# The Changing Regulation of Canadian Oligopolies: Complementary Enforcement Roles for Section 90.1 and Joint Dominance

By Melanie L. Aitken and Emrys Davis[1]

Bennett Jones LLP

[1] Melanie Aitken is co-chair of the antitrust and competition practice group at Bennett Jones LLP, and will become the Managing Principal of the firm's office in Washington, DC. From 2009 to 2012 she served as Canada's Competition Commissioner, in charge of the Canadian Competition Bureau. Emrys Davis is a litigation associate and member of the firm's antitrust and competition practice group.

## I. INTRODUCTION

Before 2010, civil redress for anticompetitive oligopoly behaviour in Canada meant one thing: joint abuse of dominance under section 79 of Canada's *Competition Act*.[2] Amendments to the *Act* that came into force in March 2010 changed this historical status quo. The amendments introduced section 90.1, a civil provision that targets agreements between competitors that substantially lessen or prevent competition.

What section 90.1 will mean for regulation of Canadian oligopolies and joint dominance applications is not yet clear. Canada's Competition Bureau has brought only one application under the new provision (in a case where the agreement element was undisputed); that matter concluded with a consent agreement and, accordingly, gave little in the way of guidance for future cases.[3] Judicial comment on section 90.1 is still likely years away.[4] In the meantime, some commentators have questioned whether section 90.1 has supplanted joint dominance's historic role, given the fact that, notwithstanding the slightly narrower remedy options, section 90.1 extends to a broad set of agreements, while relieving the Bureau of showing dominance.

We would argue against that conclusion and anticipate rather an enforcement framework with complementary roles for section 90.1 and joint dominance in section 79, leveraging the respective elements of each of the two provisions – a paradigm in which, in the context of oligopolistic conduct, section 90.1 primarily targets conduct that reduces competition *between* the members of the oligopoly, while joint dominance targets conduct that reduces competition from parties *outside* the oligopoly.

We will develop this paradigm in three parts. First, we provide a brief overview of joint dominance and the new section 90.1. Second, we identify the distinctive elements of each provision, with a view to elaborating upon the

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2 RSC, 1985, c C-34. Section 45 of the *Act* prohibited agreements that unduly lessened competition. Section 45 was a purely criminal provision, which required the Competition Bureau to prove the agreement's undue effect on competition to the criminal burden of proof. As a result, section 45 prosecutions proved very difficult in practice.

3 *The Commissioner of Competition v. Air Canada et al*, CT-2012-001.

4 The Competition Tribunal may comment on the interaction between section 90.1 and section 79 in its reasons in *The Commissioner of Competition v. The Toronto Real Estate Board*, CT-2011-003. It is the first contested abuse of dominance application to reach a hearing since section 90.1 came into force.

differences in developing or confronting an application under each. Finally, we explore the possibility of the Bureau developing an enforcement paradigm in which joint dominance and section 90.1 fulfill overlapping, but primarily complementary, roles in addressing oligopolistic behavior in Canada.

## II. SECTIONS 79 AND 90.1

### A. Joint Dominance in Section 79

Section 79 replaced Canada's historic criminal prohibition on monopolies. It was a prominent feature of the 1986 *Competition Act* as Canada's antitrust regime shifted from an entirely criminal to an increasingly civil regulatory regime.[5] Section 79 permits the Commissioner to apply to the Competition Tribunal for a remedy where (i) one or more persons control a class or species of business; (ii) that persons or those persons have engaged in a practice of anticompetitive acts; and (iii) that practice has substantially lessened or prevented competition, or is likely to do so.[6] The *Act's* reference to "one or more persons" and "those persons" are the foundation of joint dominance: the scenario in which several firms jointly control a class or species of business and together engage in a practice of anticompetitive acts.

Since 1986, the Competition Bureau has commenced four joint dominance applications. All have settled before a contested hearing[7] and, as a result, there is no joint dominance-specific jurisprudence. However, the Competition Tribunal and Federal Court of Appeal have decided several single-firm dominance applications. These decisions set out what the Bureau must prove to establish an abuse of dominance. This general framework would presumably apply to a joint dominance application.

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5 For a discussion of the gradual shift of Canada's antitrust regime from a criminal to a civil one see: Randal T. Hughes and Emrys Davis, "Competitor Agreements: Interpreting Criminal Conspiracy in a Blended Criminal-Civil Regime" (2012) 25:2 Canadian Competition Law Review 215 & Melanie L. Aitken, "The 2009 Amendments to the Competition Act: Reflecting on their Implementation and Enforcement, and Looking Toward the Future" (2012) 25:2 Canadian Competition Law Review 659 at 661.

