Updated Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the *Competition Act*)

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

April 2009

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PREFACE

The Canadian Bar Association is a national association representing 38,000 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 as a public statement of the National Competition Law Section of the Canadian Bar Association.

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I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the CBA Section) welcomes the opportunity to comment on the *Draft Updated Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)* (the Draft Guidelines) issued by the Competition Bureau in January 2009. The CBA Section strongly supports the continuing efforts of the Bureau to clarify its enforcement policies by publishing enforcement guidelines, information bulletins, speeches, press releases and other interpretative aids.

The CBA Section agrees with much of the Draft Guideline's contents. However, in several areas, the CBA Section has different views or believes that clarification might be helpful.

II. EXECUTIVE SUMMARY

The CBA Section's comments on the Draft Guidelines are principally organized according to the relevant provisions of the *Act*.

With regard to paragraph 79(1)(a) of the *Act*:

- The CBA Section believes that the Competition Bureau should revisit its position that control is synonymous with market power and consider providing guidance on the degree of market power required to meet the "substantially or completely control test".
- The CBA Section requests that the statements in the Draft Guidelines regarding joint dominance be clarified to indicate that something more than mere parallel conduct is required to demonstrate a joint abuse of dominance. The Bureau should consider requiring a linkage between the alleged jointly dominant firms, their combined market share and their adoption of similar practices. It would also be helpful if additional discussion of the "other factors" referred to at the bottom of page 15 of the Draft Guidelines were included.

- The CBA Section suggests that the discussion in the Draft Guidelines of the dominance requirement in paragraph 79(1)(a) of the Act would be clarified by including an express statement of the definition of market power. Further, the CBA Section believes that market power should be measured as the ability to maintain prices above competitive levels, rather than the ability to maintain a price above what the price would be but for the anti-competitive practice.
- For the purpose of the hypothetical monopolist test, the CBA Section believes that the "but for" test outlined in the Draft Guidelines is not the appropriate test or, alternatively, it would be helpful if the Bureau included some guidance as to the manner(s) in which the benchmark price will be determined.
- Regarding the safe harbour thresholds adopted in the Draft Guidelines, the CBA Section recommends that the Bureau consider i) adopting a single firm safe harbour market share threshold of 50%, ii) increasing the joint-firm safe harbour CR4 threshold to 75%, and/or iii) including some discussion of what importance will be attached to the durability of market shares over time and to the distribution of market shares.

With regard to paragraph 79(1)(b) of the *Act*:

- The CBA Section notes that the focus of the inquiry in paragraph 79(1)(b) is to ascertain whether the predominant purpose of the alleged anti-competitive conduct is a negative effect on a competitor that is predatory, disciplinary or exclusionary and that evidence of subjective intent is only one relevant factor in determining the purpose of the conduct.
- The CBA Section believes that further clarification is needed with regard to the Bureau's approach to business justification. Importantly, business justification is not a defence. Therefore, a "reverse onus" requiring a business to show that an efficiency-enhancing practice was the practice least harmful to competition is not appropriate and the Bureau should discontinue its investigation if a clear business justification exists.
- Regarding the economics of anti-competitive acts, the CBA Section notes that the meaning of the terms "disciplinary" and "exclusionary" remain elusive. Further clarification, possibly through examples, would be helpful. The CBA Section also has brief comments on the discussion in the Draft Guidelines regarding specific types of anti-competitive conduct.

With regard to paragraph 79(1)(c) of the *Act*:

- The CBA Section believes that a discussion of the methodologies the Bureau may employ in applying the "but for" analysis under paragraph 79(1)(c) of the *Act* would be helpful.

With regard to subsections 79(3.1/3.2) of the *Act*:

- The CBA Section believes that further guidance would be helpful regarding how the Bureau will approach the newly expanded administrative monetary penalties available to the Competition Tribunal.

With regard to subsection 79(4) of the *Act:*

- The CBA Section believes that further guidance would be helpful regarding how the Bureau views superior competitive performance.

Finally, the CBA Section sets out miscellaneous comments on the Draft Guidelines.

III. PARAGRAPH 79(1)(A) – "ONE OF MORE PERSONS SUBSTANTIALLY OR COMPLETELY CONTROL, THROUGHOUT CANADA OR ANY AREA THEREOF, A CLASS OR SPECIES OF BUSINESS"

A. Definition of Dominance

The Draft Guidelines[1] state that "[t]he Bureau considers 'control' to be synonymous with market power." While the Competition Tribunal has used the terms "control", "dominance" and "market power" interchangeably, control/dominance and market power are not, in fact, synonymous.[2] In practice, many firms have market power, but few are dominant. Consider, for example, a market with 10 firms: even if each of these firms has some market power, none of them is likely to be dominant.

The CBA Section believes that for dominance to be shown in accordance with paragraph 79(1)(a) of the *Competition Act*, a substantial level of market power must be demonstrated. In this regard, paragraph 79(1)(a) expressly requires proof that the firm or firms in issue "substantially or completely control" a class or species of business. In light of this wording, the Supreme Court of Canada observed in dicta in *R. v. Nova Scotia Pharmaceutical Society (PANS)* that the level of market power required to trigger the potential application of the abuse of dominance provisions is greater than that required under the existing conspiracy provisions of the *Act*. The Court stated that only a "moderate" degree of market power was required for the purposes of the latter provisions. It defined this degree of market power as being "an ability

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1 At Section 3.2.1(c).

2 Note also that in practice, all of the cases that have been brought before the Tribunal have involved firms with very high market shares. While market shares are not determinative, significant market power or dominance has been inferred from high market shares in prior cases.

to behave relatively independently of the market, in a passive way".[3] The Court contrasted this with "the capacity to influence the market."[4] The Court implied that an ability to influence the market is what is contemplated by paragraph 79(1)(a). It then observed that "[t]he required degree of market power under [section 79]…comprises 'control', and not simply the ability to behave independently of the market."[5]

The requirement set out by the *Act* that a firm or firms must "substantially or completely control" a class or species of business, and the interpretation of paragraph 79(1)(a) provided by PANS, together suggest that a non-substantial degree of market power will not amount to control. Recent guidance on this subject from the E.C.[6] and the U.S.[7] makes such a distinction between market power and control/dominance.

