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A Canadian Perspective on Tied Selling and Exclusive Dealing

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I. Introduction  
Canadian competition law differs somewhat from the European and American frameworks in that its statutory regime expressly sets out the circumstances in which tied selling and exclusive dealing practices are deemed impermissible. Nevertheless, these provisions have fuelled vigorous discussion among practitioners, policymakers, economists and enforcement agencies about the appropriate applicable standards. There remains no consensus about their interpretation or application.

This contribution provides a general overview of Canadian provisions related to tied selling and exclusive dealing, and of relevant case law. It also explores some of the efficiency considerations for tied selling, an issue recently discussed in greater detail at a symposium hosted by the Competition Bureau. In addition, it examines the current state of the law in Canada regarding the test for determining the existence of impermissible exclusive dealing, a topic re-invigorated by the recent Federal Court of Appeal decision in Canada Pipe.¹

II. Canada’s Institutional Framework  

A. The Competition Act  
Canadian competition law is embodied in the Competition Act,² adopted in 1986.³ The Competition Act comprises both criminal and non-criminal (also termed “civil”) provisions.

² R.S.C. 1985, c. C-34.  
³ There is a surviving body of common law causes of action relevant in the competition law context, such as intentional interference with economic interest and restraint of trade. Exclusive dealing can occur in the contractual context where a contract contains a restrictive covenant of trade. Provincial courts have traditionally examined the reasonableness of such clauses in light of the temporal and geographical limitations as well as the scope of the clause. See Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., [1894] A.C. 535 (U.K.H.L.). Claims brought under the Competition Act and claims under the common law are not mutually exclusive. In B-Filer Inc. v. The Bank of Nova Scotia, 2005 Comp. Trib. 31, Madam Justice Simpson held that matters under Part VIII of the Competition Act fell within the exclusive jurisdiction of the Competition Tribunal. Consequently, a superior court of a province did not have the jurisdiction to entertain any application brought on the basis of breaches of the Competition Act. Likewise, the Tribunal could not review any application based on the grounds of breach of contract or common law causes of action. However, a decision by a superior court of a province did not foreclose any proceedings before the Tribunal, and vice versa.
Damages can only be awarded for violations of the criminal provisions.\textsuperscript{4} Where conduct contravenes the civil provisions, the principal remedy is injunctive relief.

Competition-related laws have a long history in Canada, dating as far back as 1889. The purely criminal law approach set out in the 1910 \textit{Combines Investigation Act}\textsuperscript{5} did not work well, as the enforcement authorities could not prevail even in the most serious cases. This led to calls for reform of the system.

The approach that prevailed in Canada prior to 1976 can be called the “bifurcated judicial model”. It involved the Director of Investigation and Research\textsuperscript{6} undertaking investigative functions and, where appropriate, recommending formal enforcement action to the federal Attorney General under the criminal provisions of the Combines Investigation Act. Reviewable practices were subject to civil review initiated by the Director of Investigation and Research and heard before a specialized adjudicative body called the Restrictive Trade Practices Commission.

Canada’s Competition Act in its present form was largely created in 1986. These 1986 amendments made a major break from the previous competition-related legislation, which focused on combines primarily through a criminal sanctions approach. The 1986 legislation, while retaining the existing criminal offences, substantially overhauled the merger and monopolization provisions by designating them as civilly reviewable matters and by making effective enforcement possible through a more flexible process before the Competition Tribunal. The Supreme Court of Canada approved of this new approach, concluding that the federal Parliament could enact civil competition laws under its constitutional power to regulate trade and commerce.\textsuperscript{7}

The 1986 amendments also introduced an explicit purpose clause which, as indicated by the Federal Court of Appeal in \textit{Canada Pipe},\textsuperscript{8} should guide the interpretation of individual statutory provisions, including those relating to tied selling and exclusive dealing:

“1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.”\textsuperscript{9}

\textsuperscript{4} Section 36 of the Competition Act allows a private party who has suffered loss as a result of conduct that contravenes a criminal competition offence (or as a result of contempt of an order issued by the Tribunal or by another court under the Competition Act) to recover damages.
\textsuperscript{5} S.C. 1910, c. 9.
\textsuperscript{6} A position since renamed “Commissioner of Competition”.
\textsuperscript{7} \textit{General Motors of Canada Ltd. v. City National Leasing Ltd.}, [1989] 1 S.C.R. 641.
\textsuperscript{8} \textit{Canada Pipe}, supra note 1, at para. 48.
\textsuperscript{9} Competition Act, supra note 2.

The provisions governing tied selling and exclusive dealing, both of which are civilly reviewable matters, were enacted in 1976 and are contained in Part VIII of the Competition Act, entitled “Matters Reviewable by the Tribunal”, under the sub-heading “Restrictive Trade Practices”. This Part also contains provisions on the abuse of dominance, refusal to deal, consignment selling, and delivered pricing laws, as well as the substantive merger review provisions under the Competition Act.

Tied selling and exclusive dealing (along with a provision governing certain market restrictions) are specifically dealt with under section 77 of the Act. Historically, the courts and commentators viewed such vertical contractual constraints in conjunction with other exclusionary conduct connected with monopolistic behaviour. However, more recent views suggest that these practices – in the absence of market dominance – may actually enhance efficiency and, as a consequence, competition authorities should consider adopting a restrained approach towards their enforcement.\(^\text{10}\)

This policy debate shapes the interpretation of section 77, and helps explain why tied selling and exclusive dealing were included as civil reviewable matters rather than as criminal offences.\(^\text{11}\) As discussed below, they stand independently in the Canadian legislation, and without an explicit requirement to show market dominance. It need only be shown that the conduct is engaged in by a major supplier and that it is having an effect of a substantial lessening of competition. In theory, this would appear to give the provisions greater potential reach, but in practice the Canadian Competition Bureau does not pursue cases under these provisions very often. The focus has primarily been on abuse of dominance; tied selling and exclusive dealing are usually pursued in parallel with such dominance allegations (as discussed in Section V. below).

B. The Competition Tribunal

Decisions regarding conduct that allegedly violates the Competition Act are made by the Competition Tribunal, a statutorily created specialized court. The Competition Tribunal’s exclusive jurisdiction covers civil provisions including Part VIII of the Competition Act, which includes tied selling and exclusive dealing as well as mergers, abuse of dominance and other vertical matters.\(^\text{12}\)

The Competition Tribunal was established in 1986 and replaced the Restrictive Trade Practices Commission. Parliament’s intention was that the Tribunal would act as a specialized adjudicative body uniquely suited to deal with non-criminal competition


\(\text{12}\) Applications under Part VII.I are also subject to the exclusive jurisdiction of the Tribunal, as are references brought under s. 124.2(2) of the Competition Act.
Members of the Tribunal are comprised of both judges from the Federal Court and lay people. Judicial members preside over hearings, with panels composed of three to five members with at least one lay member. All appeals from the Tribunal are to the Federal Court of Appeal.