6 The full text of section 79 is attached as an appendix to this paper.

7 *Canada (Director of Investigation and Research) v. Bank of Montreal et al.* (1996), 68 CPR (3d) 527 (Comp Trib)*; Canada (Director of Investigation and Research) v. AGT Director Ltd. et al.,* [1994] CCTD No 24*; Commissioner of Competition v. Waste Services (CA) Inc. and Waste Management of Canada Corporation,* CT-2009-003; *Commissioner of Competition v. The Canadian Real Estate Association*, CT-2010-002.

First, with respect to dominance (i.e., control of a class or species of business), the Tribunal and Federal Court of Appeal have equated "control" of a "class or species of business" to having market power in the relevant product and geographic markets.[8] To determine the relevant markets, the Tribunal uses the hypothetical monopolist test. Determinations of market power in the relevant markets turn on the expected factors, such as market shares and barriers to entry.

Second, having proved dominance, the Bureau must prove a practice of anticompetitive acts. The *Act* does not define "anticompetitive acts" but, traditionally, judges have reasoned from the examples of anticompetitive acts listed in section 78. The Federal Court of Appeal has held in one decision that an anticompetitive act targets a competitor and must have an exclusionary, disciplinary, or predatory purpose.[9] According to that decision, the Tribunal can infer such a purpose from the act's reasonably foreseeable effects. Nonetheless, the allegedly dominant firm (or firms) can lead evidence of the act's valid business purpose to rebut the presumption that its purpose was exclusionary, disciplinary, or predatory.

Finally, substantial lessening and prevention of competition is usually conceptualized as the creation, enhancement, or maintenance of the dominant firm's market power.[10] For example, conduct that inhibits effective entry will often substantially lessen or prevent competition.[11]

To these requirements, a joint dominance application adds an additional hurdle for the Bureau: proving joint market power. In a single-firm dominance application, proving dominance requires consideration of competition from existing market participants and competition from potential new entrants. If those two sources of competition are effective, the dominant firm is unlikely to have market power. In cases of alleged joint dominance, there is a third source

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8 *Commissioner of Competition v. Canada Pipe Company Ltd*. (2006), 49 CPR (4th) 286 at para. 6 [*Canada Pipe*].

9 *Canada Pipe ibid*. at paras 67-68.

10 Competition Bureau Canada, *The Abuse of Dominance Provisions*, at 13, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03497.html [*2012 Dominance Guidelines*] & *Director of Investigation and Research v. NutraSweet* (1990) 32 CPR (3d) 1 *NutraSweet,* at 47a [*NutraSweet*].

11 *Director of Investigation and Research v. D & B Companies of Canada* (1995), 64 CPR (3d) 216 at 267a [*D & B*].

of potential competition to discipline the exercise of market power: competition between members of the allegedly dominant group.[12]

Because the joint dominance applications brought to date have settled before a contested hearing, there is no judicial guidance on what the Bureau must prove to show that there is insufficient competition between members of the allegedly dominant group such that the group as a whole has market power. Commentators have looked to pre-*Competition Act* cases and the Bureau's non-binding enforcement guidelines published and revised from time to time. In the 1980s, the Supreme Court of Canada held that conscious parallelism without more did not constitute an illegal agreement; however, it is noteworthy that the decision was made in the context of a criminal provision (the only agreements provision at that time).[13] Thereafter for some time, the Bureau adopted and adapted this approach to its civil dominance enforcement guidelines. In 2001, the Bureau stated that "something more than mere conscious parallelism must exist before the Bureau can reach a conclusion that firms are participating in some form of coordinated activities."[14] The Bureau listed several factors from which it said it would infer control among a group of firms, but maintained that an agreement between firms was unnecessary to infer control for the purposes of section 79. Thus, the Bureau appeared to identify a possible scenario of what had been described as "some sort of no-man's land"[15] – something between an illegal agreement and conscious parallelism.

Since 2001, guidance from the Bureau about how it will infer control among allegedly jointly dominant firms has arguably become less specific—or to put it another way, more general in nature, leaving the Bureau more free to conduct an open inquiry into "joint control". The Bureau's 2012 guidelines no longer list factors that the Bureau will consider to infer control by a group of firms. They state only that "[s]imilar or parallel conduct by firms is insufficient, on its own, for the Bureau to consider those firms to hold a jointly dominant position". Indeed, the Guidelines specifically acknowledge that firms may engage in similar

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12 *2012 Dominance Guidelines*, *supra* note 10 at 9.