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3 *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 654 (hereinafter *PANS*). See generally Paul Crampton and Joel Kissack, *Recent Developments in Conspiracy Law and Enforcement: New Risks and Opportunities*, 38 MCGILL L.J. 569 at 588 et seq. (1993), where the implications of this aspect of the Supreme Court's ruling are discussed. The statements made on this point in *PANS* were cited by the majority in *Commissioner of Competition v. Canada Pipe Company Ltd*. [2006] FCA 233 (hereinafter *Canada Pipe*) decision on the cross appeal.

4 *Id.*

5 *Id.*

6 The distinction between market power and substantial market power amounting to dominance was made by the EC in its 2005 Discussion Paper on the Application of Article 82 in the following terms:

> "Dominance is the ability to prevent effective competition being maintained on the market and to act to an appreciable extent independently of other players. The notion of independence, which is the special feature of dominance, is related to the level of competitive constraint facing the undertaking(s) in question. For dominance to exist the undertaking(s) concerned must not be subject to effective competitive constraints. In other words, it thus must have substantial market power.
>
> Market power is the power to influence market prices, output, innovation, the variety or quality of goods and services, or other parameters of competition on the market for a substantial period of time." (paras. 23-24)

7 The distinction between market power and substantial market power amounting to control (known in some U.S. jurisprudence as "monopoly power"), and the requirement to focus antitrust intervention on situations involving substantial market power, was also addressed in *Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act,* A Report by the U.S. Department of Justice (the "Unilateral Conduct Report") in the following terms:

> "Market power is a seller's ability to exercise some control over the price it charges. In our economy, few firms are pure price takers facing perfectly elastic demand. … Virtually all products that are differentiated from one another, if only because of consumer tastes, seller reputation, or producer location, convey upon their sellers at least some degree of market power. Thus, a small degree of market power is very common and understood not to warrant antitrust intervention.
>
> Market power and monopoly power are related but not the same. The Supreme Court has defined market power as "the ability to raise prices above those that would be charged in a competitive market," and monopoly power as "the power to control prices or exclude competition." The Supreme Court has held that "[m]onopoly power under § 2 requires, of course, something greater than market power under § 1." Precisely where market power becomes so great as to constitute what the law deems to be monopoly power is largely a matter of degree rather than one of kind. Clearly, however, monopoly power requires, at a minimum, a substantial degree of market power. Moreover, before subjecting a firm to possible challenge under antitrust law for monopolization or attempted monopolization, the power is question is generally required to be much more than fleeting; that is, it must also be durable." (pp. 19-20)

The CBA Section therefore encourages the Bureau to revisit its position that control and market power are synonymous, and to provide some guidance on the degree of market power required before the Bureau will consider a firm to be caught by the "substantially or completely control" test set out in section 79(1)(a).

B. Approach to Joint Dominance

The revised discussion of joint dominance in the Draft Guidelines appears to represent a marked departure from the position historically taken by the Bureau and from current practice in the EC which has a similar abuse of dominance provision under Article 82 of the EC Treaty. The Draft Guidelines state that "… where these firms are each engaging in similar practices alleged to be anti-competitive, and they appear to together hold market power based on their collective share of the market, barriers to entry or expansion, and other factors as discussed … the Bureau will consider these firms to hold a jointly dominant position". The revised discussion, therefore, does not require any linkage between the alleged jointly dominant firms; the combined market share and the adoption of similar practices by those firms will be sufficient to warrant a finding of joint dominance. The Draft Guidelines could be taken to suggest that the Bureau will always consider such similar practices to be indicative, or the result of, joint abuses of dominance. However, other more innocent explanations could exist, most obviously that independent firms may adopt similar practices in a market because it is the efficient outcome in that particular market.

Previous pronouncements by the Bureau have required some degree of linkage or coordination between the alleged jointly dominant firms. For example, the current Guidelines require that "…something more than mere conscious parallelism must exist before the Bureau can reach a conclusion that firms are participating in some form of coordinated activities."[8] Further, former Commissioner of Competition, Sheridan Scott, addressing the US Federal Trade Commission and Department of Justice, stated that "… in order for the Bureau to conclude that there has been a potential joint abuse of dominance there must be evidence to show

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8 *Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act*), July 2001, p. 17.

albeit short of 'conspiracy' covered by our criminal cartel provisions."[9] The European Commission has considered the issue of joint dominance, or "collective dominance" both in the context of abuse of dominance cases under Article 82 of the EC Treaty as well as under the Merger Regulation.[10] While the EC jurisprudence indicates that, under the right market conditions, economic interdependence may lead to a position of joint dominance, this conclusion should only be reached where there is a "tight oligopoly" with significant indicia[11] that the market is conducive to collusion and the parties alleged to be jointly dominant are adopting a uniform conduct or common policy on the market such that they constitute a collective entity vis-à-vis their competitors, their trading partners and consumers.

In *Airtours*, the Court of First Instance held that to find collective dominance the market must exhibit characteristics that demonstrate (i) there is sufficient transparency to allow each member of the alleged dominant group to observe the behaviour of others in the group and react in a prompt and precise manner, (ii) deviating from the uniform conduct or common policy must be discouraged by a credible threat of retaliation, and (iii) the absence of important

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9 Sheridan Scott, "Abuse of Dominance under the *Competition Act*" (Speaking Notes, delivered to the Federal Trade Commission/Department of Justice Hearings on Single-firm Conduct at Washington, DC, September 12, 2006) Online: Competition Bureau http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02179.html. See also the Report of the Competition Bureau on the Saskatchewan Gasoline Industry (November 15, 1999) Online: Competition Bureau http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01613.html. In the Report, the Bureau stated:

> While high market share is indicative of market power, it alone is insufficient. Evidence of coordinated activity between the group members to facilitate this market power is also required. Furthermore, it must be established that barriers to entry are such that no one will challenge this market power within a reasonable period of time.
>
> While the Tribunal has not considered this specific issue in any contested case, the leading case law under the predecessor monopoly provision of the *Combines Investigation Act* stated that the joint control of a class or species of business "foresees a combination of circumstances whereby one or more persons, inclusive of independent corporations, through the coordination of their activities work together as a unit." Based on a review of related Canadian decisions regarding abuse of dominance and jurisprudence from other antitrust jurisdictions, a Tribunal finding that one or more parties jointly control a market would likely require evidence of some communication between the parties as well as some coordinated conduct beyond conscious parallelism resulting in a lack of competition between the parties. Conscious parallelism is defined as firms in an industry acting in a similar but independent fashion.