The Competition Tribunal did not inherit its predecessor’s extensive investigative powers, which included the ability to authorize searches. The Competition Tribunal exercises those powers required for “the attendance, swearing and examination of witnesses, production and inspection of documents” like a superior court of record. It may also make findings of fact, issue remedial orders and approve the terms of negotiated consent agreements.

C. Private Action Rights for Tied Selling and Exclusive Dealing

In 2002, the Competition Act was amended to allow for a private right of action for claims of tied selling and exclusive dealing through the enactment of section 103.1. Accordingly, at present a claim for tied selling may be brought before the Tribunal either by the Commissioner or by an aggrieved private party.

This represents a significant step for Canadian competition law. Prior to these amendments, private rights of action, as embodied in section 36 of the Competition Act, were available only for conduct contrary to the Act's criminal provisions, for example horizontal agreements between competitors. For conduct that contravenes other provisions of the Act, the only recourse left available to an aggrieved party was to press the Commissioner to undertake action or to rally with five other complainants and file an application to commence an inquiry with the Commissioner.

The introduction of a Canadian private right of action has not unleashed a floodgate of claims. This may be in part because section 103.1 carefully circumscribes the ability of a private party to commence an action for tied selling or exclusive dealing.

A private party cannot pursue an application to the Tribunal concurrently with the Commissioner for the same matter under the tied selling or exclusive dealing provisions.

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13 Criminal offences under the Competition Act are prosecuted before superior courts. The Attorney General of Canada retains the exclusive jurisdiction to prosecute. The Commissioner’s enforcement mandate is limited to referring such a matter to the Attorney General.

14 Competition Tribunal Act, R.S.C. 1985, c. 19 at s. 13.

15 Combines Investigation Act, R.S.C. 1970, c. C-23 at s. 10(3). This provision was later deemed to be constitutionally invalid by the Supreme Court of Canada in Hunter v. Southam, [1984] 2 S.C.R. 145.

16 Competition Tribunal Act, supra note 14 at s. 8(2). Production orders and search warrants sought by the Commissioner must also be obtained from a judge of a superior or county court. See Competition Act, supra note 2 at s. 11(1).

17 Competition Act, supra note 2 at s. 105.

18 A private right of action was also made available for claims of refusal to deal under section 75 of the Competition Act but not for the more general abuse of dominance provision.

19 Competition Act, supra note 2 at s. 9(1).

20 However, in this case, a private litigant may seek leave from the Competition Tribunal to intervene. The decision to grant leave falls within the Tribunal’s discretion. However, where leave is granted, the private
addition, the Commissioner may not bring an application for an order under the tied selling, exclusive dealing or abuse of dominance provisions based on substantially similar facts.

Moreover, leave to make an application must first be obtained. The Tribunal has the discretion to grant leave where “it has reason to believe that the applicant is directly and substantially affected in the applicant’s business by any practice referred to in one of those sections that could be subject to an order under that section”. The applicant seeking leave needs to provide sufficient credible evidence of what is alleged to give rise to a bona fide belief by the Tribunal. This is a lower standard of proof than proof on a balance of probabilities, which is the standard applicable to the later decision on the merits.

Initiating a private action allows the private party to have greater control over the process. However, as of this writing – five years after the private rights of action were established – there have been very few cases brought in Canada under the tied selling and exclusive dealing provisions.

Part of the reason for the dearth of case law may be a result of the inherent challenges of marshalling evidence in advance demonstrating that the impugned behaviour had anticompetitive effects within the meaning of these provisions. Jochen Burrichter notes that this is a challenge faced by competition authorities in Europe as well. This challenge is magnified for private litigants who, unlike to the competition authorities, do not benefit from the exercise of investigative powers. Additionally, a private litigant may not have access to the material gathered by the Commissioner pursuant to the exercise of her formal powers. Furthermore, an unsuccessful private litigant may be subject to paying substantial costs, without the possibility of seeking damages. The only remedy available to a private claimant is injunctive relief.

litigant must satisfy the four elements of the test set out in Canada (Commissioner of Competition) v. United Grain Growers Ltd, 2002 Comp. Trib. 35 at para. 17. Accordingly: (1) the matter alleged to affect that person seeking leave to intervene must be legitimately within the scope of the Tribunal’s consideration or must be a matter sufficiently relevant to the Tribunal’s mandate; (2) the person seeking leave to intervene must be directly affected; (3) all representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the Commissioner; and (4) the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it.

21 Ibid. at s. 103.1(7) [emphasis added].
23 Competition Act, supra note 2 at s. 103.1(11).
24 Ibid. at s. 77(7).
26 Notably, pursuant to sections 11, 15 and 16 of the Competition Act, information obtained as a result of the exercise of the Commissioner’s formal powers may be privileged, in which case it could not be disclosed to a private litigant.
27 Competition Tribunal Act, supra note 14 at s. 8.1(1).
28 Competition Act, supra note 2 at s. 77(3.1).
As a result, there is little jurisprudence to date that would provide more clarity and certainty regarding these practices. This is somewhat unfortunate since a private party may be in the best position to detect a reviewable practice, particularly if their stake in the matter is substantial.

More recently, the Organization for Economic Cooperation and Development has recommended that Canada ought to further expand the right of private parties to pursue competition law enforcement. This was after the OECD examined the 2002 amendments to the Act that expanded the right of private access and found them to be a step in the right direction, but inadequate. The OECD report noted that “permitting private parties to obtain conduct orders and damages for violations of the Act’s civil provisions (other than those relating to mergers) would be the most effective means of supplementing governmental enforcement and deterring anti-competitive conduct”.

The Competition Bureau’s need to allocate its limited resources to other enforcement priorities is likely another reason for the lack of case law on this subject. In addition, unlike the abuse of dominance provisions, there are no agency guidelines in Canada with respect to the tied selling and exclusive dealing provisions. While the 2002 amendments to the Act expanding the right of private access to situations involving a violation of section 77 are useful, more can be done in Canada to provide clarity and guidance.

