ASSESSING THE CANADIAN LAW AND PRACTICE ON PREDATORY PRICING, PRICE DISCRIMINATION AND PRICE MAINTENANCE

J. Anthony VanDuzer*

Les pratiques anticoncurrentielles en matière de prix ont mérité pas mal d'attention depuis quelques années, mais les dispositions pénales de la Loi sur la concurrence *ayant trait à l'établissement de prix abusifs, à la discrimination par les prix et au maintien des prix (les "dispositions en matière de prix") sont assez peu souvent mises en oeuvre par le Bureau de la concurrence. Cet article examine la théorie économique qui sous-tend les préoccupations qui fondent la politique de la concurrence concernant chacun de ces comportements, puis passe en revue les dispositions pertinentes de la* Loi sur la concurrence, *la politique de mise en oeuvre de ces dispositions par le Bureau et les résultats de cette politique. Cette analyse permet d'identifier des préoccupations diverses. À certains égards, les dispositions en matière de prix ne sont pas en harmonie avec les préceptes de la théorie économique. Aussi l'interprétation et la mise en oeuvre de ces dispositions par le Bureau s'écartent parfois de ce qui est prévu par la loi ou la théorie économique. Il serait bon de modifier ces dispositions afin de répondre à certaines de ces préoccupations. Il pourrait être préférable, toutefois, de s'en tenir aux dispositions existantes en matière des abus de pouvoir, qui permettraient de régir ces formes de prix anticoncurrentiels d'une manière cohérente avec la théorie économique, en tenant compte des particularités de certaines industries et des défis de l'application de la loi sur la concurrence aux industries de plus en plus importantes de la nouvelle économie.*

Anticompetitive pricing practices have received a significant amount of attention during the past several years but the criminal provisions of the Competition Act *addressing predatory pricing, price discrimination and price maintenance (the "Pricing Provisions") are seldom the subject of enforcement actions by the Competition Bureau. This article examines the economic theory underlying competition policy concerns regarding each of these three types of behaviour and discusses the relevant provisions of the* Competition Act, *the Bureau's approach to enforcement and its enforcement record. Based on this analysis, concerns may be identified at several levels. In some respects, the Pricing Provisions do not operate in a manner consistent with what economic theory would prescribe. Also, the Bureau's interpretation and enforcement of the Pricing Provisions are not always consistent with the provisions themselves or economic theory. Amendment of the Pricing Provisions could address some of these concerns. It may be preferable, however, to rely on the existing abuse of dominance provision, which could address these forms of anticompetitive pricing in a manner which is consistent with economic theory, sensitive to the particular characteristics of specific industries and responsive to the challenges of applying competition law to the increasingly important industries of the new economy.*

* Associate Professor, Common Law Section, Faculty of Law, University of Ottawa

TABLE OF CONTENTS

I. INTRODUCTION 183

II. ECONOMIC ANALYSIS OF ANTICOMPETITIVE PRICING PRACTICES 184
A. *Introduction* 184
B. *Price Discrimination* 185
C. *Predatory Pricing* 187
D. *Price Maintenance* 191
E. *Challenges of the New Economy* 193

III. COMPETITION ACT PROVISIONS DEALING WITH ANTICOMPETITIVE PRICING .. 194
A. *Scheme of the Competition Act* 194
B. *Price Discrimination* 194
1. *General Discussion* 194
2. *The* Price Discrimination Enforcement Guidelines ... 197
C. *Predatory Pricing* 198
1. *General Discussion* 199
2. *The* Predatory Pricing Enforcement Guidelines 200
D. *Price Maintenance* 204
E. *Abuse of Dominance* 206
1. *Application to Anticompetitive Pricing* 211

IV. ENFORCEMENT OF THE PRICING PROVISIONS BY THE COMPETITION BUREAU . 212
A. *Introduction* 212
B. *Complaints Process* 212
C. *Statistical Record of Enforcement Experience* 214
D. *Case Selection Criteria* 216
1. *Introduction* 216
2. *Application to Pricing Practices* 217

V. ASSESSMENT OF COMPETITION ACT PROVISIONS RELATING TO PRICE DISCRIMINATION, PREDATORY PRICING AND PRICE MAINTENANCE 220
A. *Price Discrimination* 220
1. *Adequacy of Existing Provisions* 220
2. *Adequacy of the* Price Discrimination Enforcement Guidelines 221
3. *Adequacy of Enforcement Activity* 222
B. *Predatory Pricing* 223
1. *Adequacy of the Existing Provisions* 223
2. *Adequacy of the* Predatory Pricing Enforcement Guidelines 224
3. *Adequacy of Enforcement Activity* 226
C. *Price Maintenance* 226
1. *Adequacy of Existing Provisions* 226
2. *Adequacy of Enforcement Activity* 228
D. *General Comments* 229
1. *Challenges of the New Economy* 229

2. *Marshalling Industry-Specific Expertise* 230
3. *The Limitations of Guidelines* 230

V. CONCLUSION AND POSTSCRIPT 232

I. INTRODUCTION

Anticompetitive pricing practices have received a significant amount of attention during the past several years. Much of this attention has been due to widespread concerns regarding gas prices, though the pricing of Internet access, airline tickets, waste removal and groceries have all been the source of public comment and debate and, frequently, the subject of complaints to the Competition Bureau. Despite the substantial volume of complaints, however, relatively few have been the subject of formal inquiries, even fewer are the subject of litigation and only a fraction of those have been successful. As a consequence, the provisions of the *Competition Act*[1] dealing with anticompetitive pricing practices and the Competition Bureau's enforcement of them have drawn increasingly intense scrutiny.

Recently, concerns were raised regarding the effectiveness of the *Competition Act* provisions dealing with pricing practices and the Bureau's enforcement of them in the context of the debate on Bill C-235, a private member's bill which proposed to amend the *Competition Act* with the objective of better addressing certain forms of anticompetitive pricing activity.[2] The impetus for M.P. Dan McTeague's bill were complaints from participants in the retail gas sector. As a consequence of its consideration of the Bill, the Standing Committee on Industry resolved to conduct a general review the pricing provisions of the *Competition Act* and their enforcement.

In anticipation of the Industry Committee's review, in June 1999, the Commissioner of Competition commissioned the author and Gilles Paquet to conduct an independent study of the provisions of the *Competition Act* dealing with anticompetitive pricing and their enforcement by the Bureau. We began by examining the economic theory underlying competition policy concerns regarding predatory pricing, price discrimination and price maintenance. In that context, we considered the relevant provisions of the *Competition Act*, the Bureau's approach to enforcement and its enforcement record.

While it was not expected that our study would provide a definitive road map to legislative change or even to the enforcement of the existing provisions of the *Competition Act* dealing with predatory pricing, price discrimination and price maintenance (the "Pricing Provisions") and the abuse of dominance provision, our analysis did disclose concerns at several levels. In some respects, the Pricing Provisions do not operate in a manner consistent with what economic theory would prescribe. Also, the Bureau's interpretation and enforcement of the Pricing Provisions are not always consistent with the provisions themselves or economic theory. While amendment of the Pricing Provisions may be one way to address these concerns, we also concluded that the existing abuse of dominance provision might be used to deal with these forms of anticompetitive pricing in a manner which is consistent with economic theory, sensitive to the particular characteristics of specific industries and responsive to the challenges of applying competition law to the increasingly important industries of

---

[1] R.S.C. 1985, c. C-34 [hereinafter *Competition Act* or *Act*].

[2] Bill C-235 passed first reading on October 6, 1997 and was referred to the Standing Committee on Industry. On April 15, 1999, the Committee decided to report the Bill to the House of Commons without the clauses or the title. The Bill was numbered C-201 in the second session of the 36th Parliament but only reached the first reading stage.

the new economy. This article describes the principle results of the study.[3]

II. Economic Analysis of Anticompetitive Pricing Practices

A. *Introduction*

Section 1.1 of the *Competition Act* describes the purposes of Canadian competition law as follows:

> 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.[4]

Section 1.1 has been interpreted by the Bureau as endorsing the principle that competition law is geared to the maintenance and promotion of competition as a process, and not to the protection of competitors.[5] Such an interpretation recognizes that a normal characteristic of competition is that some market participants may not thrive or even survive while others prosper because of their superior competitive performance. This dynamic effect of competition is essential to ensure that the efficiency benefits of competition are realized. Reductions in the number of competitors should be permitted in the interests of efficiency where the survivor is a more efficient competitor, the reduction is not caused by anticompetitive conduct and the marketplace after the reduction in competition remains sufficiently competitive, taking into account potential as well as actual competition. Of course, protecting the competitive process will mean protecting competitors in some situations where they are threatened by anticompetitive conduct or their elimination would result in insufficient remaining competition. In

---

[3] J.A. VanDuzer & Gilles Paquet, *Anticompetitive Pricing Practices and the* Competition Act*: Theory, Law and Practice* (Hull: Competition Bureau, 1999), online: <http://strategis.ic.gc.ca/SSI/ct/vdreport.pdf> (date accessed: 26 March 2001) [hereinafter *Pricing Report*]. Invaluable research assistance was provided by two of my students: Derek Smith and Lorne Ptack. Many of the recommendations in the *Pricing Report* were endorsed by the Standing Committee on Industry in its *Interim Report on the Competition Act* (Ottawa: Public Works and Government Services Canada - Publishing, 2000) (Chair S. Whelan) [hereinafter *Report on the Competition Act*]. Responses to the *Pricing Report* are discussed in J. A. VanDuzer "Where are We Going with *Competition Act* Rules for Price Discrimination, Predatory Pricing and Price Maintenance: Some Comments on Recent Developments" (Annual Fall Conference on Competition Law 2000) [forthcoming in 2001 from Juris Publishing] [hereinafter *VanDuzer on Recent Developments*].