10 See, for example, case T-342/99, *Airtours plc v. Commission,* [2002] ECR II-2585 *("Airtours"),* Joined cases C-395/96P and C-396/96P,*Compagnie Maritime Belge Transports SA and Others v. Commission,* [2000] ECR I-1365*, France v. Commission,* [1998] ECR I-1375*, Gencor Ltd. v. Commission*, [1999] ECR II-0753*; Societa Italiana Vetro SpA and Others v. Commission,* [1992] ECR II-1403.

11 A helpful list, though not exhaustive nor determinative, is contained in Annex II to the Framework Directive (*Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, [2002] OJ L108/33*). It is noteworthy that recent economic research has cast doubt on some of the indicia noted in Annex II (see Markku Stenborg, "Forest for the Trees: Economics of Joint Dominance" (2004), 18 *European Journal of Law and Economics* 365).

constraints, such as customers with bargaining power or threat of entry. While *Airtours* was a merger case, and therefore the analysis is inherently forward-looking, the decision provides some helpful guidance for abuse cases.

The CBA Section believes that further guidance is required on the issue of joint dominance, and in particular submits at least coordination or tacit agreement should be required for a finding of joint dominance. Such a finding would normally require significant structural links and/or economic links, based upon an economic analysis of the particular market, to establish that the practices of firms acting independently are the result of coordinated behaviour or tacit agreement as opposed to some other motivation. To establish joint dominance on something less would, among other things, overlook the possibility that the practices engaged in are simply an efficient outcome in the particular market.

Further if parallel conduct is sufficient, a market participant (who is itself not dominant) may be unknowingly exposed to orders and significant monetary penalties under the abuse of dominance provisions as it may not know whether its competitors are engaging in similar conduct. Given that the recent amendments to section 79 were intended to deter conduct contrary to section 79, it would be anomalous to interpret section 79 in a manner that would permit orders and penalties to be issued against firms that had no way of knowing that their conduct exposed them to an order under that section.

The CBA Section also believes that it would be helpful to include some additional discussion of the "other factors" referred to at the bottom of page 15 of the Draft Guidelines and the manner in which these factors will be assessed. In this regard, the CBA Section understands that these "other factors" are the three factors identified in the preceding paragraph (competition from existing rivals outside of the allegedly dominant group; competition from potential rivals (i.e. entrants) outside of the allegedly dominant group; and competition from within the allegedly dominant group). A delineation of the indicia that the Bureau intends to consider in assessing the potential for competition from within the allegedly dominant group would be welcome.

Finally, the CBA Section believes that it would be helpful to include in the Guidelines some discussion of the factors that the Bureau is likely to consider in determining whether to pursue an agreement or arrangement between competitors under section 79 rather than under the new civil conspiracy provision (section 90.1).

C. Application of the Dominance Requirement

At page 11 of the Draft Guidelines, the Bureau states:

> … As the Bureau is generally concerned with the enhancement or preservation of market power as a result of the anti-competitive practice (where the Bureau considers that preserving or enhancing market power may include the creation of market power, if "control" under paragraph 79(1)(a) is established as a result of the anti-competitive conduct at issue), in the context of paragraph 79(1)(a), the relevant level of market power includes both a firm's pre-existing market power and its market power derived as a result of any anti-competitive conduct. The Bureau normally regards a "significant" period of time for the purposes of establishing market power to be one year. …
>
> Market power can be measured both directly and indirectly. Direct indicators of market power, such as profitability or evidence of supra-competitive pricing, are not always conclusive – it can be difficult to define the price level that would have prevailed in the absence of the alleged anti-competitive act(s) in determining whether prices are significantly above that level …

The CBA Section suggests that the analysis in these paragraphs would be clarified by including in the text an express statement of the definition of market power as set out in the Executive Summary (i.e. the ability of a single firm or group of firms to profitably maintain prices above the competitive level for a significant period of time).[12] Inclusion of this definition would ground the reference to a "significant" period of time and would clarify that the benchmark price for assessing dominance is the ability of the target firm or group of firms to maintain prices above competitive levels at the time of the inquiry.

The reference at the outset of this discussion to the Bureau's concern with the creation or preservation of market power *as a result of the anti-competitive practice*, as well as the reference in the discussion of direct evidence of market power to the difference between the price levels that would prevail absent the anti-competitive acts appear to capture concerns that are more properly addressed under the paragraph 79(1)(c) analysis. Market power has been defined in the jurisprudence and economic literature as the ability to maintain prices above competitive levels (consistent with the statement in the text that "the relevant level of market power includes both a firm's pre-existing market power and its market power derived as a

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[12] Draft Guidelines, p. ii.

result of any anti-competitive conduct"), not the ability to maintain prices above the levels that would prevail but for the anti-competitive practice.[13]

D. Definition of Relevant Markets

The Draft Guidelines describe the benchmark price for applying the hypothetical monopolist test for market definition as follows:

> In general, a five percent increase above the price level that would prevail *absent the alleged anti-competitive act(s) (i.e., the relevant benchmark)* for a period of one year is considered to be a significant and non-transitory amount. (Emphasis added)[14]

The proposal to use a "but for" price rather than the competitive price to define relevant markets is a marked departure from the current *Enforcement Guidelines on the Abuse of Dominance Provisions*[15] and existing jurisprudence, as well as approaches in other jurisdictions.