13 *Atlantic Sugar Refineries Co. v. A.-G. Canada*, [1980] 2 SCR 644.

14 Competition Bureau Canada, *Enforcement Guidelines on the Abuse of Dominance Provision*, July 2001, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01251.html, [*2001 Dominance Guidelines*].

15 Bruce McDonald, "Abuse of dominant position: a new monopoly law for Canada" (1987) 32 Antitrust Bull 795 at 804.

practices that are in effect pro-competitive, such as matching price reductions or making similar offers to customers."[16]

### B. Section 90.1

Like section 79, section 90.1 was introduced to replace a criminal prohibition. For the first hundred years of Canada's antitrust regime, the *Competition Act* and its predecessors had criminalized agreements that unduly lessened competition. The blanket, and exclusively criminal, prohibition had proved problematic for Canada's Competition Bureau and Canadian businesses because it was both overbroad and hard to prosecute. Criminal prohibition of all agreements that unduly lessened competition cast too wide a net that, in theory at least, had the potential to catch any agreement. At the same time, proving the agreement's undue effect on competition to the criminal burden of proof frustrated government enforcers in many cases that otherwise represented clear violations. A "one size fits all" criminal offence was not effective as a tool to confront unambiguously harmful cartels; at the same time, it risked disincentives to creative pro-competitive initiatives.

Amendments to the criminal prohibition and the coming into force of section 90.1 in 2010 sought to address this historical problem. A narrow set of agreements between competitors became subject to *per se* criminal prohibition under section 45 of the *Act*. Section 90.1 applies more broadly—although, significantly and without any apparent policy rationale—it is confined to agreements between competitors. It is a civil review provision that carries no threat of jail time or fines. Under section 90.1, the Competition Tribunal may make an order where the Commissioner has established: (i) the existence of an agreement or arrangement, either in place or proposed; (ii) between persons two or more of whom are competitors;[17] and (iii) that does or is likely to substantially lessen or prevent competition.[18]

The Tribunal may consider several factors but may not make an order if it finds that efficiency gains offset or exceed the lessening or prevention of

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[16] *2012 Dominance Guidelines*, *supra* note 10 at 9-10. While practitioners and their clients complain that they are therefore left to infer how the Bureau will determine whether firms are jointly dominant, that could, of course, be the criticism of any "framework" provision, a prominent feature of antitrust provisions around the world (such as in the US).

[17] The *Act* defines "competitor" to include persons that are reasonably likely to compete in the absence of the agreement between them.

[18] The full text of section 90.1 is attached as an appendix to this paper.

competition. However, if the Tribunal finds that the Commissioner has discharged his burden and there are insufficient offsetting efficiency gains, the Tribunal may make an order prohibiting any person from doing anything under the agreement or arrangement. With the consent of the parties and the Commissioner, it can also make a mandatory order.

While section 90.1 is not confined to oligopolies, it certainly captures agreements or arrangements between members of an oligopoly, including those that are not *per se* criminal under section 45. Time will tell, but the high market shares and high entry barriers that typify oligopolies may simplify proving a substantial lessening or prevention of competition in a matter pursued under section 90.1, provided of course that the other elements are satisfied.

## III. MAJOR DIFFERENCES

### A. Relative Evidentiary Burdens

The most obvious differences between the Bureau's task in pursing a section 90.1 versus a section 79 case are the constituent elements of the violation. Section 90.1 requires the Commissioner to prove an agreement or arrangement. Section 79 (at least on its face) does not; instead, section 79 requires proof of dominance (i.e., market power in a relevant market) and a practice of anticompetitive acts. Both sections require proof of a substantial lessening or prevention of competition.

One view, held by those who see a limited role for the enforcement of a joint dominance complaint in the future, is that the elements of section 90.1 will be easier for the Competition Bureau to establish than those of section 79. In the authors' view, there is no single assessment; the relative challenge will vary on a case-by-case basis. Proving an agreement has certainly been the downfall of some past prosecutions.[19] While admittedly the Bureau faced the higher criminal burden of proof in those cases, it is not obvious to us that agreements and arrangements will be so easy to prove under section 90.1, particularly in the absence of jurisprudence to guide the Tribunal.