[4] *Supra* note 1, s.1.1. Efficiency had been previously held to be an objective of competition law in the case law. See *e.g. Weidman* v. *Schragge* (1912), 46 S.C.R. 1 at 4, 2 D.L.R. 734 at 737.

[5] This view was recently expressed by the Commissioner of Competition, Konrad von Finckenstein, in his remarks to the Standing Committee on Industry on Bill C-235 (15 April 1999), online: Standing Committee on Industry Website <http://www.parl.gc.ca/infocomdoc/36/1/indy/meetings/evidence/indyev111-e.htm> (date accessed: 24 March 2001).

practice, however, distinguishing anticompetitive conduct from acceptable marketplace behaviour and determining what level of competition is sufficient are extremely difficult.[6]

Because the purpose clause of the *Competition Act* states that competition is to be sought as a way to ensure opportunities for some particular subsets of enterprises, some competitors may expect broader protection through this law than a single minded commitment to the competitive process based solely on efficiency considerations would dictate. In other words, the purpose clause may be interpreted as expressing an intention to proscribe anticompetitive behaviour, even where the outcome is the removal of a less efficient competitor and sufficient competition remains in the market place. Protecting fair and equitable opportunities for small and medium sized enterprises, for example, could lead to tradeoffs with the promotion of efficiency.

Assessing the pricing provisions requires one to deal with these tradeoffs. It is possible to adopt an enforcement approach to the Pricing Provisions which is aimed exclusively at promoting efficiency and, to a large extent, the practice of the Bureau reflects this aim. In some respects, however, the provisions themselves reflect a concern for the protection of market place participants which is out of step with the promotion of efficiency.

Most economic analysis of competition policy is concerned with how to protect the competitive process by ensuring that markets function efficiently and this Part discusses the efficiency basis for competition law rules related to the main types of anticompetitive pricing practices regulated under the *Competition Act*, price discrimination, predatory pricing and price maintenance. Part III examines the Pricing Provisions, including their interpretation by the courts and by commentators. Part IV presents the enforcement history of the Bureau in relation to the Pricing Provisions focusing on the past five years, including the application of the case weighting criteria used by the Bureau to determine whether and in what manner to proceed with a case. Part V draws on Parts II, III and IV to provide an assessment of the Pricing Provisions and their enforcement based on the criterion of economic efficiency.

B. *Price Discrimination*

Price discrimination means charging different prices to different customers, whether other businesses or final consumers, for the same product where the differences in price do not reflect differences in the cost to the supplier of serving the customers.[7] Three conditions are necessary for a firm to discriminate.[8]

1. The firm must have sufficient *market power* to set price (otherwise customers charged higher prices would choose to purchase from a competing supplier).

---

[6] Tradeoffs may also be required, for example, between static efficiency and dynamic efficiency, low prices and richness of choice and present versus future terms of sales for consumers.

[7] Discrimination can also occur where the same price is charged to customers who, perhaps because one is more expensive to serve than the other, should be charged different prices.

[8] D.W. Carlton & J. Perloff, *Modern Industrial Organization* (New York: Harper Collins, 1990) at 437; D.F. Greer, *Industrial Organization and Public Policy* (New York: MacMillan, 1980) at 335.

2. The firm must be able to identify different classes of customers with *different levels of sensitivity to the price* of the product. Differences in sensitivity may arise because of different needs, income levels or uses of the product.
3. There is *limited opportunity for customers to resell to each other.* It must not be possible, or at least costly, for customers paying a low price to sell to those for whom the product is priced more expensively.

Empirical evidence confirming the existence of price discrimination can be found relatively easily.[9] Price discrimination, however, is not inherently anticompetitive. Often discrimination may be preferable to a situation in which discrimination is not practised. It is very difficult to identify simple indicia of anticompetitive price discrimination. Much depends on the circumstances of each case.

Price discrimination may simply result in expanding a market, in which case an increase in welfare will result. For example, if we assume that some groups of consumers would not ordinarily purchase any product at the price a seller would charge if it was restricted to a single-pricing strategy, these groups would be better off if the seller was willing and able to sell them the product at a lower price. Price discrimination of this kind can increase total output and welfare.[10] The low price buyers are better off and those buying at the price which would otherwise be charged are no worse off.

To the extent that the discriminator charges more than it would if discrimination were prohibited, discrimination will impose a loss on the consumers paying the higher price. How one views the distributive effect represented by this transfer to the price discriminator will be affected by various factors. These include whether the discriminator also discriminates by selling below the price it would charge in a single price world and whether there are efficiencies associated with the discrimination. For example, through discrimination, the discriminator may be able to expand production to a more efficient level.

Charging different prices to different customers may be justified in certain circumstances, in which case it is not truly price discrimination at all. A transaction or information cost difference associated with selling to different customers will justify charging them different prices. So, for example, charging more to a customer buying low volumes or less to a high volume buyer may not be discriminatory where the volume discount is justified by cost differences. Differences between the prices a

---

[9] F.G. Tiffany & J.A. Ankrom, "The competitive use of price discrimination by colleges" (1998) 24 Eastern Econ. J. 99. Other examples are provided in R. Wilson, *Nonlinear Pricing* (New York: Oxford, 1993) at 30-36, and D.I. Rosenbaum & M.-H. Ye, "Price Discrimination and Economics Journals" (1997) 29 Applied Econ. 1611. Dana developed a model demonstrating price discrimination in the airline industry through the use of advance-purchase discounts: J.D. Dana, Jr., "Advance-Purchase Discounts and Price Discrimination in Competitive Markets" (1998) 106 J. Pol. Econ. 395. McFetridge has described price discrimination as "ubiquitous" in D.G. McFetridge, "Predatory and Discriminatory Pricing" in F. Mathewson, M. Trebilcock & M. Walker, eds., *The Law and Economics of Competition Policy* (Vancouver: Fraser Institute, 1990) at 74.

[10] This would occur where consumers have low demand elasticity: W.K. Viscusi, J.M. Vernon & J.E. Harrington, *Economics of Regulation and Antitrust* (Cambridge: MIT Press, 1995).

supplier charges to affiliated and non-affiliated distributors are justifiable, if the transaction costs of dealing with non-affiliated distributors are higher. In a similar way, if different prices are charged at different times, as a result of changes in input costs or demand shifts, or price differentials are transitory, perhaps because they are responding to price changes by a competitor or other market exigencies, the differences are not discriminatory.[11]

In short, the economic consequences of price discrimination are difficult to characterize in the abstract. Any competition law provision designed to address anticompetitive price discrimination should be restricted to true price discrimination as defined at the beginning of this section. As well, some competitive effects test will be necessary because the existence and nature of any anticompetitive effect will depend upon the particular circumstances in which discrimination occurs in each case. Assessment of the competitive effects of discrimination will be difficult, imposing a need for significant data and difficult microeconomic forecasts of demand and other variables.[12]

C. *Predatory Pricing*

Predatory pricing occurs where a firm temporarily charges particularly low prices in an attempt to deter market entry by new competitors, to drive out existing competitors, or to discipline competitors.[13] While low pricing is commonly complained about by firms struggling to compete, in practice it is hard to distinguish predation from aggressive competition.

Few would disagree that predation is anticompetitive in its effects, but its existence is often debated. Prior to the 1980's, predation was regarded by economists as likely to be rare. This view was based on the assumption that for predation to become an economically rational strategy for a firm there must be a reasonable prospect of recouping its losses after a successful low pricing campaign and that prospects for recoupment will be low in the absence of high barriers to entry by prospective competitors into the alleged predator's market. If high prices were charged by a supposed predator after successfully eliminating or deterring competitors from entering a market with low barriers to entry, others would enter to take advantage of the high prices and the prices would not be sustainable.

More recently, some sophisticated theoretical claims have been made suggesting a wider array of circumstances in which predation may be a rational strategy. For example, predation may be used to create a reputation for toughness.[14] The reputation created by an act of predation at one time may be sufficient to deter future

---

[11] J.B. Dunlop, D. McQueen & M. Trebilcock, *Canadian Competition Policy: A Legal and Economic Analysis* (Toronto: Canada Law Book, 1987) at 217.

