increase by all suppliers in a given area would result in the loss of so many customers at the margin that the price increase would not be profitable. The loss of even a fraction of the customers travelling more than the average distance could have this effect. Accordingly, defining markets with reference to average travel times will result in geographic markets that are too narrow for the purposes of antitrust analysis.

E. Assessing Market Power

We suggest that the first sentence of section 5.1.4 be amended to read as follows: "Once the Bureau has ascertained the existing competitors *and other relevant factors* …".

In the second paragraph of section 5.1.4, the Guidelines refer to "other market characteristics including extent of technological change, extent of excess capacity and customer or supplier countervailing power" which the Bureau will consider when assessing market power. The word "including" suggests that the list is non-exhaustive, in a similar manner to the list used in the General Abuse Guidelines. The Bureau should clarify whether the list is exhaustive and include a more detailed discussion of these factors. This would enhance the reader's understanding of the application of the abuse of dominance provisions to this particular industry.

We also suggest that the Bureau add a comment that market power can be exercised at any of the production, distribution or retail levels of the grocery industry and, further, that market power at one level may be offset by countervailing power of a customer or supplier at another level.

F. Market Share

In section 5.1.5, the Bureau states that a market share of 35% or more "will generally prompt further examination". As in the Section's October 2000 submissions on the Draft General Abuse Guidelines,[5] we suggest that this reference be modified to remove any implication that the Bureau would normally investigate further based solely on market shares. We presume that the Bureau would not do so unless the other relevant requirements of the abuse of dominance provisions appeared to be present after a "quick look". An alternative approach is

---

5 Canadian Bar Association National Competition Law Section, *Submission on Draft Abuse of Dominance Guidelines* (Ottawa: Canadian Bar Association, October 2000) at 10.

to state the proposition negatively — that the Bureau would normally not continue with any further examination if the market share is below 35%. In addition, we question the 35% threshold. Presumably a much greater market share is required to establish "substantial" or "complete" control of a market as contemplated in section 79.

We also suggest that the second sentence of the third paragraph of this section be revised to read as follows: "Where new entry or expansion in a meaningful time period is unlikely, high market share suggests that consumers have few alternatives when the dominant firm increases prices above competitive levels."

G. Barriers to Entry

The evaluation of barriers to entry is a key element of any analysis of an allegation of abuse in the retail grocery industry. We presume that the Bureau has considered barriers to entry in the retail grocery sector in investigations that it has conducted to date. The Guidelines would benefit from specific discussion on this point based on the Bureau's findings in prior cases rather than the very general statement included in section 5.1.6.

H. Anti-Competitive Acts

In the first paragraph of section 5.2, the Bureau states that the practices listed in section 78 "all involve an element of purpose, object *or design*" (emphasis added). With the addition of the word "design", we question whether the Bureau is intentionally expanding the scope of the provision and, if so, how the "design" differs from the "purpose" or "object" of certain conduct.

In the second paragraph of section 5.2, the Bureau states that its "approach to anti-competitive acts in the grocery sector is to determine whether these acts are exclusionary, predatory or disciplinary with respect to other competitors in the

market". The Bureau should restate here that its analysis of these acts in the retail grocery sector will not differ from that in any other sector.

According to the third paragraph of section 5.2, the Bureau focuses on whether conduct facilitates "reducing rivals' revenues" in assessing whether it is an anti-competitive act. We recognize that this phrase is used in the General Abuse Guidelines. However, our view is that reducing rivals' revenues should not be categorized as an anti-competitive act, as most acts which reduce rivals' revenues (for example, lowering prices or introducing superior products) have a pro-competitive effect and are not anti-competitive acts.

Finally, in the last sentence of this section, the Bureau lists a set of practices that raise particular concerns. In our view, "raising rivals' costs" is not an anti-competitive act and should be eliminated from this list. Instead, raising rivals' costs may be the result of some of the practices listed (for example, slotting allowances).

I. Raising Rivals' Costs

In the last paragraph of section 5.2.1, the Guidelines state that the Bureau "will examine whether this market power is being maintained or enhanced through anti-competitive activities that raise rivals' costs". We strongly suggest that the Bureau clarify that raising rivals' costs does not provide a sufficient basis for the Competition Tribunal to make an order under section 79 of the *Act*, in the absence of a substantial lessening of competition.

i) Exclusive Rights

We suggest that the phrase "at the expense of competition" (section 5.2.1(a), first paragraph) be deleted, as it is difficult to understand. In the alternative, the

Bureau should replace this phrase with "leading to a substantial lessening of competition".