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13 The Competition Tribunal has consistently assessed dominance for the purposes of section 79(1)(a) with reference to competitive prices (most often proxied by prevailing prices). This is most evident in the analysis of direct evidence of market power in *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.) ("*Tele-Direct*") and *Canada Pipe*, in which the Tribunal considered the Commissioner's evidence of supra-normal profits and "supra-competitive" pricing. Implicit in both these decisions was a comparison to competitive profits or prices.

For example, in *Canada Pipe*, the loyalty rebate program at issue (the SDP) was in place in all regions (geographic markets), including both higher and lower price regions. Clearly, therefore, evidence of differential pricing was not a comparison to prices "but for" the SDP; at best it was a comparison to prices "but for" greater competition.

In *Tele-Direct*, the Tribunal stated: "The broad question that is posed is whether the observed performance results (e.g., profits) or observed patterns of conduct (e.g., pricing policy) are more likely to be associated with a firm or firms that are *competitive* or with those that have market power." (p. 83) and "We observe that if all that Tele-Direct and other telco directory publishers were earning was a *competitive* rate of return on all assets, including intangibles, the telcos would not have "profits" available to use for a completely different purpose … In the face of *competition* from other media the amount that Tele-Direct could afford to pay, and that the telcos could demand, would be considerably less. With *sufficient competition* the payments to the telcos would disappear entirely. Even if Tele-Direct earns no economic profit on its operations beyond what it pays out to Bell Canada, its price to average cost margin is extraordinarily high. While no benchmark was placed in evidence, merger guidelines, both in the United States and Canada, place products in separate markets if their existence would not prevent a hypothetical monopolist, post-merger, from increasing prices by five percent." (pp. 100-101) In *Canada Pipe*, the Tribunal's analysis clearly focused on prices and profits relative to competitive benchmarks.

A "but for" assessment of market power would also clearly conflate the paragraph 79(1)(a) and (b) tests, contrary to accepted principles of statutory interpretation, as affirmed in *Canada Pipe*.

14 Draft Guidelines, page 7.

15 The current Guidelines provide as follows: "As in other areas of competition law, the examination then turns to determining whether competition from other product sources limits the ability of the firm(s) in question to exercise market power. The analysis focuses on whether there are close substitutes for the product(s) in question, such that buyers would turn to these substitutes in the event that the product price was raised above competitive levels by a significant amount for a non-transitory period of time. In general, a 5 percent real price increase above competitive levels lasting one year is considered a significant and non-transitory amount." (p. 11) (Emphasis added)

In practice, the definition of relevant markets around a "but for" price benchmark means that the Bureau will need to determine the effect of the anti-competitive practice(s) on price (the paragraph 79(1)(c) analysis), in order to define the relevant market(s) for the purposes of assessing dominance.

At a conceptual level the use of a "but for" benchmark price to define relevant markets undermines the utility of the dominance requirement as a screen to weed out cases that can be dealt with through limited investigation from those that merit more detailed competitive effects analysis. In essence, the Bureau has to decide the entire case in order to define relevant markets (and, by implication, assess dominance) if a "but for" benchmark price is used.

The use of a "but for" benchmark price also effectively conflates the inquiries under paragraphs 79(1)(a) and (c) of the *Act* contrary to the direction of the Federal Court of Appeal in *Canada Pipe* that "[e]ach statutory element must give rise to a distinct legal test, for otherwise the interpretation risks rendering a portion of the statute meaningless or redundant" and "the elements [of subsection 79(1)] must remain conceptually distinct."[16]

Finally, the CBA Section questions how the "but for" benchmark fully addresses the cellophane fallacy which is a problem identified in US jurisprudence when prevailing prices exceed competitive levels. The cellophane fallacy recognizes that it may not be appropriate to define markets in light of evidence of substitution at prevailing prices where the prevailing price is above competitive levels.[17]

For these reasons, the CBA Section believes that further discussion is required before the Bureau locks into a "but for" benchmark price to define the relevant markets to address the dominance requirement under paragraph 79(1)(a). Should the Bureau determine that the "but for" price is the appropriate benchmark for this exercise, the CBA Section recommends in the

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16 *Canada Pipe*, paras. 27, 28 and 83.

17 The cellophane fallacy recognizes that it may not be appropriate to define markets in light of evidence of substitution at prevailing prices where the prevailing price is above competitive levels.

alternative that the Bureau include some guidance in the Guidelines as to the manner(s) in which the Bureau proposes to determine the benchmark price.[18]

The CBA Section also believes that when applying the "hypothetical monopolist test" (HMT) model to define relevant markets, the Bureau should consider raising the measure of a significant price increase from 5% to 10%. In practice, the choice of a 5% price increase as the significant price increase threshold results in very narrow product markets if margins are small. For example, if price-cost margins are zero, a 5% significant price criterion implies a critical elasticity of 10, which will almost never be seen in practice, with the result that the product market will only include the candidate product or service in question (higher price-cost margins will produce broader markets under the HMT approach).

E. Safe Harbour Market Share Thresholds

The safe harbour thresholds adopted in the Draft Guidelines are largely unchanged[19] from the current Guidelines and reflect the Bureau's reliance on simple market power, rather than dominance or control.

