**I. Introduction**

* Two large groups of provisions
* Criminal - Ex. Criminal conspiracy, misleading advertising, and defiance of Tribunal orders; Some also have civil provision
* Civil – Reviewable Matters – Part VIII of the Act; Standard = BOP; No fines or AMP’s; Damages only available under s. 36
* Competition Act exempts labour organizations
* Bureau can get a s. 11 order forcing parties (even third parties) to deliver information (on their terms) – May be unconstitutional
* **Competitive Price** – Many ways to look at “competitive level”
* Ex. Can look at price charged by someone with many competitors, or the gap between marginal cost and price
* **Price Fixing** – Sometimes used literally, and sometimes as a shorthand for other types of activity contained in s. 45
* **SSNIP** – Small but significant non-transitory increase in price – Bureau worries about whether a SSNIP will result from activity
* **Perfect Competition** – Enough buyers/sellers to satisfy market demand/supply – Achieves market clearing price or equilibrium price
* In Canada, achieving perfect competition will be very difficult – Small economy; Accept we will have oligopolies/oligopsonies
* Law does not prevent monopolies or high monopoly prices, will stop behaviour that is abusive, limits entry by others etc.
* **Merger** – Defined in **S. 91** – Acquisition or establishment of control over or significant interest in a the whole or part of a business
* **“Significant Interest”** – “The ability to materially influence the economic behaviour of another business, including decisions

relating to pricing, purchasing, distribution, marketing, investment, financing, or licensing (MEG’s)

* Ex. Acquisition of enough voting shares to obtain a sufficient level of representation on the board of directors to

materially influence that board or block special or ordinary resolutions of the corporation (**MEGs 1.7**)

* Significant interest can be acquired or established pursuant to corporate and commercial agreements(**MEGs 1.12**)
* A direct or indirect ownership of less than 10% of voting interests is generally not a “significant” interest (**MEGs 1.8**)
* **“Business”** – Defined in s. 2; **“Competitors”** – Horizontal relationships; “**Suppliers and customers”** – Vertical relationships
* **“Control” – S. 2(4)** – >50% voting rights and votes are sufficient, if exercised, to elect a majority of the directors of the corp
* Must speculate and make predictions about what may happen (as opposed to other provisions were someone has been hurt)
* Can include the acquisition or licensing of IP rights, or the merger of firms whose assets include IP rights

**II. Purpose of Canadian Competition Law**

* Current purpose clause contained in **S. 1.1** (The fact that it is “0.1” leads some to ignore it)
* Act is aimed primarily at economic, not political or social concerns – Purely non-economic goals are beyond purview of Act
* No hierarchy among the four objectives – It is far from clear which goal should prevail in a particular context (***SP***, ***Hillsdown***)
* Not all purposes can be served at the same time, nor are all necessarily consistent (***Superior Propone***)
* Promotion of an efficient economy and provision of competitive prices and product choices are dominant themes
* Conduct which is likely to promote efficiency or result in significant consumer benefits is unlikely to attract sanction
* Conduct which tends to restrict output, raise prices, or limit consumer choice will likely attract closer scrutiny
* Competition Bureau protects competition for its beneficial effects – They are not in the business of regulating comp by itself or industries
* Main concern in US is “populist” – Idea of protecting little guy from big guy (Ex. Consumers from high-prices)
* High or low price should be irrelevant – Correct issue is whether or not the price is the equilibrium price, not what that price is
* Not as prevalent in Canada; Economic efficiency was overwhelming focus behind major amendments in 1986, not populist ideas
* If the efficient method is to have a monopoly or oligopoly, that is the system that should be in place

**III. Enforcement**

* Sources: *Competition Act* and regulations, OECD, WTO, foreign law (very frequently look to foreign law), and:
* Four Primary Enforcement Bodies

1. The Commissioner of Competition

* Head of the Competition Bureau – The “cops”
* Vested with primary authority for enforcing the *Competition Act*
* If Commissioner believes on reasonable grounds there has been a contravention, s. 10 requires her to launch an inquiry
* Commissioner, supported by the Bureau, investigates both criminal and civilly reviewable matters under the Act
* No judicial authority but can enter into “consent agreements” with individuals
* Issues enforcement guidelines – Information about how they interpret/enforce Act and bulletins
* Prosecutes civilly reviewable matters before the Tribunal and/or the courts
* In civil cases, Commissioner may bring an application before the Tribunal and/or the courts
* Represented in proceedings by lawyers from or retained by the Department of Justice

1. The Attorney General of Canada (whose functions are effectively exercised by Director of Public Prosecutions (DPP))

* If Commissioner believes a criminal offence has occurred (after invest), she may recommend to DPP that charges be laid
* Prosecutes criminal matters under Act – Initiation and conduct of all criminal prosecutions is responsibility of the DPP
* DPP has independent decision making power, unless instructed by the Attorney General to do otherwise

1. The Competition Tribunal – The “judges”

* Adjudicates civil provisions of the Act – Empowered to make findings and issue orders
* Panel of three members, incl. at least one judicial member (Only judicial members may determine questions of law)
* Appeals from the Tribunal go to the Federal Court of Appeal

1. The Courts – Try both criminal and civil matters

* Enforcement Process
* Bureau states that it operates according to five principles: Transparency, fairness, timeliness, predictability, and confidentiality
* Recommending prosecutions to DPP or bringing applications before the Tribunal are generally only taken as a last recourse
* Commissioner may allow wrongdoer to take corrective action to remedy the situation
* Commissioner may recommend that the DPP seek a prohibition order on consent to avoid guilty plea/litigation
* Civilly reviewable matters may be resolved through consent agreements between Commissioner and affected party
* Private Rights of Action
* **S. 36** – Injured party may recover damaged suffered as a result of another committing a criminal offence under the Act or

violating an order of a court or the Tribunal; Can be configured as class actions

* **S. 103.1** – Private parties who have been granted leave may apply to Tribunal to address conduct under ss. 75, 76, and 77
* Damages are not available unless there is a violation of a Tribunal order in respect of the conduct

**IV. Statutory History**

* The *Competition Act* and *Competition Tribunal Act* became law in 1986
* In 2009, sweeping changes to the *Competition Act* were passed as part of the *Budget Implementation Act*
* Passed on an urgent basis in the wake of the 2008-2009 financial and economic crisis
* Very little opportunity to meaningfully debate the amendments

**V. Market Definition**

* Market: A collection of buyers and sellers who together determine the price of something
* Overall objective of market definition in merger analysis is to identify a set of buyers that could potentially face increased market power
* Relevant market is the smallest group of products, including at least one product of the merging parties, and the smallest geographic area in which a sole profit-maximizing seller would impose and sustain a significant and non-transitory price increase (Usually 5%/1 year)
* As the purported market is enlarged, the relative significance of the merging parties within that market usually decreases
* Product Market:
* Primary goal is to identify all the substitutes available
* Price of close substitutes affects the willingness of consumers of a good to switch when price increases
* Relevant question is whether a seller’s ability to raise price by 5% is limited by the availability of substitute products
* Must choose candidate market and ask whether a hypothetical monopolist would be able to impose a 5% increase for at least one product of the merging parties in that market; If price increase would cause switching, the next-best substitute is added
* Process continues until the smallest set of products in which the increase can be sustained is identified
* In determining which products are close substitutes, consider:
* Technical and physical characteristics
* End use – But, functional interchangeability is not sufficient (MEGs)
* Price relationships and relative price levels
* Buyer switching costs – Products will not be included where costs make it unlikely buyers will switch following increase
* Past, current and future buying patterns
* Geographic Market:
* Geographic area in which a firm can increase its price without being constrained by existing competitors or new entrants
* Market is defined as all supply points that are regarded as close substitutes by buyers (Some goods are very local)
* Consider:
* Characteristics of the product (Ex. Perishable?)
* Transportation costs and shipment patterns
* Price relationships and relative price levels
* Foreign competition
* Buyer switching costs
* Participants in the relevant markets will include both current sellers of relevant products (in foreign competitors if they can import the relevant product) and those that would begin to sell relevant products in response to a price increase of 5%
* Must be able to enter within one year; Consider:
* Barriers to entry – Ex. Would firm incur significant sunk costs or switching costs to enter the market?
* Excess capacity – Does firm have capacity that they can utilize to make the relevant product?
* Information may be obtained from market and economic studies
* Barriers to Entry – Conditions or behaviours that limit (or delay) the entry of firms into markets – Even while incumbents making profits
* Main Categories:

1. Structural
2. Sunk Costs – Investments that have continuing value if you remain in market but none if you withdraw

* Ex. Specialized physical/human capital, cost of securing regulatory permissions, and start-up losses

1. Economies of Scale – Unit costs that fall with higher rates of output (require larger output/MS to break even)

* What is the penalty for staying small?

1. Switching Costs – Ex. Customers may have to learn about ways to use new product
2. Product Differentiation – May need to develop brand identity
3. Large Capital Requirements
4. Exchange Rate Fluctuations (for foreign entrants)
5. Absolute Cost Differences
6. Regulatory – Can be explicit or implicit
7. Patents, trademarks, copyrights, licenses (Ex. Occupations, transportation)
8. Tariffs, quotas, marketing boards, import restrictions, domestic ownership restrictions
9. Zoning restrictions
10. Behavioural – Actions incumbents take to make entry less attractive to others (before or after entry)
11. Limit-Pricing – Pricing low enough that entry appears unprofitable
12. Predatory Pricing – Pricing low after entry so as to drive entrant out, or at least to discourage further entry

* When competitors go away, incumbent increases prices to recover lost costs

1. Endogenous (Internal) Product Differentiation – Ex. Advertising
2. Excess Capacity – Can be used to provide credible threat of low-cost production
3. Endogenous Switching Costs – Ex. Frequent-purchaser programs
4. Bundling/Tying
5. Vertical Restraints/Foreclosure/Exclusion – Exclusive dealing in key inputs; Vertical integration
6. Contracts as a barrier to entry – Especially long term contracts can make entry difficult
7. Threat of trade actions (against potential foreign entrant considerations)

* Once participants have been identified, market shares can be calculated – Using dollar sales, unit sales, capacities or reserves
* Some suggestion in guidelines that Bureau will use capacity as the general standard (For exams, use dollars of sales)
* If market shares exceed enforcement thresholds, must conduct analysis of the competitive effects of the merger or conduct
* Must be calculated for every product in every geographical market

**VI. Refusal to Deal (S. 75)**

* Controversial, but popular provision – Generates a number of complaints/private applications, but these are rarely successful
* Not an enforcement priority of the Commissioner
* If there are few suppliers, a customer who is cut off from one may be unable to secure an alternate supply, which could affect competition

### 1. Statutory Elements

1. A person is substantially affected in his business or is precluded from doing business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms

* Supplier has refused to deal with a particular customer or terminates an existing relationship with a customer
* Requires a determination of the relevant product and geographic markets
* Product market should be defined by reference to customers of affected business and which substitutes are acceptable to them
* Effect on the business refused supply will depend on the demand of that business’s customers (*Chrysler, Xerox*)
* Not the same as for mergers
* Geographic market consists of all supply points that are regarded as close substitutes by buyers
* Determined by buyer’s ability/willingness to switch purchases from one location to another in response to price change
* Includes area within which affected business might reasonably be expected to look for supplies following refusal to deal
* Substantial – “Important”; “Significant”; Beyond *de minimis* (*Chrysler*)
* Must examine effect on the entire business of which the refused supplies are a part (*Sears*)
* To assess effect, must look at: (*Chrysler*)
* Whether the product in issue accounts for a large percentage of the overall business
* Whether the product is easily replaced by other products sold by the business
* Whether the sale of the product uses up capacity that could be devoted to other activities
* Cannot analyze effect solely by examining overall sales and profit figures
* Only the applicant’s current business situation is relevant to the analysis – Cannot use historic earnings
* Impact of suppliers’ refusals to deal may be considered collectively if there is evidence of ties between suppliers (*Nad*)
* Usual trade terms – The trade terms that are ordinarily used or found in ordinary practice in a market as a whole (*Nadeau*)
* Must be defined in relation to a distinct market at a particular point in time
* **“Trade Terms”** – Terms in respect of payment, units of purchase & reasonable technical & servicing requirements-**75(3)**

1. The person is unable to obtain adequate supplies of the product because of insufficient competition among suppliers in the market

* The overriding reason that adequate suppliers are unavailable must be the competitive conditions in the product market (*Xerox*)
* Suggests a concentration and lack of competitive alternatives for the supply of the product (need not be dominance)
* Inference may be rebutted by evidence that shows an objectively justifiable business reason (*B-Filer*)
* The narrower the product market is defined, the more likely a finding of insufficient competition will be
* A market composed of numerous suppliers acting independently would not generally qualify as insufficient competition

1. The person is willing and able to meet the usual trade terms of the supplier or suppliers of the product
2. The product is in ample supply, and

* Product is readily available and unencumbered – Has not been sold or promised to another purchaser (*Quinlan’s*)
* Suppliers are not obliged to choose between serving new customers and continuing to supply historic quantities to existing ones
* Intellectual Property – Cannot be ‘ample supply’ of legal rights over IP (*Warner Music*)
* Rights are exclusive by nature – Right to exclude others cannot be considered to be anti-competitive
* Cannot order someone to grant intellectual property rights to another
* Supply Management System – Cannot be ‘ample supply’ – No assurance that a particular supplier can obtain increased quota (*Na*)

1. The refusal to deal is having or is likely to have an adverse effect on competition in a market as a whole (anti-competitive impact)

* **“Likely to have”** – Requires proof that an adverse effect is “probable” and not merely “possible” (*B-Filer*)
* **“Adverse”** – Lower threshold than “substantial” (*B-Filer*)
* Requires assessment of the competiveness or likely competitiveness of a market with, and without, the refusal to deal
* Result must be to place remaining market participants in position of created, enhanced, or preserved market power
* Consider: (***Nadeau Poultry***) – Non-exhaustive
* Market share/concentration –Generally party refusing to deal must have market power to meet test
* Impact on price, quality and variety of the product and rivals’ costs
* Possible foreclosure of supply to other processors in the market
* Impact of the possible elimination of the applicant from the market

### 2. Enforcement

* Burden of Proof: Balance of probabilities; Burden on applicant (Commissioner or private party granted leave)
* Private Parties can bring an application to the Tribunal with leave from the Tribunal (**S. 103.1**) – **Also applies to ss. 75, 76, and 77 (below)**
* If the Commissioner has already submitted the matter to Tribunal, the Tribunal cannot grant leave to a private party
* The Commissioner may intervene in the proceeding as a matter of right
* Threshold: Must provide sufficient credible evidence to give rise to a *bona fide* belief that practice could be subject to an order
* Not a difficult threshold to meet – Must be some evidence that would, if proven, justify an order requiring supply
* Tribunal must consider each element of the test in determining whether to grant leave, but may do so summarily
* As long as each element considered, Tribunal’s decision to grant leave will be treated with deference
* Commissioner cannot apply for an order on basis of same or substantially same facts where a private party has already applied to Tribunal
* Disputes concerning refusals to deal have been actively litigated by private parties, but not by the Commissioner

