THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Enforcement Guidelines: Abuse of Dominance (*Competition Act* sections 78 and 79)

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

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

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I. INTRODUCTION AND EXECUTIVE SUMMARY

The National Competition Law Section of the Canadian Bar Association (the CBA Section) welcomes the opportunity to comment on the *Draft Enforcement Guidelines: The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)* (the Draft Enforcement Guidelines) issued by the Competition Bureau in March 2012.

The CBA Section strongly supports the clarification of the Bureau's enforcement policies through the publication of enforcement guidelines, information bulletins, speeches, press releases and other interpretative aids. Abuse of dominance is an area in which it is particularly important for the Bureau to provide meaningful guidance, given the limited jurisprudence and the potential application of substantial administrative monetary penalties (AMPs) for non-compliance. For these reasons, the CBA Section has significant concerns with the minimalist approach taken in the Draft Enforcement Guidelines.

These comments identify specific areas where further information is required to provide meaningful guidance to Canadian businesses and their advisors on the Bureau's approach to the application of the abuse of dominance provisions of the *Competition Act*. The CBA Section would welcome the opportunity to work with the Bureau to address these issues.
The overarching comment of the CBA Section on the Draft Enforcement Guidelines is that additional information is required on the Bureau's approach to applying the constituent elements of section 79 in order to provide practical and meaningful guidance to Canadian businesses and their counsel and to avoid the potential for significant chilling of pro-competitive business activity in Canada.

The CBA Section's specific comments on the discussion (or lack thereof) of the constituent elements of section 79 in the Draft Enforcement Guidelines are:

s. 79(1)(a) – "Substantially or completely control a class or species of business"

- The CBA Section continues to believe that the appropriate benchmark price for the purposes of determining relevant markets is the price that would prevail in a competitive market, not the price that would prevail absent the anti-competitive conduct.
- The CBA Section remains of the view that guidance on the degree of market power required to meet the "substantially or completely control" test would be helpful.
- The CBA Section believes that the proposition that the Bureau may file proceedings or initiate a significant inquiry in circumstances where a firm does not possess market power but may do so at some time in the future is at odds with the plain wording of paragraph 79(1)(a) and, at a very minimum, requires further clarification.
- The CBA Section continues to recommend that the Bureau adopt an unambiguous single-firm market share "safe harbour" threshold of 50% and a joint-firm "safe harbour" CR4 threshold of 75%.
- The CBA Section seeks additional guidance on what the Bureau considers necessary to establish the requisite linkage between firms for the Bureau to consider the firms to hold a jointly dominant position – which in the Section's submission, should include at least coordination or tacit agreement. Relatedly, the CBA Section supports more guidance on the Bureau's approach to deciding when it will review civil arrangements among competitors under section 90.1 or as joint abuse of dominance under section 79.

s. 79(1)(b) – Practice of anti-competitive acts

- The CBA Section believes it would be of significant assistance to the compliance efforts of Canadian companies and their counsel if the Bureau provided a substantially more detailed description of its understanding of what constitutes an anti-competitive act, particularly wherever (a) the Bureau has removed guidance that appeared in prior drafts and iterations of abuse of dominance guidelines, (b) the Bureau has set out guidance that is substantively different from prior Bureau guidance or interpretations offered by the Tribunal or the courts, or (c) the Bureau has adopted an enforcement approach, the economics of which are not obvious.
- The CBA Section seeks justification for the departure from the jurisprudence that anti-competitive acts must be intended to have a negative effect on a competitor and guidance on circumstances when the Bureau would elect to pursue conduct lacking this intent and the basis for doing so.
- The CBA Section seeks clarification of the rationale for the withdrawal of the Bureau's previous guidance on business justification and additional guidance on how the Bureau intends to treat conduct that has some legitimate business justification but also a foreseeable anti-competitive effect.
- The CBA Section requests meaningful guidance on how the Bureau is likely to evaluate the exclusionary nature of different types of conduct.

- The CBA Section believes that Canadian companies and their counsel would benefit from additional guidance on how the Bureau will implement a price-cost screen and identification of scenarios when the Bureau may not wish to proceed against an allegedly dominant company that appears to be pricing below its costs. The CBA Section also recommends that the guidelines reinstate recognition of a recoupment screen.

s. 79(1)(c) – Substantial lessening or prevention of competition

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

s. 79(3.1) and (3.2) – AMPs

- The CBA Section believes that guidance on the factors the Bureau will consider in assessing the level of AMP sought and the types of cases where the Bureau will likely seek an AMP would be helpful.

s. 79(4) – Superior competitive performance

- The CBA Section believes that some guidance would be helpful on how the Bureau approaches the issue of superior competitive performance in accordance with 79(4).

The CBA Section also seeks guidance on the Bureau's approach to the issuance of binding written opinions on the application of the abuse of dominance provisions.

II. REQUIREMENT FOR MEANINGFUL GUIDELINES

Guidelines play an important role in the business world. The crucial role of guidelines is to communicate to the business community and the practicing bar two things: What the Bureau believes the law to be (i.e., how it interprets the law); and how the Bureau applies the law in its day to day activities. This communication is essential if the Bureau is to be transparent and predictable in carrying out its statutory mandate. It permits businesses to factor the Bureau's positions into their business decisions.

We have an overarching concern that the current slimmed-down Draft Guidelines have become less specific, less precise and more qualified in many important respects. As drafted, we do not believe that the Draft Guidelines accomplish either of the key functions of guidelines.