III. Elements of the Tied Selling and Exclusive Dealing Provisions

Under the Competition Act, tied selling and exclusive dealing are defined as distinct reviewable practices. Section 77 sets out in detail the requisite elements of tied selling and exclusive dealing. In contrast, the American definitions of tied selling and exclusive dealing arise from judicial development under the Sherman Act and the Clayton Act. Notwithstanding this distinguishing feature, the concepts used to analyze the law of tied selling and exclusive dealing have evolved to become fairly similar, and indeed the Competition Tribunal has relied upon American case law in certain circumstances.

Given their similar legislative evolution, the tied selling and exclusive dealing practices share common elements. Treatment by the Competition Tribunal of one provision largely has been interpreted as applicable to the other.

We examine below the respective definitions of tied selling and exclusive dealing and their common elements.

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A. Definition of Tied Selling

Under section 77(1), "tied selling" is defined as:

“(a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to

(i) acquire any other product from the supplier or the supplier’s nominee, or

(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.”

To substantiate a claim of tied selling, it is necessary to establish: (1) the existence of “two separate products”; (2) the existence of a practice of tying; (3) that the tying is engaged by a major supplier or that it is widespread in the market; and (4) anticompetitive effects leading to a substantial lessening of competition. The first two elements, which are specific to tied selling, are discussed below.

1. Separate Products

By definition, tied selling requires two distinct products, one tied to the other. Though superficially simple, the question of whether there are two separate products occupied a majority of the Tribunal’s tied selling analysis in the Tele-Direct case. In this case, the Director of the Competition Bureau alleged that the respondents, Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc., engaged in tied selling by, as a condition of supplying advertising space in telephone directories, inducing customers to acquire another product

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31 Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc. (1997), 73 C.P.R. (3d) 1 (Comp. Trib.), at 118-165.
32 Ibid. The Tele-Direct case concerned an application brought by the Director under both the abuse of dominance and tied selling provisions, seeking an order from the Competition Tribunal against Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc., affiliated companies. The Director alleged that respondents illegally bundled advertising space (i.e. the printing, publishing, and distribution of a directory) with their advertising services (i.e. the provision of advice and support with respect to design, placement, and content of ads) in Yellow Pages directories. The Tribunal undertook the two-stage inquiry described above to determine whether services and advertising space formed distinct products over any segment of the market. In particular, the Tribunal considered evidence from advertiser witnesses, economic and practical efficiencies arguments, and profitability studies that were accepted as having a weak connection to cost studies. In the end, the Tribunal found that there were in fact two different products over a segment of the market that included more than just the commissionable accounts. The other conditions having been met, the Tribunal made a finding of impermissible tied selling which substantially lessened competition in the advertising services market.

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from the respondents, namely advertising/marketing services. The Tribunal adopted the test set out by the US Supreme Court in *Jefferson Parish Hospital District No. 2 v. Hyde* to determine whether there were two separate products. According to the Supreme Court, “no tying arrangement can exist unless there is a sufficient demand for the purchase of [the tied product] separate from [the tying product] to identify a distinct product market in which it is efficient to offer [the tied product] separate from [the tying product].”

This two-stage inquiry asks: (i) whether there is sufficient demand from buyers to acquire the allegedly tied products separately from each other; and if so, (ii) whether separating the products would result in their efficient supply. In adopting this two-pronged approach based on demand and efficiency, the Tribunal rejected the use of other tests which could protect unjustifiable tied selling. For instance, the functional dependency test, which would regard as a single product (or allow the tying of) any two goods which were heavy complements or useless without each other, has been explicitly rejected.

Whether there is separate demand for products is determined by evidence from actual purchasers about their preferences, along with explanations as to why they hold those preferences. The actual behaviour of purchasers (for example whether they actually do purchase the products separately where possible) is also relevant.

2. **Tying Condition**

The definition of tied selling also requires the existence of a tying condition. The tying condition need not entirely preclude the possibility of acquiring the tied product elsewhere. It is sufficient that it establishes a form of coercion. In addition, there is no need for the condition to be embodied in an express clause inducing or requiring a tied sale. The coercion may arise as a result of a combination of benefits and/or economic penalties which have the effect of limiting the effective choice of supplier. Absent the “enforcement” element, there is no tying case.

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34 *Tele-Direct*, supra note 31, at 120-121. However, a certain lesser degree of complementarity between the products will not preclude a finding of two separate products.
36 *Ibid.* at 139.
37 *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) [*NutraSweet*] at 54; *Tele-Direct*, supra note 31 at 122-124 and 172-173. In *Tele-Direct*, the respondents pointed to the absence of an express contractual condition which bound clients to purchase advertising space and services as one inseparable product. Clients were not prohibited from purchasing their advertising services from a supplier other than *Tele-Direct*. Rather than endorsing a literal definition, the Tribunal preferred to take a purposive approach. It found that a condition within the meaning of section 77 may arise absent an express provision where there is any type of inducement, particularly economic, to force a customer to acquire two otherwise distinct products from the same supplier. Customers were effectively coerced into buying both advertising space and services as a package from *Tele-Direct* rather than acquiring only advertising space and obtaining advertising services from another supplier. Accordingly, the Tribunal made a finding that the definition of “tied selling” had been satisfied. The Tribunal’s discussion in relation to the nature of the required condition for a tied selling would equally apply to the other reviewable conduct enunciated at section 77, such as the exclusive dealing arrangements.

B. Definition of Exclusive Dealing

According to the legislative history, the exclusive dealing provision was introduced in 1976 to address situations where the practice of exclusive dealing “deprives the market of products which are in demand and which would produce needed price competition in the market”.

Under section 77(1), "exclusive dealing" means:

“(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier’s nominee, or

(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.”

Anticompetitive exclusive dealing is not limited to absolute exclusions. This provision also addresses situations where a supplier permits a customer to deal only in one or two insignificant articles obtained from sources other than the supplier, or where a supplier provides something less than 100 per cent of the customer’s requirements. Accordingly, permitting a customer to deal in some other products which do not constitute a significant threat to a supplier’s competitive position will not in itself immunize the supplier from the exclusive dealing provision.

In order to sustain a claim of impermissible exclusive dealing, it is necessary to demonstrate some element of coercion which obliges customers to deal only or primarily in the products of the supplier. The coercive element can be satisfied not only where (actual or implied) threats have been made, but also where there is any type of inducement or advantage.

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38 Standing House of Commons Committee on Finance, Trade and Economic Affairs, Minutes of Proceedings and Evidence, (3 December 1974), at 50.
39 Ibid. at 50.
41 Goldman and Bodrug, supra note 11, at §5.06[2].
42 Competition Act, supra note 2 at ss. 77(1)(a) and (b).
C. Other Elements of the Tied Selling and Exclusive Dealing Provisions

Before the Tribunal can issue a remedial order in the case of either tied selling or exclusive dealing, the following additional elements must be satisfied: (i) the practice must be engaged in by a major supplier or must be widespread in a market; and (ii) there must be an exclusionary effect as a result of which competition is likely to be lessened substantially. These elements are discussed below.