### 3. Remedial Powers

* Power is discretionary – Even if all elements are satisfied, the Tribunal may decline to issue an order
* Factors Considered:
  + - Business justifications for the refusals in question (Ex. Reputational risk)
    - If refusal to supply is an objectively justifiable business decision, refusal is not anti-competitive behaviour
    - Conduct of the refused party
    - Whether granting an order would disadvantage the party refusing supply (Ex Administrative burden or other costs)
    - The prior relationship between the parties - A pre-existing relationship is a very important factor in Tribunal’s decision
    - The manner in which the cut-off was implemented
* The Tribunal may order that one or more suppliers of the product in the market accept the affected person as a customer within a specified time on usual trade terms (Can order a supplier to begin or continue supplying customers)
* Tribunal may make interim orders, which can be on such terms as the Tribunal considers necessary and sufficient to meet circ’s of the case
* Relatively low threshold for obtaining an interim order for supply
* Balance of convenience favours interim order where product is in ample supply – Refusing order causes irreparable harm
* Tribunal may not grant damages, but may order costs against a party
* Private party can do no better than ask for a Tribunal remedy – Economics of private litigation are often not there
* Damages may be available for termination of a dealership/distributorship or the requirement to give notice for term w/o cause

**VII. Price Maintenance (S. 76)**

* Vertical price restraints may promote inter-brand competition – If the price is too high for one brand, customers will buy others
* Conspiracy risk – Possibility that vertical restraints may be used to enforce or implement horizontal price fixing agreements (illegal by s.45)

### 1. Statutory Elements

**A) Resale Price Maintenance – Price Controls**

* Applies only to vertical price maintenance – Horizontal price maintenance – or conspiracy to fix prices – remains a *per se* criminal offence
* Four Main Elements:

1. A supplier supplied a product to a customer

* **“Supplier”** – Includes any person who

1. Whose business involves supplying or producing a product
2. Who extends credit by way of credit cars or whose business relates to credit cards, or
3. Who has the rights and privileges conferred by forms of intellectual property

* **“Product”** – Includes both articles and services (although it is unclear how, or whether, a service may be re-sold)

1. The supplier actually influenced upward, or discouraged the reduction of, the price the customer, or any other person to whom the product came for resale, charged for the product or advertised a product at (does not apply to attempts)

* Does not apply where supplier sets a price ceiling or a minimum discount, as long as customers are free to charge less
* Note: Operative language does not appear to restrict control to the resale of the product from the supplier
* Would likely also apply to resale prices of alterations on supplied product, or products using supplied product as input

1. The existence of an agreement (explicit or implicit), threat, promise or any like means, and

* **“Threat”** – Form of intimidation, harassment or warning which carries with it some form of penalty
* Supplier must comm intention to levy future sanctions (expressing opinion on foreseeable conseq’s insuff)
* Requirement likely includes (established by courts under old provision)
* Suggestion from a supplier where a supply contract can be easily terminated (***R v. Shell*** ***Canada***)
* Agreement that customers may follow other retail prices down but may not initiate price reductions (***Sunoco***)
* Attempt to convince retailers to discontinue a price war (***R v. Campbell***)
* Provision of commission to retailer if it sells according to a standard set of terms including price (***Campbell***)
* Discussion, persuasion, suggestions, advice or requests, short of agreement, threat or promise, cannot be reviewed
* Fine distinction – Must be cautious when discussing pricing with customers, even if common in the industry
* Phoning competitors to verify their prices and notify them of one’s own prices not sufficient
* Seemingly small suggestions may be deemed to be threats where supplier has significant power to impose sanctions
* Suggestions, advertisements, and publications of resale price or min resale price deemed to be influence (**76(5 )& (6)**)
* **S. 76(7)** – Presumptions do not apply to a price that is affixed or applied to a product or its packaging
* Supplier can avoid deeming provisions by establishing that he made it clear dealer was under no obligation to accept sugg and would in no way suffer if he didn’t – Ex. By showing circ’s where dealer sold below sugg price w/o penalty
* Where a vertically-integrated supplier also competes with its customers, minimum pricing agreements between the supplier and its customers may constitute horizontal price maintenance (criminal conspiracy)

1. The impugned conduct has had, is having, or is likely to have “an adverse effect on competition in a market” (See S. 75)

* Resale price maintenance may not always harm competition, and may sometimes be pro-competitive
* Somewhere between trivial/*de minimus* and substantial – Requires enhancement or preservation of MP (***B-Filer***)

**B) Refusal to Supply because of Low Pricing Policy**

* Elements:

1. A direct or indirect refusal to supply any person or class of persons engaged in business in Canada

* Includes cutting off customer, refusing to accept potential customer, and otherwise discriminating against a customer
* Indirect refusal may include discrimination that has the effect of disturbing the retailer’s suppliers
* Discrimination requires that the supplier provide a more advantageous arrangement to its non-low pricing dealers
* May Include:
* Delays in filling orders
* Charging higher prices to discounters than to premium customers
* Refusing to grant widely available discounts or rebates
* Offering different payment terms or conditions, or having stricter credit policies

1. The refusal was due to the low pricing policy of the customer, and

* Test does not require the existence of a pre-existing relationship between supplier and the refused party
* There must be a causal connection between the low pricing policy and the refusal or the discrimination
* Historically, the low pricing policy had to be the sole and effective reason for the refusal
* But, two decisions suggest low pricing policy can be the main reason or one incidental to it, or one of many
* Thus, genuine reasons to refuse to supply may be irrelevant

1. The conduct has had, is having, or is likely to have an “adverse effect on competition in a market

* Exceptions/Defences – **S. 76(9)** – Tribunal shall not make an order if the customer was engaged in a practice of:
  + - **“Practice”** – Any action that is more than an isolated act, even if limited in time or not continued indefinitely

1. Loss-leader selling

* Dealer is selling the supplier’s products at a loss in order to attract customers to purchase other products
* Products were not sold for the purpose of making a profit

1. Bait and switch advertising

* Dealer is inducing customers by advertising a product at cost or at a price which includes minimal profit, but then maintaining little inventory to induce the customer to purchase other higher priced products for greater profit

1. Misleading advertising

* Dealer is providing a level of servicing of products that is below what might reasonably be expected by customers
* The existence of customer complaints may be critical for this particular defence

1. Providing an unacceptable level of servicing

* If customer is engaging in above practices, threat to cut them off may be price maintenance; supplier may be forced to actually cut him off

**C) Inducing a Supplier to Refuse to Deal (S. 76(8))**

* Elements:

1. An actual inducement of a supplier, as a condition of doing business with the supplier, to “refuse to supply” a person
2. The inducement was due to the low pricing policy of that person
3. The inducement was made by way of agreement, threat, promise, or any like means, and
4. The conduct has had, is having, or is likely to have an “adverse effect on competition in a market”

* Provision applies to any person dealing with a supplier (more than just di-stributors); Supplier can be located within or outside Canada
* Affiliates exemption does not apply – Ex. Provision will apply where parent causes its subsidiary to refuse to supply a customer
* Will also apply to retailers who induce refusal to deal so they do not need to compete with low re-sellers

### 2. Remedies & Enforcement

* Burden of Proof: Balance of probabilities; Burden on applicant (Commissioner or private party granted leave under s.103.1)
* Intention of party maintaining prices is irrelevant
* Tribunal may not grant damages – Although damages remain possible for horizontal price maintenance
* Unlikely that price maintenance would constitute unlawful conduct for purposes of economic torts
* The Tribunal may make an order prohibiting a person from continuing the impugned conduct or requiring them to accept another person as a customer within a specified time on usual trade terms
* Businesses may be willing to implement RPM and hope no one will apply or it can be defended on merits (At worst ordered to stop
* Questionable if Bureau/Private parties would have motivation/resources to pursue many cases – High cost and limited financial recovery
* Exemption for price maintenance that occurs between people who are part of a single economic actor (Ex. Principals/agents or affiliates)

**VIII. Restrictions on Distribution (s. 77)**

* Covers vertical non-price restrictions
* Very similar to abuse of dominance – S. 77 allows some private access (as opposed to opening all of s. 79 up to private application)
* No presumption that behaviour falling within s. 77(1) is anti-competitive – Conduct may support competitive markets or enhance efficiency
* Not *per se* illegal – Actions are only prohibited after the Tribunal issues an order

### 1. Exclusive Dealing

* Requirements:

1. Supplier of a product engages in a practice of exclusive dealing

* **“Practice”** – Normally more than one isolated act (but individual acts taken together may qualify) (***Nutrasweet***)
* One type of conduct that is sustained & systemic or has lasting impact may qualify
* **“Product”** – Encompasses both articles and services

1. Supplier is a “major supplier” of a product or the practice is widespread in a market

* **“Major Supplier”** – One whose actions have an appreciable or significant impact on the markets in which it sells
* Consider: Market share, supplier’s financial strength, and supplier’s record as an innovator (***Nutrasweet***)
* **“Widespread”** has not yet been considered – Suggests that you need not show any given supplier unilaterally has MP

1. The practice is likely to have an exclusionary effect on actual or potential competitors, and

* May consist of impeding entry or expansion of a competitor or sales of a product in the market – Relative standard
* Affected market need not be the one where supplier has market power (Ex. TS – Leverage power into another market)
* Must compare what is likely to happen with the exclusionary practice with what is likely to happen without the practice

1. As a result, competition is or is likely to be lessened substantially

* Must compare level of competition that would prevail without ED with what one would likely obtain with the practice
* Not enough to look at whether or not there is substantial competition remaining
* No mention of substantial “prevention” of competition
* No “past tense” (as in AoD) – Orders forward looking – Unclear Tribunal would issue order solely for past conduct
* Two Branches of Exclusive Dealing:

1. Exclusivity as a condition of supply

* Supplier, as a condition of supply, requires a customer to

1. Deal only or primarily in products supplied by the supplier or his designate (Positive condition)
2. Refrain from dealing in certain products except as supplied by supplier or his designate (Negative condition)

* Tribunal may find there is a condition of exclusivity in the absence of an express contractual term where the economic conditions (including incentives offered by the supplier) have the effect of precluding choice of supplier

1. Exclusivity as an incentive

* Supplier offers incentives to customers to encourage them to deal exclusively or primarily with the supplier or his designate in respect of all or certain products
* Exemptions:
* Exclusive dealing is or will be engaged in only for a reasonable period to facilitate entry of a new supplier or product into a market
* Exclusive dealing between or among affiliated companies (Def’n of affiliated parties in **SS. 77(5) and 77(6)**, not general def’n)
* Exclusive dealing involving a specialization agreement registered with the Tribunal (**S. 90**)

### 2. Tied Selling

* Req’s:
* Practice of forcing or inducing a customer to buy a “tied” product as a condition for receiving the “tying” product or refrain from using or distributing a product in conjunction with “tying” product that is not of a brand or manufacture designated by supplier
* The tied and tying products must be distinct – There must be at least two separate products
* Components of items or transactions might be characterized as separate products
* Test for determining the number of products

1. Is there sufficient demand for the purchase of the components separately as opposed to a bundle?
2. If yes, is it efficient to offer the components separately or would costs of doing so outweigh the benefits?

* A trade-mark itself may be considered a separate product
* Same as under exclusive dealing – Market power, likely exclusionary effects, and actual/likely substantial lessening of competition
* Theory is that if you have market power for one product (“tying” prod), you leverage that into markets where you do not have such power
* Need for provision has been challenged on the basis that it is unclear you would obtain net gain from trying to leverage MP
* Exemptions:
* Tied selling between affiliated persons
* Tied selling is reasonable having regard to the technological relationship between or among the products
* The seller may legitimately seek to protect its reputation by insisting that the products be used together
* Exemption likely does not apply where the technological relationship only applies to the production of the two products
* TS engaged in by a money lender where tie is reasonably necessary for purposes of better securing loans made by that person

### 3. Market Restriction

* Requirements:

1. Practice of requiring, as a condition of supply, a buyer to deal in products only in a defined market (normally a geographic area)

* Products do not have to be the products of the supplier
* Very common practice
* Would seem to apply to defined channels of trade (Ex. Prohibiting customers from selling through the Internet)

1. Supplier is a “major supplier” of a product or the practice is widespread in a market
2. Competition is or is likely to be lessened substantially

* No need to show exclusionary effects on competitors, but without such affects, likely hard to show there is an SLC
* Exemptions:
* Conduct between affiliates (**S.77(5)** – Bit broader than general definition in s. 2)
* Reasonable temporary restrictions designed to facilitate entry

### 4. Remedies & Enforcement

* Tribunal has the discretion to prohibit future conduct by the suppliers, and can impose any other condition necessary to overcome the effects of the conduct in the market or to restore or stimulate competition in the market
* Tribunal may grant interim injunctive relief (SS. 103.3 and 104)
* Applicant must show there is a serious issue to be tried, irreparable harm would result if the injunction were not granted, and that the balance of convenience favours the granting of the injunction
* Application can be made by the Commissioner or a private party (under s. 103.1)
* **S. 77(7)** – For private applications, Tribunal cannot draw inference from the fact that Commissioner has or has not taken action
* Damages are not available, but a person who has suffered loss/damage from breach of an order may recover loss & costs of investigating
* Conduct cannot be used as the basis of an action for unlawful interference with economic relations or for breach of the *Competition Act*
* Conduct is not unlawful unless and until the Tribunal issues an order

**IX. Abuse of Dominance (SS. 78 & 79)**

* Abuse of dominance is concerned with problems that may arise where there is a lack of competition b/c one or more first have sig MP
* Focuses on on-going conduct by firms that already have market power – Generally irrelevant how the market power was obtained
* Overlap With Other Provisions:
* Mergers – Pattern of the acquisition of competitors may be anti-competitive under abuse (longer lim period for abuse) (***Laidlaw***)
* Conspiracy: Collective dominance may be the result of an agreement btw members of an industry that may be conspiratorial
* Same competitive effects test (SLC/SPC), but s. 79 requires anticompetitive practices and s. 90.1 does not