Section 5.2.1(a) discusses exclusive rights from three perspectives: a retailer requiring an exclusive right to sell as a precondition to selling a manufacturer's goods; a manufacturer requiring that a retailer carry only its goods in a particular market; or a manufacturer or distributor granting an exclusive right to retail particular goods to one retailer or group of competitors in a market. There is a significant difference between a retailer requesting an exclusive right and a manufacturer granting an exclusive right for its own reasons and on its own initiative. This distinction should be made clearer. Presumably, a manufacturer's grant of a right of exclusivity of a product to that retailer is rarely of concern under section 79, either because there are few grocery products with a dominant position or because suppliers of those products that do have such a position would not grant such exclusivity. In addition, there may be business efficiencies associated with a manufacturer or distributor giving an exclusive right to retail a particular good to one retailer or group of retailers. This should be discussed. In most cases, the manufacturer or distributor may wish to focus distribution only with certain grocery chains for efficiency reasons. If there is any anti-competitive impact, it would likely be at the manufacturer/distributor level rather than the retail level.

In section 5.2.1(a) the Bureau discusses a hypothetical situation "where a core product or group of products in the household bundle of groceries is supplied by only one manufacturer or distributor in a given market". We have difficulty identifying products that would meet this criterion. Even if the case of Heinz Canada baby food (discussed in section 5.2.1(c)) is assumed to fit within this hypothetical, it would appear to be a rare situation where only one manufacturer or distributor supplies a core product, let alone a group of products, in the bundle

of groceries. It is therefore questionable whether the hypothetical example is of sufficient relevance to be included in the Guidelines for general application.

If it is to be included, we suggest that the discussion of the Heinz Canada undertaking be integrated into the discussion in section 5.2.1(a) or that it be moved to an Appendix from the main text of the Guidelines as it interrupts the flow of the text. In addition, the discussion about the case would be more instructive if it referenced available public documents concerning the undertaking.

We also suggest that the Bureau consider adding a footnote referring to the exclusive dealing provisions in section 77 of the *Act* which may also apply to exclusivity arrangements.

ii) Slotting Allowances

Given the background to the Guidelines,[6] it is surprising to see that the discussion of slotting allowances in section 5.2.1(b) focuses on the potential for such fees to reflect an abuse of dominance by a manufacturer, rather than a retailer. Because such fees are charged by the retailer, we presume that the Bureau has considered whether such listing fees may represent an abuse of dominance by a retailer. The Bureau should describe its approach and analysis from that perspective. Some balance is called for in this respect.

In the second paragraph of the discussion of slotting allowances, the Guidelines state that retailers with market power who use slotting allowances "*may not* be contravening the abuse provisions". Given that slotting allowances are a common business practice in this sector, as well as other retail sectors, we suggest that this

---

6 See section II, "Scope of the Guidelines", above.

statement be revised to read that slotting allowances "generally will not raise issues under the abuse provisions …".

In the third paragraph of section 5.2.1(b), the Bureau discusses what it will look for when investigating exclusivity arrangements — in particular, whether the effect of these contracts is to increase competitors' costs and result in higher prices to consumers. This discussion does not address the exclusionary effect that may, in addition to increasing competitors' costs, be a barrier to entry and result in less consumer choice. The Guidelines should address this issue. In addition, the last sentence of this paragraph inappropriately suggests that any price increase made possible by the exclusivity arrangement constitutes a substantial lessening of competition. This would only be the case only if the price increase is significant and non-transitory.

The next paragraph suggests that "full exclusivity contracts" and certain other contract clauses are "problematic" and cause for "concern". The Bureau should clarify that this is the case only if the other elements of section 79, such as the existence of market power and a substantial prevention or lessening of competition, are present. The Bureau should clarify what is meant by a "full exclusivity" contract. While exclusivity may refer to a grocery retailer refusing to carry *any* similar products of competing manufacturers, this is not entirely clear.

In the last paragraph of this section, the Guidelines list a set of contractual clauses that the Bureau considers problematic. The Bureau should discuss its reasons for singling out these particular contract clauses as problematic, as the types of clauses identified are not uncommon. In addition, the Bureau should clarify what is meant by contract clauses that "require some form of price parity with competitors". This reference raises questions as to parity by whom and with respect to whose competitors. Finally, how can a contract between a

manufacturer and a retailer "specify when and how competitors can advertise"? Some explanation or clarification of this example would also be helpful.

The Bureau's consideration of efficiency should also be clarified in the Guidelines. On the one hand, section 5.2.1(b) of the Guidelines states that, if exclusive dealing contracts have exclusionary effects that "also result in higher prices to consumers, the Bureau concludes that there is a substantial lessening of competition in the product market". On the other hand, the last paragraph of section 5.2.2 seems to contemplate a trade-off between pro-competitive benefits and higher prices in the future. As the Section commented in submission on the Draft General Abuse Guidelines, if it is apparent on its face that the conduct is efficiency enhancing, a Tribunal application should not be necessary.[7] In addition, it may be difficult to show that efficiency enhancing conduct constitutes an anti-competitive act.

J. Predatory Conduct

In the second paragraph of section 5.2.2, the Bureau comments on predatory pricing. The Bureau states that predatory pricing occurs when there is selling below some "measure of cost". The Bureau should provide guidance on what it considers an appropriate measure of cost in this context. Later in this section, the Bureau uses the concept of "normal" or "typical" mark-ups. Again, the Bureau should explain what it considers to be a "normal" mark-up. That is, does a normal mark-up include some measure of profit? If a price still results in some profit, will it generally not be considered to be predatory?