In the Unilateral Conduct Report, the US Department of Justice reviewed existing US jurisprudence and concluded that "[a]s a practical matter, a market share of greater than fifty percent has been necessary for courts to find the existence of monopoly power. If a firm has maintained a market share in excess of two-thirds for a significant period of time and the firm's market share is unlikely to be eroded in the near future, the Department believes that such facts

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18 In its Unilateral Conduct Report, the U.S. Department of Justice (US DOJ) discussed the problems with using the hypothetical monopolist test to define relevant markets. Implicit in the US DOJ's analysis is the assumption that this analysis is conducted at prevailing prices. The US DOJ noted the cellophane fallacy criticism of this approach. To address this, the US DOJ considered defining relevant markets prior to the onset of the alleged anti-competitive conduct but concluded that "substantial practical problems may make it difficult to determine consumers' preferences and other relevant factors as of some prior date … Moreover, the market definition as of the pre-conduct time may no longer be relevant because of intervening new product introductions or other significant changes in the marketplace. … An additional problem concerns allegations of monopoly maintenance where the conduct in question allegedly has maintained pre-existing monopoly power rather than created that power." The US DOJ indicated that this could be addressed by employing the HMT methodology using the competitive price rather than the prevailing price but concluded that "accurately determining the competitive price is apt to be quite difficult in such cases." The US DOJ concluded that more study was warranted on this issue, but the HMT approach (at prevailing prices) still had considerable merit in some cases.

19 The safe harbour market share threshold for joint dominance has been increased from 60% in the current Guidelines to 65% in the Draft Guidelines.

ordinarily should establish a rebuttable presumption that the firm possesses monopoly power." (p. 30)

Similarly, all cases that the Commissioner has brought before the Tribunal have involved firms with market shares in excess of approximately 80%.

The CBA Section believes that the Bureau should give serious consideration to adopting a single-firm safe harbour market share threshold of 50% rather than 35% and to increasing the joint-firm safe harbour CR4 threshold from 65% to 75%. In the unlikely event that the Bureau decides to pursue a case where these thresholds are not satisfied, it has clearly indicated in the Draft Guidelines that it retains the ability to bring an exceptional case against a firm or firms with market shares below these thresholds.

The CBA Section also recommends that the Guidelines include some discussion of what importance will be attached to the durability of market shares over time and to the distribution of market shares, to complement the discussion of market share levels. While both durability and distribution are noted in the bullet points that precede section 3.2.1(c)(i) of the Draft Guidelines, there is no discussion of these factors in section 3.2.1(c)(i) itself.

F. Barriers to Entry

The first paragraph in section 3.2.1(c)(ii) of the Draft Guidelines states: "Factors that reduce the likelihood of this profitability are referred to as barriers to entry." The CBA Section suggests that this sentence be revised to state: "Some of the factors that reduce the likelihood of this profitability might constitute barriers to entry." This revised sentence recognizes that there are factors that might reduce the likelihood of profitable entry without being entry barriers. For example, the intensity of competition among incumbent firms might be one such factor. Other examples might include exogenous shocks to markets affecting either supply or demand that reduce the expected profitability of entry.

The CBA Section also suggests that the list of barriers to entry in this paragraph be limited to sunk costs, regulatory barriers, excess capacity, first-mover advantages and existing long term contracts. Although formal definitions of barriers to entry vary,[20] these are generally accepted examples of barriers to entry. In contrast, scale economies would qualify as a barrier to entry under some definitions, but not others. Accordingly, unless the Bureau provides guidance on when economies of scale and scope might qualify as a barrier to entry, the CBA Section suggests this example be deleted. The CBA Section also suggests that "market maturity" and "network effects" are likely not barriers to entry. Rather, other underlying barriers such as switching costs or first mover advantages would need to be present to give rise to barriers to entry in mature markets or markets with network effects.

IV. PARAGRAPH 79(1)(B) – "THAT PERSON OR THOSE PERSONS HAVE ENGAGED IN OR ARE ENGAGING IN A PRACTICE OF ANTI-COMPETITIVE ACTS"

A. Test for Anti-Competitive Acts

The CBA Section recognizes that, consistent with the approach endorsed by the Federal Court of Appeal in *Canada Pipe* and by the Competition Tribunal in earlier abuse cases such as *Canada (Director of Investigation and Research) v. NutraSweet Co*,[21], the focus of the paragraph 79(1)(b) inquiry is to ascertain whether the predominant purpose of the alleged anti-competitive conduct is a negative effect on a competitor that is predatory, disciplinary or exclusionary. The Tribunal and the Federal Court of Appeal have also stated that proof of predominant purpose may be established directly through evidence of subjective intent, or indirectly by reference to the reasonably foreseeable consequences of the acts. The Federal Court of Appeal expressly cautioned, however, that "evidence of subjective intent is neither necessary nor determinative" in establishing anti-competitive intent, but rather is one of the "[r]elevant factors to be weighed to determine [the] over-arching 'purpose' or 'overall character' of the conduct", along with the reasonably foreseeable or expected effects of the act and any business justification. (*Canada Pipe*, paras. 67 and 72.) The CBA Section believes it would be appropriate to reflect this caution in the Guidelines.

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20 For example, Stigler defines a barrier to entry as a cost of producing at some or every rate of output which must be borne by firms which seek to enter an industry but is not borne by firms already in the industry. In contrast, under Bain's definition, a barrier to entry exists if an incumbent firm can raise price above competitive levels without attracting entry.

21 (1990), 32 C.P.R. (3d) 1 (Comp. Trib.).

B. Approach to Business Justification

The CBA Section appreciates that the Bureau has revised its discussion of business justification to reflect the *Canada Pipe* decision. The CBA Section believes however that there are some areas where additional clarification of the approach would be helpful.

First, as a general comment, the Draft Guidelines appear at times to reflect some hostility to taking efficiencies into account in a section 79 analysis. The CBA Section's view is that the Bureau should give considerable weight to efficiencies in assessing whether certain conduct constitutes an anti-competitive act.

More specifically, the first paragraph on page 18 of the Draft Guidelines seems to state that if efforts to improve efficiency have the effect of excluding, predating or disciplining a competitor, the Bureau will "examine the credibility of any efficiency claims being made and the likelihood of these efficiencies being achieved before assessing the overall purpose of these activities." The CBA Section has some difficulty understanding when efforts to improve efficiency will have the effect of disciplining, predating or excluding (i.e. "artificially" raising rivals' costs or reducing rivals' revenues, to use the Bureau's terminology in the Draft Guidelines) and believes that specific examples of efficiency-enhancing conduct that might have these effects would be useful. In addition, it would appear that assessing the likelihood of achieving efficiencies would be part of (and not separate from) an assessment of the credibility of the claim and, more importantly, is something that might only be fairly done after the practice has gone on for quite some time. Therefore, guidance as to how the Bureau will undertake this assessment in respect of a complaint at or about the start of the conduct would be useful.