[12] D. McFetridge, "Anti-Competitive Pricing: An Economist's View" (Annual Fall Conference on Competition Law 2000) at 2-4 [forthcoming in 2001 from Juris Publishing].

[13] P. Milgrom & J. Roberts, "Limit Pricing and Entry Under Incomplete Information: An Equilibrium Analysis" (1982) 50 Econometrica 443.

[14] J. Ordover & G. Saloner, "Predation, Monopolization and Antitrust" in R. Schmalensee & R. Willig, eds., *Handbook of Industrial Organization* (New York: Elsevier Science, 1989) 537 at 562; Milgrom & Roberts, *ibid.*; J. Roberts, "A Signaling Model of Predatory Pricing" (1986) 38 Supp. to Oxford Econ. Papers 75; G. Saloner, "Predation, Mergers, and Incomplete Information" (1987) 18 Rand J. Econ. 165.

entry on an ongoing basis, thereby allowing the predator to raise prices to recoup its investment in predation. In these circumstances, predation is less costly because, in effect, initial acts of predation insulate the predator from competition by creating a strategic barrier to entry in the market. Since the cost of predation is reduced while the prospects for recoupment are enhanced, predation should be more likely. This explanation is most compelling in circumstances where the predator is active in multiple markets. If predation in one market creates a reputational barrier to entry in all markets in which the predator participates, the predator may be able to engage in supra-competitive pricing in all markets after a successful predatory campaign in one of them.

Some argue that incumbent dominant firms may also successfully predate by lowering price upon entry by a new firm to send a signal either that demand is weak or that the predator's costs are so low that they can afford to reduce prices. In either case, the intended message may be that there is no prospect of profitable entry.[15] Such signals may be false. A firm may lower prices to a level below its costs even when demand is strong in order to falsely signal that demand is weak or that its costs are lower than they actually are. Such "signal jamming" may be used to keep firms from entering the market by making profitable entry appear more difficult or impossible.[16] In these ways, firms may use strategic behaviour to create barriers to entry.

Recently, Lott has suggested that the plausibility of profitable predation on any of these theories depends upon certain assumptions being fulfilled.[17] In general, the managers of the predator must have incentives to engage in a predatory strategy if the reputation for predation is to be credible. This means that their compensation must not be linked to short term share value which will decline during the unprofitable predation period and that they will be protected against losing their jobs. In a study of U.S. firms convicted of predation, Lott concludes that there is no evidence of the management incentives or entrenchment necessary for the theoretical claims to be plausible. He found, instead, that firms accused of predation tied management compensation to short term profits. Nevertheless, to the extent that pricing decisions are made outside the management group or are not effectively monitored by management, Lott's findings do not exclude the possibility of predatory strategies being adopted.[18]

Pricing is only considered predatory where it is below some measure of the predator's cost. The prominent U.S. antitrust scholars Areeda and Turner assert that a price at or above marginal cost is not predatory and that a price below marginal cost is predatory.[19] Because of the difficulty in measuring marginal cost, Areeda and Turner suggest average variable cost as a proxy in most circumstances.[20] Others argue,

---

[15] See *e.g.* E. Rasmussen, "Signal Jamming and Limit Pricing: A Unified Approach" Yale Law School Working Paper, 1991 (on file with the author); Milgrom & Roberts, *ibid.*

[16] Milgrom & Roberts, *ibid.*

[17] J.R. Lott, *Are Predatory Commitments Credible? Who Should the Courts Believe?* (Chicago: University of Chicago Press, 1999) at 28-59.

[18] This and other criticisms of Lott's approach and conclusions are made in D.E.M. Sappington & J.G. Sidak, "Are Public Enterprises the Only Credible Predators?" (2000) 67 U. Chi. L. Rev. 271 at 274-76. Other theories of predation are discussed in the *Pricing Report*, *supra* note 3.

[19] P. Areeda & D. Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act" (1975) 88 Harv. L. Rev. 697.

[20] Areeda and Turner, *ibid.*, suggest average variable cost as a proxy only so long as the predator has excess capacity. If the predator is producing at capacity, they suggest average total cost is a better proxy because of the need to add a new plant to produce more. This distinction

however, that prices between average total cost and average variable cost may be predatory. Joskow and Klevorick[21] suggest that, where prices are in this "grey zone," predation may occur where the alleged predator is dominant and the barriers to entry are high enough that post-predation recoupment is feasible. Joskow and Klevorick also suggest that consideration should be given to the dynamic effects of competition on costs including the effects of changing technology. In short, they suggest that cost evidence alone, typically, does not dictate a conclusion that pricing is not predatory when the price is in the grey zone.

Also, there may be business justifications for pricing in the grey zone which are not predatory. Under normal competition, prices may fall below average total cost when firms are seeking to enter a market or expand, where demand is declining or growth is slower than expected or there is excess capacity in the market.[22] In addition, it is quite naive to presume that an incumbent firm should sit passively in the face of a new aggressive entrant.[23] More reasonably, one may expect the incumbent firm to increase output and reduce prices as a way to prevent its market share from being eroded.

Some commentators[24] have suggested that evidence of intent is useful to distinguish true predation from pro-competitive price cutting. The difficulty with such an approach is that it is often impossible to produce reliable evidence of intent. On the one hand, the language of the market place is not precise, and aggressive competition may be expressed in language which sounds predatory. On the other hand, sophisticated business people may be able to disguise intent effectively. It will often be the case that no intent evidence is available. Because of these concerns, other commentators have disputed the value of intent evidence.[25]

To summarize, economic theory suggests that the following are indicators of predation, though none is conclusive:

1. Market power defined by reference to market shares and barriers to entry. In the absence of market power, the prospect of recouping the costs of a predatory campaign is small;
2. A policy of selling at prices below some measure of the predator's

---

was recognized in *Director of Investigation and Research* v. *NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) [hereinafter *NutraSweet*], as discussed in Part III, *infra*.

[21] P. Joskow & A. Klevorick, "A Framework for Analyzing Predatory Pricing Policy" (1979) 89 Yale L.J. 213 at 252. McFetridge is critical of this model as being unworkable in practice: *supra* note 9 at 93-94.

[22] McFetridge, *ibid.* at 83.

[23] For example, the dominant firm responded in this way in *Canada (Director of Investigation and Research)* v. *Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. 1 (Comp. Trib.) [hereinafter *Tele-Direct*].

[24] See *e.g.* R.A. Posner, *Antitrust Law* (Chicago: University of Chicago Press, 1976). Intention has the advantage of allowing action to be taken against people engaged in anticompetitive acts for non-economic reasons, or who do so out of bad judgement. This unsuccessful predation, in general, however, is good for consumers.

[25] See *e.g.* Lott, *supra* note 17 at 7, and Posner, *ibid.* at 189-190. Lawson Hunter and Susan Hutton have stated that "it is impossible to distinguish between predatory and non-predatory competitive intent": L.A.W. Hunter & S.M. Hutton, "Is the Price Right?: Comments on the *Predatory Pricing Enforcement Guidelines* and *Price Discrimination Enforcement Guidelines* of the Bureau of Competition Policy" (1993) 38 McGill L.J. 830 at 864.

cost:

(A) where sales are at prices below average total cost and the predator has no pro-competitive explanation, such as

(I) meeting competition or changes in demand conditions; or

(II) excess supply;

(B) where sales are at prices below average variable costs; and

3. Evidence of predatory intent.

This simple listing raises but does not address, the challenge of how each of these indicators may be used in practice. While it is simple to state that market power is needed to make predatory strategies credible, the assessment of market power is inherently problematic. To begin with, there are complex issues associated with determining the relevant product and geographic market. As well, while categories of barriers to entry may be readily identified, such as sunk costs and economies of scale, how precisely they may be measured and how to evaluate them is the subject of debate. When are sunk costs high enough to constitute a barrier to entry? Should sunk costs arising from efficiencies of the dominant firm be counted? More difficult still are assessments of barriers derived from slippery concepts such as reputation.

Even an assessment of costs is difficult. In principle, the relevant costs should be the anticipated marginal costs of the predator throughout the period of predation. Given the difficulty of determining marginal costs in practice, average variable costs are often used as a proxy. Even average variable costs, however, may be difficult to ascertain. In U.S. judicial decisions, the determination of costs has been described as being even more difficult than the market power analysis.[26]

Empirical evidence on the prevalence of predation is mixed. In a recent U.K. study, it was found that only six cases of predation were initiated over a ten year period ending in 1990 and anticompetitive conduct was found in just three cases.[27] One must be somewhat careful about inferring the absence of predatory activity from such studies, however. An absence of cases may reflect the allocation of enforcement priority to other types of anticompetitive behaviour, evidentiary challenges in assembling a predation case, problems in designing effective legal rules to address predation or some combination of these factors.[28]

Prosecutions and private litigation based on allegations of predation are more

---

[26] T. Calvani, *Predatory Pricing and State Below-Cost Sales Statutes in the United States: An Analysis* (Hull: Competition Bureau, 1999) at 2-4, online: Competition Bureau <http://strategis.ic.gc.ca/SSG/ct01491e.html> (date accessed: 24 March 2001). What costs are considered variable will depend on the time frame chosen for analysis. There are some significant challenges in determining the appropriate time frame chose for analysis: see McFetridge, *supra* note 12 at 8.