The Draft Enforcement Guidelines provide considerably less guidance than the 2009 draft *Updated Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)* (the 2009 Draft Enforcement Guidelines) and, in some important areas, less

guidance than the 2001 *Enforcement Guidelines on the Abuse of Dominance Provisions* (the 2001 Enforcement Guidelines). It is not clear whether the removal of these details represents a change in approach or a movement to less transparency. As the Draft Enforcement Guidelines purport to "supersede all previous guidelines and statements by the Commissioner of Competition or other Bureau officials regarding the administration and enforcement of section 79", if adopted they will also repeal the more detailed guidance in *The Abuse of Dominance Provisions (Sections 78 and 79) as Applied to the Retail Grocery Industry* (2002) and the *Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry* (2008). Furthermore, much of the detailed guidance in the *Predatory Pricing Enforcement Guidelines* has not been transferred to the Draft Enforcement Guidelines.

The effect of the Draft Enforcement Guidelines, if adopted, would be to repeal guidance that has been the subject of detailed consultation in the past and to create a serious void in the guidance available to businesses on the Bureau's approach to application of the abuse of dominance provisions. This result is particularly troubling given that the requirement for meaningful guidelines has been made more, not less, acute by the introduction of substantial AMPs for non-compliance with the abuse provisions and increased enforcement action.

III. 79(1)(a) – SUBSTANTIAL OR COMPLETE CONTROL OF A CLASS OR SPECIES OF BUSINESS

A. Relevant Markets

Subsection 2.1 of the Draft Enforcement Guidelines describes how the Bureau will assess whether a firm or group of firms "substantially or completely control ... a class or species of business" for the purposes of paragraph 79(1)(a) of the Act. The Draft Enforcement Guidelines explain that a class or species of business is synonymous with a relevant product market and set out the "hypothetical monopolist framework" used to define the market for the purposes of assessing "substantial or complete control." The Draft Enforcement Guidelines caution that "the current price may not be the appropriate benchmark to use when defining the relevant market, as some products that appear to be good substitutes at that price level might not be considered substitutes at price levels that would have prevailed in the absence of the alleged anti-competitive act(s)."

While the Draft Enforcement Guidelines correctly state that the appropriate benchmark price for the purposes of defining the scope of the relevant market may not in all cases be the

prevailing price, they do not identify the circumstances in which the Bureau will be concerned with whether the prevailing price is not the appropriate benchmark price. Further, the only guidance on how the Bureau will attempt to determine the appropriate benchmark price where it believes that the prevailing price is not an appropriate benchmark is the suggestion in footnote 10 that it will define markets around the price level that would prevail absent the alleged anti-competitive acts.

The appropriate benchmark price for defining relevant markets is the price that would prevail in a competitive market. The competitive price is the price that would prevail absent any pre-existing market power – this contrasts with the Bureau's implied approach in the Draft Enforcement Guidelines that the appropriate benchmark is the price which would have prevailed absent the alleged anti-competitive conduct.

As the CBA Section noted in its comments on the 2009 Draft Enforcement Guidelines, the Bureau's proposed approach effectively conflates the analysis of market power (under paragraph 79(1)(a)) and the as-of-yet unproven effects that may arise from the conduct under investigation (under paragraph 79(1)(c)).[1] This approach, if adopted, would result in market definitions that follow from the paragraph 79(1)(c) analysis: broader relevant markets would arise where the conduct would not lead to a small but significant non-transitory increase in price, and narrower markets will result where such an effect is found to arise. This approach is not consistent with the Federal Court of Appeal (FCA) decision in *Canada Pipe*.[2]

Rather, to avoid the "cellophane fallacy" and in accordance with the FCA's decision, the Bureau should examine whether the prevailing prices exceed the competitive level because of the existence of market power at the time of the alleged conduct under paragraph 79(1)(b) (as distinguished from the effects of alleged abuse of itself). This inquiry would be properly restricted to the terms of paragraph 79(1)(a) and consistent with guidance provided by the FCA. It would properly recognize that the inquiry under subsection 79(1) is dependent on a preliminary finding of dominance in a market under paragraph 79(1)(a); there is no scope at

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1 CBA Section comments on 2009 Draft Enforcement Guidelines, pages 9-11.

2 "The multi-element structures of sections 77 and 79 suggest that the applicable legal tests consist of several discrete subtests, each corresponding to a different requisite element. Indeed, this interpretation appears necessary to give effect to the "well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage". Each statutory element must give rise to a distinct legal test, for otherwise the interpretation risks rendering a portion of the statute meaningless or redundant." *Canada (Commissioner of Competition) v. Canada Pipe Co.* 2006 FCA 233 ("*Canada Pipe*"), at para. 26.

this point in the inquiry for analysis or speculation about the unproven effects that such conduct has had on competition. The question of the scope of the relevant market should not be contingent on the as-of-yet unproven effects of the conduct in the marketplace.[3]

B. Degree of Dominance

The CBA Section reiterates its suggestion, made in response to the 2009 Draft Enforcement Guidelines[4], that the Bureau revisit its position that "substantial or complete control" of a "class or species of business" is synonymous with market power *simpliciter.* As described in the CBA Section's prior comments, guidance on the *degree* of market power required before the Bureau will consider a firm to be dominant under paragraph 79(1)(a) is required given that most firms possess some amount of market power, and also in light of the Supreme Court's discussion of the degree of market power required in *PANS*[5] and guidance on the issue from the E.C. and U.S. The CBA Section notes that the definition of market power provided in the Draft Enforcement Guidelines does appear to describe a non-trivial degree of market power. Further elaboration would be helpful, however, including clarification that a firm's market power must, at minimum, be "substantial" in order to cross the control threshold in paragraph 79(1)(a).

C. Anticipated Future Market Power

The CBA Section is concerned by suggestions in the Draft Enforcement Guidelines that the Bureau may file proceedings, or at least initiate a significant inquiry, in circumstances where a firm does not possess market power but may do so at some time in the future. In particular, the statement "[i]f a firm does not have market power, or is not expected to obtain market power through the alleged anti-competitive conduct within a reasonable period of time, the Bureau will generally not pursue allegations of abuse of dominance related to that conduct" suggests that section 79 may be triggered by the conduct of firms that have not yet obtained market power.[6] This appears to be at odds with the basic requirement in paragraph 79(1)(a) that "one or more persons substantially or completely control […] a class or species

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3 See also the Comments of the CBA Section on the 2009 Draft Enforcement Guidelines at pages 10-11.