1. “Major Supplier or Widespread in the Market”

The statute does not define what threshold is required for a supplier to be considered “major” or for when a practice is deemed to be “widespread”. However, indicators of whether a supplier is a major one include its market share, its financial strength and its record as an innovator.43 Absent any evidence of countervailing power, a major supplier will also be equated with a participant that possesses market power in the market for the tying product.44 However, even where a participant does not possess market power it may nonetheless be considered a “major supplier” within the meaning of section 77 if its actions either result in a substantial lessening of competition or have an appreciable or significant impact on the market where it sells.45 The Competition Tribunal has established that a practice will be found to be widespread when virtually all customers are affected by the impugned practice.46

This “major supplier” requirement is a key distinguishing element setting the exclusive dealing and tied selling legislative provisions apart from the abuse of dominance provision. The latter requires a demonstration that the party “substantially or completely control, (…) a class or species of business”,47 which has been equated with market power.48 Market power is defined as the “ability to set prices above competitive levels for a considerable period”.49 While market share will be an important factor in assessing whether a party has market power, other factors, such as barriers to entry, will also be taken into account.

2. Exclusionary Effects

This element requires the demonstration that the practice at issue (has or) is likely to: (a) impede entry into or expansion of a firm in a market; (b) impede introduction of a product

43 Director of Investigation and Research v. Bombardier Ltd. (1980), 53 C.P.R. (2d) 47.
44 Tele-Direct, supra note 31 at 34.
45 Bombardier, supra note 43 at 55; NutraSweet, supra note 37 at 55.
46 NutraSweet, supra note 37 at 55.
47 Competition Act, supra note 2 at s. 79(1)(a).
48 Tele-Direct, supra note 31 at 107.

into or expansion of sales of a product in a market; or (c) have any other exclusionary effect in a market, as a result of which competition is, or is likely to be, lessened substantially.\textsuperscript{50}

Whether the tied selling or exclusive dealing practice is likely to impede entry or expansion \textit{and} result in a substantial lessening of competition is considered simultaneously. The Competition Tribunal has held that:

“Whether exclusive dealing \textit{[or tied selling]} by a supplier impedes expansion or entry of competitors in the market is most easily and meaningfully considered as part of the determination of whether there is or is likely to be substantial lessening of competition as a result of that practice.”\textsuperscript{51}

The statutory test to determine the existence of a substantial lessening of competition is similar to the test contained in the abuse of dominance provisions of the Act; hence, the examination will involve principally the same considerations.\textsuperscript{52} According to the Tribunal, the question will be whether the practice enhances or preserves the supplier’s market power, and the degree to which such conduct creates barriers to entry or expansion in the market. The element of exclusionary effect is met if a practice of exclusive dealing or tied selling adds to or preserves market power, the element of exclusionary effect is met.\textsuperscript{53}

Fundamental to this assessment, as the Tribunal has indicated, is the degree to which the anticompetitive acts have created entry or expansion barriers. For example, it would be relevant if a new entrant with a smaller market share has been precluded from increasing its market share as a result of the allegedly anticompetitive acts.\textsuperscript{54}

For tied selling, the anticompetitive effects are to be measured in terms of the market for the tied product, not the tying product. The Tribunal has found that, since tying involves leveraging from the tying product market to the tied product market, it is only sensible to assess the effects of the practice, that is, the substantial lessening of competition, in the target or tied product market.\textsuperscript{55}

In \textit{Tele-Direct}, the Tribunal used as a comparator the value of business in the market of the tied product which, "but for" the tying practice, would be available to competitors.\textsuperscript{56} In that case, since the “total of the [business] found to be tied add[ed] up to well in excess of 50

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{50} Competition Act, supra note 2 at s. 77(2).
\item \textsuperscript{51} NutraSweet, supra note 37 at 56. But see the decision by the Federal Court of Appeal in \textit{Canada Pipe} (see section V below).
\item \textsuperscript{52} \textit{Ibid}.
\item \textsuperscript{53} \textit{Ibid}. at 47.
\item \textsuperscript{54} \textit{Director of Investigation & Research v. BBM Bureau of Measurement} (1980), 60 C.P.R. (2d) 26; NutraSweet, supra note 37, at 47-48.
\item \textsuperscript{55} \textit{Tele-Direct, supra} note 31 at 175. We note, however, that economists have postulated alternative theories of anticompetitive harm based on tied selling. See, example e.g., Michael D. Whinston, “Tying, Foreclosure and Exclusion”, 80 American Economic Review 837, 855-56 (1990).
\item \textsuperscript{56} This test was affirmed in the abuse of dominance context in \textit{Canada Pipe}, supra note 1 at para. 26, leave to appeal to Supreme Court of Canada refused 31637 (11 May 2007). The Federal Court of Appeal stated that “[e]ach statutory element must give rise to a distinct legal test, for otherwise the interpretation risks rendering a portion of the statute meaningless or redundant”.
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percent of the current … market”, the “amount of revenue affected by the tie [was] undoubtedly sufficient to conclude that there is a substantial lessening of competition”. The Tribunal also found a direct correlation between the degree of market power and the effect of an anticompetitive act on the market. In other words, the greater the market power, the more likely the impugned anticompetitive action is likely to have a significant anticompetitive effect and thus the more likely it is to be scrutinized by the Tribunal.

“Where a firm with a high degree of market power is found to have engaged in anticompetitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being “substantial” than where the market situation was less uncompetitive to begin with. In these circumstances, particularly Tele-Direct’s overwhelming market power, even a small impact on the volume of consultants’ business, of which there is some evidence, by the anti-competitive acts must be considered substantial.”

D. Remedies and Exceptions

1. Remedies

The typical remedy for an anticompetitive practice of tied selling or exclusive dealing is an order by the Tribunal directing the supplier to unbundle the tied products or prohibiting the supplier(s) from continuing to engage in the exclusive dealing. However, the Competition Tribunal is neither limited nor bound by the remedies outlined in the Commissioner’s application and has the discretion to fashion any remedy that it deems appropriate to “overcome the effects [of the practice] in the market or to restore or stimulate competition in the market”.  