[27] M.A. Utton, "Anticompetitive Practices and the Competition Act, 1980" *Department of Economics Discussion Papers in Industrial Economics,* series E, vol. III, no. 24 (Reading: University of Reading, 1990). A 1998 study of competition in the U.K. petrol market conducted for the Office of Fair Trading in response to complaints of predatory pricing, found no evidence of predatory activity, though large numbers of independent gas stations had closed: U.K., Office of Fair Trading, *Competition in the Supply of Petrol in the UK* (1998). The OFT attributed the decline in independents to intense competition from supermarkets.

[28] As discussed in Part II and Part III, all of these factors are present in the current Canadian regime.

plentiful in the United States. Nevertheless, in reviewing U.S. court cases in which companies have been successfully prosecuted, some commentators have concluded that many firms have been wrongfully convicted even with the courts using a relatively relaxed test for predation: any pricing below average total cost.[29] Other studies of individual cases, however, have concluded that predation occurred.[30]

D. *Price Maintenance*

Price maintenance occurs where a firm tries to set a minimum price at which another firm can sell a product and it is one of the most pervasive restraints in the market place.[31] Where price maintenance occurs horizontally between competitors who agree to fix their prices it is unambiguously anticompetitive in most cases.[32] Where price maintenance is vertical, such as where a wholesale supplier tries to set the price or a minimum price at which a retailer may sell the supplier's product, the effect on competition is more difficult to assess.

The economic rationale for prohibiting vertical resale price maintenance under competition law is that it lessens competition by restricting the ability of the retailer to compete on price. It leads to higher prices for consumers and higher margins for retailers, and, in the process, protects inefficient retailers that would not prosper in a truly competitive environment. In the absence of price maintenance, competition would be more likely to eliminate less efficient retailers and lead to price and cost reductions in the long run.[33] Where price maintenance is implemented by a supplier solely in response to pressure from one of the supplier's large customers seeking to eliminate the low pricing policies of competitors of the customer, the only purpose may be to protect the large customer from price competition.[34]

---

[29] R. Koller, "The Myth of Predatory Pricing" (1971) 4:4 Antitrust L. & Econ. Rev. 105. See also J. McGee, "Predatory Price Cutting: The Standard Oil (N.J.) Case" (1958) 1 J. L.& Econ. 137; K. Elzinga, "Predatory Pricing: The Case of the Gunpowder Trust" (1970) 13 J.L.& Econ. 223; L. Phlips & I.M. Moras, "The AKZO Decision: A Case of Predatory Pricing?" (1993) 41 J. Indus. Econ. 315.

[30] M.R. Burns, "Predatory Pricing and the Acquisition Cost of Creditors" (1986) J. Pol. Econ. 266; D. Weiman & R. Levin, "Preying for Monopoly? The Case of the Southern Bell Telephone Company, 1894-1912" (1994) J. Pol. Econ. 103.

[31] F. Mathewson & R. Winter, "The Law and Economics of Vertical Restraints" in Mathewson *et al.*, *supra* note 9, 109 at 112.

[32] T. Kennish & T. Ross, "Toward a New Canadian Approach to Agreements Between Competitors: Re-evaluating the Law on Horizontal Agreements" (1997) 28 Can. Bus. L.J. 22 at 27. It is not clear whether all agreements relating to price may be contrary to section 61, when not accompanied by a threat or promise: H. Chandler & R. Jackson, "Beyond Merriment and Diversion: The Treatment of Conspiracies under Canada's *Competition Act*" in *Roundtable on Competition Act Amendments* (Toronto: Insight, 2000) [hereinafter *Roundtable on Competition Act Amendments*] 77 at 86, 91.

[33] Price maintenance may not protect a competitor where the competitor sells multiple goods only some of which are subject to price maintenance or there are many substitutes available for the price maintained goods in the market.

[34] It is also possible that the large customer may encourage price maintenance by a supplier in order to ensure that the customer's competitors in the retail market compete more on service delivery and less on price. In any case, one may expect that this would rarely be successful so long as the retailer's competitor can find an alternative source of supply. In practice, however, the costs of changing suppliers and exclusive contracting arrangements may make doing

On the other hand, efficiency is typically served by freedom of contract and many commentators have suggested that vertical resale price maintenance should be permitted, at least in some circumstances. Suppliers may want to encourage resellers to compete on demand determinants other than price, such as service, for example. The retail market may not provide the optimal level of service the supplier desires because of a "free rider" problem. Discount shops may free ride on the efforts of full-service retailers that provide important pre- and post-sales service on technically complex products such as computers or electronics. Resale price maintenance ensures that resellers have an incentive to offer important consumer services because they are precluded from competing on price.[35]

Another efficiency explanation is that suppliers, such as those in the designer clothing industry, may want to maintain a certain image of their product which can be damaged by the item being heavily discounted or used as a loss leader. In each case, price maintenance is more efficient if it is cheaper than alternative means of accomplishing the same objective, such as by contractual commitments or vertical integration by the supplier into the retail market.[36]

It is possible to identify some of the economic indicia of anticompetitive vertical price maintenance as follows:

1. The person implementing price maintenance (the "*Supplier*") has market power, a characteristic of which is limited opportunities for customers to change suppliers; and
2. The Supplier does not have an efficiency based justification, such as the improvement of customer service or the prevention of brand impairing practices, which would include loss leadering or misleading advertising.

Vertical price maintenance may be associated with anticompetitive activity in the form of a cartel. A cartel of wholesalers may agree to impose price maintenance on the retailers they deal with rather than agreeing to fix wholesale prices. This might be attempted because the granting of discounts off retail prices may be more readily monitored by the cartel than discounts by cartel members at the wholesale level. In this way, vertical price maintenance may facilitate enforcement of the wholesaler cartel. As McFetridge notes, however, certain conditions must be satisfied before vertical price maintenance is likely to be used as a facilitating device for a wholesaler cartel.[37] It is also possible that a cartel of retailers may seek to get wholesalers to impose retail price maintenance as a way of maintaining high margins on sales at the retail level. The limited empirical evidence available provides examples of both types of cartels but

---

so infeasible in some circumstances.

[35] A.W. Dnes, "Resale price maintenance and antitrust policy" (1996) 3 Applied Econ. Letters 107 at 107-108. The magnitude of this effect will be a function of the search costs of consumers and the inherent importance of service in connection with a particular product. Where search costs are low and the product is complex, such as computers, the free riding problem is likely to be significant. Mathewson & Winter, *supra* note 31 at 120.

[36] McFetridge, *supra* note 12 at 12-15, provides a more comprehensive discussion of the economic justifications for price maintenance.

[37] *Ibid.* at 14. These include (i) wholesalers attempt to eliminate discounting by retailers of other brands, (ii) wholesalers are a "tight oligopoly" and (iii) entry is difficult.

suggests that the price maintenance associated with cartels is rare.[38]

E. *Challenges of the New Economy*

The economic analysis of the competitive effects of pricing practices must be responsive to the changing conditions of the Canadian economy. Our economy has become increasingly competitive as a consequence of globalization due, in part, to the ongoing process of trade liberalization. Also, in certain sectors the channels of distribution have substantially changed. The emergence of "big box" retailing and Internet distribution are both a response to and a cause of increased competitiveness. Even more fundamentally, the economy is currently undergoing a radical transformation; it is becoming more and more knowledge-based and increasingly innovation-driven. The following features of the new economy must be incorporated into competition policy analysis in relation to anticompetitive pricing, especially predatory pricing: (1) accelerating technological change;[39] (2) increasing returns and declining or zero marginal cost as units of output increase;[40] (3) the desirability and benefits of products becoming industry standards; and (4) the likelihood that market dominance by firms will be short-lived or non-existent.

In the new economy, legitimate efficiency enhancing competition through low pricing practices is likely to become more pervasive. In some industries, high rates of innovation will continually drive down costs, encouraging vigorous price competition. Where declining marginal costs and increasing returns are associated with increased production, low pricing strategies will also be encouraged. Such strategies may be most common where establishing the industry standard may have substantial benefits, such as in software where a program's value increases with the number of users.[41] Assessments of whether a low pricing strategy is predatory must take these factors into account.

Technology is driving down barriers to entry, both through innovations in marketing and distribution, such as Internet sales, and by creating low cost ways of carrying on business. When one combines declining barriers to entry with increasing threats to dominance in some markets from innovative new products and technologies, the likelihood that dominance can be exploited to injure competition through anticompetitive pricing practices is substantially reduced. At the same time, a characteristic of an innovation driven market is that the innovator will be dominant, at least for a time, and that there may be efficiencies associated with dominance, including

---

[38] *Pricing Report*, *supra* note 3 at 14-15.