4 CBA Section's Comments on the 2009 Draft Enforcement Guidelines, pages 3-5.

5 *R v. Nova Scotia Pharmaceutical Society,* [1992] 2 S.C.R. 606, 654.

6 By contrast, the 2009 Draft Enforcement Guidelines (at page 6) indicated that the Bureau "will not pursue any alleged abuse of dominance" where a firm does not have market power or is not expected to obtain market power through the alleged practice within a year, in the sense that prices are at competitive levels and it is not expected the firm will have the ability to raise them."

of business". This requirement, drafted in the present tense, confirms that control (not the possibility of control) must be a constituent element of a section 79 application.[7] Unlike paragraph 79(1)(c), paragraph 79(1)(a) has no likelihood threshold that permits analysis of what might occur in future.[8] In other words, a respondent must already be dominant to satisfy the "dominance" threshold in paragraph 79(1)(a). Section 79 does not capture conduct by a non-dominant firm that may (or may not) become dominant at some point in the future, regardless of the timeframe. Unlike section 2 of the *Sherman Act*, which prohibits monopolization and attempted monopolization, section 79 of the Act only applies to already dominant firms. It is not clear how speculation about the anticipated acquisition of market power in the future could found enforcement action under section 79. In addition, the reference in the Draft Enforcement Guidelines to developing and obtaining market power within a "reasonable period of time" adds further confusion as to what time period the Bureau would consider when evaluating the possibility of a firm developing market power.

The Draft Enforcement Guidelines reinforce the impression that the Commissioner may proceed against non-dominant firms under section 79 when they describe the Bureau's approach to market shares. Footnote 21 to that section states that, in cases where a firm's market share is below 50%, the Bureau will be "concerned with allegations of abuse of dominance that appear likely to create market power within a reasonable period of time".[9] The example provided is the situation of a firm with an initially low market share allegedly engaging in a practice of predatory pricing that has a high likelihood of creating market power within a reasonable time period. Again, it is not clear how such a scenario, without more, could conceivably be the subject of an order under section 79 or even an inquiry under sub-paragraph 10(1)(b)(ii). For the reasons set out above, the Tribunal would not be able to issue an order under section 79 in respect of this conduct as the allegedly predatory firm does not "substantially or completely control... a class or species of business." Dominance is a pre-

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7 *Interpretation Act,* R.S.C. 1985, c. I-23, s. 10 provides "The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning."

8 Paragraph 79(1)(c) requires proof that the impugned practice of anti-competitive acts has had, is having or is likely to have the effect of preventing or lessening competition substantially. Thus, satisfaction of the substantial lessening of competition threshold permits reference to effects in the past, present and/or future.

9 Draft Enforcement Guidelines at page 9.

requisite condition to an examination of the competitive nature and effect of a firm's conduct under paragraphs 79(1)(b) and 79(1)(c).[10]

The CBA Section urges the Bureau to clarify its enforcement position under section 79 for firms that do not possess market power. Relaxation of the market power requirement in paragraph 79(1)(a) would remove the primary screen for abuse of dominance and, as such, would be entirely inconsistent with existing abuse of dominance jurisprudence. The approach suggested in the Draft Enforcement Guidelines would have the effect of creating considerable uncertainty and, perhaps more importantly, would also risk dampening pro-competitive conduct by smaller firms seeking to grow market share. As this is an issue that greatly influences the scope of the Commissioner's enforcement approach under section 79, firms and their advisers require further details of the Bureau's thinking to better understand this apparent change in position.

D. Market Shares and "Safe Harbours"

The CBA Section welcomes the additional guidance on the analytical interplay between market share levels, their durability and their distribution among competitors. The Draft Enforcement Guidelines helpfully clarify that the Bureau will assess any inferences from an allegedly dominant firm's market share in the context of the distribution of the remaining market among competing firms. Similarly helpful is the discussion of the relevance of the relative durability of market shares over time, and particularly the acknowledgement that significant fluctuation in market shares among competitors can diminish the importance to be attached to current high market share as an indicator of market power. The CBA Section supports the Bureau's willingness to engage in a broader factual assessment of how and when market shares may be more or less indicative of the ability to exercise market power depending on particular circumstances.

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10 The notion that a firm can abuse a dominant position in order to acquire market power (i.e. dominance) appears paradoxical. It may be the case that an already dominant firm might engage in a practice of anti-competitive acts that results in a substantial lessening or prevention of competition by preserving, enhancing or entrenching the firm's pre-existing market power. This conventional understanding of the operation of section 79 does not, however, involve an enquiry under paragraph 79(1)(a) about the threatened future acquisition of market power. Rather, it requires separate proof of market power under paragraph 79(1)(a) and a practice of anti-competitive acts under paragraph 79(1)(b), and then proceeds to analyze under paragraph 79(1)(c) the effects of the impugned practice on the firm's pre-existing market power.

The CBA Section also commends the Bureau for its efforts to provide more guidance on its approach to investigating alleged abuse of dominance by firms with market shares between 35% and 50%. The statement in the Draft Enforcement Guidelines that a market share in this range "will not give rise to a presumption of dominance, but may be examined by the Bureau depending on the circumstances" provides firms a degree of additional comfort compared to the Bureau's prior position in the 2009 Draft Enforcement Guidelines that a 35% or higher market share will normally prompt continued investigation.

