

## **Appendices**

## Appendix 1

### TERMS OF REFERENCE FOR REVIEW

The purpose of the review is to study some of the provisions of the *Competition Act* dealing with anticompetitive pricing practices by suppliers and powerful competitors and the practices and procedures of the Competition Bureau relating to these provisions. The provisions subject to review are those dealing with predatory pricing, price discrimination and price maintenance and, to the extent that it concerns pricing, abuse of dominance. These provisions are set out in sections 50(1), 61 and 79 of the *Competition Act*.

In particular, the review will focus on the following four areas:

1. Are the provisions of the *Competition Act* adequate in light of today's economic forces?
2. With respect to the Bureau's interpretation of these provisions:
  - (a) is the Bureau's interpretation appropriate?
  - (b) is the Bureau's interpretation consistent with international practice?
  - (c) are the Bureau's enforcement guidelines (s. 50(1)) adequate?
  - (d) is there a need for additional enforcement guidelines?
3. Have the Bureau's practices, procedures and guidelines led to the appropriate administration and enforcement of these provisions?
4. Are the Bureau's case selection criteria sufficient to ensure that an adequate number of cases are pursued?

## Appendix 2

### **SELECTED PROVISIONS OF THE *COMPETITION ACT***

#### Section 1.1

##### Purpose

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.

#### Section 50

##### Illegal trade practices

50. (1) Every one engaged in a business who

(a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity,

(b) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in that part of Canada, or designed to have that effect, or

(c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

##### Defence

(2) It is not an offence under paragraph (1)(a) to be a party or privy to, or assist in, any sale mentioned therein unless the discount, rebate, allowance, price concession or other advantage was granted as part of a practice of discriminating as described in that paragraph.

Cooperative societies excepted

(3) Paragraph (1)(a) shall not be construed to prohibit a cooperative association, credit union, caisse populaire or cooperative credit society from returning to its members, suppliers or customers the whole or any part of the net surplus made in its operations in proportion to the acquisition or supply of articles from or to its members, suppliers or customers.

## Section 51

Definition of "allowance"

51. (1) In this section, "allowance" means any discount, rebate, price concession or other advantage that is or purports to be offered or granted for advertising or display purposes and is collateral to a sale or sales of products but is not applied directly to the selling price.

Grant of allowance prohibited except on proportionate terms

(2) Every one engaged in a business who is a party or privy to the granting of an allowance to any purchaser that is not offered on proportionate terms to other purchasers in competition with the first-mentioned purchaser, which other purchasers are in this section called "competing purchasers", is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Definition of proportionate terms

(3) For the purposes of this section, an allowance is offered on proportionate terms only if

(a) the allowance offered to a purchaser is in approximately the same proportion to the value of sales to him as the allowance offered to each competing purchaser is to the total value of sales to that competing purchaser;

(b) in any case where advertising or other expenditures or services are exacted in return therefor, the cost thereof required to be incurred by a purchaser is in approximately the same proportion to the value of sales to him as the cost of the advertising or other expenditures or services required to be incurred by each competing purchaser is to the total value of sales to that competing purchaser; and

(c) in any case where services are exacted in return therefor, the requirements thereof have regard to the kinds of services that competing purchasers at the same or different levels of distribution are ordinarily able to perform or cause to be performed.

## Section 61

### Price maintenance

61. (1) No person who is engaged in the business of producing or supplying a product, who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography, shall, directly or indirectly,

(a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or

(b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.

### Exception

(2) Subsection (1) does not apply where the person attempting to influence the conduct of another person and that other person are affiliated corporations or directors, agents, officers or employees of

(a) the same corporation, partnership or sole proprietorship, or

(b) corporations, partnerships or sole proprietorships that are affiliated,

or where the person attempting to influence the conduct of another person and that other person are principal and agent.

### Suggested retail price

(3) For the purposes of this section, a suggestion by a producer or supplier of a product of a resale price or minimum resale price in respect thereof, however arrived at, is, in the absence of proof that the person making the suggestion, in so doing, also made it clear to the person to whom the suggestion was made that he was under no obligation to accept the suggestion and would in no way suffer in his business relations with the person making the suggestion or with any other person if he failed to accept the suggestion, proof of an attempt to influence the person to whom the suggestion is made in accordance with the suggestion.