Also in paragraph 1 on page 18, the Draft Guidelines indicate that the Bureau will "examine the necessity of the conduct in question for achieving those efficiencies" and if the Bureau concludes that the cost savings can be achieved otherwise in an "equally effective manner", "the Bureau will not consider the conduct as having a valid business justification". These statements appear to impose a burden on the target of an investigation to meet this "necessity" test. In the CBA Section's view, a "reverse onus" is not appropriate in this context. Under section 79(1)(b), the Bureau must prove the anti-competitive purpose on the balance of probabilities; the inability of the target of an investigation to establish that some other measure (which the Bureau may propose but the target may not have contemplated) would not have achieved the same efficiencies should not justify a conclusion, by the Bureau, that there is no valid business justification for the conduct. As *Canada Pipe* made clear, business justification is not a "defence" and thus a reverse onus is not appropriate.

The CBA Section also urges the Bureau to provide some additional guidance on its approach to applying the proposed "equally effective manner" test, e.g. is the cost to the target of an investigation part of a consideration of whether the efficiencies can be achieved in an "equally effective manner"? Finally, the CBA Section believes that the statement in paragraph 1 on page 18, that a firm with a high degree of market power is less likely to be able to achieve greater scale efficiencies, should be tempered. This is not necessarily the case as even a firm with a very high degree of market power can achieve greater scale efficiency by expanding into other markets or find efficiencies from other means, such as technological change.

In paragraph 2 on page 16, the Draft Guidelines suggest that the production of new products or improvements in product quality and service could be viewed as anti-competitive acts. The CBA Section does not believe that this kind of behaviour should be discouraged. Accordingly, the CBA Section proposes that this paragraph be revised to clarify that the phrase "negatively affect competitors" refers only to exclusion, predation or discipline of a competitor (as many successful, pro-competitive, business strategies can negatively affect competitors). In the CBA Section's view, the last sentence in the paragraph also warrants further explanation: what is envisaged by "demand-enhancing" (just discounts)? What is meant by self-interest? (Does it mean only that enhancement of demand for the product writ large, not the target's product, will be considered beyond self-interest and, if so, how is this consistent with the reference to the "firm's core assets or demand"?) As firms routinely adopt practices in their own self-interest that are efficiency-enhancing, guidance on the meaning of "self-interest" in this context is, in the CBA Section's submission, required.

Finally, in paragraph 3 on page 18, the Draft Guidelines state that "where it is clear that the firm's objective in engaging in that conduct was for reasons other than the exclusion, discipline or predation of a competitor, then the Bureau will likely elect not to pursue further investigation. However, where there is evidence that suggests a potentially anti-competitive purpose, the Bureau will continue to investigate the matter." Given that the Bureau bears the burden of establishing an anti-competitive act, the CBA Section does not understand why the

Bureau would be able to proceed if it is "clear" that a valid business rationale exists - it would seem that the Bureau should only proceed where it is clear that no valid business rationale exists. Accordingly, the CBA Section believes that if the Bureau finds a clear business justification to exist, the Bureau should state that it will discontinue its analysis. More generally and consistent with the "predominant purpose" test referred to on page 17 of the Draft Guidelines, if the predominant purpose of the conduct is found not to exclude, predate or discipline a competitor, the CBA Section believes that the Bureau should terminate its investigation.

C. The Economics of Anti-Competitive Acts

The CBA Section believes that the expanded discussion of specific types of conduct is very helpful and commends the Bureau for this expansion of the Guidelines.

However, notwithstanding the expanded discussion of the specific types of conduct in the Draft Guidelines, the meaning of the terms "disciplinary" and "exclusionary" remains elusive. (In contrast, the term predatory is more precisely defined.) In a footnote to the discussion of the economics of anti-competitive acts (footnote 50 at page 20) the Draft Guidelines state: "The Bureau considers that "disciplinary" conduct will generally fall into one of these two broad categories [exclusionary or predatory]." This is a helpful statement and could be given more prominence by placement in the body of the document. Also, the discussion of the economics of anti-competitive acts continues to refer to the concept of "discipline" in a number of places. If these references are intended to mean something other than "exclusionary" or "predatory" as defined in section 4.1 of the Draft Guidelines, it would be useful if the Guidelines clarified how and why this might be the case.

In the case of exclusionary conduct, the Draft Guidelines (as the current Guidelines) distinguish between raising rivals' costs and reducing rivals' revenues, with the addition in the Draft Guidelines of the modifier "artificially". This is a welcome recognition that not all behaviour that raises rivals' costs or reduces revenues should be considered exclusionary. Additional examples of circumstances in which behaviour would not be considered to artificially raise rivals' costs or reduce revenues would be welcome. Also, although the distinction between costs and revenues is not new, it is not a clear-cut approach to classifying conduct. For example, the Draft Guidelines classify a rebate program that locks in distributors or customers as raising costs, but this program might also be viewed as reducing revenues. Query whether a better dichotomy or definition of exclusionary conduct might focus on conduct that artificially raises costs of production and distribution or that artificially raises customer switching costs. (This is the distinction alluded to at the beginning of section 4.2.1 of the Draft Guidelines.)

The CBA Section also believes that the statement at the beginning of the second paragraph in section 4.1 (page 20) that "exclusionary conduct is designed to make current and/or potential rivals less effective at disciplining the exercise of a firm's market power" is too broad. Even pro-competitive conduct is "designed to make current and/or potential rivals less effective at disciplining the exercise of a firm's market power". It is often the case that a firm competes by enhancing its product offering to differentiate it from others and allow it to charge a higher price (as recognized in the discussion of business justification). This is hardly exclusionary, as competitors are free to innovate also.