The CBA Section is concerned, however, that this additional comfort in the Draft Enforcement Guidelines is substantially undermined by the statement in the accompanying footnote that "[i]n circumstances where a firm's market share is below 50 percent and the firm does not appear to possess market power, the Bureau is concerned with allegations of abuse of dominance that appear likely to create market power within a reasonable period of time." For reasons already discussed above, the CBA Section invites elaboration as to why further enquiry would be necessary under section 79 where a firm does not possess market power. In the absence of clarification, the Draft Enforcement Guidelines appear to provide less comfort and certainty than the prior abbreviated approach to market share "safe harbours".

More generally, the CBA Section remains of the view that the Bureau should adopt an unambiguous single-firm safe harbour market share threshold of 50%.[11] This threshold is supported by the jurisprudence in Canada and the U.S.[12] and would be of significant practical benefit to firms and their advisers in seeking to comply with section 79 of the Act. It would also prevent the chilling of pro-competitive conduct by firms with market shares under the threshold. For the same reasons, the CBA Section continues to recommend an increase in the joint-firm safe harbour CR4 threshold from 65% to 75%.

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11 As the CBA Section noted in its comments to the 2009 Draft Enforcement Guidelines, in the unlikely event that the Bureau decides to pursue a case falling below the threshold, it will have indicated clearly in its guidelines that it retains the ability to bring exceptional cases against firms falling below the threshold. See page 12 of the CBA Section Comments on the 2009 Draft Enforcement Guidelines. If this is not considered sufficient, it would be of assistance if the Draft Enforcement Guidelines would, at a minimum, expressly acknowledge how unusual it would be for a party with a share of between 35% and 50% of a market to have a dominant position.

12 The Tribunal has noted that where a firm has share below 50%, no *prima facie* finding of dominance will arise. *(Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd*. (1992), 40 C.P.R. (3d) 289 (Comp. Trib.)) In the U.S. Department of Justice Antitrust Division's exhaustive 2008 study of unilateral conduct cases, the authors concluded that, "The Department is not aware, however, of a court that has found that a defendant possessed monopoly power when its market share was less than fifty percent. Thus, as a practical matter, a market share of greater than fifty percent has been necessary for courts to find the existence of monopoly power." (U.S Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, September 2008, at page 22)

E. Joint Dominance

In its comments on the 2009 Draft Enforcement Guidelines, the CBA Section expressed a number of concerns about the Bureau's approach to joint dominance, which deviated in material respects from the approach set forth in the 2001 Guidelines. Principally, the CBA Section was concerned with the lack of any apparent requirement in the 2009 Draft Enforcement Guidelines of a linkage – whether through coordination or tacit agreement – between the firms alleged to be jointly dominant. Rather the 2009 Draft Enforcement Guidelines indicated that the Bureau would find firms to be jointly dominant where they engage in similar allegedly anti-competitive practices and appear to together hold market power based on their collective market share, barriers to entry or expansion, and the state of competition from within or outside the allegedly dominant group. The CBA Section noted that this approach was out of step with other jurisdictions, raised fairness issues in the context of individually non-dominant firms being exposed to significant orders and AMPs, and failed to provide guidance on the factors the Bureau will consider in deciding whether to pursue an arrangement between competitors under section 79 or the civil agreements provision in section 90.1 of the Act.

The CBA Section welcomes the more moderate position apparently espoused in the Draft Enforcement Guidelines which, like the 2001 Guidelines, explicitly acknowledge that "[s]imilar or parallel conduct by firms is not sufficient, on its own, for the Bureau to consider them to hold a jointly dominant position".[13] However, other statements in the Draft Enforcement Guidelines resurrect serious concerns about a lack of guidance on what the Bureau considers necessary to establish the requisite joint activity or connection between the firms alleged to be jointly dominant. For example, the Draft Enforcement Guidelines continue, without significant elaboration, to refer to the indicia set out for the first time in the 2009 Draft Enforcement Guidelines, but with the notable exception that explicit mention is no longer made of the need for the firms to be engaging in similar allegedly anti-competitive conduct.[14] The Draft Enforcement Guidelines also create significant uncertainty by asserting that "[t]he Bureau

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13 The CBA Section notes, however, the curious omission of reference to the concept of "consciously" parallel conduct employed in the 2001 Guidelines. It would be helpful to clarify the Bureau's position on this omission as the rationale for its exclusion (if intended) could go some distance to explaining the Bureau's approach to discerning the requisite linkage between firms alleged to hold joint dominance.

14 Compare the 2009 Draft Guidelines at section 3.1.2(d): "[i]n the case of joint dominance, this requires an assessment of which firms in that market would need to be each engaging in potentially anti-competitive behaviour such that together they have market power. If these firms are not each alleged to be engaging in potentially anti-competitive behaviour, the Bureau will not consider joint dominance to exist in that market."

considers evidence of coordinated behaviour between firms to be potentially probative, although not strictly necessary, to establishing these firms hold a jointly dominant position". Without clarification, this statement appears to contradict the earlier statement about parallel conduct alone being insufficient to found joint dominance.

Accordingly, the CBA Section believes that the Draft Enforcement Guidelines continue to provide insufficient guidance as to what the Bureau considers to be the requisite degree of "joint" conduct or activity to raise concerns about joint dominance. It appears from the Draft Enforcement Guidelines that the level of competition within the allegedly dominant group of firms will be relied on by the Bureau as the key indicator of the necessary linkage between the firms.[15] The CBA Section is concerned that using the perceived level of intra-group competition as a screen for joint dominance involves significant practical difficulties and risks chilling efficient independent conduct by individually non-dominant firms. Although the Draft Enforcement Guidelines mention a number of factors that could be evidence of positive intra-group competition – including prices that appear to be competitive, price-matching competition, frequent customer switching, and "leapfrog" competition through innovation – the Draft Enforcement Guidelines are silent on the factors the Bureau will consider to be evidence of the requisite *lack of competition* sufficient to raise joint dominance concerns. Guidance on these factors is especially important given the Draft Enforcement Guidelines' statement, noted above, that parallel conduct is not alone sufficient to lead to a finding of joint dominance. In this regard, it seems logical that evidence of actual coordination between firms is what is required to establish joint dominance.[16] However, the Draft Enforcement Guidelines reject that proposition without providing tangible alternative indicators.