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[19] For example *R v. Bayda and Associates Survey Inc*., [1997] AJ No 806 (QB), 5 Alta LR (3d) 95 (failure to establish an agreement) & *R v. Bugdens Taxi*, [2006] NJ No 250 (Pr Ct ) aff'd R *v. Budgens's Taxi (1970) Ltd*., 2007 NLTD 167, [2007] NJ No 322 (TD) (failure to establish the relevant market and uncertainty regarding the implementation of the agreement).

In contrast, the comparatively rich jurisprudence under section 79, and some of the presumptions it has signalled, make prosecutions for abuse of dominance less challenging than might appear at first glance. Of course, a contested joint abuse of dominance application has yet to be heard by the Tribunal. Such cases will almost certainly prove more difficult for the Competition Bureau than a single-firm case because of the added burden of showing that intra-group competition does not undermine the market power of the group as a whole. It is fair to anticipate that the Bureau will require strong evidence of coordinated behaviour. Whether evidence of coordination sufficient to establish joint dominance will also satisfy section 90.1's agreement or arrangement requirement is the critical question in any assessment of the relative ease of prosecuting a section 79 versus a section 90.1 case. The short answer: it may.

Parallel conduct *alone* is insufficient to establish either an agreement or joint dominance. However, parallel conduct *with more* may be sufficient to establish either. The Bureau's Competitor Collaboration Guidelines state that parallel conduct combined with facilitating practices[20] may be sufficient to prove that an agreement was concluded between the parties.[21] That comment relates to section 45 agreements. But there is no reason to believe that it would not apply equally to agreements reviewed under section 90.1. Likewise, some commentators have argued that facilitating practices may help to prove joint dominance because they decrease competition between firms and thereby increase the collective exercise of market power.[22]

However, while facilitating practices may help prove either an agreement or joint dominance, so long as the Federal Court of Appeal decision in *Canada Pipe* is followed, such practices could not satisfy the "anticompetitive act" requirement of section 79.[23] Facilitating practices may permit an oligopoly's members to maintain supra-competitive prices, harm consumers, and thus reduce competition. But they do not harm competitors as required by *Canada Pipe*. They do not have the requisite exclusionary, disciplinary, or predatory

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[20] Examples include sharing competitively sensitive information or activities that assist competitors in monitoring one another's prices.

[21] Competition Bureau Canada, *Competitor Collaboration Guidelines*, at 7, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html [*Competitor Collaboration Guidelines*].

[22] Jeffrey Church and Roger Ware, "Abuse of Dominance under the 1986 Canadian *Competition Act*" paper prepared for *The Review of Industrial Organization*, March 1997 at 94.

[23] Edward M. Iacobucci and Ralph A. Winter, "Abuse of Joint Dominance in Canadian Competition Policy" (2010) 60 UTORLJ 219 at 236.

purpose. Instead, they benefit competitors, since the competitors are the members of the oligopoly and they benefit from charging higher prices. As such, this "requirement" to have an exclusionary, disciplinary or predatory purpose, while grafted onto the provision in our view without jurisdiction, narrows the scope for a successful section 79 prosecution.

**B. Remedies**

Section 79 gives the Tribunal seemingly more powerful remedies than does section 90.1. Section 90.1 is primarily designed to prohibit behavior: the Tribunal may prohibit any person from doing anything under an illegal agreement or arrangement. But the Tribunal can only require a person to take action if that person and the Commissioner consent.

In contrast to section 90.1's focus on prohibition, section 79 provides for prohibition, restorative, and "compliance" orders. First, pursuant to section 79(1), the Tribunal may make an order prohibiting the practice of anticompetitive acts. This essentially mimics the Tribunal's power under section 90.1 (subject to the above comment that, per the Federal Court of Appeal in *Canada Pipe* the Tribunal cannot prohibit facilitating practices because they are not anticompetitive acts). Second, section 79(2) permits any other order required to restore competition if the Tribunal finds that a prohibition order will not do so on its own. Consent is not required. In past cases, the Tribunal has made such orders, including ordering a dominant firm to give historical input data to a poised new entrant.[24] Finally, section 79(3.1) permits the Tribunal to order administrative monetary penalties (AMPs) of up to $10 million. Section 79(3.3) states that the AMPs are meant to promote compliance with section 79, not to punish the anticompetitive practice. The constitutionality of AMPs is currently before the courts[25] so it remains to be seen whether they will remain available to the Tribunal in future section 79 cases, although analogous decisions suggest that they will be found constitutional.[26] In either event, section 79 contemplates more aggressive remedies, particularly as the Tribunal can make a mandatory order without needing the target's consent.