In the third paragraph of this section, the Bureau states that disciplinary actions which remove a competitive threat can have the same effect on competition as the elimination of a rival. The Guidelines give the example of a "dominant firm

---

7 *Supra*, note 5 at 3.

engaging in a predatory pricing strategy aimed not at eliminating the competitor but rather at compelling it to resume pricing at previous levels". It is not clear that this example (essentially, a "price war") constitutes an anti-competitive act. However, if the Bureau believes that it does, then further explanation or discussion should be included.

The discussion in paragraph 4 of section 5.2.2 appears to suggest that a "new retail grocery entrant" could engage in predatory conduct. This statement appears to contradict the Predatory Pricing Enforcement Guidelines (section 2.2.1.1) which state that "it is unlikely that an alleged predator with a market share of less than 35% would have the ability to unilaterally affect industry pricing". In addition, low prices offered by new entrants are more likely to be a pro-competitive development rather than predatory behaviour. Furthermore, it is difficult to reconcile the concept of "allowable" new store discounts with the idea that a new entrant could be engaging in predatory pricing by offering low prices.

With regard to the "new store discounts" by suppliers, the Bureau should amplify on that example and indicated how long a period it generally considers new store discounts to be appropriate.

We find the last paragraph of section 5.2.2 difficult to understand. Why should an entrant have to establish that "the lower prices and other pro-competitive benefits of entry to consumers will be offset by higher prices in the future"? The Bureau should clarify that this would be required only in a situation where an entrant is already pricing below some measure of cost. Further, why should an entrant bear this onus? How would it be anti-competitive for the prices to remain low? The previous paragraph suggests the opposite. In any event, it is difficult to conceive how this requirement could ever be established given that it would require extensive forecasting of costs and market conditions.

K. Interdependence

In our view, the Guidelines' discussion of interdependence does not provide a sufficient analysis of the nexus required between two firms before joint control will be found.

We also suggest that the second sentence in the third paragraph of section 5.2.3 be amended to state that "a group of firms *could* employ facilitating practices to ensure cooperation of members in order to sustain the group's joint dominance in the relevant market(s)". The suggestion that a group of firms "would" employ facilitating practices for this purpose is inappropriate because many of these practices can be adopted for purposes that are not anti-competitive. The characterization in section 5.2.3 of "meet-or-release" clauses as "punishments" seems to us to be inappropriate. Such clauses do not punish. Rather, in some circumstances, they can make it more difficult for any other firm to gain the customer's business in the first place. In our view, it is more common to speak of such effects as creating or raising barriers to entry. "Punishment" normally refers to contexts in which either a party to a cartel is not following the "agreement" with respect to prices or output, or a dominant firm engages in anti-competitive activity targeted at a specific firm that has either entered the market recently or gained new customers.

In general, this section should conclude with recognition that all of the practices described are commonplace and often pro-competitive. It is only when these practices are engaged in by one or more firms that jointly control a market, in which entry barriers are high, that these practices could be problematic under section 79.

L. Substantial Prevention or Lessening of Competition

The required element of a substantial prevention or lessening of competition ("SLC") appears to have been given insufficient emphasis throughout most of the Guidelines. We suggest that the discussion of the SLC requirement be expanded. Alternatively, the Bureau could cross-reference the General Abuse Guidelines on this point, given that there appears to be nothing specific to the retail grocery sector in the Bureau's discussion of an SLC.

M. Alternative Case Resolutions

The discussion of voluntary settlement in section 6.1 suggests that resolutions will always be made public "so that all interested parties are informed of the fact that the matter has been resolved". While some cases may call for such public disclosure, section 10 of the *Act* requires that inquiries be conducted in private. Automatic publication of case resolutions would undermine section 10. Moreover, many cases may have proceeded in an entirely private manner, such that there is no need to publicly announce the resolution in order to alert interested parties. At the very least, we suggest the text read that "the Commissioner may make the resolution public...".

N. Limitations and Exceptions

The Guidelines should provide guidance as to how these provisions would actually come into play and how the Bureau interprets these provisions in the context of this industry. The third paragraph should refer the reader to the Intellectual Property Enforcement Guidelines for additional detail.

O. Definitions

We suggest that Appendix 3 either be deleted or revised to provide more precise definitions. For example, "discounts" are not limited to the type of early payment discount described in the definition. Listing fees are not generally understood to include any "fixed payments made by manufacturers to wholesalers or retailers",

but only those relating to access to the store. Finally, it is not clear how the definition of "slotting allowances" differs from "listing fees".

V. CONCLUSION

The Section appreciates the opportunity to provide input into this draft of the Guidelines. We support the Bureau's efforts to educate the Canadian public and business community on the application of the *Act*. Although there are places where the Guidelines can be improved and subject to the general reservation expressed in Part II above, overall we agree with many of the positions taken.