The CBA Section reiterates its submission in response to the 2009 Draft Enforcement Guidelines that at least coordination or tacit agreement should be required for a finding of joint dominance. This approach is in line with prior Bureau statements,[17]judicial comment on the

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15 The Draft Enforcement Guidelines state that "if the firms in the allegedly jointly dominant group are, in fact, competing vigorously with one another, they will not be able to jointly exercise market power."

16 This is apparently recognized in the Bureau's Grocery Sector Guidelines, which state that "in markets where a small number of competitors account for a significant proportion of the market and barriers to entry make it difficult for other competitors to enter or expand in the market, there is increased concern that incumbent firms could create market dominance through co-ordinated activities." [emphasis added]. See Competition Bureau (Canada), *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)* as Applied to the Grocery Sector (Ottawa: Industry Canada, November 2002) at section 5.2.3; available online at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01642.html.

17 Examples are noted in the CBA Section's comments on the 2009 Draft Enforcement Guidelines in footnotes 8 and 9.

predecessor provision to section 79,[18] analogous European jurisprudence[19] and the principle of fair notice to individually non-dominant firms that may face significant penalties under section 79. A requirement of coordination or tacit agreement is also consistent with the wording of paragraph 79(1)(a) when considered in contrast to the more obviously expansive language in section 77, which allows an order to be made with respect to exclusive dealing, tied selling or market restriction if, among other things, the conduct is engaged in by a major supplier of a product or is merely "widespread in a market".

The CBA Section notes too that joint dominance raises important issues of interpretation under paragraph 79(1)(b). These issues similarly relate to the "jointness" or connection aspect of a joint dominance application under section 79. For instance, it would be useful to have guidance on the Bureau's approach to establishing a common practice of anti-competitive acts, including the types of evidence the Bureau would consider to demonstrate that a practice is engaged in jointly and exhibits a common anti-competitive purpose. The CBA Section notes that the Bureau has provided a degree of guidance on these issues in its Telecommunications Bulletin, which will be replaced by the Draft Enforcement Guidelines.[20] However, the Draft Enforcement Guidelines are silent on these points and, as noted above, there is no longer any explicit reference in the Draft Enforcement Guidelines to the need for allegedly dominant firms to even be engaging in similar anti-competitive acts.

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18 See *R v. Canadian General Electric Company Ltd*. (1976), 15 O.R. (2d) 360 (H.C.) at 370, where Pennell J. discussed the definition of "monopoly" in the *Combines Act*, which used the same relevant wording now in paragraph 79(1)(a), i.e. "a situation where one or more persons either substantially or completely control throughout Canada or any area thereof [...]" Although expressing doubt about the defendants' submission that "one or more persons" should be read to be in a proprietary or contractual relationship, Pennell J. noted that "[t]o me the wording of the section foresees a combination of circumstances whereby one or more persons, inclusive of independent corporations, through the co-ordination of their activities work together as a unit. For the sake of convenience, I will refer to this situation as shared monopoly. But monopoly control is something more than a number of persons, each acting for himself, controlling a large part or all of the business of a particular commodity" [emphasis added].

19 For a discussion of these, see the CBA Section's comments on the 2009 Draft Enforcement Guidelines at page 6.

20 In that Bulletin, the Bureau states at section 4.2 that "if all (or a significant proportion) of the facilities-based competitors are engaged in a joint denial of access, the Bureau would examine the reasons underlying the decision by each facilities-based supplier to refuse access to the service to determine whether any or all of those refusals are for an anti-competitive purpose. If the denial of access is found to be a coordinated refusal to exclude or discipline the third party, it may constitute an anti-competitive act. However, this behaviour might more properly be addressed under either the conspiracy or the refusal to deal provisions of the Act." See Competition Bureau (Canada), *Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry* (Ottawa: Industry Canada, June 6, 2008); available online at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02690.html.

Additional guidance on the Bureau's approach to joint dominance would be valuable to firms and their advisers given the normal course reliance by smaller firms on single firm market share safe harbours in complying with section 79. In light of the recent introduction of significant AMPs for conduct contrary to section 79, a lack of clarity in the Bureau's approach to joint dominance may be especially liable to chill pro-competitive single-firm conduct. Significant uncertainty can arise if individual firms have to be concerned about the independent, and potentially unknown, conduct of their rivals exposing them to enforcement action under section 79. For similar reasons, the CBA Section supports more guidance from the Bureau on its approach to deciding when it will review civil arrangements among competitors under section 90.1 or as a joint abuse of dominance under section 79.

IV. 79(1)(b) – PRACTICE OF ANTI-COMPETITIVE ACTS

Subsection 3.2 of the Draft Enforcement Guidelines is one of the most important sections of these guidelines since larger companies are likely to look to it frequently and on a regular basis for guidance about the appropriateness of different business practices.

Considering the importance of this subsection, it would significantly assist the compliance efforts of Canadian companies and their counsel if the Bureau provided a substantially more detailed description of its current thinking and understanding of what constitutes an anti-competitive act, together with examples where appropriate. This detailed approach would be of particular utility wherever (a) the Bureau has removed guidance from the Draft Enforcement Guidelines that appeared in prior drafts and iterations of the abuse of dominance guidelines, particularly where there have not been any significant jurisprudential, economic or other developments in the intervening period, (b) the Bureau has set out guidance that is substantively different from prior Bureau guidance or interpretations offered by the Tribunal or the courts, and (c) the Bureau has adopted an enforcement approach, the economics of which are not obvious.

A non-exhaustive set of comments about subsection 3.2 of the Draft Enforcement Guidelines are set out below.