[39] See W.O. Sheremata, "'New' issues in competition policy raised by information technology industries" (1998) 43 Antitrust Bull. 547; J. Farrell & M.L. Katz, "The effects of antitrust and intellectual property law on compatibility and innovation" (1998) 43 Antitrust Bull. 609 and D.J. Teece & M. Coleman, "The meaning of monopoly: antitrust analysis in high-technology industries" (1998) 43 Antitrust Bull. 801. In the same volume, Rubinfeld suggests how conventional antitrust analysis can be applied to deal with dynamic network industries: D.L. Rubinfeld, "Antitrust enforcement in dynamic network industries" (1998) 43 Antitrust Bull. 859.

[40] That is, the supply curve is downward sloping. J.T. Schwartz, "America's economic-technological agenda for the 1990s" (1992) 121 Daedalus 139; K. Kelly, *New Rules for the New Economy: 10 Radical Strategies for a Connected World* (New York: Penguin, 1998).

[41] This is an example of a "network effect". Network effects may create barriers to entry as well as having efficiency-enhancing effects. See Rubinfeld, *supra* note 39 at 861-72.

the promotion of further innovation.[42] Market power must be assessed in light of the characteristics of competition in the new economy.

The challenge of accurately identifying and taking enforcement action against anticompetitive pricing behaviour is becoming more daunting. The Competition Bureau needs to be vigilant to ensure that its enforcement policies are both informed by and sensitive to these exigencies of the new economy. In part, this means that competition authorities should increasingly emphasize dynamic over static efficiency goals in their enforcement analysis. Dynamic efficiency recognizes that innovation is essential to efficiency, that the establishment of a standard may be beneficial to consumers and, in any event, that any standard will not be sustainable in the long term since standards themselves are a significant site of competition.[43]

III. COMPETITION ACT PROVISIONS DEALING WITH ANTICOMPETITIVE PRICING

A. *Scheme of the Competition Act*

Under the *Competition Act*, price discrimination, predatory pricing and price maintenance are offences. Under section 36 of the *Act*, criminal offences under the *Act* may be the subject of private civil proceedings by anyone who has suffered damages as a result of the commission of the offence.

Other provisions which deal with pricing practices are contained in Part VI, the civil part of the *Act*. Where there is a contravention of a civil provision, the Commissioner may apply to the Competition Tribunal for an order prohibiting the person engaged in the anticompetitive behaviour from continuing it. The main requirement for the Tribunal to make such an order is that there be some specified effect on competition. Price discrimination, predation and price maintenance may all be addressed under the civil abuse of dominance provision, section 79, where the requirements of that provision are met.

In the following sections of this Part, the specific criminal provisions dealing with price discrimination, predation and price maintenance as interpreted by the courts as well as the Bureau's *Price Discrimination Enforcement Guidelines* and *Predatory Pricing Enforcement Guidelines* are discussed. The possible application of the abuse of dominance provision to these pricing practices is also considered.

B. *Price Discrimination*

1. *General Discussion*

A criminal prohibition on price discrimination was introduced into Canadian

---

[42] G.B. Richardson, "Competition, innovation and increasing returns" (1996) *Danish Research Unit for Industrial Dynamics Working Paper No. 96-10*; G.B. Richardson, "Economic analysis, public policy and the software industry" (1997) *Danish Research Unit for Industrial Dynamics Working Paper No. 97-4*. See also G. Dosi, "The nature of the innovative process" in G. Dosi *et al.*, *Technical Change and Economic Theory* (Great Britain: Pinter, 1988) 221.

[43] R.D. Corley, "IP and Competition Law: Enforcement Challenges of the Information Economy" in G.F. Leslie, ed., *Annual Fall Conference on Competition Law 1999* (Toronto: Juris Publishing, 2000) at 340-42.

law in 1935[44] to address concerns that large buyers might be able to use their market power to extract unfairly large discounts from suppliers.[45] The grocery industry was identified as particularly threatened by this type of behaviour.[46] The purpose of the provision was to protect small businesses dealing with such large buyers.[47]

The essence of the current provision is a prohibition on suppliers engaging in a practice of granting concessions on price to one purchaser which are not available to competing purchasers of the same article in like quality and quantity. The provision contains some significant limitations. For example, unlike most of the provisions of the *Act*, it only applies to a "sale" of "articles". Other forms of transactions, such as leases, are not included; sales of anything other than an article, such as a service, are not included.

For the offence to be established, there must be a sale to a purchaser on terms that, at the time of the sale, are not available to a second prospective purchaser who competes with the first. If the purchasers do not carry on business in the same market, such as where one sells to final consumers, while the other sells only to other businesses, no offence is committed. Finally, the price concession must be granted as part of a "practice" of discriminating. Discounts for particular purposes which occur occasionally and are of short duration, such as those for gaining entry into a new market or to respond to a competitor's behaviour will not likely be considered to be a practice.[48]

---

[44] Section 489A of the *Criminal Code*, enacted by S.C. 1935, c. 56, s. 9, and re-enacted by S.C. 1952, c. 39, s. 11. In the next revision of the *Criminal Code*, the provision became s. 412 (S.C. 1953-54, c. 51) and it was transferred to the *Combines Investigation Act* as s. 33A (S.C. 1960, c. 45, s. 13). Several provisions dealing with price discrimination appear in the civil part of the *Act*, in addition to the abuse of dominance provision. Under section 76, the Competition Tribunal may order that a seller discontinue a practice of consignment selling where it finds that the practice has been introduced for the purpose of price discriminating. Discrimination in the form of "delivered pricing" may also be subject to an application to the Tribunal under section 80. Delivered pricing means refusing to deliver articles at a particular location on the same trade terms as the supplier delivers the article to other customers at the same location. Section 77 of the *Act* deals with certain practices which may involve price discrimination. The Competition Tribunal may make an order prohibiting the practice of granting price concessions to induce a customer to deal exclusively in a particular product or refrain from dealing with a particular product, if certain requirements are met, including the requirement that competition is or is likely to be lessened substantially. Also, where discrimination in the pricing of one product by a supplier is used as an inducement for a buyer to acquire some other product, the supplier is engaged in tied selling and the Tribunal may make an order prohibiting the discrimination where the same competitive effect test is met. Discrimination may also take the form, not of price differences, but of differential access to promotional allowances. Section 51 makes such discrimination a criminal offence in some circumstances. See also the discussion of price maintenance and s. 61(1), *infra*.

[45] J. O. Patenaude, *Report of the Royal Commission on Price Spreads* (Ottawa: King's Printer, 1935) at c. 2.

[46] In the United States, such an injury in the grocery trade was found in *United States* v. *New York Great Atlantic & Pacific Tea Co.*, 67 F.Supp. 626 (E.D. Ill. 1946), aff'd 173 F.2d 79 (7th Cir. 1949).

[47] Patenaude, *supra* note 45 at 270; R. J. Roberts, *Roberts on Competition/Antitrust: Canada and the United States*, 2d ed. (Toronto: Butterworths, 1992) at 137.

[48] *R.* v. *Howard et al.* (1958) (B.C. Mag. Ct.), unreported but reproduced in D.G. Kilgour, *Cases and Materials on Unfair and Restrictive Trade Practices* (Toronto: University of Toronto Press, 1962) at 354.

There must be knowledge of each element of the offence. The supplier must have knowledge that the sale is discriminatory. The Restrictive Trade Practices Commission concluded that this requirement could be satisfied by negligence in *Mary Maxim Knitting Wool*.[49]

The provision has been the subject of very few criminal prosecutions. There have been only three convictions, all since 1983[50] and, in each case, the accused pleaded guilty. One of the factors militating against convictions is that each of the many elements of the offence must be proven beyond a reasonable doubt.

Despite its apparent ineffectiveness,[51] its application has been a significant concern in the business community. In the absence of judicial decisions providing guidance regarding how the provision should be interpreted, the Bureau received many requests for advisory opinions regarding whether certain kinds of pricing practices were consistent with the *Act*. Many commentators have claimed that the uncertainty surrounding the application of the provision meant that it had a chilling effect on pricing strategies with no anticompetitive effect and resulted in unnecessary compliance and monitoring costs.[52] In 1992, in order to provide better guidance regarding its interpretation of the price discrimination provision, the Bureau issued the *Price Discrimination Enforcement Guidelines*.[53] As discussed below, the guidelines have been only partly successful in dispelling the chilling effect associated with the provision even though they are generally perceived as disclosing a relatively permissive

---

[49] Restrictive Trade Practices Commission, *Pricing Practices of Miss Mary Maxim Ltd.: A Report in the Matter of an Inquiry Relating to the Distribution and Sale of Mary Maxim Knitting Wool, Patterns and Accessories Thereof in Canada* (Ottawa: Queen's Printer, 1966) at 32. The supplier was found to have breached the section because it was negligent in classifying its customers for the purpose of giving volume discounts. Volume requirements were not clearly determined, purchases were not tracked effectively, and no period was established for determining whether volume requirements were met.