In specific circumstances, interim injunctive relief is also available. On ex parte application of the Commissioner, the Tribunal may make an interim order where: (1) injury to competition that cannot adequately be remedied by the Tribunal is likely to occur; (2) a person is likely to be eliminated as a competitor; or (3) a person is likely to suffer a significant loss of market share, revenue or other harm that cannot adequately be remedied by the Tribunal. Interim orders are initially effective for ten days. They are subject to both extension and revocation.

2. Exceptions

The statute outlines specific circumstances where tied selling and exclusive dealing are permissible, even though the requisite elements of the anticompetitive acts as described

57 Tele-Direct, supra note 31, at 174.
58 Ibid. at 126.
59 Competition Act, supra note 2 at s. 77(3); NutraSweet, supra note 37 at 58.
60 Competition Act, supra note 2 at s. 103.3(1).
61 Ibid. at s. 103.3(2).
62 Ibid. at s. 103.3(4).
63 Ibid. at ss. 103.3(5.1) and (5.3).
above may have been met. To begin with, the language of the provision specifies that these acts are illegal only where the supplier requires an exclusivity relationship or imposes tied products. It would appear that where the exclusivity or bundling request originates from the customer, the request would not run afoul of the Competition Act.

a. **Temporary Exclusive Dealing**

A party may legally engage in temporary exclusive dealing arrangements for the purpose of facilitating the entry or introduction into a market of a new supplier or product where the following conditions are met: (1) the exclusive dealing is engaged in for only a limited period of time; (2) the period of time is a reasonable one; and (3) the behaviour is engaged to facilitate the entry of a new supplier or new product in the market.

The Competition Tribunal has not yet had the occasion to consider the meaning of “reasonable period of time” under this section. It appears likely, however, that the relevant time is in each case a question of fact to be considered in relation to the time needed to enter the market, taking into account prevailing industry conditions. It is presumed that a firm which has become a “major supplier” has likely exceeded that time period.

b. **Technological and IP Rights**

Tied selling arrangements that are “reasonable having regard to the technological relationship between or among the products to which it applies” are not prohibited. While the “technological” exemption for tied selling arrangements has been subject to judicial interpretation, the term “reasonable” has not been clarified. In BBM, the respondent, BBM, tried to argue that there was a reasonable technological relationship between radio and television audiences because the preparation and provision of data had common “administration costs” and “process costs”. The Restrictive Trade Practices Commission held that the technological defence could only arise where there is a reasonable requirement to sell the two products together for technological reasons. This might be the case where there might be injury or damage resulting from not using the tying product in conjunction with the tied product. Any technological benefits from producing the products together were irrelevant.

**IV. Efficiency Considerations with respect to Tied Selling**

There is no efficiency exception or defence for tied selling expressly set out in section 77 or anywhere else in the Competition Act. However, from a purely business (and economic) perspective, efficiency may be a valid justification for tying two possibly distinct products.

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64 *Ibid.* at s. 77(4). There are two other exceptions that should be noted. Pursuant to s. 77(4)(c), tied selling is permissible in certain circumstances for the purposes of securing a loan. Tied selling and exclusive dealing arrangements are permissible among affiliates where the parties are affiliated within the definition provided for by s. 77(5).

65 On these points, see Goldman and Bodrug, *supra* note 11 at § 5.06[3]; Michael Trebilcock *et al.*, *The Law and Economics of Canadian Competition Policy*, University of Toronto Press, 2002, at 449-50.

66 *Competition Act, supra* note 2, at s. 77(4)(b).

67 *BBM, supra* note 54, at 33-34.
As a result, efficiency could be a factor considered at the stage of determining whether there is in fact a single tied product or two unrelated and distinct products.

As tying is in fact prevalent in competitive markets, it is a fair assumption that it provides efficiencies in many circumstances. Some of these efficiencies include the elimination of some transaction costs, reduction in searching and sorting, and “variable proportion” where, for instance, it eliminates inefficient input substitution when one product is characterized by market power.

There are various other legitimate reasons why firms engage in tying. For example, the aim might be to reduce production, distribution or marketing costs, or to facilitate the entry and market penetration of a new product.

After several decades of economic investigation into the competitive effects of tying, there is still a debate as to whether there should be any presumption on the part of competition authorities that tying is anticompetitive.68 As discussed at a symposium held by the Competition Bureau in March of 2007, the Chicago School’s theory on tying postulates that tying has nothing to do with trying to achieve a monopoly in the tied product because the monopolist’s profits remain the same for complementary products whether or not products are tied - monopoly profits can only be extracted once. However, this position does have its critics. For example, one theory argues that a firm enjoying monopoly power in the tying product might have an anticompetitive incentive to tie when the market for the tied good is imperfectly competitive if tying keeps potential rivals out of the market for the tied product or, alternatively, helps the monopolist to preserve its market power in the tying product. This “foreclosure” theory suggests that, through tied selling, a monopolist deprives its competitors in the market for the tied product of adequate scale, thereby lowering their profits below the level that would justify remaining active in (or, alternatively, entering) that market.69

Another possible issue is that, in certain circumstances, a commitment to tying through a physical tie involving incompatible products may be a means to leverage monopoly power. This may be the case when products that are not exclusively complementary are tied, or where some use of the tied product is discrete from use of the tying product. It could prevent other producers of the tied good from entering the market or, if they already participate in the market it could force them to exit. Although this situation could possibly reduce the monopolist’s short-term profits in the tying product, any such losses would be offset by increased profits in the tied product as prices rise due to of lack of competition in the market for the tied product.

A further example, at least in theory, that is cited by critics involves analyzing tying in a two-stage market. This is the situation where the monopoly component is essential only for a period of time, but not thereafter. By physically tying its products from the outset, the

monopolist commits to depriving its rival of sales in the earlier period, which may force the rival out of the market for the longer term. This, in turn, would reduce the monopolist’s profits in the initial period, but it may increase its profits in the second period by more than it lost in the first period.

In any event, although certain economic theories have provided examples of situations where tying may be anticompetitive, they do not disturb the evolving consensus that tying is a constant feature of economic life in dynamic, competitive markets and that the primary motivations for this form of strategic behaviour are usually the realization of substantial efficiencies and increased consumer welfare.

In line with this economic discussion, the Competition Bureau is currently grappling with the question of under what circumstances tied selling in the intellectual property context should be prohibited by the Competition Act, particularly where a patented product is tied to an unpatented product. There is, of course, no easy or clear-cut answer. Efficiency considerations appear to have played a large role in the views expressed at the Competition Bureau's recent symposium. In this regard, we note that while there is no efficiency exception to tied selling pursuant to section 77, the abuse of dominance provision does have an explicit exception for the exercise of IP rights as well as practices resulting from “superior competitive performance”, and the overarching purpose clause in the Competition Act does make reference to efficiency-based considerations.