A. Negative Effects on a Competitor

The first paragraph of subsection 3.2 of the Draft Enforcement Guidelines concludes that "While many types of anti-competitive conduct may be intended to harm competitors, the

Bureau considers that certain acts not specifically directed at competitors could still be considered to have an anti-competitive purpose."

We observe that the Bureau's guidance appears to be at odds with the FCA's interpretation of paragraph 79(1)(b) in *Canada Pipe*, which held expressly that to be anti-competitive, the purpose of the impugned conduct must be intended to have effects on a competitor. In particular, the court held:

> the type of purpose required in the context of paragraph 79(1)(b): to be considered "anti-competitive" under paragraph 79(1)(b), an act must have an intended predatory, exclusionary or disciplinary negative effect on a competitor. The paragraph 79(1)(b) inquiry is thus focused upon the intended effects of the act on a competitor. As a result, some types of effects on competition in the market might be irrelevant for the purposes of paragraph 79(1)(b), if these effects do not manifest through a negative effect on a competitor. It is important to recognize that "anti-competitive" therefore has a restricted meaning within the context of paragraph 79(1)(b). While, for the Act as a whole, "competition" has many facets as enumerated in section 1.1, for the particular purposes of paragraph 79(1)(b), "anti-competitive" refers to an act whose purpose is a negative effect on a competitor.[21] [Emphasis in the original].

The Draft Enforcement Guidelines do not offer any jurisprudence, economic thinking or other discussion that would justify a departure from the FCA's guidance in *Canada Pipe* that anti-competitive acts must be intended to have an effect on a competitor. As a related matter, the Draft Enforcement Guidelines do not offer any discussion of the Bureau's reasons for departing from the positions it adopted in previous enforcement guidelines[22] and pleadings.[23] While the Draft Enforcement Guidelines state that the FCA and the Tribunal "have acknowledged that paragraph 78(1)(f) is one exception" to the requirement to have an intended negative effect on a competitor, in fact the FCA and the Tribunal have acknowledged that paragraph 78(1)(f) is the only exception to this standard in the enumerated list of anti-competitive acts in 78(1). Moreover, the FCA and the Tribunal did not indicate in what circumstances it would be

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21 *Canada Pipe*, *supra,* at para. 68.

22 See, for instance, the 2009 Draft Enforcement Guidelines, at page 17 ("However, what the acts in section 78, along with other potential anti-competitive acts, all have in common is that they must be performed for an anti-competitive purpose, namely an intended negative effect on a competitor...").

23 Memorandum of Argument of the Commissioner of Competition in *Commissioner of Competition v. Canada Pipe Company Ltd./Tuyauteries Canada Ltée*, filed November 1, 2007, at paras. 73 and 75 ("… the Federal Court of Appeal confirmed that an "anti-competitive act" is an act that has as its purpose an intended negative effect on a competitor… It is also sufficient, for the purposes of paragraph 79(1)(b), to demonstrate that the subjective intent of the conduct and/or the actual and foreseeable consequences of the conduct were a negative effect on a competitor or competitors…").

possible to bring a case under paragraph 78(1)(f).[24] Therefore, to the extent the Bureau will seek to investigate conduct that is not alleged to be intended to have an impact on competitors, it would be of substantial assistance if the Bureau would provide guidance as to the circumstances where it would elect to investigate such matters, what theories of harm it would consider exploring, and how such conduct might be evaluated under paragraph 79(1)(c).

As a general matter, the Bureau's description of acts that are anti-competitive also does not provide any guidance regarding the criteria or other factors that the Bureau will examine when attempting to distinguish between conduct that is "competition-on-the-merits" and conduct that is "anti-competitive". The Tribunal has recognized that competitive responses targeted at new entrants are not necessarily anti-competitive.[25] Further clarification in this area would be helpful.

B. Business Justification

The penultimate paragraph of subsection 3.2 of the Draft Enforcement Guidelines sets out the manner in which the Bureau intends to apply the business justification doctrine.

At the outset, the Bureau's discussion of the business justification doctrine is limited to a single paragraph, which does not provide meaningful guidance as to how the Bureau intends to apply the doctrine. This can be contrasted with the 2009 Draft Enforcement Guidelines, with long passages describing the Bureau's approach to a series of aspects of the doctrine.[26] These passages were of significant assistance to the bar and private parties, and generated helpful suggestions and commentary from a number of parties that replied to the Bureau's consultation efforts. Absent any jurisprudential, economic or other developments in this area, the Bureau's reasons for withdrawing its previous guidance on the business justification doctrine are not obvious. We would welcome more extensive guidance from the Bureau on the business justification doctrine, particularly if it took into account the helpful commentary from, among others, the CBA Section and the American Bar Association Anti-trust Section, in response to the 2009 Draft Guideline consultation.

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24 See *Canada Pipe*, supra, para. 65, and *Director of Investigation and Research v. NutraSweet*, CT 89/2, at page 57.

25 *Canada Pipe, supra, paras.* 182-183.

26 2009 Draft Enforcement Guidelines, pages 17-18.

Second, the Draft Enforcement Guidelines explain that "proof of the existence of some legitimate business purpose underlying the conduct is not sufficient." While this language is generally consistent with the FCA decision in *Canada Pipe*, the Draft Enforcement Guidelines do not provide any additional meaningful insight into how the Bureau intends to treat conduct that has a foreseeable anti-competitive effect but also some legitimate business justification. Absent any expansion on the FCA's dicta in *Canada Pipe*, the Draft Enforcement Guidelines do not provide additional guidance and risk chilling legitimate efficiency-enhancing business activity.