### Idem

(4) For the purposes of this section, the publication by a supplier of a product, other than a retailer, of an

advertisement that mentions a resale price for the product is an attempt to influence upward the selling price of any person into whose hands the product comes for resale unless the price is so expressed as to make it clear to any person to whose attention the advertisement comes that the product may be sold at a lower price.

#### Exception

(5) Subsections (3) and (4) do not apply to a price that is affixed or applied to a product or its package or container.

#### Refusal to supply

(6) No person shall, by threat, promise or any like means, attempt to induce a supplier, whether within or outside Canada, as a condition of his doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons.

(7) and (8) [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 36]

#### Offence and punishment

(9) Every person who contravenes subsection (1) or (6) is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

#### Where no unfavourable inference to be drawn

(10) Where, in a prosecution under paragraph (1)(b), it is proved that the person charged refused or counselled the refusal to supply a product to any other person, no inference unfavourable to the person charged shall be drawn from that evidence if he satisfies the court that he and any one on whose report he depended believed on reasonable grounds

(a) that the other person was making a practice of using products supplied by the person charged as loss-leaders, that is to say, not for the purpose of making a profit thereon but for purposes of advertising;

(b) that the other person was making a practice of using products supplied by the person charged not for the purpose of selling the products at a profit but for the purpose of attracting customers to his store in the hope of selling them other products;

(c) that the other person was making a practice of engaging in misleading advertising in respect of products supplied by the person charged; or

(d) that the other person made a practice of not providing the level of servicing that purchasers of the products might reasonably expect from the other person.

## Section 75

### Jurisdiction of Tribunal where refusal to deal

75. (1) Where, on application by the Commissioner, the Tribunal finds that

- (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
- (b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
- (c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product, and
- (d) the product is in ample supply,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

### When article is a separate product

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

### Definition of "trade terms"

(3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

## Section 76

### Consignment selling

76. Where, on application by the Commissioner, the Tribunal finds that the practice of consignment selling has been introduced by a supplier of a product who ordinarily sells the product for resale, for the purpose of

- (a) controlling the price at which a dealer in the product supplies the product, or
- (b) discriminating between consignees or between dealers to whom he sells the product for resale and consignees,

the Tribunal may order the supplier to cease to carry on the practice of consignment selling of the product.

## Exclusive Dealing, Tied Selling and Market Restriction

### Section 77

#### Definitions

77. (1) For the purposes of this section,

"exclusive dealing"

"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"

"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"

"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.

Exclusive dealing and tied selling

(2) Where, on application by the Commissioner, 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, 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.

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.

### Abuse of Dominant Position

#### Section 78

Definition of "anti-competitive act"

78. 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; and
- (i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

## Section 79

### 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.

#### 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.

## Section 80

#### Definition of "delivered pricing"

80. (1) For the purposes of section 81, "delivered pricing" means the practice of refusing a customer, or a person seeking to become a customer, delivery of an article at any place in which the supplier engages in a practice of making delivery of the article to any other of the supplier's

customers on the same trade terms that would be available to the first-mentioned customer if his place of business were located in that place.

#### Definition of "trade terms"

(2) For the purposes of subsection (1), the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

### Section 81

#### Delivered pricing

81. (1) Where, on application by the Commissioner, the Tribunal finds that delivered pricing is engaged in by a major supplier of an article in a market or is widespread in a market with the result that a customer, or a person seeking to become a customer, is denied an advantage that would otherwise be available to him in the market, the Tribunal may make an order prohibiting all or any of such suppliers from engaging in delivered pricing.

#### Exception where significant capital investment needed

(2) No order shall be made against a supplier under this section where the Tribunal finds that the supplier could not accommodate any additional customers at a locality without making significant capital investment at that locality.

#### Exception where trade-mark used

(3) No order shall be made against a supplier under this section in respect of a practice of refusing a customer delivery of an article that the customer sells in association with a trade-mark that the supplier owns or in respect of which the supplier is a registered user where the Tribunal finds that the practice is necessary to maintain a standard of quality in respect of the article.