Finally, the CBA Section notes that the discussion of certain specific types of anti-competitive conduct in both the body of the document (sections 4.2 and 4.2.1) as well as in the appendices may be confusing. A possible remedy would be to focus on general principles in the body of the document (as is generally the case), with appropriate cross references to the discussion of specific types of conduct in the appendices.

In the remainder of this section, we provide brief comments on the discussion in the Draft Guidelines of specific types of anti-competitive conduct.

1. Predatory conduct

The CBA Section suggests that section 4.3, which deals with predation, might be expanded to include more of the discussion in the Predatory Pricing Enforcement Guidelines since the criminal predatory pricing provision has been repealed.

For the existing discussion in the Draft Guidelines, the CBA Section suggests that clarification on how the Bureau will implement the price-cost and recoupment screens to avoid over-deterrence would be helpful, as the Bureau will not have access to the alleged predator's cost data before a formal inquiry is commenced.

The first paragraph on page 25 states that establishing the existence of market power is sufficient to establish that a firm will likely be able to recoup its losses following a period of predatory pricing. The remainder of the paragraph suggests – correctly in the CBA Section's view – that significant market power will be required ("high" barriers to entry and "lack of remaining competition") for recoupment to be possible. Consistent with this, the CBA Section proposes that the first sentence of this paragraph be revised to state "establishing that substantial market power exists is sufficient ..."

2. Exclusive Dealing

The CBA Section believes that the expanded discussion of exclusive dealing (beginning at page 21 and at page 32 of the Draft Guidelines) and the acknowledgement that exclusive dealing can be pro-competitive in many circumstances is very helpful.

However, the CBA Section is concerned by the statement on page 33 that exclusive dealing can be problematic when "a share" of the downstream market is captured by the dominant firm by way of exclusive dealing. The CBA Section believes that a "significant" share must be captured in order to raise barriers to entry. The CBA Section also suggests that the Bureau consider establishing a "safe harbour" for conduct that captures only a small portion of the downstream market (e.g. below 30%).

The CBA Section also suggests that the Bureau give consideration to indicating that it will perform a price-cost analysis for exclusive dealing that is induced by lower pricing (including single product loyalty discounts).

3. Tying, Bundling, and Bundled Rebates

As in the case of exclusive dealing, the CBA Section believes that the expanded discussion of tying, bundling, and bundled rebates (beginning at page 22 and at page 35 of the Draft Guidelines), and the acknowledgement that tying is ubiquitous in many if not all markets, is very helpful. The reference made to recoupment is also a welcome development.

However, the CBA Section believes that further clarification would be useful on whether the Bureau will pursue bundled rebates where the bundled price is shown to be above average avoidable cost. In this respect, the declaration of a "safe harbour" where the price of the bundle exceeds the average avoidable cost of the bundle would be welcome.

The CBA Section also suggests that the appropriate consideration in assessing bundled rebates is not whether the bundle constitutes a single product, but rather whether bundle-to-bundle competition is reasonably possible. Identification of the ability of competitors to compete against bundled products appears to be the central issue and clarification of this point would provide more certainty to businesses.

4. Denial of Access to a Facility or Service

The CBA Section is troubled by the broad statements in the Draft Guidelines on the possible obligation of dominant firms to share their facilities with competitors. Although the CBA Section recognizes that the EU has identified a similar approach to essential facilities in its *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, there is no support in Canadian jurisprudence for an essential facilities doctrine. Recent US jurisprudence has rejected a general essential facilities doctrine, highlighting in this context the detrimental effects of forced sharing on innovation by both the dominant firm and smaller competitors.

With this in mind, the CBA Section believes the Bureau should revisit and clarify the statement in the first full paragraph on page 40 that "with a finding of market power, a denial of access is an anti-competitive act where its purpose is to exclude or impede actual or potential competitors." As excluding or impeding competitors is almost always (if not always) the objective effect of a refusal to provide a facility or service, this statement appears to suggest a presumed duty to supply and a dominant firm must find a valid business justification for refusing to supply to escape possible sanctions under section 79.

The CBA Section appreciates the statement in footnote 83 of the Draft Guidelines that if new firms can enter and compete effectively without forced access, an order mandating access could actually impede competition. However, this statement fails to recognize that mandated access may cause inefficiencies regardless of the ability of new firms to enter the market and, in any event, still seems to place the onus on a dominant firm to justify a refusal to supply a competitor.

Finally, the definition of the term "facility" in the Draft Guidelines is exceptionally broad, encompassing "any necessary input or service". In light of the potential economic costs of mandated access, the CBA Section believes that, at a minimum, the Bureau should provide additional guidance on what will be considered a "facility", when it might consider access to a facility to be critical to a competitor, and how it will assess and balance the economic costs and benefits of mandating access.

5. Price Discrimination and Promotional Allowances

Given the elimination of price discrimination and promotional allowances from the *Competition Act*, it would be helpful for the Bureau to clarify that these practices are rarely likely to raise serious concerns under the abuse of dominance provisions because it is unlikely that engagement in these practices could give rise to a substantial lessening or prevention of competition. Similarly it would be helpful to indicate that price maintenance activity to the extent it has or is likely to have an adverse impact on competition will be pursued under the new section 76 and not under the abuse of dominance provisions.

V. PARAGRAPH 79(1)(C) – "THE PRACTICE HAS HAD, IS HAVING OR IS LIKELY TO HAVE THE EFFECT OF PREVENTING OR LESSENING COMPETITION SUBSTANTIALLY IN A MARKET"

The Draft Guidelines provide little guidance on the manner in which the "but for" analysis will be applied. While conceptually simple, the Bureau (see bottom of page 11 of the Draft Guidelines) and others[22] have recognized that the practical application of this test is complex. Accordingly, discussion of the methodologies that the Bureau may employ in applying the "but for" analysis, including how it might establish "but for" prices or other indicia of competition absent the alleged anti-competitive practices, would be welcomed.