Third, the Draft Enforcement Guidelines conclude that "the firm bears the burden of proving that the overriding purpose of the conduct was in furtherance of a credible efficiency or pro-competitive rationale." As the Bureau notes earlier in the paragraph, the business justification doctrine is not a defence. As a result, though it would be helpful if firms subject to Bureau investigations were to raise potential business justifications early in the process and to support the business justifications with whatever relevant materials are available, firms do not (either at the investigatory stage or before the Tribunal) bear any formal burden of proof. It is for the Bureau to investigate and, where an application is brought, set out for the Tribunal all the factors necessary for an assessment of whether conduct is intended to be anti-competitive.

C. Exclusionary Conduct

Subsection 3.2.1 of the Draft Enforcement Guidelines does not give any meaningful guidance as to how the Bureau is likely to evaluate the exclusionary nature of different forms of conduct.

For example, the Bureau states that exclusionary conduct "often takes the form of raising rivals' costs." With this statement the Bureau withdraws the detailed guidance in the 2009 Draft Enforcement Guidelines about exclusionary acts and raising rivals' costs. However, the Bureau's motivation for this withdrawal is not obvious absent any discussion of any recent jurisprudential, economic or other developments in this area. In addition, naked references to strategies of raising rivals' costs as an exclusionary practice are imprecise and give no indication as to how the Bureau will define the anti-competitive standard for conduct under paragraph 79(1)(b) of the *Act.* For instance, intensive advertising imposes additional costs on – and lowers the margins of – rival firms, but such practices (even where deployed by dominant firms) will rarely constitute anti-competitive conduct.

The Bureau's additional examples of potentially exclusionary strategies are similarly vague and do not offer meaningful guidance. For example:

- The Draft Enforcement Guidelines indicate that foreclosing rivals' access to key inputs can constitute an exclusionary strategy. However, they do not indicate that upstream and downstream dominance and the essential nature of the input are usually necessary elements to the finding of an abusive act in these circumstances.
- The Draft Enforcement Guidelines indicate that "depriving rivals of scale economies" can constitute an exclusionary strategy. In so doing, they confuse what is in fact an effect of other underlying strategies (which may or may not be exclusionary) with an exclusionary strategy itself. Effects are to be considered under paragraph 79(1)(c), not under paragraph 79(1)(b).
- The Draft Enforcement Guidelines indicate that "increasing customer switching costs" can constitute an exclusionary strategy. This is not an exclusionary strategy that the Bureau has described in any detail in past guidelines. If the Bureau seeks to describe "lock-in" or some other strategies as potentially exclusionary, it should make the same clear and describe the other strategies that would have to operate concurrently to result in actual exclusion. In addition, guidance in the form of examples from industries most likely to experience such practices would be particularly helpful.

D. Predatory Conduct

The Draft Enforcement Guidelines describe predatory conduct and indicate that the "Bureau uses a price-cost screen to avoid chilling legitimate price competition". It would assist private parties if the Bureau clarified how it will implement a price-cost screen to avoid over-deterrence, since the Bureau is unlikely to have access to a measure of the average avoidable costs of a firm under investigation prior to commencing a formal inquiry. This guidance would be of particular utility in industries where parties frequently engage in bundling practices, or where attribution of prices among separate products is otherwise complex.

The Draft Enforcement Guidelines also indicate that, when assessing whether pricing is predatory, the Bureau "will also examine whether the alleged predatory price can be matched by competitors without incurring losses..." This statement is potentially ambiguous. The Draft Enforcement Guidelines should make clear that the Bureau will always use the allegedly dominant firm's costs for the purposes of assessing whether the conduct is predatory, and that in no circumstances could "above cost" pricing practices be characterized as predatory. Firms must be free to price above their own costs without concern, since such firms do not have

information about their competitors' costs, and because low pricing by efficient competitors benefits consumers.[27]

We commend the Draft Enforcement Guidelines for suggesting that merely "meeting competition" by reacting to match a competitor's price may not in fact be anti-competitive. The Draft Enforcement Guidelines would be improved by expressly indicating that it is not anti-competitive for a dominant firm to meet a competitor's pricing. In so doing, the Bureau would also assist private parties evaluating the appropriateness of their own conduct if the Bureau were to describe other scenarios – whether in this section or in a discussion of the business justification doctrine – where below cost pricing would not be considered to be abusive. A non-exhaustive list of additional scenarios where the Bureau may not wish to proceed with an investigation of an allegedly dominant company that appears to be pricing below its costs are where (a) the company is engaging in short term promotional offers, (b) the company is pursuing market-expanding efficiencies, (c) the company is engaging in loss-leading or pursuing other "follow on" revenue opportunities, and (d) the company is seeking to minimize its losses by utilizing excess production capacity.

Finally, the Draft Enforcement Guidelines depart from the 2009 Draft Enforcement Guidelines in the issue of recoupment. The Draft Enforcement Guidelines do not indicate that the Bureau will also use a recoupment screen to assess whether pricing is likely predatory on a preliminary basis. The CBA Section recommends that it do so. In addition, the Draft Enforcement Guidelines do not recognize the importance of high barriers to entry for any recoupment strategy to succeed.

V. 79(1)(c) – SUBSTANTIAL LESSENING OR PREVENTION OF COMPETITION

The discussion of the application of paragraph 79(1)(c) is similar to that in the 2009 Draft Enforcement Guidelines. As noted in the CBA Section's comments on the 2009 Draft Enforcement Guidelines, while the "but for" analysis is conceptually simple, the practical

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27 Richard Posner indicated that an exclusive practice is one that is "likely in the circumstances to exclude from the defendant's market an *equally or more efficient competitor*." The exclusion of inefficient competitors is part of the process of competition, and competition law should not seek to protect such competitors since their continued presence is unlikely to result in lower prices or greater innovation. The relevant question for competition law purposes is whether the dominant company would itself be excluded if faced by the same pricing or other exclusionary practices. See Richard Posner, "Antitrust Law", (2nd ed., 2001), page 196.

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 and other indicia of competition absent the alleged anti-competitive practices, would be welcomed. The CBA Section would also welcome clarification of the role that efficiencies might play in assessing the impact of conduct on competition.