[50] The three convictions are: *R.* v. *Simmons* (unreported, 15 October 1984) (Ont. Prov. Ct. (Crim. Div.)) ($15,000 fine on each of two counts and prohibition order); *R.* v. *Neptune Motors*, [1986] C.C.L. 7046 (Ont. Dist. Ct.) ($50,000 fine); and *R.* v. *Perreault*, [1996] R.J.Q. 2565, [1996] A.Q. No. 2660 (C.S.), online: QL (QJ) (one year prison term) [hereinafter *Perreault*]. Other cases have proceeded to court but did not result in convictions. A prohibition order was issued in *R.* v. *Station Mont. Tremblant Lodge Inc.* (unreported, 12 January 1989) (F.C.T.D.). Several private actions under s. 36 have dealt with price discrimination allegations: *Hurtig Publishers Ltd.* v. *W.H. Smith Ltd.* (1989), 99 A.R. 70, 28 C.P.R. (3d) 22 (Q.B.); *Acier d'Armature Rô Inc.* v. *Stelco Inc.*, [1996] R.R.A. 355, 69 C.P.R. (3d) 204 (Qué. C.A.); *536839 Ontario Ltd. (c.o.b. Techumseh Fuels)* v. *Imperial Oil Ltd.*, [1998] O.J. No. 2667 (C.A), online: QL (OJ); *Newcourt Credit Group Inc.* v. *G.A. Finance Inc.* (1998), 70 O.T.C. 72, 13 P.P.S.A.C. (2d) 372 (Gen. Div. [Commercial List]); *Records on Wheels Ltd.* v. *Twentieth Century Fox Home Entertainment Canada Ltd.*, [1998] O.J. No. 3982 (Gen. Div.), online: QL (OJ); and *BASF Canada Inc.* v. *Max Auto Supply (1986) Inc.* (1999), 30 C.P.C. (4th) 23, 91 O.T.C. 264 (Gen. Div.).

[51] The provision was described as "generally ineffective" in *Proposals for a New Competition Policy for Canada, Second Stage: Combines Investigation Act Amendments* (Ottawa: Consumer and Corporate Affairs Canada, 1977) at 63.

[52] Davies, Ward & Beck, *Competition Law of Canada*, looseleaf (New York: Matthew Bender, 1988) at 4-4 – 4-9; Hunter & Hutton, *supra* note 25 at 864-65.

[53] (Ottawa: Consumer and Corporate Affairs Canada, 1992), online: Competition Bureau <http://strategis.ic.gc.ca/SSG/ct01140e.html> (date accessed: 26 March 2001).

interpretation.[54]

The Competition Bureau raised the question of whether the provision should be abolished in its 1995 Discussion Paper on possible amendments to the *Competition Act*.[55] Abolition was endorsed by the Consultative Panel on amendments to the *Competition Act* in its 1996 Report.[56] The Panel concluded that criminal prohibitions and penalties are inappropriate tools to deal with price discrimination and that the abuse of dominance provision is sufficient to deal with cases of price discrimination which were injurious to competition. The Panel also found that the protection of small business afforded by the provision was overstated, particularly because it permits the granting of volume discounts which will tend to favour large businesses.

Nevertheless, section 50(1)(a) was retained unchanged in the most recent round of amendments which came into force in March 1999. The reason suggested by the Director of Investigation and Research who was responsible for introducing the amendments, George Addy, was that some small business sectors felt strongly that the provision provided them with protection.[57] Accordingly, it was concluded that the provisions should not be repealed until further study had confirmed whether the claimed protection existed in fact.

2. *The* Price Discrimination Enforcement Guidelines

The *Price Discrimination Enforcement Guidelines*,[58] published by the Bureau, purport to set out the Bureau's enforcement policy and its interpretation of the price discrimination provisions. The *Guidelines* indicate that the Bureau is unlikely to take action against a wide range of discounts which are available upon the purchaser fulfilling some condition, such as performing a service for the seller (sometimes referred to as a "functional discount");[59] or upon the purchaser agreeing to deal exclusively in the seller's products (sometimes referred to as an "exclusive dealing discount"); or upon a purchaser increasing purchases over a prior period (sometimes referred to as "growth bonuses" or "fidelity discounts"). Such discounts are not likely to raise issues so long as they are available to all purchasers who compete with each other. Prior to the issuance of the *Guidelines*, the prevailing view was that only volume based discounts were immune from attack under the *Act*.[60]

Some aspects of the *Guidelines* have been criticized as departing from the language of the *Act*. The requirement that discounts and other concessions be "available" to competing customers is interpreted in a manner which is, arguably,

---

[54] Hunter & Hutton, *supra* note 25 at 865; Davies, Ward & Beck, *supra* note 52 at 4-6.

[55] Industry Canada, *Discussion Paper: Competition Act Amendments* (Ottawa: Industry Canada, 1995) at 19-20.

[56] *Report of the Consultative Panel on Amendments to the Competition Act* (1996) at 29-30.

[57] "Luncheon Address" (Canadian Institute, Toronto, 10 May 1996) at 18-20 [unpublished].

[58] *Supra* note 53.

[59] A functional discount was upheld in *R.* v. *William E. Coutts Co.*, [1968] 1 O.R. 549 at 550, 67 D.L.R. (2d) 87 at 88 (H.C.), aff'd, [1968] 1 O.R. 549 at 564, 67 D.L.R. (2d) 87 at 102 (C.A.) [hereinafter *Coutts* cited to O.R.]. In that case, the purchaser received the discount because it test marketed a new style of greeting card for the supplier.

[60] Growth discounts, for example, had previously been the subject of enforcement action in *R. v. Simmons*, *supra* note 50.

inconsistent with section 50(1)(a) and unduly onerous, because it requires suppliers to actually offer discounts to all customers in some circumstances.[61] The *Guidelines* go to some length to provide direction on what "available" means. Where a seller on its own initiative offers a concession to one customer, it must make the same offer to competing customers. If a purchaser initiates negotiations, and, at the end of negotiations, a concession is agreed to, the seller need not offer it to competing purchasers. The seller only needs to offer it if another purchaser asks for it directly. The *Guidelines* specifically state that there is no obligation to offer the concession where a competing purchaser asks only for the seller's "best deal". Some have suggested that this interpretation suffers from practical difficulties in real world situations where it may be hard to distinguish purchaser initiated negotiations from unilateral offers by sellers. More significantly, this approach may be argued to be inconsistent with the *Act* to the extent that the *Guidelines* interpret "available" as requiring an offer to be made. Section 51 expressly requires that promotional allowances be offered to competing purchasers. Parliament must be considered to have intended a different and lower degree of obligation by using "available" in section 50(1)(a). A court may not accept the interpretation in the *Guidelines* that the terms should be given the same meaning in circumstances where a seller has made a unilateral offer to someone else.

Unlike certain other provisions of *Act*,[62] section 50(1)(a) does not exempt sales between affiliates. Nevertheless, the *Guidelines* appear to create an exemption for enforcement purposes. They state that the Bureau may consider transactions between affiliates as being something other than sales and therefore outside the price discrimination prohibition. The jurisprudence on what is a sale, however, is well settled, and it seems unlikely that a court would exclude a transaction between affiliates if the formal requirements for a sale, including, in particular, the passing of title, are met.[63]

Also, the *Guidelines* indicate that all the franchisees in a franchise system may be treated as a single economic unit, such that anyone selling to the franchisees may aggregate all their purchases for the purpose of granting volume discounts. Where the franchisees make their purchases individually and are individually responsible for payment, this interpretation seems doubtful, since separate sales take place between the supplier and each franchisee.[64]

C. *Predatory Pricing*

1. *General Discussion*

---

[61] Hunter & Hutton, *supra* note 25 at 853; Davies, Ward & Beck, *supra* note 52 at 4-18 – 4-24.

[62] See *e.g.* ss. 61(2), 77(4).

[63] Sale has been clearly defined in Anglo-Canadian law since *Helby* v. *Matthews*, [1895] A.C. 471, [1895-99] All E.R. 821 (H.L.). The treatment of affiliates in the *Guidelines* has been criticized in Davies, Ward & Beck, *supra* note 52 at 4-27 - 4-30 and Hunter & Hutton, *supra* note 25 at 851. By contrast, Roberts suggests that a court may agree with the Bureau's interpretation: Roberts, *supra* note 47 at 156.

[64] Hunter & Hutton, *ibid.* at 856-57, raised this issue as well as the logic of treating franchise units as an economic unit. Interests may diverge, for example, where the franchisor retains the benefit of any discount based on system volume. The authors raise similar concerns with respect to the *Guidelines*' acceptance of international volume price discounts granted to a Canadian subsidiary of a multinational corporation as a consequence of the volume of sales to all corporations affiliated with the multinational.