### 1. Statutory Elements

1. One or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business

* Pre-existing position of dominance – One or more firms is in a dominant position
* Must define both the relevant product market (“class or species of business”) and the relevant geographic market
* Then, assess market power
* **“Control”** requires that a person be able to exercise “market power” in a properly defined competition market
* Market Power: An ability to impose a real price increase of 5% and maintain prices at that level for one year
* Base price is not the prevailing price as in mergers, but the competitive price – marginal cost
* Guidelines: Relevant MP includes both pre-existing MP and MP derived as a result of any anti-competitive conduct
* Can assess control using directorindirect approach
  + - Direct – Consider indicators related to the performance of the firm(s) or to their behaviour (related to exercise of MP)
    - Consider: Presence of very large accounting profits, supra-competitive prices, high margins etc.
    - Indirect – Consider indicia such as:
      * Market shares – Not determinative of market power, but relevant
      * Market share above 35% is likely to prompt an inquiry into whether a firm is dominant
      * Even a substantial market share will not necessarily lead to a finding that a firm is dominant
      * Distribution of MS’s – Ability to  price s as disparity ‘s between own MS and shares of competitors
      * Barriers to entry – Absence of barriers to entry will usually mean firm does not have market power
      * Extent/rate of technological change
      * Excess capacity, and
      * Customer or supplier countervailing power
      * Bureau Guidelines (2001) suggest a safe harbour of 35% market share for unilateral cases and 65% for collective dominance

1. That person (or persons) have engaged in, or are engaging in, a practice of anti-competitive acts, and

* Includes actions in **S. 78** (deemed to be anti-competitive) and:
* Incorporating various types of restrictive conditions in contracts with customers (Ex. Exclusivity clause)
* Requiring customers to reveal quotes or bids provided by competitors
* Threatening customers with spurious litigation to prevent them from switching to competing suppliers
* Acquisition of competitors
* *Draft Guidelines*: Actual or “constructive” denial to a facility to a competitor
* Includes any act the purpose of which is to exert a predatory, exclusionary or disciplinary effect on competitors (not comp generally)
* Includes actions that do not directly include competitors (Such as offering customers incentives to remain exclusive)
* *Abuse Guidelines* Three Types of Conduct:

1. Raising rivals’ costs – Ex. By excluding current or potential competitors from inputs necessary to compete
2. Predatory conduct – Ex. Selling below cost to harm a competitor
3. Facilitating the ability of firms to coordinate their behaviour in order to increase or maintain prices

* Ex. Pre-announcing price increases or publicizing price lists
* *Draft Guidelines* substitute “reducing rivals’ revenues” for the third type of conduct
* Ex. Implementing tech, Ks or practices that make it difficult or costly to switch to another supplier
* Not considered abuse to charge customers higher prices (or provide lower quality, product choice, etc.)
* Behaviour is generally not illegal by itself
* Selective refusal to license a trade-mark is not an anti-competitive act
* Focus of inquiry is on effects on a competitor, not competition generally (that is reserved for final element of test)
* Intention: Focus is on the objective intention behind the acts – Do not have to show subjective intent
* Intent can be established directly or indirectly – Ex. Intended neg purpose can be established indirectly by inference based on reasonably foreseeable conseq’s of the acts themselves and the circ’s surrounding their commission (***Canada Pipe***)
* Proof of a valid business justification may rebut or negate a deemed intention – Plausible pro-competitive explanation
* Justification must be a credible efficiency or pro-competitive rational for conduct, attributable to the respondent, which relates to and counterbalances anti-competitive effects and/or the subject intent of the acts in question (***Canada Pipe***)
* Examples:
* Minimization of costs of production or operation, independent of the elimination or discipline of a rival
* Activities that improve a firm’s product, service, or some other aspect of the firm’s business

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

* Overriding emphasis is on harm to the competitive process as a whole, rather than to specific competitors
* Would the relevant markets (in past, present or future) be substantially more competitive but for the practice of anti-comp acts?
* Bureau uses time period of 2 years to assess potential of market to provide effective competition with removal of acts
* Do the anti-competitive acts engaged in by the dominant firm preserve or add to its market power?
* In undertaking analysis, regard must be had to the different objectives of the *Competition Act*, as set out in section 1.1
* Surprising, because s. 1.1 can be used to justify a lot of different positions (including conflicting positions)
* **S. 79(4) –** Tribunal must consider whether any lessening of comp is a result of the “superior competitive performance” of the firm
* Ex. Might be legitimate for firm to exploit advantage over rivals in terms of lower costs, even if competitors eliminated

**Collective / Joint Dominance**

* 2001 Guidelines: Something more than merely copying/following what another is doing (conscious parallelism) is required
  + - * Need not be full blown conspiracy – Sufficient if firms engage in “similar” anti-competitive practise and together hold market power
      * Increases difficulty of compliance – Even if firms have low market shares, need to consider/track what competitors are doing (if known)
      * Otherwise, may be implicated in potential “abuse” for conduct that otherwise is lawful and commonly done
      * Practically, it is difficult to know you competitor’s capacity and thus know the relevant MS (will not know if 65% threshold tripped)

### 2. Exemptions

* **S. 79(5)** – Any act engaged in pursuant only to exercise of any right under the IP statutes is not an anti-competitive act
* IP rights can be used to harm competitors by excluding them
* **S. 79(7)** – No application can be made on the basis of facts that are the same or substantially the same as facts on the basis of which

proceedings have been commenced against that person under s. 45, or an order is sought under ss. 76, 90.1, or 92

### 2. Remedies & Enforcement

* Provision is non-criminal – “reviewable matter” under Part VIII – Civil burden of proof (balance of probabilities)
* Remedies designed to be forward-looking and not penal; Primarily behavioural (stop conduct), but in extreme cases divestiture may be req
* Tribunal may:
* **S. 79(1) –** Make an order prohibiting all or any parties involved from engaging further in impugned anti-competitive practice
* **S. 79(2) –** Make an order directing any or all parties involved to take such actions as are reasonable and necessary to overcome

the effects of the anti-competitive practice, including the divestiture of assets or shares

* Remedies seek to fix the anti-competitive effects in the future
* **S. 79(3.1)** – Impose administrative monetary penalties (“AMPs”) of up to $10-$15 million in addition to other penalties/damages
* May be open to constitutional challenge – Potentially a criminal provision masquerading as a civil provision
* Issue interim orders to prevent continuation of conduct that could be the subject of a final order, if without such an order:

1. Injury to competition that cannot be adequately remedied by the Tribunal is likely to occur
2. A competitor is likely to be eliminated, or
3. A person is likely to suffer sig loss of MS, revenue or other harm that cannot adequately be remedied by Tribunal

* **S. 79(3) –** Tribunal’s orders may interfere with the rights of any person only to the extent necessary to achieve the purpose of the order
* Tribunal will do what it needs to do to restore competition, but it will go only that far
* Cases may be solved by consent – Parties provide Commissioner with voluntary but binding undertakings to modify their conduct
* **S. 79(6) –** Limitation Period: 3 years – Commissioner cannot file an application more than three years after the impugned conduct occurred
* Private Actions:
* Applications are brought by Commission only, which investigates alleged abuses – Private parties are not entitled to bring apps
* Private parties have attempted to rely on s. 79 in private actions, but have essentially failed
* **Novus**
* Party complained about Shaw’s advertising campaigns – Alleged unlawful interference with business & econ interests
* Alleged “unlawfulness” was the “breach” of s. 79 of the Act
* Court held that there is no contravention of s. 79 unless and until Tribunal issues order (and then only for future conduct)
* Conduct is *prima facie* lawful, until the Tribunal orders the behaviour to stop
* **Microsoft**
* Conduct in part VIII of the Act does not represent unlawful or illegal means for the purposes of the tort of interference with economic relations or the tort of conspiracy
* But, violation of monopolization provisions in *Sherman Act* in US constituted an “illegal act” – Allegations allowed to stand
* S. 79 does not “prohibit” anything – It is not a “violation” to be dominant; If conditions met, Tribunal simply finds conduct warrants remedy

**Enforcement Issues**

* Potential target business, complainants, and enforcers are all unhappy in one way or another
* Potential Targets
* Very hard to distinguish what is legitimate/pro-competitive and what is anti-competitive/abusive
* Same conduct may be either depending on who does it in what circumstances
* Types of conduct that almost everyone does can draw a reaction if business has MP (Difficult to advise clients)
* Complainants
* No remedy for high prices
* No recovery of damages (unless party breaches Tribunal order)
* No private application (must convince Bureau to investigate, competing in the triage line against other cases)
* But, there is a chance that simply having a Bureau investigation can help a complainant
* Formally, 6 or more can require Commission to start inquiry, but Commissioner does not have to carry it through
* Bureau
* Difficult cases to investigate and prove (but with triage, once Bureau takes a case, it really goes for it)
* Firms have incentive to flout law (no damage for past conduct; Generally at worst one will be told not to do it anymore)
* This may change with the new potential for AMPs
* Parties may change practices, but no promise they will not change back or engage in new anti-competitive behaviour

### 3. Defences and Exemptions

* Tribunal may not make an order where:

1. Proceedings based on same or substantially same facts have already been commenced under the merger or conspiracy provisions
2. The act in question is engaged in pursuant only to the exercise of an intellectual property right

* Regulated Conduct Defence – Immunity from enforcement given to persons engaged in conduct directed or authorized by other valid legis
* May not apply to immunize provincially regulated conduct from the *Competition Act* – Insufficient case law to support this

**X. Merger NOTIFICATION**

* Pre-merger notification provisions are contained in Part IX of the *Competition Act*
* All mergers (with limited exceptions) may be reviewed under Part VIII up to one year after they have been substantially completed
* Only specific types of transactions that also exceed specified transactions are subject to additional pre-merger notification
* If thresholds exceeded, parties must provide the Commissioner with advance notice and specified information
* Obligation to file notification is on parties to proposed txn – In the case of a proposed acquisition of shares, parties are buyer and target
* Affiliates are almost always not parties to a transaction (Help trip thresholds, but usually do not have an obligation to notify)
* **S. 114** contains the basic filing/notification requirements (Supplemented by s. 16 of the Notifiable Transactions Regulations)
* Ex. Parties must supply information about the 20 largest customers and suppliers or their business and any market studies
* **S. 118** –Information provided must be certified
* **S. 29 –** Information obtained or provided pursuant to ss. 114 or 102 is afforded confidential treatment
* Does not apply to the communication of such information to law enforcement or for purposes of administering/enforcing Act
* Does not apply to the communication of such information upon a request by the Minister of Transportation or Finance
* Information that has been made public loses confidential treatment (**S. 29(2)**)
* Bureau may err in disclosing info when subject-matter has been disclosed, but not info (make a judgment call)
* Potential concern: Securities laws prohibit selective disclosure of material
* Question of whether information given to anti-trust bodies that is leaked by them to select parties is a violation
* Ex. Bureau makes “market contacts” with provided suppliers/customers – Shares select information with them
* Txn must be completed within one year of notification (otherwise further notification required unless Commissioner allows otherwise)

### 1. Notifiable Transactions

* Type of Transaction:
* **S. 114** – Categories of transactions – Transaction must be:

1. Acquisition of assets in Canada or shares
2. Amalgamation of corporations, or
3. Formation of a combination to carry on business other than through corp. or acquisition of an interest in a combination

* Ex. Partnership or unincorporated joint venture
* And, subject of transaction must be an “operating business,” either directly or indirectly – A business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work
* Thresholds – Both must be exceeded:

1. Size of Parties – $400 million

* Parties to the transaction, including their affiliates must

1. Have assets in Canada that exceed $400 million in aggregate book value, or

* **“Book Value”** refers to the “gross value” of revenues or assets

1. Have annual gross revenues from sales in, from or into Canada that exceed $400 million in aggregate value

* Expenses are irrelevant
* **S. 2(2) –** One corporation is affiliated with another if:
* One is a subsidiary of another (one controls the other – Basic test: 50+% ownership of voting securities)
* Both are subsidiaries of the same company, or
* Both are controlled by the same party

1. Size of Transaction – Assets in Canada or annual gross revenues from sales in or from Canada of the target exceed $73 million
2. Asset Acquisition – Aggregate book value of the assets proposed to be acquired from an operating business, or annual

gross revenues from sales in or from Canada generated from those assets, must exceed $73 million

1. Acquisition of Voting Shares (**S. 110(3)**)

* Target corporation and any corps controlled by it must have assets in Canada having aggregate book value, or annual gross revenues from sales in or from Canada generated from such assets, exceeding $73 mill, and
* For targets that are public companies
* Acquirer will own shares carrying more than 20% of votes attached to all outstanding voting shares
* If acquirer already owns 20%, transaction must increase interest to more than 50% of the votes
* For targets that are private companies:
* Thresholds are more than 35% of votes, of if acquirer already owns 35%, 50%

1. Amalgamation (**S. 110(4**))

* At least two of the amalgamating corps, together with their affiliates, must each exceed threshold, and
* Corporation that would result from amalgamation or corporations controlled by it must exceed threshold

1. Acquisition of Interest in Combination (**S. 110(6)**)

* Combination must exceed threshold, and
* Acquirer(s) together with affiliates, will hold an interest in the combination entitling acquirers(s) to receive more than 35% of profits or assets on dissolution, or 50% of such profits or assets were already so entitled
* If after calc of assets or revenues, entity was affected by a transaction that would affect determination, values must be adjusted

### 2. Exemptions

* General Exemptions: **Section 113**  - Ex. Asset securitizations (acquisitions of assets by lenders through realizing their securities)
* Specific Exemptions: **Section 111** (Specific classes of transactions)**, 112** (Joint ventures where certain conditions are met)
* Ex. Ordinary course acquisition, underwriters, gifts, insolvencies, and certain resource properties
* A transaction where notification was waived because substantially similar information to that required was supplied in a request for an ARC

### 3. Statutory Waiting Period & Bureau Service Standards

* Txn that is subject to notification cannot close until a 30-day “waiting-period” following submission of complete notification has expired
* If Commissioner issues a supplementary information request (SIR) within waiting period (**S. 114(2)**), a new 30-day WP is triggered
* New waiting period begins after the Commissioner receives the requested supplementary information
* Likely to be used only when a proposed transaction may raise sig competition issues and additional info is required
* Waiting period may be waived by the Commissioner
* During waiting period, Bureau will review transaction – Including asking suppliers/customers provided about their opinions
* Competition Bureau follows an administrative schedule in its review of mergers that is often longer than the statutory waiting period
* Maximum Review Period Guidelines (May involve more or less time):
* “Non-Complex” Transactions – Two weeks
* “Complex” Transactions – 60 days
* “Very Complex” Transactions – 120 days
* Bureau will inform the parties within 5 days of the complexity level and service standard
* Risky to close before review complete – Commissioner may challenge txn after closing or seek interim order prior to closing
* Bureau is also open to entering into pre-issuance timing agreements to create a schedule for when a decision will be made
* Time periods for submitting information to the Bureaur in hostile bid scenarios are much shorter than in friendly transactions