## Appendix 3

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Appendix 4

**INTERVIEWS CONDUCTED**

**A. Bureau Personnel**

Criminal Matters Branch

Harry Chandler, Deputy Commissioner  
Robert McCrone, Assistant Deputy  
Commissioner  
James Walker, Assistant Deputy Commissioner  
James Innes, Senior Commerce Officer  
Anne Salvatore, Senior Commerce Officer  
Charles Schwartzman, Senior Commerce Officer  
Eugene Besruky, Commerce Officer  
Morgan Currie, Commerce Officer  
Lynne Leclair, Commerce Officer  
Suzanne Legault, Commerce Officer  
Tony Morrocco, Commerce Officer  
C.A. Page, Commerce Officer

Amendments Unit

Donald Mercer, Deputy Commissioner

Information Centre

Jeanne Faubert, Acting Manager

Civil Matters Branch

André Lafond, Deputy Commissioner  
David McAllister, Acting Assistant Deputy  
Commissioner  
Richard Taylor, Assistant Deputy Commissioner  
Brian Chambers, Senior Commerce Officer  
Madeleine Dussault, Senior Commerce Officer  
Brian Linseman, Senior Commerce Officer  
Christopher Broadbent, Commerce Officer  
Dave Doherty, Commerce Officer  
Natalie Joly, Commerce Officer  
Carole Lederer, Commerce Officer  
Robert Yip, Commerce Officer

Economics and International Affairs Branch

Gwill Allen, Assistant Deputy Commissioner  
Anindya Sen, Economist



## **B. Other Interviews**

Daniel Bellemare,  
Centre for the Study of Regulated Industries, McGill University

Paul Crampton,  
Davies, Ward & Beck

Dan McTeague,  
Member of Parliament

Frank Roseman

John Scott,  
Canadian Federation of Independent Grocers

Manju Sekhri,  
Independent Retail Gasoline Marketers Association

Colleen Vanderkercove,  
Col-Rob Holdings Ltd.

Fred Wade,  
Wade Enterprises Ltd.

Garth Whyte,  
André Piché,  
Canadian Federation of Independent Business

Barry Zalmanowitz,  
Fraser Milner

## Appendix 5

### AUTHORS OF THE REPORT

This study was prepared by J. Anthony VanDuzer and Gilles Paquet of the University of Ottawa with the assistance of Derek Smith and Lorne Ptack, both law students in the Common Law Section of the Faculty of Law at the University of Ottawa.

*J. Anthony VanDuzer* is an associate professor and former Vice Dean of the Common Law Section of the Faculty of Law at the University of Ottawa. Prior to joining the Section in 1989, he practised corporate and commercial law in Toronto with Fasken & Calvin (now Fasken Campbell Godfrey). At the law school, Professor VanDuzer teaches various courses in business law including International Business Transactions. He has also taught in the Multinational Management Course in the University of Ottawa's Executive MBA program. He has provided advice to the Canadian Competition Bureau on amendments to the merger notification provisions of the Canadian *Competition Act* as well as conducting research for the Bureau on the prospects for an international agreement on competition law. Professor VanDuzer has acted as an advisor to the law firm of Macleod Dixon on competition and trade law issues.

Professor VanDuzer's publications include a book on merger notification under the Canadian *Competition Act* (with Albert Gourley) and articles on various business and trade law issues including competition and intellectual property. He is also the author (with Albert Gourley) of the competition law chapter of the *Canada Corporations Law Reporter*. He received his B.A. from Queens University, his LL.B. from the University of Ottawa and his LL.M. from Columbia University.

*Gilles Paquet* studied economics at the graduate level at Laval, Queen's (Canada) and at the University of California where he was Postdoctoral Fellow in Economics. He was Dean of the Faculty of Graduate Studies and Research at Carleton in the 1970s and Dean of the Faculty of Administration at the University of Ottawa in the 1980s. Professor Paquet has authored/co-authored or edited over 25 books and written over 250 papers or chapters and books on issues ranging from economic history of Canada, regional and industrial development, trade and technology, governance and public management. He has been president of the Social Sciences Federation of Canada and of a large number of other Canadian associations. He was Secretary-Treasurer of the Canadian Economics Association from 1967 to 1981. At the end of 1997, he was appointed Director of the Centre on Governance at the University of Ottawa.

Professor Paquet is a Fellow of the Royal Society of Canada and of the Royal Society of Arts of London. He has received in 1982 the Jacques-Rousseau Medal in recognition of important contributions of a multi-disciplinary nature and the Esdras-Minville Medal in 1989 for the corpus of his works in social sciences. He was named Member of the Order of Canada in 1992. In 1993, he received the Award for Excellence in Research at the University of Ottawa. Between 1978 and 1991, he was a regular interviewer/commentator/animateur on the national radio or television network of Radio-Canada. Between

1992 and 1997, he was an editorial writer for Le Droit. Since 1995, he has been a member of STUDIO 2 weekly panel on national affairs on TV Ontario.