Predatory pricing is a criminal offence under section 50(1)(c) of the *Competition Act*.[65] Several elements must be established before the offence is proven. The alleged predator must be engaged in business and engaged in a "policy" of selling products at prices which are "unreasonably low." In addition, one of four alternative requirements must be met:

1. the policy must have the effect or tendency of substantially lessening competition;
2. the policy must have the effect or tendency of eliminating a competitor;
3. the policy must be designed to substantially lessen competition; or
4. the policy must be designed to eliminate a competitor.

There has been very little jurisprudence to inform the interpretation of these requirements.[66]

In *Hoffmann-La Roche*,[67] it was held that, before a "policy" will be found, there must be a conscious decision to sell at an unreasonably low price and there must be continuing or repeated sales. A written policy need not be found.[68]

"Unreasonably low" was interpreted in the *Consumers Glass*[69] case. The court stated that the purpose of section 50(1)(c) was to prohibit selling at low prices for an anticompetitive purpose. The Court did not give any indication as to how to identify such a purpose, except to say that an anticompetitive purpose should not be inferred from the fact that a firm sets prices to a particular level with the intention of gaining business from a rival even if the alleged predator knew that pricing at that level would

---

[65] The *Competition Act* contains one other provision directed at predatory pricing behaviour. Geographic price discrimination occurs where a person charges prices for products in one area of Canada which are different from those that it charges elsewhere. Geographic price discrimination is specifically prohibited under s. 50(1)(b) of the *Act* where the same lessening of competition or elimination of a competitor tests, as discussed below in relation to s. 50(1)(c), has been met. There has been only one conviction under this section: *Perreault, supra* note 50. A consent order was issued in *R.* v. *Allen Sloman Enterprises Ltd.* (unreported, 29 May 1972) (F.C.C.). One other case involving s. 50(1)(b) resulted in an acquittal: *R.* v. *Carnation Co. Ltd.* (1969), 4 D.L.R. (3d) 133, 58 C.P.R. 112 (Alta. C.A.).

[66] There have been several private actions under s. 36 in which an allegation of predatory pricing has been raised: *947101 Ontario Ltd.* v. *Barrhaven Town Centre Inc.* (1995), 121 D.L.R. (4th) 748, 43 R.P.R. (2d) 251 (Ont. Gen. Div.); *Mansoor Electronics Ltd.* v. *BCE Mobile Communications Inc.* (1995), 99 F.T.R. 217, 64 C.P.R. (3d) 165; *Boehringer Ingelheim (Canada) Inc.* v. *Bristol Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51, 77 O.T.C. 36 (Gen. Div.) [hereinafter *Boehringer*]; and *W. J. Mowat Ltd. (c.o.b. Mowat Express)* v. *United Parcel Service Canada Ltd.*, [1998] O.J. No. 4337 (Gen. Div.), online: QL (OJ).

[67] *R.* v. *Hoffmann-La Roche Ltd.* (1980), 28 O.R. (2d) 164 at 194, 109 D.L.R. (3d) 5 at 35 (H.C.) [hereinafter *Hoffmann-La Roche* cited to O.R.], aff'd (*sub nom. R.* v. *Hoffmann-La Roche Ltd. (Nos. 1 & 2)*) (1981), 33 O.R. (2d) 694, 125 D.L.R. (3d) 607 (C.A.).

[68] This approach was applied recently in *Perreault, supra* note 50. Low pricing for a brief period, such as 48 hours for the purpose of meeting the competition, was held not to be a policy in *R.* v. *Producers Dairy Ltd.* (1966), 50 C.P.R. (2d) 265 at 265 (Ont. Mag. Ct.), aff'd (1966), 50 C.P.R. (2d) 265 at 270 (Ont. C.A.).

[69] *R.* v. *Consumers Glass Company Ltd. and Portion Packaging* (1981), 33 O.R. (2d) 228 at 246-47, 124 D.L.R. (3d) 274 at 292-93 (H.C.) [hereinafter *Consumers Glass* cited to O.R.].

make it difficult for the rival to stay in the market. The court stated that setting prices so as to take business away from rivals for the purpose of minimizing losses to a new entrant or maximizing profit is the whole object of competition. Where a price reduction is defensive, that is, in response to price cutting by a rival, even if it is a pre-emptive response, pricing is unlikely to be found to be unreasonably low unless it is disproportionate, in some way, to the rival's behaviour.[70]

Another factor relevant to determining if prices are unreasonably low is whether they are below some measure of cost. The courts have not been clear on what is the appropriate cost based test. While *Consumers Glass*[71] and *Hoffmann-La Roche*[72] held that pricing above average total cost could not be predatory, a presumption of predation from pricing below average variable cost has not been adopted, nor has a test been articulated for pricing between average variable cost and average total cost.

There were no sales below average variable cost in *Consumers Glass*. In *Hoffmann-La Roche*, where the alleged predation consisted of giving away drugs, the court did not state a definitive rule with respect to below average variable cost pricing. Instead, the court acknowledged that there may be circumstances in which pricing below some measure of cost would be justified and the question to be asked in each case, as indicated above, was whether there were any "external or [anticipated] long term economic benefits [which] would accrue to the seller by reducing its prices below cost".[73] The court suggested that where the firm was attempting to defend its market share, or attempting to "keep its business alive, its customers supplied and its employees working during a difficult economic period" predation should not be found.[74]

The case law provides no real guidance on the specific interpretation of the four final alternative requirements of section 50(1)(c) relating to lessening of competition and the elimination of a competitor.

In some cases, there will be evidence of intent to predate. Though no such evidence was found in *Consumers Glass*, the court noted the inherent unreliability of such evidence. Words used to describe aggressive competition may be used carelessly, inadvertently suggesting an intention to eliminate a competitor.[75] In *Hoffmann-La Roche*, intent evidence was relied on to convict the accused.[76]

2. *The* Predatory Pricing Enforcement Guidelines

In 1992, the Competition Bureau set out its interpretation of the predatory pricing provision and its enforcement policy in the *Predatory Pricing Enforcement*

---

[70] The court in *Boehringer*, *supra* note 66, followed *Hoffmann-La Roche*, *supra* note 67, and held that matching a competitor's price, even if below cost, cannot be predatory. The court also refused to grant an injunction prohibiting the alleged predator from selling below cost on the additional ground that prices were inherently volatile and the plaintiff would have been free to sell below cost.

[71] *Consumers Glass*, *supra* note 69 at 247, 255.

[72] "If an article is sold for more than cost, it can never be held to be unreasonable": *Hoffmann-La Roche*, *supra* note 67 at 200 (H.C).

[73] *Ibid.* at 201.

[74] *Ibid.* at 201, 204.

[75] *Consumers Glass*, *supra* note 69 at 247. The absence of intent evidence was noted at 238, 242-43.

[76] *Hoffmann-La Roche*, *supra* note 67 at 206-13.

Guidelines.[77] The Bureau adopts a two-part test to determine whether prices are unreasonably low.[78] First, the Bureau looks at one of the key indicators of predation identified in Part II's economic analysis: market power, including market share and barriers to entry, to determine to what extent the alleged predator is likely to be able to recoup the costs of the predatory campaign.[79] A market share of 35% is generally considered the threshold below which market power is unlikely to be sufficient to affect price unilaterally.[80] Other market structure considerations are referred to in the *Guidelines* as well. For example, the relative size of the alleged predator compared to its rivals in the marketplace may be important. If the alleged predator is much larger than its rivals and the competitive fringe of smaller firms, the likelihood of market power is increased.

The Bureau is less likely to pursue a case in which barriers to entry are low and entry into the predator's market or the expansion of the operations of existing firms would be likely to occur if the predator attempted to recoup its losses from a predatory campaign by raising prices.[81] The *Guidelines* suggest that in considering barriers to entry, the approach set out in the *Merger Enforcement Guidelines*[82] will be followed. The *Guidelines* specifically refer to the two-year period specified in the *Merger Enforcement Guidelines* as the appropriate time period to assess barriers to entry. One must ask whether barriers sufficiently low that price increases following the predatory campaign will invite entry into the industry on a sufficient scale within two years to ensure that price increases could not be sustained? The use of this two-year period has been criticized on the basis that the appropriate time period should depend upon the circumstances, including the length and severity of the period of predation.[83]

Under the *Guidelines*, barriers to entry include cost advantages enjoyed by an incumbent firm, such as licensing requirements which the incumbent has already satisfied, costs associated with acquiring market specific assets and control of essential technology or sources of raw materials through vertical integration.[84] Barriers may also result from the presence of economies of scale or scope which the new entrant would

---

[77] (Ottawa: Queen's Printer, 1992), online: Competition Bureau <http://strategis.ic.gc.ca/SSG/ct01139e.html> (date accessed: 26 March 2001).