### 4. Methods of Fulfilling or Avoiding Pre-Merger Notification

1. Advance Ruling Certificate (ARC) Application (Pursuant to **S. 102**) – Parties argue why they should not be subject to a s. 92 review

* Receipt of ARC exempts transaction from notification and challenge by the Commissioner solely on the basis of information that is the same or substantially the same as the information on the basis of which the certificate was issued (removes 1 year WP)
* Highest level of assurance that can be secured in respect of a merger
* Transaction must be completed within one year of the issuance of the ARC
* ARC will be unavailable unless the Commissioner finds the transaction gives rise to no or minimal anti-competitive effects
* ARC does not start waiting period – Where time is an issue, ARC application will often be supplemented with required notification
* Discretionary; Application is often submitted in combination with a request for a waiver of the obligation to file

1. No Action Letter – Most common disposition where ARC not granted; Bureau sends letter that they will not take action at this time

* Does not prevent Bureau from bringing a challenge against parties within one year (If non-complex, likely no challenge, but risk)
* Can be issued with or without conditions – May state no action at this time, but they will re-evaluate if company does X

1. Waiver (Pursuant to **S. 113(c)**)

* Where parties have been denied ARC (Ex. Because of high market share), but detailed ARC application has been submitted that contains substantially similar information to that req with pre-merger notification, the Commissioner may waive notification req
* Waiver has implications only under Park IX, but highly unlikely Commissioner will challenge transaction where waiver provided

1. Consent Agreement – Some problem, but parties agree to give something up in order to close and Bureau agrees not to bring a s. 92 app
2. Relief for Fluctuating Interests and Staged Acquisitions

* Where notification was filed because acquisition of voting shares or interest in combination exceeded threshold, and ownership subsequently fell below threshold, no further notification is required in respect of same threshold if exceeded again within 3 yrs

1. Unsolicited Takeover Bids

* Statutory waiting period is determined without reference to the day on which the target files its part of the notification

### 5. Failure to Comply

* **Failure to File** – **S. 65(2)** – Failure to file merger pre-notification without good and sufficient cause is a criminal offence – Fine of up to $50K
* Still subject to s. 92 – Bureau may still bring transaction before the Tribunal, and s. 114 (waiting period and potential for SIR)
* May be subject to dissolution, divestiture (txn could be dissolved), or AMP’s of $10,000 per day for waiting to comply with WP
* Failure to file is also a basis for a Tribunal interim order under **S. 100** preventing the parties from closing the merger
* **File, But Close During Waiting Period** - Escape criminal offence, but:
* Two types of injunctive relief available – Court may prohibit any conduct directed at completion or implementation of the txn
* May be subject to dissolution, divestiture (txn could be dissolved), or AMP’s of $10,000 per day for waiting to comply with WP
* Still subject to s. 92 – Bureau may still bring transaction before the Tribunal, and s. 114 (waiting period and potential for SIR)
* Court may grant any other relief it finds appropriate
* **File, Close After Statutory Waiting Period, But Close Before Service Period Expired**
* Still subject to s. 92 and may be subject to injunctive relief

### 6. Interaction with Other Regulatory Regimes

* Investment Canada Act – If transaction is an acquisition, may have to file with Industry Canada (they will review when Bureau done)
* Acquisition of Canadian business or other investment to establish a new Canadian business that is subject to review and approval under the *Investment Canada Act* must be determined to be of “net benefit to Canada”
* Canada Transportation Act
* Notifiable transactions involving “transportation undertakings” must notify Bureau and the Minister of Transportation
* If transaction is an “air undertaking” must also notify the Canadian Transportation Agency
* If Minister determined public interest issues are raised, the proposed txn cannot be completed until approved by Cabinet

**XI. Market Power**

* The primary economic objective of competition law is to prevent the inappropriate acquisition or exercise of market power
* Market Power: The ability of a firm (or firms acting jointly) to raise price above competitive level for sustained period of time
* The ability to behave relatively independently of the market (***Southam***)
* “Price” is short hand – Includes non-price dimensions such as service, quality or product choice
* Market power from a buyer perspective means the ability of firm(s) to profitably depress prices paid to sellers to a level that is below the competitive level for a significant period of time (hard to identify what the harm is)
* Evidence of market power can be direct or indirect (same as abuse of dominance)

**XII. Substantive Merger Review**

* Under Part VIII, Commissioner can review merger up to one year after it has been substantially completed
* Prudent to seek comfort from the Commissioner in the form of an ARC or “no action” letter even if is not a notifiable merger
* Few non-notifiable mergers are reviewed
* **Steps of Merger Review**:
* Does transaction fall within definition of merger?
* Have you hit the anti-competitive threshold?
* Define the market
* Identify of market participants and potential participants
* Measure market shares and concentration
* Assess barriers to entry
* Cheat: If no barriers to entry, very likely Tribunal will find merger will not last for any period of time
* Look at assessment criteria, theories of competitive harm and countervailing power
* Exceptions/Efficiencies
* Remedies

### 1. Statutory Elements

* **S. 92(1)** – Merger or proposed merger substantially prevents or lessens competition, or is likely to do so
* **S. 92(1)(b)** – “sonys” (upstream) **S. 92(1)(c)** – “polys” (downstream) **S. 92(1)(d)** – Basket clause – Tries to catch left-over mergers
* Lessening of competition is “**substantial**” when (no numerical threshold):
* MEGs:

1. The price of the relevant product is likely to be materially greater in a substantial part of the relevant market that it would be in the absence of the merger, and

* Would customers face “sig” higher prices or sig less choice over a significant period of time? (***Southam***)
* Must have more than just “some increase” or a “noticeable increase”
* Concern is over magnitude, scope, and duration of any price increase because of merger
* Note: MEG’s and Tribunal do not use term “significant” – Just talk about the ability to increase prices
* “Price” is shorthand for other dimensions of competition (Ex. Service/quality/innovation/product choice)
* Mainly worried about an ability to influence price upwards or reduce quantity

1. Such price increase is not likely to be eliminated by existing or new competitors within two years

* For there to be an SLC there must be market power effects
* S. 93 – Substantiality based on listed factors (non-exhaustive) – Bureau assesses these factors over two years (tied to MEG test)
* Two Themes:

1. The extent to which there is likely to be sufficient effective competition remaining in the market as defined
2. What, if any, competition may be lost by the merger (Subordinate to the first theme)

* It is necessary to consider the extent to which the merger may:

1. Lessen existing competition, and
2. Prevent future competition by reference to assessment criteria

* Restraints on a merged firm’s (alleged) market power can come from both inside and outside the market as defined
* May have a competitor excluded from definition of market that still has constraining impact on price (***HIllsdown***)
* Pressures exerted by change and innovation may be such that a material price increase is unlikely to be sustainable
* Failing firm doctrine is strictly applied – Not sufficient to show business has not made money this year
* Must determine if merger would damage competition – Irrelevant how uncompetitive market was at start
* Worried about the ability of the merger to raise price even more – Focus on impact of merger, not pre-merger situation
* Note: Even with a monopoly or conspiracy, there still may be competition (Ex. If no barriers to entry)
* Also consider degree of countervailing power held by buyers/suppliers
* Focus is upon whether merger is likely to create, maintain or enhance ability of merged entities to exercise market power alone or together
* Ex. Merger removes a particularly aggressive competitor or enables firms to coordinate
* Concentration Thresholds – Market Shares:
* **S. 92(2)** – Tribunal is prohibited from finding an SLC solely on the basis of evidence of concentration or market share
* Safe Harbours – Bureau will generally not challenge a merger if (mergers are unlikely to have anti-competitive consequences if):
* Concern is related to unilateral exercise of market power and merged entity’s post-merger market share is less than 35%
* Concern is related to coordinated exercise of market power by the merged entity and others and the post-merger market share of the four largest firms in the market is less than 65%, or post-merger share of merged entity is less than 10%

### 2. Theories of Anti-Competitive Effects (Competitive Harm)

* Following theories of potential anti-competitive effects will be considered by Commissioner in determining whether SLC is present (MEGs)
* Horizontal Mergers
* Unilateral Effects – Merger gives merged firm sufficient MP that it can raise price without cooperation from rivals
* If a firm raises prices, and no one response, the theory is that they must have market power
* Where the relevant product is differentiated (can distinguish between products), Bureau will assess whether a “significant number of buyers” view the product offerings of the merging parties to be their first and second choices
* Post-merger, a price increase by one party diverts demand to the allow – Allows them to sustain price increase
* Bureau also evaluates extent to which competitors are likely to re-position their products to discipline MP
* Where mergers involve firms with undifferentiated products, Bureau focuses on the extent to which competitors:
* Have sufficient excess capacity to prevent merged entity from implementing & sustaining a price increase, &
* Are able to expand quickly and at low cost
* Also consider: Large market share in merged firm (& significant change) and any barriers to entry
* Coordinated Effects – Merger reduces the competitive vigour in the marketplace
* Forms: Explicit collusion, tacit collision, and conscious parallelism
* Criminal provisions for explicit collusion exist, but merger review is primary weapon against tacit collusion and CP
* Conditions That Facilitate Collusion:
* Coordinated behaviour is only likely to be sustainable when firms are able to:
* Individually recognize mutually beneficial terms of coordination,
* Monitor one another’s conduct, detect deviations, and credibly punish cheating, and
* Coordination will not be threatened by external factors (Such as reactions of other competitors/buyers)
* Conditions that facilitate collusion include:
* Small number of rivals and high concentration (This is why the CR4 is set at such a high number)
* Many small buyers making infrequent small purchases
* Inelastic demand
* Limited excess capacity
* Barriers to entry
* Product and cost homogeneity
* Predictable and stable demand and costs
* Price and output transparency
* History of cooperation or collusion
* Facilitating practices:
* Public speeches and other “cheap talk”
* Resale price maintenance
* Basing-point pricing
* Strategic alliances and joint ventures
* Advance notice of price changes
* Maverick – Firm that is less inclined to cooperate with others, resisting efforts to increase prices and leading decreases
* Firm has a disproportionate and positive effect on competition in a market
* Key is that there is something different about firm that leads it to adopt different & more aggressive strategies
* A merger that removes a maverick can therefore be problematic from a competition standpoint
* Vertical Mergers – Two types of situations in which Commissioner may have concerns about potential for an SLC:

1. Merger makes it more difficult to enter either upstream or the downstream stage, and the entry that is impeded would otherwise have been an important constraining influence on prices – Mergers not likely to lead to concern on this ground unless:

* The elimination of an independent upstream source of supply or downstream distribution outlet leaves only a small amount of unintegrated capacity at one of the stages in question (the “secondary market”)
* Merger makes it unlikely that entry into the other stage (the “primary market”) will occur on a sufficient scale to eliminate a material price increase within 2 yrs, due to the need to simultaneously enter the secondary market, and
* The exercise of market power in the primary market is likely to be facilitated by the merger

1. Merger facilitates coordinated behaviour by firms at either the upstream or the downstream stage

* Mergers are only likely to give rise to such concerns when:
* Prices at which txns are made at the retail level are more transparent than the prices at which upstream txns are made
* Conditions in upstream market are otherwise conducive to the coordinated exercise of market power, and
* Percentage of output that is sold downstream through unintegrated firms is so low that post-merger sales to such firms on concealed terms are not likely to prevent a material price increase from being imposed and maintained for two yrs
* No pre-existing relationship between the parties is needed
* Conglomerate Mergers – Merger between firms that are not horizontal competitors or vertically related
* Ask: W/o the txn, would one of the merging parties likely have entered the relevant market other than through a merger?
* Elimination of such entry is likely to raise concerns only where prices are likely be sub higher in a sub part of rel market for 2 yrs

### 3. Exceptions

* **S. 94** – Tribunal cannot make order if Minister of Finance/Transportation has issued a certificate for the merger or proposed merger
* Usually for financial institutions and transportation undertakings
* **S. 95** – Exception for qualifying joint ventures
* **S. 97** – Commissioner cannot apply for orders under s. 92 in respect of mergers that have been substantially completed for more than 1 yr
* Parties still need to comply with Part IX, even if caught by this provision
* **S. 98** – Commissioner cannot apply for an order under s. 92 on the basis of fact that are the same or substantially the same as facts on the

basis of which proceedings have been commenced against that person under s. 45 or 49, or an order is sought under ss. 79 or 90.1

* **S. 103** – Commissioner cannot apply for an order under s. 92 where an advance ruling certificate has been issued under s. 102

**Efficiency Exception (Acts as a Defence) – S. 96**

* Anti-competitive effects to be considered should involve all statutory objectives in s. 1.1 to be served by the encouragement of competition
* “Effects” of any SLC must be estimated – Both quantitative and qualitative effects will be assessed
* Categories of Efficiency: (Non-Exhaustive)
* Allocative Efficiency – The degree to which resources available to society are allocated to their most valuable use
* Prices move closer to marginal cost (Right Q’s produced) – Possible if merger makes market more competitive
* Productive Efficiency – The creation of a given volume of output at the lowest possible resource cost, and
* Lower costs of production – Possible if synergies, economies of scale, etc. – Often focused on
* But: **“X-Inefficiencies”** – Concern that when firms aren't in competitive situations, their costs may creep up
* Usually ignored – Focus is usually on productive efficiency (Bureau’s main efficiency concern)
* Dynamic Efficiency – The optimal introduction of new products and production processes over time
* Balance seems to say that more competition is good for innovation, but there is a debate
* Some think monopolies are more likely to innovate b/c they have more MS and customers to benefit from it
* Others say a small firm might be able to take over the market with a good enough innovation
* Efficiency “Screens” – Efficiencies do not count if they:

1. Could have been achieved in the absence of the merger
2. Are a mere transfer of wealth (Ex. Lower prices for inputs or tax savings)
3. Are savings that result from a reduction in output, service, quality, or product choice in the economy

* Ask: Can efficiencies be achieved in a way that is less harmful to competition? How likely is it that they will be achieved?
* Efficiencies likely to arise and costs likely to be incurred in future years must be discounted back to the present
* Law and MEG’s complete a sort of cost-benefit analysis, but it is unclear what the Canadian standard is
* Welfare Standard – Evaluate total surplus without worrying about transfer? (Looked like way it was going until ***Superior Propane***)
* Comparison of value of efficiency to lost consumer surplus, or
* Price standard – If you think price is going to go up, merger disallowed (approach taken in US, but slight movement away)