V. The Current Test in Canada for Exclusive Dealing

The two leading cases in Canada concerning the exclusive dealing provisions of the Competition Act are NutraSweet and Canada Pipe. One telling feature of these cases, and of the exclusive dealing provision generally, is that claims for exclusive dealing are discussed in both cases alongside claims for abuse of dominance outlined in section 79. There has yet to be a litigated case in Canada where the exclusive dealing provision has been considered on its own, although there is now a private right of action for exclusive dealing (as discussed above), and this right does not extend to abuse of dominance.

As a result of this parallel treatment the Competition Tribunal has, to a certain degree, conflated the exclusive dealing practice with abuse of dominance. For example, the Tribunal has confirmed that the types of anticompetitive behaviour listed in section 78 are not exhaustive, and they arguably would encompass arrangements such as exclusive dealing.

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70 Competition Act, supra note 2 at s. 79(4).
71 Ibid. at s. 1.1.
72 NutraSweet, supra note 37.
73 Canada Pipe, supra note 1; Commissioner of Competition v. Canada Pipe, 2005 Comp. Trib. 3.
74 Trebilcock, supra note 65, at 448. Damien Neven suggested, in his oral remarks at this Workshop, that the methods developed in merger control to assess a transaction’s anticompetitive effects are transferable to the determination of whether behaviour is truly exclusionary in the antitrust context. Neven, “A reformed approach to exclusionary conduct”, presented at the 12th Annual Competition Law and Policy Workshop, Robert Schuman Centre, EUI, Florence, 8 June 2007.
75 Ibid. at 505.
This approach thus recalls that of the European Court of Justice, which long ago held that Article 82 EC “merely gives examples, not an exhaustive enumeration of the sort of abuses of a dominant position prohibited by the Treaty.”

In fact, in economic terms, the exclusive dealing provision closely resembles sections 78 and 79 of the Competition Act, which deal with abuse of dominance. For instance, section 78 lists (for the purposes of the abuse of dominance provision), as an example of an “anti-competitive act”, the "acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier ... for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market” and “requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in a market”. This notion of locking up customers or suppliers, and preventing access by competitors, has been the hallmark feature of the exclusive dealing cases brought before the Competition Tribunal.

However, as noted below, the Tribunal in Canada Pipe treated the same practice differently under the abuse of dominance and exclusive dealing provisions, finding that the practice in question did not constitute an “anti-competitive act” under the abuse provisions but that it did meet the definitional requirement of exclusive dealing under section 77.

A. Canada (Director of Investigation and Research) v. NutraSweet Co.

In NutraSweet, the NutraSweet Company (“NSC”) produced and sold aspartame worldwide to various customers who manufactured foods and beverages using aspartame. In Canada, NSC supplied aspartame for over 90% of the market’s needs. As the expiry date of its patent in Canada approached, NSC had systematically begun to insert exclusivity clauses into all of its supply contracts. In addition to these exclusivity clauses, NSC’s customers were further incentivized to use NSC as a result of substantial financial inducements, including logo allowances and cooperative marketing allowances. These “fidelity” rebates encouraged the promotion of logo in products made exclusively with aspartame. If a product was made with a blend of different sweetener, the logo could not be used and the customer was not entitled to these rebates.

The Director brought an application under sections 77 and 79, claiming these practices were contrary to the exclusive dealing and abuse of dominance provisions. The Director had attempted to infer from the inclusion of the exclusivity clauses that customers were effectively hostages to NSC because a refusal to accept this term or to comply with it could have resulted in a refusal to supply.

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77 NutraSweet, supra note 37; Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd. (1992), 40 C.P.R. (3d) 289 (Comp. Trib.); Canada Pipe (Comp. Trib.), supra note 74.

The Competition Tribunal stated that the mere existence of an exclusivity clause was not in itself conclusive of the existence of a condition of exclusivity. Whether customers are really subjected to the influence of a supplier had to be determined from the context surrounding the inclusion of that clause. However, the Tribunal held that the fidelity rebates in the supply contracts constituted clear financial inducements to customers both to deal only in the respondent's brand of aspartame and to refrain from using another producer's aspartame. Thus, as a result of the combination of financial inducements and exclusivity clauses, the definitional requirement of "exclusive dealing" was met:

"Therefore we conclude that the financial incentives and the exclusivity clause amount to exclusive dealing within the meaning of para. 77(1)(b): the customers clearly agreed to deal only or primarily in the products of NSC and in return received various rebates whose existence depends on exclusive use of NutraSweet brand aspartame."\(^78\)

With respect to the key question of whether there had been a substantial lessening of competition, the Tribunal referred to its reasoning regarding the same issue as discussed under the abuse of dominance claim. In that discussion, the Tribunal phrased the test as follows:

"In essence, the question to be decided is whether the anticompetitive acts engaged in by NSC preserve or add to NSC's market power. The issue with respect to the contract terms associated with exclusivity ... is the degree to which these anticompetitive acts add to the entry barriers into the Canadian market and, additionally therefore, into the industry."\(^79\)

Based on the evidence, which included the fact that the exclusive use clauses appeared in virtually all of NSC's contracts and thus covered 90 percent of the Canadian market, the Tribunal was convinced that "the exclusivity in NSC's contracts, which includes both the clauses reflecting an agreement to deal only or primarily in NutraSweet brand aspartame and the financial inducements to do so, impedes 'toe-hold' entry into the market and inhibits the expansion of other firms in the market".\(^80\) Accordingly, the requisite exclusionary effect element was satisfied.

The Tribunal was not persuaded by NSC's assertion that the supply contracts were renewable on a yearly basis. Nor did it agree that exclusivity promoted efficient supply distribution and lower inventory costs when managed by a single firm, although the Tribunal did leave the door open where an industry has such special characteristics that may justify this claimed source of cost-savings. Notably, the Tribunal decided not to label this argument as one based on "efficiencies":

\(^78\) NutraSweet, supra note 37 at 54.
\(^79\) Ibid. at 47 (emphasis supplied).
\(^80\) Ibid. at 48.