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[24] *D & B, supra* note 11 at 288.

[25] *The Commissioner of Competition v. Chatr Wireless Inc. et al*., CV-10-8993-00CL.

[26] See for example *Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48, *Canada (Attorney General) v. United States Steel Corp*., 2011 FCA 176 & *Rowan v. Ontario Securities Commission*, 2012 ONCA 208.

## IV. COMPLEMENTARY SCHEMES

Three key points arise from a review of the differences between section 90.1 and joint dominance. First, whether principled or not in the context of section 90.1, both sections focus on only horizontal relationships. Second, section 79 provides for more powerful and aggressive remedies than section 90.1. In particular, a section 79 application will be necessary if a mandatory order is required to restore competition to a market. Finally, which section is easier for the Bureau to prove will vary on a case-by-case basis. In this regard, the drafters of the *Act* clearly contemplated that activity could be reviewed under either section 79 or 90.1.[27] Where there is strong evidence of an agreement, section 90.1 is the obvious choice. Where there is strong evidence of a practice of anticompetitive acts, a joint dominance application under section 79 may be preferable.

The somewhat differing features to the civil agreements and joint dominance provisions, and in particular the seeming inability of the Bureau to address facilitating practices through a joint dominance prosecution, suggest a complementary co-existence. Whereas section 79 is apparently unable to address facilitating practices between members of an oligopoly (to the extent *Canada Pipe* governs), section 90.1 may prove particularly well-suited for doing so. That said, while section 90.1 jurisprudence remains to be developed, the Bureau may face the straightjacket of pre-*Competition Act* jurisprudence which casts doubt on whether evidence of facilitating practices could constitute an illegal agreement[28], leaving such conduct immune from effective review.

Addressing this limitation perhaps, the Bureau's published position is that parallel conduct combined with a facilitating practice may be evidence of an agreement between the parties. Assuming that the facilitating practice substantially lessens or prevents competition, under section 90.1 the Tribunal may make an order prohibiting any activity under the agreement. Presumably this could include prohibiting any party from engaging in the facilitating practice that formed part of the agreement.

As to what that leaves for section 79 and joint dominance applications, one possibility is as follows: when the Competition Bureau seeks not to prohibit the

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[27] *Competition Act, supra* note 2 s. 79(7) and s. 90.1(10).

[28] *Atlantic Sugar*, *supra* note 13. Of course, this case was decided on the criminal burden of proof, whereas section 90.1 cases are decided on the civil balance of probabilities standard.

facilitating practice itself, but to stop other conduct engaged in by the oligopoly that excludes poised entrants or disadvantages other firms competing with the oligopoly's members. In these situations, the facilitating practice is not the Bureau's target, but it is evidence of joint dominance. The Bureau can then address the other "abusive" oligopolistic conduct that targets the oligopoly's rivals. Benefiting from the presumptions in the jurisprudence, the Tribunal will infer that the oligopoly intended to harm competitors absent a valid business justification. In addition, where a poised entrant requires access to a critical input withheld by the oligopoly, the Tribunal's ability to make a mandatory order under section 79 may prove important.

In this way, section 90.1 and joint dominance can fulfill overlapping but primarily complementary roles. Put in perhaps too simple terms, where the Bureau targets conduct that reduces competition *between* an oligopoly's members, section 90.1 may prove well-suited; where the Bureau targets conduct that reduces competition from firms *outside* of the oligopoly, a joint dominance application may be more effective. Thus, we can conceptualize section 90.1 as addressing intra-oligopoly conduct and joint dominance addressing extra-oligopoly conduct.

## V. CONCLUSION

How exactly the Bureau will approach the enforcement of section 90.1 in practice is unknown. How the Tribunal will interpret it is an even more significant question. We think it fair to say that, based on the jurisprudence to date and the fact that section 90.1 was introduced without substantive changes to the abuse of dominance provision, there is no reason to believe that section 90.1 will necessarily supplant joint dominance in regulating the behavior of Canadian oligopolies. Instead, one can posit a view that, while gaps may still remain, and the constraints introduced by the courts may not have respected the original legislative intent, sections 90.1 and 79 have complementary roles to play in addressing different elements of oligopolistic behavior for a more complete Canadian antitrust regime.

## APPENDIX

## 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; and

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

***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) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an

administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000.