### 4. Enforcement/Remedies

* **S. 92(1)(e) and (f)** – Tribunal may:
* Prohibit the parties from proceeding with all or part of the merger
* Order the divestiture of assets or shares or the dissolution of a completed merger
* Dissolution – Merger no longer exists – Parties are separate once again
* Divestiture – Complete alienation of the asset – Can be with respect to any asset owned by either merged party
* Order parties to take steps to mitigate any anti-competitive effects of the merger (With consent of Commissioner and parties)
* Tribunal cannot order behavioural remedies or continuing contracts without consent
* **S. 100** – Commissioner may seek interim injunction if not yet in a position to determine whether to make an application under s. 92
* Any proposed remedy must be both available and effective
* Remedy does not need to restore competition completely or bring competition to the market
* Must restore it to the point at which it can no longer be said to be substantially less than it was before the merger (***Southam***)
* If choice is between a remedy that does not go far enough & one that goes too far, choose latter (overreach not under-reach)

**A) Consent Orders**

* **S. 105** – Merging parties may propose remedies – If remedies accepted, parties enter into consent agreement which has binding force
* Generally beneficial to do this as Tribunal will overreach not under-reach in their orders
* **S. 106(1)** – Tribunal may rescind or vary an order or consent agreement upon application by Commission or parties to it if conditions met
* **S. 106(2)** – Third parties who are “directly affected” by a consent agreement may apply to have it varied or rescinded if conditions met
* A party is directly affected if he experiences first hand a sig impact on a right or on a serious interest which relates to competition
* The impact must be definite and concrete (not speculative or hypothetical) and must be caused by the consent agreement

**B) Designing Remedies**

* Structural Remedies:
* Tribunal changes the structure of the market – Bureau prefers fast, structural remedies
* Divestiture:
* Divested assets must be viable and sufficient to eliminate SLC
* Buyer of divested assets must:
* Be in the relevant market (Financial buyers allowed – Ex. Hedge Fund, but must hire mgt to assist)
* Be independent of the merged entity (arms-length)
* Have the ability and intention to be an effective long-term competitor
* Keep assets in the relevant market
* Be able to restore or preserve competition (Tribunal is seeking effective remaining competition)
* Generally want a buyer with strong management to support business and who has been around for a while
* There may be hold-separate provisions
* Require parties to keep their assets separate until Bureau decides if remedy will work (contested)
* Divestiture must occur in a timely manner
* No minimum price on assets – May be forced to sell assets for $0
* Bureau may hold the “crown jewel” of the purchase to ensure assets are properly divested
* If you have to get rid of assets you cannot be the one to shut them down!
* Divesture must not itself adversely affect competition
* Confidentiality – What is confidential?
* Remedy, during initial sale period (but eventually will get out)
* Existence of, and assets forming, the crown jewel package (if company is in industry, it will know what crown jewel is)
* The fact that there is no minimum price (not really confidential – anyone can read the bulletin!)
* Quasi**-**Structural and Behavioural Remedies:
* Bureau willy only grant such remedies if they can eliminate the SLC without intervening or monitoring the deal
* Types – Bureau may:
* Compel the licensing of IP (Where IP rights are required to run business, divestiture alone would not be sufficient)
* Remove anti-competitive contract terms (Ex. Non-competition clauses, or terms of Ks that lock up customers)
* Grant non-discriminatory access to networks (Applicable to railways, airlines, gas and electric companies etc.)
* Bureau probably cannot divest a piece of a network

**C) International Merger Remedies**

* Treaties allow for international sharing of information (generally only done for criminal matters)
* Bureau prefers to take coordinated approach, and likes to see how others will rule in merger cases (Does not want to stand out)
* A remedy from outside the jurisdiction that does not achieve all of the objectives within the domestic jurisdiction is seen as good enough
* May encourage forum-shopping to obtain favourable remedy, but forum-shopping is not really an issue – Every country has its own timelines, and the International network is working to get timeline consistency to completely prevent forum-shopping

### 5. Gun-Jumping

* Pre-merger coordination of business activities of merging parties before transaction is approved or deemed to be approved
* Problems – Information exchanged during merger negotiations:
* May be in breach of statutory obligation to notify, statutory waiting periods, or Bureau complexity guideline periods
* May fall under conspiracy provisions (ss. 45 and 90.1)
* US Cases
* **Qualcomm**
* Acquirer prevented target from engaging in certain activities during waiting period without its consent, in areas such as:
* Agreements to license its intellectual property to third parties
* Hiring employees except in the ordinary course of business
* Presenting business proposals to customers or prospective customers
* Other day-to-day business decisions
* Can use negative covenants during WP, but acquirer cannot take operational control before expiry of waiting period
* Entities must be run separately until the expiry of the waiting period
* Covenants were particularly onerous – Looked like the buyer had already taken over
* Alarming to many because first three conditions were considered to be normal in the industry
* **Omnicare**
* Due diligence exercise can be evidence of information exchange to support inference of price-fixing agreement
* Bureau’s 1991 Guidelines:
* Conspiracy risk can be reduced by limiting the amount of information exchanged to that which is reasonably necessary to make a decision to merge and ensuring to the extent possible that such information is restricted to persons involved in negotiating txn
* Sensitive information flow should be one-way, unless there are legitimate reasons why it needs to be shared in both directions
* Omitted from 2004 MEGs – No discussion of gun-jumping, which suggests it is OK, but it is not (they are still alive to issue)
* Lessons:
* Review pre-closing covenants and monitor pre-merger conduct
* Don’t complete transaction before periods expire
* Below-threshold mergers not immune (s. 45)
* Avoid unlawful information exchanges
* Review due diligence strategies and transition planning with counsel

**XIII. Conspiracies and Competitor Collaborations**

* Old Provision:
* Required proof of two *mens rea* and two *actus reus* elements (***R v. Nova Scotia Pharmaceutical Society***)
* Mens Rea:

1. Accused had intent to enter agreement & Knowledge of the terms of the agreement (Subjective)
2. Accused knew or ought to have known the agreement prevented or lessened competition unduly (Objective)

* Ask: Would a reasonable business person know that the agreement was anti-competitive
* Actus Reus:

1. Accused was a party to an agreement (Express, implied, or tacit agreement)
2. Agreement prevented or lessened competition unduly

* Must consider behaviour of parties (must have anti-competitive behaviour) & Structure of market
* Under-Inclusive – Restricted to agreements that “unduly” lessened competition
* Over-Inclusive – Caught JV’s in its “criminal” web
* Two-Track Regime: 1) *Per se* criminal offence (s. 45); 2) “Rule of reason” civil offence (s. 90.1)

### S. 45 – Criminal Conspiracy

* **S. 45(1)** – Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees, or arranges to

1. Fix, maintain, increase, or control the price for the supply of the product,

* Criminal offence for two or more competitors (or potential competitors) to enter into a price-fixing agreement
* **“Price”** – Any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product
* Includes mechanism by which price is set and components of prices

1. Allocate sales, territories, customers or markets for the production or supply of the product, or
2. Fix, maintain, control, prevent, lessen or eliminate the production or supply of the product

* Includes agreements between competitors to limit the quality of products (as opposed to just quantity)
* Provision Covers:
* Only the most egregious, hard core cartel activity – *Per se* criminal offences (Provide business certainty)
* Deals with “clear” criminal arrangements (“Naked restraints” on competition); Unclear where line between 45/90.1 falls
* Agreements that are not implemented in furtherance of a legitimate collaboration, strategic alliance, or joint venture
* Only horizontal agreements between actual or potential competitors
* Only selling-side (supply-side) activity – Downstream price fixing
* Information Sharing:
* Must consider whether the act led to the prohibited conduct under **s. 45** – Was the act enough to found a conviction under **s. 45**?
* Must determine whether there is actually an agreement, arrangement or conspiracy; Tacit collusion is not actionable
* Problem:
* The inclination of almost everyone once they are gathered together to discuss their trade is to share information
* The very act of sharing information has an impact on prices – Competitors get to behave in a way that is different than the market would otherwise allow because not everyone has access to identical information
* But, how is it that the market can be affected if it is competitive? – Something to mention on exam!
* If the market is competitive, does it matter who is sharing what?
* The higher the number of sellers, the less impact the information sharing will have
* Arrangements are frequently targeted in the US
* In Canada, it was always thought it would be hard to go after these arrangements b/c of the old req for an unduly lessening of comp
* Elements – Must be established beyond a reasonable doubt

1. Agreement, Arrangement or Conspiracy

* Arrangement is less than an agreement; Conspiracy is undefined

1. Two or more competitors (or potential competitors)

* Includes any person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, arrangement or agreement
* Does not include parties that only compete with respect to products which are not the subject of the agreement

1. Intent – Subjective intent to enter conspiracy & knowledge of terms (From ***Canada v. Pharmaceutical*** on old s.45 but still applicable)

* Under old s. 45 it was not sufficient if an accused intended to enter an agreement but did not intend to carry out its terms
* Crown need not demonstrate that the agreement had an effect on competition
* A party involved in a conspiracy who is not a competitor may still face prosecution for aiding and abetting under s. 21 of the Criminal Code
* New mens rea requirement seems to be only that the accused know he was conspiring, agreeing, or arranging (but no case law yet!)

**B) Agreement**

* Parties must have a mutual understanding or agreement (Unilateral conduct may be contrary to other provisions)
* Consensus or understanding may be arrived at either explicitly or tacitly
* Formal contract not necessary – Provision applies to all forms of agreement regardless of the degree of formality or enforceability
* Agreement must be more than communication which raises expectation that parties will act in a certain way
* Agreement may be inferred from circumstantial evidence alone (W/o direct evidence of communication or an express agreement) (**S. 45(3)**)
* Circumstantial evidence can include evidence of:
* Meetings
* Exchanges of competitively sensitive information (must be very careful about what information is circulated)
* Identical or similar pricing
* Language inferring the existence of an agreement (Including off-hand references to an agreement)
* Enforcement activities or suggestions that cheaters will be punished
* Conduct that can only be explained by the existence of an agreement
* Agreement does not need to be carried out to establish an offence – No acts need to be taken in furtherance of the conspiracy
* Agreement does not need to be secret or covert to establish an offence – Can be public or overt
* Conscious parallelism, in and of itself, does not constitute an agreement
* One competitor may take the lead at raising prices
* The others will then follow suit, with the unspoken mutual understanding that all will reap greater profits from higher prices
* Agreement may be found where conscious parallelism is coupled with evidence of communication or exchange of information that could be used for the purpose of permitting-coordination

**C) Defences**

* **S. 45(4)** – No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement, or arrangement that would

otherwise contravene that subsection if

1. That person establishes, on a balance of probabilities, that
2. It is ancillary to a broader or separate agreement or arrangement that includes the same parties, and

* **“Ancillary”** – Restraint is a part of an agreement or is a separate agreement that is functionally incidental or

subordinate to the objective of some broader agreement

* Bureau will have regard to a number of factors, including:
* The terms of the agreement
* The form of the agreement
* The functional relationship or lack thereof between the restraint and the principal agreement, and
* How the restraint makes the main agreement more effective in accomplishing its purpose
* Restraint cannot be the main object of the corporation between the parties
* Arguably, restricting new product in the market is justifiable, but less justification for restricting existing products

1. It is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and

* Parties must demonstrate that the restraint was directed at the promotion or facilitation of an objective of the broader agreement – Parties must show they would not have formed agreement if controls were not present
* Challenged restraint need not be the least restrictive alternative
* Bureau will likely conclude that a restraint is reasonably necessary unless there are significantly less restrictive alternatives

1. The broader or separate agreement or arrangement, considered alone, does not contravene s. 45

* Likely better to try to fit these kinds of arrangements under s. 90.1
* Defence most often used in relation to post-term restrictive covenants
* Restrictions that extend beyond life of the agreement – Ex. Non-compete clauses
* Must determine whether the covenants are actually the main purpose of the agreement, or merely ancillary
* **S. 45(6)** – Subsection (1) does not apply if the agreement is entered into only by affiliates of each other
* **S. 45(7)** – Regulated conduct defence
* Where particular conduct is authorized by another validly enacted law, it will be immune from scrutiny under s. 45
* Elements: (Some debate about the elements):

1. Conduct mandated or authorized (unclear whether conduct must be mandated or authorized; Better if mandated)
2. By validly enacted provincial or federal legislation
3. Authority to regulate has been exercised (must look for as precise wording as possible)
4. Regulatory scheme has not been hindered or frustrated by conduct

* Other Uncertainties – Whether RCD:
* Is a defence or an exception (Does it bar application of Act or is it a defence? There is case law that goes both ways)
* Applies equally to civil matters and criminal offences

**D) Penalties**

* **S. 45(2)** – Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to

imprisonment for a term not exceeding 14 years or to a fine not exceeding $25 million, or to both

* Fines have exceeded this amount in non-contested cases
* Penalties may be imposed on individual employees, directors, or officers of a company
* Parties may also face liability under a number of offences under the *Criminal Code* (Including aiding and abetting or counselling)
* **S. 36** – Provides a statutory cause of action for persons who have suffered actual loss or damage as a result of anti-competitive conspiracies
* Must establish all elements of s. 45 and actual loss or damage (direct or indirect) on a balance of probabilities
* As a result, a participant in a conspiracy may be subject to significant claims for damages brought pursuant to class proceedings
* Contested proceedings very uncommon – Virtually all penalties imposed are the result of plea negotiations

### Immunity Program

* Evidence of acts and the declaration of one accused can be used against a co-accused
* Bureau may recommend that full immunity be granted where:

1. The Bureau is unaware of an offence in relation to a particular product or service and the party is the first to disclose it, and
2. The Bureau is aware of an offence and the party is the first to come forward, before there is sufficient evidence to warrant a referral of the matter to the Attorney General

* Before a recommendation will be made, Bureau must be satisfied that the applicant has met, or is prepared to meet, the following conditions:

1. The applicant must have ceased its participation in the illegal activity
2. The applicant must not have coerced others to be party to the illegal activity

* Where a party does not qualify for immunity, but provides cooperation, Bureau may recommend that the AG consider some form of leniency
* Where a party is the first in line after the immunity applicant (second), it may be eligible for a reduction of up to 50% of the fine
* Subsequent leniency applicants may be eligible for a reduction of up to 30%
* Steps:

1. Seek an immunity “marker” reserving the applicant’s place in line (Typically have hypothetical conversation to determine place first)

* Marker is only available from:
* Senior Deputy Commissioner, Criminal Matters Branch, or
* Deputy Commission of Competition, Fair Business Practices Branch

1. Provide a hypothetical proffer, which contains adequately detailed information about the key elements of the case
2. Negotiate an immunity agreement with the Bureau
3. Complete full and timely disclosure

### S. 90.1 – Civil Review of Agreements Among Competitors

* Addresses forms of anti-competitive agreements among competitors that are not hard core, *per se* offences (that are not caught by s. 45)
* There may be valid reasons for buyer cartels
* Three required elements that the Commissioner must establish on a balance of probabilities:

1. An agreement or arrangement (No conspiracy as in s. 45)
2. Between persons, two or more of whom are competitors, and
3. Which leads to substantial lessening or prevention of competition in a market

* Agreement must be likely to create, maintain, or enhance ability of the parties to the agreement to exercise market power
* Tribunal can consider the factors listed in **s. 90.1(2):**
* The extent to which foreign products or competitors are likely to provide effective competition
* The extent to which acceptable substitutes for products supplied by parties are or are likely to be available
* Any barriers to entry into the market, and any effect of the agreement on those barriers
* The extent to which effective competition remains or would remain in the market
* Any removal or likely removal of a vigorous and effective competitor
* Any other factor that is relevant to competition in the market that is or would be affected by the agreement
* Covers both buying and selling side agreements
* Types of agreements that may be reviewable under s. 90.1 include;
* Information Sharing Agreements (Ex. Disclosure of competitively sensitive information; May be unilateral)
* An agreement that involves a unilateral disclosure or exchange of information between competitors can impair competition by reducing uncertainties regarding competitors’ strategies and diminishing each firm’s independence
* Bureau will consider:
* Whether the information exchanged is competitively sensitive
* The timing of the information exchanges
* Whether the parties have or are likely to have market power
* The manner of collection and dissemination of the information, and
* Any offsetting efficiencies
* Non-compete Agreements (Ex. Employment K’s, Sales of business K’s)
* Joint Production Agreements (Ex. Joint Venture Context – Generally have pro-competitive aspects and so are not clearly within s. 45)
* Bureau’s position is that JV’s and strategic alliances are more appropriately reviewed under s. 90.1
* Ex. Bureau will review under s. 90 a non-compete obligation between the parent undertakings and a joint venture where such obligations correspond only to the products, services, and territories covered by the JV
* But, note that ancillary restraints in JVs are dealt with in the US under the ancillary restraints doctrine
* Bureau considers a number of factors in assessing joint production agreements, including:
* Whether the agreement is between parties that are actual or potential competitors
* Whether the agreement otherwise reduces the incentive or ability of the parties to compete independently
* Whether the parties to the agreement have market power, and
* Whether any anti-competitive effects are offset and outweighed by the efficiencies generated
* For exam, not that “trade associations” are the same as joint ventures
* Research and Development Agreements
* Joint Purchasing (Ex. Buyer Group) Agreements
* Some Types of Concerted Refusals to Deal (Ex. Boycotts)
* Parties need not be competitors with respect to the specific product that is the subject of the agreement
* Bureau will define the relevant market and calculate market shares
* **S. 90.1(3)** – Tribunal may not find an SLC solely on the basis of evidence of concentration or market share
* Generally, Commissioner will not challenge an agreement under s. 90.1 where the market share held by the parties represents less than 35% of the relevant market, or on the basis of a concern related to a coordinated exercise of market power, where the market share of the four largest firms in the relevant market is less than 65% or the share of the parties to the agreement is less than 10%
* **S. 90.1(a) & (b)** – Tribunal may make remedial orders to prohibit persons, whether or not a party to the agreement, from doing anything

under the agreement, or with consent, may take any other action

* No monetary penalties, criminal fines, civil actions, or imprisonment
* **S. 36** applies if an order if made under this section and breached

**Defences**

* **S. 90.1(4)** – Tribunal shall not make an order under subsection (1) if it finds that the agreement has brought about or is likely to bring about

gains in efficiency that will be greater than, and will offset, the effects of any SLC that will result or is likely to result from the

agreement, and that the gains in efficiency would not have been or would not likely be attained if the order were made

* Bureau will analyze exception consistently with analysis undertaken in respect of efficiency exception applicable to mergers
* Efficiency claims should be substantiated by documentation whenever possible
* Bureau will examine all relevant price & non-price effects in defined market and interrelated markets when evaluating SLC
* **S. 90.1(7)** – S. 90.1 does not apply to agreements between affiliates
* Note: Ancillary restraints doctrine and regulated conduct defence also apply under this provision (Apply across whole Act)

### Boycotts

* It remains to be seen how courts will treat some types of output restraints that either should not be considered to be *per se* illegal in all cases or do not clearly fall within the scope of the new offence in s. 45
* While the language of s. 45(1)(c) may be broad enough on its fact to catch group boycotts, they are not expressly prohibited
* US courts have concluded that such agreements may be reviewed under either a *per se* or rule of reason standard (***NW v. Pacific Stationary***)
* You do not want to categorically condemn agreements that are not obviously anti-competitive at the outset
* Unless the conduct is virtually always likely to have an anti-competitive effect, it should not be *per se* illegal (***NW***)
* Court may look at factors such as: (***NW***)
* Does the cooperative possess market power or exclusive access to an input? Was refusal egregious enough for *per se* rule?
* Courts will likely engage in a partial market analysis to determine if the particular agreement is likely to be anti-competitive

### Economic Theory

* Firms, by entering agreements, may be able to collectively exercise monopoly power, thereby doing the same harm to competition and consumers as a monopolist (deadweight loss and transfer of wealth to monopolist)
* Prisoner’s dilemma – Nash equilibrium is always to cheat, but dilemma ignores possibility that behaviour might be repeated over time
* Cartels Face Three Problems: 1) Coming to an agreement; 2) Monitoring compliance; 3) Punishing cheating
* Characteristics of Markets Prone to Cartelization:
* Few companies that are similar along key dimensions
* Product is homogenous or similar in nature (If you can only compete on price/quality etc., easier to collude)
* Product has no close substitutes
* Information about transactions is widely available (easier to monitor)
* History of cooperation
* Facilitating Practices:
* Public speeches and other “cheap talk” – Let others know what firm is thinking
* Resale price maintenance – Retailers can transfer cartel enforcement to manufacturers
* Most-favoured customer clauses – Rebates if new customers are offered lower prices
* Meet the competition clauses – Guarantee to meet any lower price (Removes temptation to cheat; Helps monitor collusion)

**XIV. Investigative Powers & Orders**

### Informal Evidence Gathering

* Main Ways Bureau Obtains Voluntary Informal Information:

1. By Complainants – Complaints may be quite detailed

* The more that is included, the more likely Bureau will investigate
* Bureau has to decide how to allocate limited resources – If customers have already done leg-work, more likely to help

1. In Response to Voluntary Requests

* Bureau may contact and invite responses from customers, market participants, or even the targeted party
* Parties have an incentive to comply – Not a good idea to antagonize the Bureau
* Bureau can force information from parties
* Bureau may draw inferences from resistance to produce information

1. Leniency and Immunity Program – Proffer discloses information about the applicant’s unlawful conduct

* Risks to Voluntary Disclosure:

1. Unclear whether confidentiality of voluntary information is protected (Information compelled to be disclosed certainly is)
2. No limits on use of the evidence presented (Use of compelled evidence is limited under evidence rules – Ex. Incriminating evidence)

* If risk that incriminating evidence will be provided is high, can refuse voluntary disclosure and ask for mandatory order
* But, if Commission issues an order, they may issue a press release – Could be detrimental to business
* If party is unlikely to give incriminating evidence, likely more willing to give information voluntarily

1. Being selective in voluntary disclosure risks antagonizing Bureau

### Formal Evidence Gathering

* Formal processes are engaged when the Bureau commences an inquiry – Threshold to begin an inquiry is quite low
* Ways an Inquiry can be Started:

1. Commissioner – Must have reasonable grounds that order or certain provisions of the Act have or are about to be contravened
2. Six Canadian Residents – Must submit a written statement of grounds upon which an inquiry could be commenced
3. Minister of Industry – May direct Commissioner to start an inquiry

* Inquiry may be discontinued at any time, subject to the Minister’s right to review the Commissioner’s decision
* Inquiries are required to be conducted in private
* But, when complaint received from six persons, Bureau is required to inform the complainant of the progress of the inquiry
* Decision of whether or not to start an inquiry is not subject to judicial review
* Commissioner may remit matters to the DPP for consideration at any stage of the inquiry

**S. 11 Orders**

* Commissioner may apply to a court for an order requiring any person who has or is likely to have information relevant to the inquiry to:

1. Submit to examination under oath or solemn affirmation on any matter relevant to the inquiry before a presiding officer
2. Produce a record or any other thing specified in the order, or
3. Make a written return under oath or solemn affirmation

* Threshold Test – Low Threshold – Commissioner must demonstrate that:

1. An inquiry has been commenced, and
2. The party against whom the order is sought is likely to have information relevant to the inquiry

* Orders are *ex parte* – Target does not need to be notified about the application
* A successful challenge to a s. 11 order can be made only on the basis of a virtual fraud on the court or wilful omission of information
* Ex. Order set aside in ***Canada v. Labatt Brewing*** on the basis that the order was “misleading, inaccurate and incomplete”
* Portions of the material sought had already been provided
* With *ex parte* applications, only party seeking order appears in court – Onerous obligation to disclose all evidence (even if contrary)
* Must ensure other party made adequate disclosure – If not, this will be one of your first arguments
* Report issued in response to the ***Lebatt*** case indicated that the Bureau does not intend to make orders against suspects in criminal inquiries
* If evidence obtained by order, can be argued that it is inadmissible as “unlawful search and seizure” if Crown chooses to prosecute criminally
* Information may be required from a number of participants in the market – Need not be the targets of the inquiry
* Ex. In the merger context, in light of the SIR procedure, Bureau has indicated that s. 11 orders will be confined to third parties
* Orders can be limited by consent between the parties (Ex. By time, Custodian of documents, or by exhaustiveness of search (Ex. Keywords))

**S. 15 Orders**

* Commissioner may apply to a judge for a warrant to search and seize evidence upon premises in relation to provisions of the *Competition Act*
* Warrant application must set out reasonable grounds for the request together with details of the desired search
* Commissioner may also seek a Criminal search warrant via the *Criminal Code*
* But, unlike *Criminal Code*, warrants may be issued for offences that have been or are about to be committed
* Warrantless searches are permitted where “exigent circumstances” exist – Where loss or destruction of evidence would arise from delay
* Evidence obtained may be held for 60 days unless target consents to or Bureau applies for an extension of the retention period
* Counsel may be possible to convince agents to limit search or use search methodologies that are less destructive to their client’s business
* Persons who impede or prevent an inquiry, examination, or search (under ss. 11 or 15) may be charged with an offence
* In particularly serious cases, parties may be charged with criminal obstruction under the *Criminal Code*
* No appeal from the granting of a warrant under s. 15
* Orders under ss. 11 or 15 can potentially be challenged under the *Charter*

**Interception of Private Communications**

* Bureau has stated that the power to intercept private communications will only be used under “exceptional circumstances”
* Application must be made pursuant to s. 185 of the *Criminal Code* – Interception must relate to offence under ss. 45, 47, or 52.1(3)
* Judge must be satisfied that:
* It would be in the best interests of justice, and
* Other procedures have been tried and failed, or are unlikely to succeed, or the matter is of such urgency that it would be impractical to investigate using only other procedures
* App must fully disclose all circ’s to enable reviewing judge to stipulate terms and conditions to protect privileged communications
* Electronic surveillance constitutes a “search and seizure” – Governed by s. 8 of the *Charter*
* Interception of private communications constitutes a greater invasion of privacy than a regular search, thus a higher constitutional standard is required for authorization
* Person whose communications have been intercepted must be notified within 90 days (but period can be extended to up to 3 years)
* Fraud, non-disclosure and misleading evidence do not automatically vitiate the authorization
* Question becomes whether there continues to be a basis upon which the judge could have granted the authorization
* Even if authorization determined to be invalid, evidence may still be admitted under s. 24(2) of the *Charter*

**Information Sharing**

* **S. 29** – Governs the communication of information obtained by the Bureau (either informally or formally)
* Bureau is permitted to share information with other Canadian law enforcement agencies or with other entities for the purposes of administration or enforcement of the *Competition Act*
* **“Canadian Law Enforcement Agency”** – Defined broadly
* In addition to municipal, provincial and federal police forces, includes any federal or provincial authority that enforces acts or regulations that provide for criminal, civil, or administrative sanctions
* Includes communicating with customers, suppliers, or competitors in order to obtain additional information
* Bureau will not voluntarily provide information to parties in private actions and will opposed subpoenas for production

### Interim Orders

* **S. 100** – Commissioner can apply for an order to enjoin parties from taking any act towards the completion or implementation of a proposed

merger where she has not yet commenced a formal proceeding under s. 92 (Ex. Where there has been a failure to notify)

* Commission must prove, on a balance of probabilities, that:

1. The Commissioner has an inquiry in progress
2. The Commissioner needs more time to complete the inquiry
3. Without the order, a person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on completion because the action would be difficult to reverse

* Order is discretionary, but Tribunal will typically issue order if three part test satisfied
* **S. 103.3** – Tribunal may make order to prevent the continuation of actions under s. 75, 76, 77, 79 or to prevent a foreign judgment, decree,

order, policy or other process or communication from being implemented in Canada

* **S. 104** – Once Commissioner has commenced a formal proceeding, she may apply for an order to enjoin parties from completing or

implementing the merger, based on common law rules governing injunctions

* Commissioner must prove, that:

1. There is a serious issue as to whether a merger will result in an SLC under s. 92 (Low standard; Claim must not be frivolous)
2. There will likely be irreparable harm to the public interest if the order is not granted

* Harm that either cannot be quantified in monetary terms or which cannot be cured
* Ex. Integration of operations of merging parties and disposal of surplus assets (“scrambling the eggs”)

1. The balance of convenience favours the granting of an interim order

* Tribunal will weigh harm to the public interest against the relative harm to the merging parties

### Prohibition Orders

* Under **s. 34**, on application by the AG, a court may prohibit any person (need not be the accused) from doing any act or thing that is directed toward the commission of a criminal offence under the Act
* Contravention of a prohibition order is punishable by a fine in the discretion of the court or by imprisonment for a term not exceeding 5 years
* Prohibition orders may contain novel behavioural remedies (Ex. Requirement to remove certain personnel from management positions)

**XV. Misleading Advertising and Marketing Practices**

### Civil Deceptive Marketing Practices

**Misrepresentations to the Public**

* **S. 74.01(1)(a)** – A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a

product, or any business interest makes a representation to the public that is false or misleading in a material respect

* Five Elements:

1. A representation has been made

* Interpreted broadly; Includes: Print, oral, broadcast, visual or graphic
* Making a representation includes permitting a representation to be made

1. To the public

* Easily satisfied and interpreted broadly; Can include:
* Claims made to a single person
* Private communications (telemarketing)
* Claims originating in Canada which are aimed at non-Canadians (cross-border marketing)
* **S. 74.03(1)** – “To the public” includes a representation that is
* Expressed on an article offered for sale, or an anything accompanying an article offered for sale
* Made in the course of in-store, door-to-door or telephone selling (Ex. Btw salesperson & consumer)
* Expressed on an in-store or other point-of-purchase display
* It is not necessary that the representation be made in a place to which the public had access
* It is not necessary to establish that the representation was made to a member of the public in Canada

1. To promote a product (including services) or any business interest

* The “business interest” must be that of the person making the claim
* Can include any business interests (Ex. Could be some secondary business interests)

1. The representation is false or misleading (to the average consumer), and

* It is not necessary for any one to actually have been deceived or misled for a representation to be false or misleading
* **S. 74.03(5)** – Both the literal meaning and the general impression conveyed by an advertisement must be considered in

determining whether it is materially false or misleading

* General impression can be important where a representation is:
* Partly true and partly false (Ex. One aspect is party true (i.e. Written) and another is false (i.e. Visual)
* Literally true but created a false impression (***Maritime Travel***), or failed to disclose certain essential information

1. The representation is false or misleading in a “material” respect – No single test; Monetary amount is irrelevant

* Guideline: Did the purchaser change his/her course of conduct based on the advertisement?
* Price claims are almost always material; Even omissions can be material
* Representations are only prohibited to the extent that the false or misleading element causes or is capable of causing the consumer to act based on that representation – Objective test
* Ask: Is the “average purchaser” likely to be misled, regardless of whether any consumers actually were misled?