VI. 79(3.1) AND (3.2) – AMPS

The amendments to the Act authorizing the Competition Tribunal to impose substantial AMPs have the potential to significantly chill legitimate vigorous competition, thereby increasing the importance of the guidelines generally, but also making it essential to provide specific guidance on when the Commissioner is likely to seek an AMP under section 79. As noted in the CBA Section's 2009 Comments, 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 provide additional guidance on its approach to seeking AMPs including, in particular, identification of the types of cases where the Commissioner would likely seek an AMP.

VII. 79(4) – SUPERIOR COMPETITIVE PERFORMANCE

The Draft Enforcement Guidelines do not discuss the Bureau's approach to section 79(4) of the Act. The 2009 Draft Enforcement Guidelines included a discussion of this issue, as do the 2001 Enforcement Guidelines. Some clarification of the Bureau's approach to superior competitive performance would be useful.

VIII. ADVISORY OPINIONS

The Foreword to the Draft Enforcement Guidelines states that "Guidance regarding future business conduct can be sought by requesting a binding written opinion on the applicability of section 79 from the Commissioner under section 124.1 of the Act". The CBA Section agrees that it is imperative for Canadian businesses to have access to meaningful guidance on how the Bureau would apply section 79 to a proposed practice or conduct. However, the Bureau's footnoted reference in the Draft Enforcement Guidelines to its approach to written opinions as detailed in the Competition Bureau Fee and Service Standards Handbook for Written Opinions published in May 2011 (the "Handbook") creates significant uncertainty as to whether a meaningful written opinion would actually be provided by the Bureau on the applicability of

section 79. The Handbook states that written opinions provided pursuant to section 124.1 of the *Act* will not provide substantive assessments related to competitive effects or defences. Rather, written opinions will only address *whether* one or more provisions of the *Act* apply to the proposed arrangement, practice or conduct.

Section 124.1 of the Act provides that any person may apply to the Commissioner for a binding written opinion on the applicability of any provision of the Act to a proposed practice or conduct. The term "applicability" is not defined for purposes of section 124.1 and until May 2011, when the Handbook was published, there was a general expectation that the Bureau would issue written opinions on all aspects of the applicability of a provision, including, most basically, *how* it would be applied to any particular proposed practice or conduct. Interpreting the term "applicability" to mean only whether a provision could be applied on a particular set of facts but not *how* it would be applied is confusing and, in any event, an overly narrow reading of Parliament's intent when section 124.1 was enacted. As described below, this is particularly true in the case of a written opinion sought on the applicability of section 79.

First, it is uncertain what useful guidance the Bureau could provide on the applicability of section 79 to proposed conduct that would not involve an assessment of competitive effects. The assessment of dominance, the assessment of whether particular conduct would constitute a practice of anti-competitive acts, and the examination of the impact on the relevant market to assess whether the conduct proposed would be likely to result in a substantial prevention or lessening of competition each requires the Bureau to draw conclusions about the nature of competition in a particular market. The information requirements for requesting an opinion on the applicability of section 79 set out in section 5.1.2 of the Handbook include information on "possible effects of the plan on current or potential customers, suppliers, and competitors". Accordingly, it appears the Bureau also recognizes that providing meaningful guidance on section 79 requires that it consider the competitive dynamics of the market and the impact of proposed conduct on competition. This being the case, it is uncertain why the Bureau would be prepared to address some but not all elements of section 79 in an opinion on its applicability.

Second, meaningful advisory opinions are particularly important for section 79 of the Act. The Bureau is the sole enforcer of section 79 and its views on the its scope determine whether enforcement action will be taken. The ability to obtain useful guidance through an opinion on how section 79 would be applied to a proposed course of conduct is even more relevant in light

of the Bureau's apparent move to reduce the detail in its general guidelines on enforcement of section 79, a move that concerns the CBA Section as discussed elsewhere in this submission.

Furthermore, now that the Competition Tribunal can impose significant AMPs for conduct that is found to be abusive, it is incumbent on the Bureau to take steps to reduce the potentially chilling effect on legitimate business activity by providing clear guidance on how section 79 will be applied, particularly where guidance is specifically requested. Moreover, providing meaningful guidance on its approach to section 79 is an opportunity for the Bureau to reduce concerns that businesses will be severely penalized for conduct they did not know was anti-competitive. Indeed, section 124.1 was included in Bill C-23 in significant part to alleviate concerns about the impact of AMPs for abusive conduct by airlines (which were also introduced as part of Bill C-23). On several occasions in his testimony on Bill C-23 before the Senate Banking Committee, then Commissioner of Competition Konrad von Finckenstein referenced the binding opinions that airlines could seek under the proposed 124.1 to address concerns about the introduction of AMPs. For example, on April 25, 2002, with reference to concerns raised about the impact of AMPs on Air Canada, Mr. von Finckenstein commented:

> ...Bill C-23 contains additional amendments to further enhance compliance with the act [sic] such as requests made to the commissioner [*sic*] for a binding written opinion on the applicability of the Competition Act in respect of a specific conduct. Therefore, a dominant airline will be able to ask the Competition Bureau for guidance and avoid conflict with the provisions of the act [*sic*].[28]

Similarly, on February 20, 2002, Mr. von Finckenstein observed that:

> They have the ability to ask us for written opinions if there is any question as to whether the prospective activity will be in violation.[29]

For these reasons, the CBA Section urges the Bureau to revisit its position on written opinions as set out in the Handbook and clarify that written opinions issued on the applicability of section 79, as well as other provisions of the Act, will include the Bureau's view on how the provision will be applied on a particular set of facts, including in relation to the assessment of competitive effects and defences.

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28 Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, Issue 39, Evidence, April 25, 2002.

29 Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, Issue 39, Evidence, April 25, 2002.

IX. CONCLUSION

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