“This line of reasoning, it should be noted, is not an ‘efficiency defence’. It leads, rather, to the conclusion that customers are, on balance, better off as a result of exclusivity and that they pass these cost savings on to consumers. Under exclusivity customers are able to negotiate a band of minimum and maximum purchases. Without it, the customers would presumably have to commit to a specific volume and would have to hold inventories to satisfy higher-than-anticipated demand, or would have to make higher-than-required purchases in the event that requirements were less than anticipated. An executive of a major customer stated that the broad band negotiated by the customer in its exclusive contract does not mean that this is an important consideration; the customer is, in any event, quite capable of accurately forecasting demand for its product. Whatever the customer's abilities, the Tribunal does not see much merit in the respondent's line of reasoning. It can always be claimed that the risk and cost of holding plant and inventory are reduced if there is a single supplier rather than several. Unless it can be shown that an industry has special characteristics that make this claimed source of cost savings important, there is no reason to give it any weight.”

Perhaps the Tribunal felt that it could not label this argument as an “efficiency” defence because of the absence of any explicit reference to an efficiency justification under section 77. However, it is clear that the Tribunal felt the need to explain its economic rationale on this particular point. This may suggest that the Tribunal was in fact mindful of the possible efficiency-based justifications of exclusive dealing, even if such considerations are not explicitly set out in section 77.

The Tribunal also dismissed arguments that exclusivity was necessary to protect against free riding, albeit in a rather abbreviated fashion, simply noting that “NSC is [not] entitled to any more protection against competition than it was able to obtain through patent grants that provided it with a considerable head start on potential competitors”.

B. Commissioner of Competition v. Canada Pipe Ltd.

The exclusive dealing provisions were considered again, and for the first time by the Canadian Federal Court of Appeal (“FCA”), in the more recent case of Canada Pipe. At issue in Canada Pipe was the stocking distributor program (“SDP”) offered by Bibby Ste-Croix – a division of Canada Pipe, which provided quarterly and annual rebates to distributors who bought certain products exclusively from that division. The Commissioner of Competition contended that the SDP constituted a practice of exclusive dealing contrary to section 77, as well as an abuse of dominance contrary to section 79.

With respect to exclusive dealing, the Competition Tribunal had found that Bibby Ste-Croix was a "major supplier" and that the practice at issue met the definition of exclusive

81 Ibid. at 51-52.
82 Ibid. at 52.
83 Canada Pipe, supra note 1.
dealing under section 77; however, it did not find that the SDP was an anticompetitive act for purposes of the abuse of dominance provisions. In any event, there was no finding of a substantial lessening or prevention of competition because of the apparent ease of entry, low switching costs and lack of exclusionary effect.\textsuperscript{84}

The Commissioner appealed to the FCA, which engaged in an extensive analysis applying the tests mandated by the language of the Act. The FCA, in a decision issued in June 2006, went out of its way to note that section 77 and section 79, although based on similar logic and fundamental principles, contained different statutory language regarding the test for exclusionary effects. For example, although not germane to this particular case, the FCA noted that, on the one hand, the wording of section 79 appears to embrace all past, present and future effects of the impugned anticompetitive act, while on the other hand, section 77 seems limited to present and future (but not past) effects.\textsuperscript{85}

Moreover, the FCA observed a further distinction between the two provisions. In the opinion of the FCA, the term “impede” found at section 77 called for a “broader perspective” relative to the scope indicated by the term “prevent” used in section 79. As a result, the scope of section 77 may be more encompassing than initially interpreted by the Tribunal.

After taking stock of the differences between the language of sections 77 and 79, the FCA explained that the Tribunal had erred with respect to section 77 because it had misconstrued the appropriate test to apply to the determination of a substantial lessening of competition for the same reasons that it had erred with respect to the abuse of dominance claims. Accordingly the FCA referred to and relied upon the discussion with respect to the abuse of dominance in explaining the appropriate standard for a substantial lessening or prevention of competition:

“In order to achieve the inquiry dictated by the statutory language of paragraph 79(1)(c), the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is ‘substantial’. This comparison must be done with reference to actual effects in the past and present, as well as likely future effects. Only through such a comparative approach can the Tribunal determine, as the statutory provision requires, whether the impugned practice ‘has had, is having or is likely to have the effect of preventing or lessening competition substantially.’”\textsuperscript{86}

Following its publication, there has been some debate over whether the FCA’s ruling actually altered the exclusionary effects test first established in NutraSweet.

\textsuperscript{84} Canada Pipe (Comp. Trib.), supra note 74, at paras. 263-70.
\textsuperscript{85} Canada Pipe, supra note 1 at para. 94.
\textsuperscript{86} Ibid. at para. 37.
The novel aspect of the Canada Pipe decision is the establishment of the “but for” test to determine the substantial lessening of competition.\footnote{\textit{Ibid.} at paras. 36-38.} The Federal Court of Appeal clarified that the language of the provision required an examination of whether the relevant market would be substantially more competitive “but for” the alleged anticompetitive practice. As a result, the essence of the test is to compare the state of the market in the presence of the impugned practice with the same market without it.

Leave to appeal the FCA’s decision was recently denied by the Supreme Court of Canada.\footnote{\textit{Supra} note 45.} Accordingly, the matter is remanded to the Tribunal for further consideration in line with the FCA’s reasoning. The extent to which efficiency or other business justifications are considered by the Tribunal in its assessment of exclusive dealing remains to be seen. On the one hand, there is no explicit statutory provision that allows for such considerations in section 77 (as there is for "superior competitive performance" under the abuse of dominance provision in section 79), and the FCA has made it clear that section 77 is a distinct statutory provision that must be read on its own. On the other hand, however, the purpose clause of the Competition Act, which the FCA has said should guide the interpretation of statutory provisions throughout, seems to allow for such considerations.

Decisions like NutraSweet and Canada Pipe contribute to the ongoing debate surrounding the appropriate treatment of loyalty-based discounts or other similar rebate programs by dominant players. These cases demonstrate the difficulty in assessing whether a practice is truly anticompetitive and whether it has the types of effects on competition that merit prohibition.

VI. Conclusion

In Canada, the provisions governing tied selling and exclusive dealing have been part of the relevant competition law statute for over 30 years. Yet there remain relatively few decided cases concerning these provisions and no cases have been brought by the Commissioner outside of the abuse of dominance context. There are no agency guidelines or other forms of official guidance available to help interpret these provisions.

The Competition Bureau continues to wrestle with the task of finding the appropriate dividing line between anticompetitive tied selling or exclusive dealing practices and conduct that has a legitimate business rationale and basis. In Canada Pipe, the Federal Court of Appeal did provide some guidance by clarifying the test for a substantial lessening of competition, albeit primarily in the context of abuse of dominance. However, the Court also stated that the exclusive dealing provision (and, presumably, the companion tied selling provision) must be interpreted in its own light, keeping in mind all of the aims enunciated in the purpose clause of the Competition Act.