The CBA Section also believes that this part should include a discussion of the possible role of efficiencies in assessing the impact of conduct on competition. This possibility is referred to in passing in section 5.3.2 but is not addressed in section 3.2.3 of the Draft Guidelines.

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22 See for example, *ConcordBoat Corporation v. Brunswick Corporation*, 207 F.3d 1039 at 1055 (8th Cir. 2000) where the Court specifically commented on the difficulty of constructing a "but for" hypothetical market.

VI. SUBSECTION 79(3.1 / 3.2) – ADMINISTRATIVE MONETARY PENALTIES

The recent amendments to the *Act* have granted the Competition Tribunal authority to impose administrative monetary penalties (AMPs) on those subject of an order issued by the Tribunal under section 79. The Tribunal's ability to impose substantial AMPs has the potential to significantly chill legitimate vigorous competition, thereby significantly enhancing the general importance of these Guidelines. The recent amendments also give rise to the need for specific guidance on when the Commissioner is likely to seek an order under section 79 for a significant AMP. Although section 79(3.2) lists certain mitigating and aggravating factors that the Tribunal must take into account when determining the amount of any AMPs, the CBA Section recommends that the Bureau include additional guidance on its approach to seeking AMPs including, in particular, detailed guidance on the factors it will consider in assessing an appropriate level of AMP, the relationship to the types of conduct discussed in the Draft Guidelines, and the types of cases where the Commissioner would not likely seek an AMP. The Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases, released by the Bureau on March 25, 2009, provides an example of the type of detailed discussion that would be useful in this context.

VII. SUBSECTION 79(4) - SUPERIOR COMPETITIVE PERFORMANCE

The CBA Section has difficulty reconciling the statements in section 5.3.2 of the Draft Guidelines and believes that further guidance on subsection 79(4) would be helpful.

It is not clear how the following two statements in section 5.3.2 of the Draft Guidelines can be reconciled:

> Superior competitive 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.
>
> [Superior competitive performance] is the sort of competitive dynamic that the *Act* is designed to preserve and, where possible, enhance, as it ultimately leads to more efficient allocation of resources.

In a sense, superior competitive performance does "exclude" competitors. This suggests that subsection 79(4) could be interpreted as directing that exclusionary conduct is not anti-competitive if the exclusion is attributable to superior competitive performance. In any event, additional guidance would be helpful on how the Bureau will interpret and apply subsection 79(4) and on the relationship between superior competitive performance and anti-competitive acts.

VIII. MISCELLANEOUS COMMENTS

The CBA Section has the following additional minor comments and suggestions:

- Wherever possible, further practical examples and more concrete guidance on the Bureau's positions and action thresholds would be welcomed.
- Page iii, first full paragraph, second last sentence – some clarification of what is meant by "other relevant factors" would be helpful.
- At page iii, in the discussion of "Practice of Anti-Competitive Acts" – we suggest including, in a single paragraph, the manners in which "purpose" can be determined (subjectively and objectively) and the role of business justification in this analysis. Also, we suggest deleting the reference in this section to the absence of an efficiency exemption. Possible revised text might read: "For an act to be considered to be anti-competitive, the purpose of the act must be an intended negative effect on a competitor that is exclusionary, disciplinary, or predatory. The jurisprudence under section 79 has held that the element of anti-competitive intent or purpose can be established directly, through evidence of subjective intent, or inferred as objective intent from the reasonably foreseeable effects of the alleged anti-competitive conduct. A valid business justification for the conduct will overcome evidence of subjective intent and/or deemed (objective) intent where the business justification is the predominant purpose of the conduct."
- At page iii and page 17, first full sentence - the statement that all of the acts in section 78 must be performed for an anti-competitive purpose is contradicted by footnote 36 and 78(f) of the *Act*. Accordingly, we suggest revising the text to read: "all (with the exception of 78(f)) have in common …" and deleting the second sentence of footnote 36.
- Page 3, footnote 8 – would read better as follows: The standard of proof required for civil reviewable matters is proof "on a balance of probabilities."
- Page 4, footnote 11 – delete reference to predatory conduct and subsection 50(1). Also, consider including a discussion of when the Bureau is likely to proceed under section 90.1 rather than section 79.
- Page 5, third paragraph – It is not clear how parties can intervene in the registration of a consent agreement.
- Page 5, fourth paragraph – the description of when the 80 days can be extended is not entirely accurate.
- Page 7, last line – add "by a monopolist" after "sustained".

- Page 9, last paragraph – define the benchmark price for assessing relevant geographic market.
- Page 12, footnote 24 seems misplaced and might be better placed in reference to the last paragraph of the preceding section.
- Page 13, footnote 27 – states that the *Nielsen* case stands for the proposition that an inference of market power based on 100% market share can only be rebutted by evidence of an absence of barriers to entry. Presumably technological change and countervailing buyer power might also rebut this inference.
- Page 14, paragraph before "Other Factors" – revise discussion of likelihood of entry to read: "likely refers to the expectation that entry will be profitable and is otherwise probable".
- Page 15, first paragraph, fourth line – delete "dominant".
- Page 17, paragraph 1 change "consequences" to "effects" to be consistent with the nomenclature in the next paragraph.
- Beginning at Page 20 – In the discussion of anticompetitive acts in Section 4 of the Draft Guidelines, it would be helpful if the specific anticompetitive acts in section 78 were referred to at the places in the section where they are discussed.
- Page 21, second full paragraph, second last line – delete "necessary".
- Page 22, second full paragraph, third line – change "produces" to "sells".
- Page 23, first full paragraph – reference to "or disciplining" needs to be explained if it is distinct from exclusion or predation.
- Page 24, top paragraph – why aren't rebates assessed with reference to predatory conduct?
- Page 26, Section 5.2 –amend to reflect the recent amendments (AMPs).

IX. CONCLUSION

The CBA Section thanks the Bureau for the opportunity to submit these comments and hopes they are of assistance. The CBA Section would be pleased to discuss its comments further at the Bureau's convenience.