**Performance Claims**

* **S. 74(1)(b)** – Prohibits representations to the public about the “performance, efficacy or length of life of a product that is not based on an

adequate and proper test”

* Claim substantiation is not required if the claims are clearly hyperbole, the claims are so outlandish that a consumer would not reasonably rely upon them or believe them to be true, or the claims are solely the opinion of the advertiser
* Any testing done to substantiate a claim must be done before the claim is made
* A “proper and adequate” test: (***Commissioner v. Imperial Brush and Kel Kem***)
* Depends on the type of product and the nature of the claim made as understood by the common person
* Must be reflective of the risk or harm which the product is designed to prevent or assist in preventing
* Must be done under controlled circumstances or in conditions which exclude external variables or take such variables into account in a measureable way
* Must be conducted on more than one independent sample wherever possible
* Must have results that, while not measured against a test of certainty (no requirement for scientific certainty), are reasonable given the nature of the harm at issue and establish that it is the product itself which causes the desired effect in a material manner (Claim(s) must actually flow from the test results without leaving a gap in logic), and
* Must be performed regardless of the size of the seller’s organization or the anticipated volume of sales
* Onus is on the defendant to prove that adequate and proper testing was done

**Warranty and Serviceability Claims**

* **S. 74.01(1)(c)** prohibits claims involving a warranty or guarantee or a promise to repair or service if the claim is misleading or has no reasonable prospect of being carried out

**Sale Above Advertising Price**

* **S. 74.05** – Businesses are prohibited from selling or renting products at a higher price than advertised
* Exception – Prohibition does not apply to the following:
* Catalogue advertisements in which it is prominently stated that the prices contained therein are subject to error, provided the advertiser establishes that there really was an error
* An advertisement that is immediately followed by another advertisement correcting the price mentioned in the first advertisement
* Sales of public securities that have a valid prospectus, and
* Sales of products by people who are not in the business of dealing with such products
* Oral representations of prices or representations of prices appearing on product labels (but these may offend general/DT provisions)

**Promotional Contests**

* **S. 74.06** requires
* Adequate and fair disclosure of such matters as the number and approximate value of prizes
* Where companies provide a link to contest rules, contest sponsor must provide a short list of disclosure
* That the distribution of prizes must not be unduly delayed, and
* That the selection of participants or distribution of prizes must be allocated either on the basis of skill or chance

**Ordinary Price Claims**

* **S. 74.01(2)** – It is a reviewable practice to mislead the public about the “ordinary” selling price of a product

### Criminal Misleading Advertising

* **S. 52(1)** – No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, by any

means whatsoever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect

* Individual components are the same as the civil provision, except criminal provision includes concept of “knowingly or recklessly”

**Double Ticketing**

* **S. 54(1)** – It is an offence to supply a product at a price that exceeds the lowest of 2 or more prices clearly expressed in respect of the product

### On-Line Advertising

* ***Competition Act*** addresses the substance of a representation rather than the means by which it is made
* **S. 74.03(e)** – A representation contained in anything that is transmitted or made available in any other manner to a member of the public is

deemed to be made to the public

* The interplay between text, illustrations and audio must be considered to ensure that the overall message is not misleading

### Administration and Enforcement

* Deceptive marketing matters will generally be pursued under the civil track, with the criminal track reserved for the most egregious cases and for repeat offenders

**Criminal Track**

* Pre-Requisites to Criminal Track:

1. Mens Rea Element: Materially false or misrepresenting representations made knowingly or recklessly
2. Criminal prosecution must be in the public interest

* Following factors will be considered when determining whether a criminal prosecution is “in the public interest”
* Seriousness of the alleged offence (Ex. Whether there is a substantial harm that cannot be adequately dealt with by civil remedies)
* Whether the deceptive practices were aimed at taking unfair advantage of vulnerable groups such as the elderly
* Whether there was a failure to make timely and effective attempts to remedy the adverse effects of the conduct
* Any evidence of similar conduct in the past
* Whether there is a compliance plan in place that is being actively followed (if plan has not been implemented that is damaging!)
* Whether conduct involved failure to comply with previous undertaking, promised voluntary corrective action or prohibition order &
* Any mitigating factors such as whether the company or entity has in place an effective compliance program
* Prosecution can be by way of indictment (Potentially unlimited fine – in the discretion of the court and/or up to 14 years imprisonment) or by summary conviction (fine of up to $200,000 and/or imprisonment of up to one year)

**Civil Track**

* An order may be sought from the Tribunal, the Federal Court, or the superior court of a province directing that the alleged offender cease the offending conduct, publish a corrective notice, pay restitution to victims, and/or pay an AMP
* The maximum AMP for an individual is $750,000 for a first offence and $1,000,000 for subsequent offences, and for corporations is $10,000,000 and $15,000,000, respectively
* Commissioner has the power to seek an interim injunction to freeze the assets and prevent the disposal of property before a finding that a business has made misleading representations
* **S. 74.12** provides for consent agreements between the Commissioner and the party alleged to have violated the provisions
* Consent agreements may include any or all of the terms that could be imposed in an order of the Tribunal
* Many consent agreements do not include any admission that there has been a violation of the *Competition Act*, and the company can negotiate the wording of any corrective notices

**Defences**

* Statutory Defence: Due Diligence – Defendant did everything possible to avoid the advertisement being false/misleading
* Only good against certain criminal offences, not civil offences
* Common Law Defence: Regulated Conduct Defence – Unclear whether this is available against civil penalties

### Competition Bureau Guidelines - Dos

* Do avoid fine print disclaimers (All print should be same size – If you have to deviate, must choose carefully what to make smaller)
* Do fully and clearly disclose all material information
* Do avoid terminology which is not meaningful and clear to the ordinary person

### Competition Bureau Guidelines – Don’ts

* Don’t confuse “regular price” or “ordinary price” with “manufacturer’s suggested list price” or a like term
* Don’t use “regular price” unless the product has been offered in good faith for a substantial period of time
* Don't use the words “sale” or “special” in relation to the price of a product unless a significant reduction has occurred
* Don’t use a performance claim, unless it can be proven

**XVI. Private Litigation and Class Actions (S. 36)**

* Private actions are intended to compensate victims and to complement government enforcement by serving as an additional deterrent

**Components and Evidentiary Burden**

* Plaintiff must prove (on a balance of probabilities):

1. Defendant has either:
2. Engaged in conduct that is contrary to any provision of Part VI (Criminal provisions only) of the *Competition Act*, or

* Plaintiff will have to prove the same elements required to be proven under the corresponding criminal provision

1. Failed to comply with an order made by the Competition Tribunal or another court under the *Competition Act*

* Includes orders made under the reviewable practice provisions of the *Competition Act*

1. Plaintiff has suffered loss or damage as a result of the conduct complained of

* **S. 36(2)** creates two rebuttable presumptions (although difficult to rebut):

1. Where D has been convicted of an offence under Part VI or has been convicted or punished for having breached an order, P in a s.36 claim can use the “record of proceedings” in the court in which D was convicted as proof D engaged in the conduct complained of

* **S. 36** does not require a prior conviction, but a prior conviction or guilty plea will help alleviate the burden of proof

1. Evidence given in criminal proceedings as to the effect of the offensive conduct may be introduced as evidence regarding the effects of the conduct for purposes of the civil procedures

* Documents in the Bureau’s possession are protected by **s. 29**, but disclosure may be allowed for the purpose of the administration or enforcement of the Act (***Forest Protection v. Bayer***)

**Competent Court**

* Claim may be commenced in either the Federal Court of Canada or a provincial superior court, but a **s. 36** claim can only be combined with common law claims in provincial superior courts (Federal court lacks jurisdiction over common law claims)

**Limitation Period and Available Remedies**

* Limitation period is two years from the later of:

1. The day on which the anti-competitive conduct (breach of provision or breach of order) was engaged in, or
2. The day on which any criminal proceedings relating to the conduct were finally disposed of

* No statute of limitations for laying charges with respect to an indictable offence (can create very long limitation periods)
* Plaintiff may recover an amount equal to the loss or damage proved and any additional amount that the court may allow, not exceeding he full cost of any investigation (but no recovery of punitive or exemplary damages, and no interlocutory or permanent injunctive relief)
* Plaintiffs can also seek redress under other civil liability regimes (Ex. Civil conspiracy or unlawful interference with economic interests)

**Class Actions**

* All provinces except PEI have adopted class proceedings legislation
* First Step: Certification – Plaintiff who wants to represent the class must first obtain leave from the court
* Critical – If class is certified, parties will almost always settle
* Test requires that:
* The pleadings or notice of application disclose a cause of action
* There must be an identifiable class of two or more persons
* The claim of the class members raises common issues
* A class proceeding must be the preferable procedure for the resolution of the common issues, and
* There must be a representative plaintiff who

1. Would fairly and adequately represent the class
2. Has produced a workable plan for advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
3. Does not, on the common issues, have interests, have interests which might conflict with those of the class

* The final judgment is binding on all members of the class, subject to their right to opt out of the class
* Jurisdiction in cases with foreign aspects is decided based on the “real and substantial connection” test
* There cannot be multiple class actions asserting the same cause of action against the same defendants (One certified class per set of facts)
* Factors to determine which action should proceed: (***VitaPharm Canada v. F. Hoffman-La Roche***)

1. The nature and scope of the causes of action advanced
2. The theories advanced by counsel as being supportive of the claims advanced
3. The state of each class action, including preparation
4. The number, size, extent of involvement of the proposed representative plaintiffs
5. The relative priority of commencing the class actions, and
6. The resources and experience of counsel

* Statute is silent on the issue of whether you can certify a national class, which includes members from several or all provinces
* Ontario courts have allowed such certification, provided the enacting province has a real & sub connection with the subject matter
* May raise a question of recognition of the judgement in the other provinces whose residents are included in the national class
* In price fixing cartel cases, the inflated price paid by a direct purchaser is inevitably altered as it passes through each level in the dist chain
* Very difficult to calculate harm suffered by indirect purchasers – In US, no cause of action; In Canada, issue not finally resolved

**XVII. Private Applications**

* Only available with respect to **ss. 75, 76, and 77**
* Two Part Process

1. Obtain leave from the Tribunal pursuant to s. 103.1
2. The Tribunal will not consider the leave application if:
3. The matter is currently the subject of an inquiry by the Commissioner,
4. The matter was the subject of an inquiry which was discontinued because of a settlement, or
5. The matter is subject of an application already submitted to the Tribunal

* Commissioner must certify to Tribunal within 48 hours that matter does not fall within one of above categories

1. The leave application must be supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been substantially (or directly for price maintenance (s. 76)) affected in the applicant’s business by a reviewable practice, and that the practice in question could be subject to an order

* Assessment of substantial effect on a business must be taken in the context of the entire business
* “Substantial” – “Important”; More than *de minimis*; High threshold but unclear where the line is drawn
* The standard of proof on a leave application is a lower standard of proof than proof on a balance of probabilities
* Tribunal may not draw inferences from the fact that Commissioner has or has not taken action in respect of the matter

1. Bring private application to the Tribunal on the merits

* Private application must be brought within one year after the practice that is the subject of the application has ceased
* Private parties are not entitled to seek damages – Limited to the same remedies that would have been available had the application been
* Significantly reduces the attractiveness of this route for private parties
* initiated by the Commission or Competition
* If private party obtains leave from the Tribunal and brings a private application, the Commissioner is precluded from making an application under ss. 75, 76, or 77 on the basis of the same or substantially the same facts as alleged in the application
* Commissioner is able to intervene in a private application, but will likely only do so in exceptional circumstances
* Tribunal may issue an interim order pursuant to **s. 104** (3-part test), enter into consent agreements, and award costs of proceedings
* Order made pursuant to a private leave case is binding – If it is breached, private parties may sue for damages

**XVIII. Intellectual Property Interface**

* Historically, IP and competition have often been viewed as contradictory
* IP laws were viewed as creating an protecting monopolies, while competition laws were directed to mitigating their effects
* The “modern view” is that IP and competition legislation are complementary instruments (***IPEGs***)
* Both stimulate innovation which leads to increased productivity and greater competition; Both promote efficient invests (incl R&D)
* In addition, although IP owners enjoy exclusive rights, IP does not necessarily confer market power

### Analytical Principles

* Markets:
* The Bureau is likely to define the relevant market based on:

1. The intangible knowledge or know-how that constitutes the IP
2. Processes based on the IP rights, or
3. Final or intermediate goods resulting from, or incorporating, the IP

* Market does not include R&D or innovation markets *per se*
* Bureau will not define market around a license but rather will focus on what the legal rights granted to the licensee actually protect
* Market Power:
* Factors indicating a lack of market power:

1. Effective substitutes
2. Probability of market entrants, and
3. Ability to “innovate around” the protection

* Two Enforcement Tracks:

1. Mere Exercise of IP Rights

* The inherent right of the IP owner to exclude use by others is recognized as part of the IP grant and the mere exercise of this basic right will rarely be interfered with
* Generally, competition law does not apply to the mere exercise of IP rights
* Bureau may use special remedy under s.32 to restrain a mere exercise of IP rights that it considers harmful to competition
* Ex. ***Warner Music*** – Court ruled Warner was merely exercising its copyright, even if it was refusing to allow others to use

its IP rights with the aim of reducing competition; No liability

1. Anything More than a Mere Exercise of IP Rights

* Dealt with under the general provisions of the *Competition Act*
* The Bureau may examine any activity beyond the exercise of the IP right granted if it involves the creation, enhancement or maintenance of market power in a manner prohibited by the *Act*, or if it involves joint conduct by two or more firms
* Distinction between right to use and right to exclude use of others
* IP owners can exclude use from IP right, but they license others, all bets are off