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Moreover, tied selling and exclusive dealing claims may now be brought before the Competition Tribunal by private parties, a further indication that the rules applying to these practices are stand-alone provisions. While there has been little case law to date, it will be interesting to see how the legal and economic debate concerning these provisions continues to evolve in Canada and across other jurisdictions.

APPENDIX: Relevant Provisions of the *Competition Act*

**Purpose of Act**

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

**Exclusive Dealing, Market Restriction and Tied Selling Provisions**

**Definitions**

77. (1) For the purposes of this section, "exclusive dealing" means

"exclusive dealing" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier’s nominee, or

(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;

"market restriction" means any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside a defined market;

"tied selling" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to

(i) acquire any other product from the supplier or the supplier’s nominee, or

(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;

favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

Exclusive dealing and tied selling
(2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to
(a) impede entry into or expansion of a firm in a market,
(b) impede introduction of a product into or expansion of sales of a product in a market, or
(c) have any other exclusionary effect in a market,
with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

Market restriction
(3) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that market restriction, because it is engaged in by a major supplier of a product or because it is widespread in relation to a product, is likely to substantially lessen competition in relation to the product, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in market restriction and containing any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product.

Damage awards
(3.1) For greater certainty, the Tribunal may not make an award of damages under this section to a person granted leave under subsection 103.1(7).

Where no order to be made and limitation on application of order
(4) The Tribunal shall not make an order under this section where, in its opinion,
(a) exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market,
(b) tied selling that is engaged in is reasonable having regard to the technological relationship between or among the products to which it applies, or
(c) tied selling that is engaged in by a person in the business of lending money is for the purpose of better securing loans made by that person and is reasonably necessary for that purpose, and no order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among companies, partnerships and sole proprietorships that are affiliated.

Where company, partnership or sole proprietorship affiliated
(5) For the purposes of subsection (4),
(a) one company is affiliated with another company if one of them is the subsidiary of the other or both are the subsidiaries of the same company or each of them is controlled by the same person;

(b) if two companies are affiliated with the same company at the same time, they are deemed to be affiliated with each other;
(c) a partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person; and
(d) a company, partnership or sole proprietorship is affiliated with another company, partnership or sole proprietorship in respect of any agreement between them whereby one party grants to the other party the right to use a trade-mark or trade-name to identify the business of the grantee, if
   (i) the business is related to the sale or distribution, pursuant to a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers, and
   (ii) no one product dominates the business.

When persons deemed to be affiliated

(6) For the purposes of subsection (4) in its application to market restriction, where there is an agreement whereby one person (the "first" person) supplies or causes to be supplied to another person (the "second" person) an ingredient or ingredients that the second person processes by the addition of labour and material into an article of food or drink that he then sells in association with a trade-mark that the first person owns or in respect of which the first person is a registered user, the first person and the second person are deemed, in respect of the agreement, to be affiliated.

Inferences

(7) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.
Abuse of Dominant Position

Definition of "anti-competitive act"

78. (1) For the purposes of section 79, “anti-competitive act”, without restricting the generality of the term, includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer’s entry into, or expansion in, a market;
(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor’s entry into, or eliminating the competitor from, a market;
(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor’s entry into, or eliminating the competitor from, a market;
(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
(f) buying up of products to prevent the erosion of existing price levels;
(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor’s entry into, or expansion in, a market;
(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;
(j) acts or conduct of a person operating a domestic service, as defined in subsection 55(1) of the Canada Transportation Act, that are specified under paragraph (2)(a); and
(k) the denial by a person operating a domestic service, as defined in subsection 55(1) of the Canada Transportation Act, of access on reasonable commercial terms to facilities or services that are essential to the operation in a market of an air service, as defined in that subsection, or refusal by such a person to supply such facilities or services on such terms.

Regulations

(2) The Governor in Council may, on the recommendation of the Minister and the Minister of Transport, make regulations

(a) specifying acts or conduct for the purpose of paragraph (1)(j); and
(b) specifying facilities or services that are essential to the operation of an air service for the purpose of paragraph (1)(k).

Prohibition where abuse of dominant position

79. (1) Where, on application by the Commissioner, the Tribunal finds that
(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Additional or alternative order
(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

Limitation
(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

Administrative monetary penalty
(3.1) Where the Tribunal makes an order under subsection (1) or (2) against an entity who operates a domestic service, as defined in subsection 55(1) of the Canada Transportation Act, it may also order the entity to pay, in such manner as the Tribunal may specify, an administrative monetary penalty in an amount not greater than $15 million.

Aggravating or mitigating factors
(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account the following:

(a) the frequency and duration of the practice;
(b) the vulnerability of the class of persons adversely affected by the practice;
(c) injury to competition in the relevant market;
(d) the history of compliance with this Act by the entity; and
(e) any other relevant factor.

Purpose of order
(3.3) The purpose of an order under subsection (3.1) is to promote practices that are in conformity with this section, not to punish.

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

Exception
(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

Limitation period
(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

Where proceedings commenced under section 45 or 92
(7) No application may be made under this section against a person

(a) against whom proceedings have been commenced under section 45, or

(b) against whom an order is sought under section 92

on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45 or 92, as the case may be.
Private Action Provision

Leave to make application under section 75 or 77

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person’s application under section 75 or 77.

Notice

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75 or 77 is sought.

Certification by Commissioner

(3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought

(a) is the subject of an inquiry by the Commissioner; or

(b) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order under section 75 or 77 is sought.

Application discontinued

(4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(a) or (b) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75 or 77.

Notice by Tribunal

(5) The Tribunal shall as soon as practicable after receiving the Commissioner’s certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.

Representations

(6) A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and shall serve a copy of the representations on any other person referred to in subsection (2).

Granting leave to make application under section 75 or 77

(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants’ business by any practice referred to in one of those sections that could be subject to an order under that section.

Time and conditions for making application

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75 or 77 must be made. The application must be made no more than one year after the practice that is the subject of the application has ceased.
(9) The Tribunal must give written reasons for its decision to grant or refuse leave and send copies to the applicant, the Commissioner and any other person referred to in subsection (2).

Limitation
(10) The Commissioner may not make an application for an order under section 75, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a matter for which the Tribunal has granted leave under subsection (7), if the person granted leave has already applied to the Tribunal under section 75 or 77.

Inferences
(11) In considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it.

Inquiry by Commissioner
(12) If the Commissioner has certified under subsection (3) that a matter in respect of which leave was sought by a person is under inquiry and the Commissioner subsequently discontinues the inquiry other than by way of settlement, the Commissioner shall, as soon as practicable, notify that person that the inquiry is discontinued.