***Aggravating or mitigating factors***

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account any evidence of the following:

(a) the effect on competition in the relevant market;

(b) the gross revenue from sales affected by the practice;

(c) any actual or anticipated profits affected by the practice;

(d) the financial position of the person against whom the order is made;

(e) the history of compliance with this Act by the person against whom the order is made; and

(f) any other relevant factor.

***Purpose of order***

(3.3) The purpose of an order made against a person under subsection (3.1) is to promote practices by that person that are in conformity with the purposes of this section and not to punish that person.

***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, 49, 76, 90.1 or 92***

(7) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

> (a) proceedings have been commenced against that person under section 45 or 49; or
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> (b) an order against that person is sought by the Commissioner under section 76, 90.1 or 92.

**AGREEMENTS OR ARRANGEMENTS THAT PREVENT OR LESSEN COMPETITION SUBSTANTIALLY**

***Order***

90.1 (1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order

> (a) prohibiting any person — whether or not a party to the agreement or arrangement — from doing anything under the agreement or arrangement; or
>
> (b) requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.

***Factors to be considered***

(2) In deciding whether to make the finding referred to in subsection (1), the Tribunal may have regard to the following factors:

> (a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the agreement or arrangement;
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> (b) the extent to which acceptable substitutes for products supplied by the parties to the agreement or arrangement are or are likely to be available;
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> (c) any barriers to entry into the market, including
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> > (i) tariff and non-tariff barriers to international trade,
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> > (ii) interprovincial barriers to trade, and
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> > (iii) regulatory control over entry;
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> (d) any effect of the agreement or arrangement on the barriers referred to in paragraph (c);

(e) the extent to which effective competition remains or would remain in the market;

(f) any removal of a vigorous and effective competitor that resulted from the agreement or arrangement, or any likelihood that the agreement or arrangement will or would result in the removal of such a competitor;

(g) the nature and extent of change and innovation in any relevant market; and

(h) any other factor that is relevant to competition in the market that is or would be affected by the agreement or arrangement.

***Evidence***

(3) For the purpose of subsections (1) and (2), the Tribunal shall not make the finding solely on the basis of evidence of concentration or market share.

***Exception where gains in efficiency***

(4) The Tribunal shall not make an order under subsection (1) if it finds that the agreement or arrangement has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the agreement or arrangement, and that the gains in efficiency would not have been attained if the order had been made or would not likely be attained if the order were made.

***Restriction***

(5) For the purposes of subsection (4), the Tribunal shall not find that the agreement or arrangement has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

***Factors to be considered***

(6) In deciding whether the agreement or arrangement is likely to bring about the gains in efficiency described in subsection (4), the Tribunal shall consider whether such gains will result in

(a) a significant increase in the real value of exports; or

(b) a significant substitution of domestic products for imported products.

***Exception***

(7) Subsection (1) does not apply if the agreement or arrangement is entered into, or would be entered into, only by companies each of which is, in respect of every one of the others, an affiliate.

***Exception***

(8) Subsection (1) does not apply if the agreement or arrangement relates only to the export of products from Canada, unless the agreement or arrangement

(a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

(b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or

(c) has prevented or lessened or is likely to prevent or lessen competition substantially in the supply of services that facilitate the export of products from Canada.

***Exception***

(9) The Tribunal shall not make an order under subsection (1) in respect of

(a) an agreement or arrangement between federal financial institutions, as defined in subsection 49(3), in respect of which the Minister of Finance has certified to the Commissioner

(i) the names of the parties to the agreement or arrangement, and

(ii) the Minister of Finance's request for or approval of the agreement or arrangement for the purposes of financial policy;

(b) an agreement or arrangement that constitutes a merger or proposed merger under the Bank Act, the Cooperative Credit Associations Act, the

Insurance Companies Act or the Trust and Loan Companies Act in respect of which the Minister of Finance has certified to the Commissioner

(i) the names of the parties to the agreement or arrangement, and

(ii) the Minister of Finance's opinion that the merger is in the public interest, or that it would be in the public interest, taking into account any terms and conditions that may be imposed under those Acts; or

(c) an agreement or arrangement that constitutes a merger or proposed merger approved under subsection 53.2(7) of the Canada Transportation Act in respect of which the Minister of Transport has certified to the Commissioner the names of the parties to the agreement or arrangement.

***Where proceedings commenced under section 45, 49, 76, 79 or 92***

(10) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

(b) an order against that person is sought by the Commissioner under section 76, 79 or 92.

***Definition of "competitor"***

(11) In subsection (1), "competitor" includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of the agreement or arrangement.