### General Provisions

* Section 75 – Refusal to Deal
* S. 75 does not apply to a mere refusal to license IP
* Licenses are not “products” and are not in “ample supply” so s. 75 does not apply
* Conduct going beyond a mere refusal to license IP could warrant enforcement action
* Ex. The systematic acquisition of a collection of IP rights and the subsequent refusal to license them, thereby substantially lessening or preventing competition in markets associated with the IP
* Section 76 – Price Maintenance – Expressly applies to owners or licensees of IP rights
* Includes:
* Owner of IP controls by agreement, threat or promise the price at which licensee sells/advertises the licensed products
* Refusal to supply a product made with or incorporating IP because of the low pricing policy of the purchaser
* Section 77 – Vertical Restraints
* An IP owner’s attempt to extend the term of its exclusive rights may amount to exclusive dealing if it prevents licensees from dealing with other firms (exclusivity) and has foreclosure effects which substantially lessen competition in the relevant market
* “Ever-greening” may also be pursued under s. 79 as an abuse of dominance
* IP owner may wish to restrict the territories in which its licensees can exercise IP rights or sell products derived from the use of IP
* Such territorial restrictions may be desirable to encourage licensees to invest in promoting the IP owner’s product
* To date, no proceedings have been brought under the market restriction provisions
* Section 79 – Abuse of Dominance
* By virtue of s. 79(5) and ***Tele-Direct***, the mere exercise of an IP right will not in itself constitute abuse of dominance
* Selective refusal to license is not an anti-competitive act (one of the req’s for finding of abuse of dominance)
* But, an abuse of IP right may provide grounds for an order under s. 79 (Ex. “Ever-greening”)
* Steve: Bureau is wary of defining this s. 79(5) exception broadly
* An exclusive license likely will not raise a s. 79 concern if the licensee’s competitors are able to access substitute products or techs
* But, a dominant firm’s use of long-term exclusive licenses to lock-up all available supply of an essential input is likely to be pursued under s. 79 in the absence of a business justification
* Exclusive licenses which might otherwise be viewed as anti-competitive may, in certain circumstances, be justified by efficiencies or a business rationale
* Ex. An exclusive license of an unproven technology may be necessary to give the licensee sufficient initiative to invest in the promotion
* Sham litigation or settlements may also constitute anti-competitive conduct
* Ex. A patent owner with market power attempting to prevent market entry by an owner with a non-infringing patent

**S. 45 – Conspiracies**

* Licenses and assignments must go beyond mere exercise of IP rights
* Must separate out the bare permission and the aspects of the license that may restrict pricing, output, and competition
* Licensing agreements have been generally viewed as pro-competitive, as they facilitate the use of IP by third parties
* Licensing agreements between parties that do not compete with one another are not likely to attract scrutiny under either section 45 or 90.1 even if they contain restraints
* Licenses that facilitate coordination between competitors can raise concerns under ss. 45 or 90.1
* Ex. Cross-licensing arrangements – Competitors grant each other exclusive licenses to related patents
* Such licenses that include restraints such as allocation of markets, fixed prices for products manufactured from the patents, or restrictions upon licensing such products are now per se offences under s. 45 unless defence is available
* Mere collaboration between firms in R&D is unlikely in itself to attract the Bureau’s scrutiny
* Transfers and Assignments
* SS. 45 can apply to an assignment to IP, even where the assignment is authorized by the relevant IP statute (***Apotex***)
* Patent assignment must amount to more than a mere assignment (***Apotex***)
* Courts have been generous in finding that agreements to transfer IP rights do not violate s. 45
* Assignment of patent does not violate s. 45 where the only market power created by the assignment was that inherent in the patent assigned (***Molnlycke***)
* Acquiring patents with the aim of acquiring market power may violate s. 45, but if that was not the aim or effect of acquisition, no violation
* ***Apotex***: Acquiring additional patents so as to hold the only two commercially viable ways to make a product may violate s. 45
* S. 45 may also prohibit terms imposed in a settlement of IP litigation (Parties may settle but terms may violate s. 45)

**S. 90 – Agreements Amongst Competitors**

* IPEGs state that the Bureau will not consider licensing agreements to be anti-competitive unless they reduce competition substantially or unduly relative to that which would have likely existed in the absence of the license
* A licensing agreement between potential competitors which results in the development of a new product that would not otherwise have been developed may enhance competition as opposed to lessening it or preventing it
* R&D agreements may SLC where restrictions are imposed on the exploitation of resulting products
* In assessing R&D agreements, the Bureau generally considers the following factors:
* Whether the agreement is between competitors
* Whether the agreement is limited to R&D or also contains provisions regarding the joint exploitation of products
* Whether the parities hold market power in the relevant market
* Whether the restrictions on competition are reasonably necessary for achieving the objective of the R&D agreement, &
* Whether any anti-competitive effects are offset and outweighed by efficiencies generated through the R&D agreement
* Joint production, specialization, and subcontracting arrangements may have anti-competitive effects if they result in reduction of output or the lowering of price of an input below competitive levels
* Specific types of ancillary restraints that the Bureau will review under s. 90.1 include:
* An agreement among competitors to charge a common price in a blanket license agreement for artistic works
* A non-compete clause in an employment agreement or an agreement for the sale of assets or shares between the parties

### S. 32 – Special Remedies

* S. 32 allows for action against a mere exercise of IP rights that unduly lessens competition (in contrast to the general provisions of the *Act*)
* S. 32 empowers the Federal Court, at the request of the Attorney-General, to grant certain types of remedial orders to restrain anti-competitive conduct – In practice, AG would likely only seek such an order at the recommendation of the Bureau
* The court may:
* Declare an agreement or licence void
* Order the compulsory licensing of IP (except a TM)
* Will be sought only in the rare circumstances where a refusal to license has adversely affected competition in a market that is different or wider than the subject matter of the IP or the products or services resulting from the IP (IPEGs)
* Revoke a right, or
* Direct that other things be done to prevent anti-competitive use of IP
* Given the exceptional nature of these remedies, such a recommendation would likely be made only if there was no appropriate remedy under the relevant IP statute – Would very rarely be used (IPEGs)
* Likely requirements
* IP owner must be dominant in the relevant market
* IP must be an essential input or resource of other firms in the market, which has the effect of stifling innovation, and
* Remedy would not adversely impact incentives to invest in R&D

**XIX. Regulated Conduct Defence**

* RCD is a principle that exempts conduct undertaken pursuant to direction or authorization under other regulatory regimes
* Contest is between acts “authorized” by one statute, but which contravenes the Act
* Theory is that the requirements of the Act cannot be satisfied if the conduct was authorized or compelled by valid legislation
* Applies federally and provincially, and to both civil (including mergers) and criminal provisions
* But, give a very narrow reading so it will rarely come into effect – *Competition Act* is very broad; Meant to cover everything
* Does not apply to ministerial orders and anything of lesser authority (Ex. Bribes)
* Bureau believes that in the vast majority of cases the *Competition Act* and other legislation governing impugned conduct can co-exist
* In determining whether to pursue conduct allegedly regulated by another law, the Bureau will consider:
* The purpose of the *Competition Act* and the other law
* The parties involved
* The interests sought to be protected by both laws, and
* The principles of statutory interpretation
* Requirements:

1. Other legislation under which the party has acted is validly enacted
2. The conduct falls within the scope of the legislation, and
3. The conduct is required or at least authorized under that legislation

* Bureau positions where jurisprudence unclear:
* Forbearance – Regulator had authority, but did not exercise it
* If regulator has forborne unconditionally, Act applies, and regulator will not have the benefit of RCD until it starts exercising its authority to rescind or vary its forbearance
* If forbearance is conditional (Will exercise regulation only in certain conditions), Act applies only to forborne activities
* Civil Matters:
* RCD applies to both regulators and regulates in civil matters, including mergers
* Self-Governing Professions:
* Different than marketing boards; Activities exposed to greater scrutiny, since they are regulating in their own interest
* Crown agents have immunity, Act does not apply

### Conflicts between Act and Provincial Regimes

* To resolve conflicts, courts have traditionally applied the federal paramountcy doctrine – Competition laws enacted pursuant to federal jurisdiction will override valid provincial laws in the event of an operational conflict
* For the doctrine to apply, there must be an “impossibility of dual compliance” or at least a “displacement or frustration of Parliament’s legislative purpose”
* RCD is an alternative approach for the Bureau to move into a provincial sphere with a federal legislation
* The Bureau is of the view that the RCD may immunize conduct from either the criminal or reviewable matters provisions of the Act
* The SCC in ***Garland*** seemed to hold that the RCD can immunize conduct from the criminal offences in the *Competition Act* only where the criminal provision expressly or by necessary implication grants “leeway” for persons acting under a provincial regulatory scheme
* Leeway language includes things such as “Undue”
* Not every criminal offence in the *Act* includes clear “leeway language” – Ex. *Per se* offences
* But, S. 45(7) states that the removal of “unduly” from s. 45 does not impact the availability of the RCD defence
* ***Garland*** was not decided in the context of the *Competition Act*
* Bureau has stated that ***Garland*** at least requires it to exercise caution in applying the RCD to *per se* criminal provisions of the *Act*

### Conflicts between Act and Other Federal Laws

* The Bureau will apply the *Competition Act* to conduct undertaken pursuant to other federal legislation “unless it is clear that Parliament intended the other federal law to prevail”
* The Bureau will look for clear language in the other federal law either displacing competition law enforcement, authorizing or requiring a particular conduct, or exhaustively stating the law in a particular area
* The Bureau will follow the principle that a specific law is intended to take precedence over a general law

### Bureau’s 2002 Bulletin

* Heavily criticized
* RCD is an interpretive tool developed by courts to resolve statutory conflicts (“interpretive” not “determinative” or “dispositive”)
* Bureau states that its job is to determine where the Act and the validly enacted regulatory regime conflict
* RCD applies to make Act inoperative “only where there is clear operational conflict…such that obedience to the regime means contravention”
* Operational conflict – Situation where obeying one law means disobeying the other
* Where there is no operational conflict, both legislative schemes will co-exist
* Very controversial – Cannot be true; When there is an actual conflict, you use the paramountcy doctrine; Removed in 2006 bulletin
* Bureau examines only the specific conduct complained of, not the entire industry or statute
* Analytical Approach:

1. Is there an operational conflict? If not, RCD does not apply
2. Is the body in question the regulator or regulatee?

* Division does not really work
* Distinction removed in the 2006 Bulletin, but treatment is a whole different question
* Bureau will likely go after regulatees more vigorously

1. If regulator, is the conduct either authorized or mandated? If not, RCD does not apply

* Regulators have been shown more deference by the courts because the conduct is part of their job, they are deemed to be acting in the public interest, and the Bureau recognizes it is harder to go after regulators

1. If regulatee, is conduct voluntary? If so, RCD does not apply

* If regulatees have any latitude, they will not get the benefit of the RCD; Specific conduct must be mandated
* But, this is not the law – ***Jabor v. Law Society*** holds that for authorization is sufficient for all parties (no distinction)

### Regulated Industries

* Natural Monopoly – A market structure where a single seller supplies the socially optimal quantity of output at the lowest cost because of

economies of scale

* Certain industries (especially network industries) are best run alone – When they run into each other they cannot make fixed costs
* Companies incur massive costs to enter (Ex. Infrastructure), and once in industry they are committed (Very costly to make change)
* But, marginal cost is low – Each additional user can be added for a very low cost
* Ex. Rail Industries – A company would never enter a market that another is already in just to grab market share
* Costs of entry/installation are far too high; Very easy to monopolize activity over the routes
* Natural Monopolies are largely immune from the *Competition Act*
* Conspiracy
* Cannot have a “conspiracy of one” – Act cannot apply
* Ex. Rail industry – Can only conspire on routes that are shared between two companies (rare)
* Abuse of Dominance
* Abuse test requires a practice of anti-competitive acts that display negative effects on competitors
* If competitors raise prices, this has no effect on their competitors – No matter what their conduct, no one will enter the industry, so their conduct is not excluding competitors from entering
* One of the indicia of abuse is preventing access to essential facilities, but must be directed towards competitors
* Conduct is clearly abusive to consumers, but does not need the test as it is defined
* Railways are the starkest cases – You may be able to have some natural monopolies fulfil the abuse test, but it is unlikely
* Bureau recognizes that they have no remedies against natural monopolies
* Dilemma – Government has gotten out of the regulation business
* They have unleashed natural monopolies on the public which are largely unrestrained
* They understand that natural monopolies are socially optimal, but regulation protects consumers and suppliers
* They have failed to introduce effective competition or provide regulatory control over access to essential facilities (and more)
* Principles of Deregulation
* Introduce effective competition and efficient market structure as soon as feasible
* Give regulator an explicit role to promote competition
* Provide regulatory control over excessive pricing due to incumbent market power
* Provide regulatory control over access to essential facilities (s. 78(e))
* Rely on competition law to prevent anti-competitive business practices unless regulation is demonstrably better
* Create mechanisms for removing regulation when its costs outweigh its benefits
* Allow for inter-agency cooperation and coordination
* Differential Pricing
* Two Kinds: 1) Illegal (Not governed by the Act); 2) Legal (Governed by the Act)
* Idea in a network is to try to recover all of the common costs of the network (costs on the portions of the railways that they have less monopoly over) by charging more on the portions they have a monopoly over
* Monopolist must charge more than marginal cost to cover their huge fixed costs
* Legal to charge different prices for the same type of good in different circumstances (Ex. Steak and Hamburger)
* Objectionable to charge different prices where all other circumstances are the same
* The minute a company can price differentially, they must have some market power
* Ramsey Pricing – Charge more to some than others but the more you can charge high prices to, the less they will have to pay
* Occurs in rail movements for two reasons:

1. Lack of Competition
2. Lack of Regulation

* Legislative Response to Rail Market Power
* Running Rights – Running provisions allow access to rail networks
* This is really the answer for these network industries
* Government must either re-regulate or let everyone have access to the networks (for compensation of course)
* Interswitching
* If you have a mill within 30km of the place where two rails interchange, you are guaranteed a regulated rate to get to the competitor (In BC this only really happens in Kamloops, and there are few mills there)
* Level of Service – If railway does not provide suitable accommodation for the traffic being moved, the shipper can complain
* Final Offer Arbitration – Railway and shipper have a third party arbitrator determine what the price will be