[78] This approach has been endorsed by the OECD: Organization for Economic Cooperation and Development, *Predatory Pricing* (Paris: OECD, 1989) at 82.

[79] In order to define market share, the first task is to define the relevant geographic and product market. The *Predatory Pricing Enforcement Guidelines*, *supra* note 77, suggest that this will be done in the same manner as is indicated in the *Merger Enforcement Guidelines* (Ottawa: Queen's Printer, 1991), online: Competition Bureau <http://strategis.ic.gc.ca/SSG/ct01026e.html> (date accessed: 26 March 2001). At s. 3.1, the *Merger Enforcement Guidelines* define the relevant market "in terms of the smallest group of products and smallest geographic area in relation to which sellers, if acting as a single firm (a "hypothetical monopolist") that was the only seller of those products in that area, could profitably impose and maintain a significant nontransitory price increase above the levels that would likely exist in the absence of the merger." The application of this standard is elaborated in Part 3 of the *Merger Enforcement Guidelines*.

[80] *Predatory Pricing Enforcement Guidelines*, *supra* note 77 at s. 2.2.1.1.

[81] *Ibid.* at s. 2.2.1.2.

[82] *Supra* note 79 at s. 4.6 and Appendix I.

[83] Davies, Ward & Beck, *supra* note 52 at 4-85.

[84] For this to be the case, capital markets must be inefficient. Otherwise all entry costs may be financed so long as there is a promised expected rate of return commensurate with the risk. See McFetridge, *supra* note 9.

have to achieve to be competitive.[85]

The *Guidelines* acknowledge the possible existence of strategic barriers to entry, such as a reputation for predation, which would discourage entry. Running up sunk costs may be another form of strategic behaviour, as are exclusive dealing and tied selling arrangements and other arrangements with customers which may make market entry difficult.[86]

While no market power test is expressly called for in section 50(1)(c) or by the case law, it must be acknowledged that, as a standard, "unreasonably low" does not give specific guidance as to the relevant criteria for its application. Arguably, it is susceptible to an almost unlimited range of interpretations and *Hoffmann-La Roche*[87] directs that all relevant circumstances be taken into account. On this basis, the interpretation in the *Guidelines* cannot be said to be inconsistent with the *Act*. At the same time, one cannot state that a court would come to the same result with complete confidence.[88]

The second step, in determining whether there is evidence of unreasonableness, is to apply a cost based test. Consistent with *Consumers Glass* and *Hoffmann-La Roche*, prices above average total cost will not be considered to be unreasonably low. The *Guidelines* go on to provide specific guidance regarding other price/cost comparisons. Prices less than average variable cost will be considered to be unreasonably low in the absence of some legitimate commercial objective, such as the need to sell off perishable inventory.[89] Under the *Guidelines*, prices in the "grey area" (between average total cost and average variable cost) may be predatory or not depending on all the circumstances. If there is direct evidence of predatory intent or the alleged predator was lowering prices in the face of increasing demand, the Bureau would consider that the prices in the grey area were unreasonably low. By contrast, prices in the grey area may be considered reasonable where demand is declining, or

---

[85] Economies of scale means that unit costs are lower at higher levels of production. Economies of scope arise where it is cheaper to jointly produce two or more products than to produce each separately. See *Predatory Pricing Enforcement Guidelines*, *supra* note 77 at s. 2.2.1.2. While economic analysis prescribes that barriers to entry be considered, some have questioned whether the approach taken in the *Guidelines* is the best one. Hunter and Hutton suggest that all sunk costs may be financed so long as capital markets are perfect. Hunter and Hutton are not troubled that this assumption is unjustified in practice because, in their view, imperfections in capital markets are not the problem of the Commissioner of Competition: *supra* note 25 at 839-40. With respect to cost advantages, Hunter and Hutton argue that only those which are external to the predator, such as a licensing scheme, should be taken into account. If a cost advantage is due to efficiencies of the predator it should not figure in the analysis because it will not permit the predator to earn supra-normal profits. It will only be able to price up to the level of its competitor's costs before entry or expansion will occur. From an efficiency point of view, predation is less of a concern where the predator is demonstrably more efficient than its victim.

[86] *Predatory Pricing Enforcement Guidelines*, *supra* note 77 at s. 2.2.1.2. Some of these practices are reviewable under ss. 76, 77 and 79 of the *Act*.

[87] *Hoffmann-La Roche*, *supra* note 66 at 197.

[88] At least one court has adopted a similar approach. In *Upper Lakes Group Inc.* v. *National Transportation Agency*, [1995] 3 F.C. 395, 125 D.L.R. (4th) 204 (C.A.), a decision interpreting a provision of the *National Transportation Act, 1987*, R.S.C. 1985 (3d Supp.), c. 28, similar to s. 50(1)(c), the Federal Court of Appeal affirmed the National Transportation Agency's decision that CN's rates were not predatory based on there being no prospect of recoupment.

[89] *Predatory Pricing Enforcement Guidelines*, *supra* note 77 at s. 2.2.2.

there is substantial excess capacity in the market, even if it causes the exit of other firms.[90] Excess capacity was one of the factors relied on by the court in *Consumers Glass* as a justification for prices in the grey area. Because capacity was more than double what was required, "competition and the desire to make as high a contribution as possible towards fixed overhead will naturally drive down the price of the product below the total cost of manufacturing that product and towards but not below the variable cost of manufacturing the product."[91]

The *Guidelines* suggest a methodology for the determination of costs, both variable and fixed.[92] They do not suggest a time frame. From the point of view of economic theory, it is only reasonably anticipated long run costs which are relevant.[93] The *Guidelines* provide no direction with respect to the time frame for looking at costs though they do express a preference for forecast over historical cost.

The *Guidelines* refer to the requirement, stipulated in section 50(1)(c), for the alleged predator to have a "policy" of selling at unreasonably low prices. This part of the *Guidelines* closely follows the interpretation of this requirement in the case law. The Bureau will look for pricing which is not "a competitive expedient of brief duration," but rather "a deliberate corporate program" of "sufficient duration."[94] Sufficiency will be determined by reference to the characteristics of the market. So, for example, where the market is seasonal, prices maintained over a relatively short time may be considered a policy.

As described so far, in developing a framework for analysing whether prices are unreasonably low the *Guidelines*, in effect, require consideration of the effect and likely future effect on competition. Section 50(1)(c) mandates such an inquiry when one is considering whether the alleged predatory behaviour has the effect or tendency of substantially lessening competition. But competitive effect is not the only basis for liability under section 50(1)(c). The provision also refers to the effect of or tendency to eliminate a competitor and to unreasonably low pricing policies *designed* to substantially lessen competition or eliminate a competitor. A policy may be found to be designed to have these effects regardless of whether it has or is likely to have them. The two stage test described above is concerned with the likely effect in the market, with whether the alleged predator is going to be able to recoup its losses. The test itself may not be satisfied where the effect is only to eliminate a competitor. More significantly, the test does not take into account subjective intent as an independent basis of liability as the section contemplates.

Several statements in the *Guidelines* suggest that meeting the two stage test is not an absolute threshold requirement for proceeding with a complaint about predatory pricing. The *Guidelines* indicate that unreasonably low prices may be inferred from all the circumstances, including evidence of predatory intent and the exclusion or

---

[90] *Ibid.*

[91] *Consumers Glass*, *supra* note 69 at 238. Excess capacity is also recognized as a justification for pricing in the grey area by the OECD, *supra* note 78 at 82-83.

[92] *Predatory Pricing Enforcement Guidelines*, *supra* note 77 at s. 2.2.2..

[93] L.A. Skeoch & B. C. McDonald, *Dynamic Change and Accountability in a Canadian Market Economy* (Ottawa: Queen's Printer, 1976) at 218-19. What costs are considered variable will depend on the time frame chosen for analysis. There are some significant challenges in determining what is the appropriate time frame: see McFetridge, *supra* note 12 at 8.

[94] *Predatory Pricing Enforcement Guidelines*, *supra* note 77 at s. 2.3.

elimination of competitors.[95] The thrust of the *Guidelines*, however, is to de-emphasize these bases of liability.

D. *Price Maintenance*

Under section 61 of the *Competition Act*, it is illegal for a person engaged in business to attempt to influence upward or discourage the reduction of the price at which any other person engaged in business offers or supplies a product in Canada by "[any] agreement, threat, promise or any like means."[96] Requests, discussion, persuasion and suggestions directed toward the maintenance of prices, however, are all permitted.[97] Breach of the provision is a criminal offence.[98] Unlike the other pricing provisions in the *Competition Act*, price maintenance has been the subject of a significant number of judicial decisions.

With respect to the meaning of "agreement" for the purposes of section 61, there is no requirement that any agreement be forced on the person committing to maintain prices.[99] Price support programs in the retail gasoline sector taking the form of voluntary allowances available to retailers to offset the effect of price drops have been held to constitute an agreement to maintain prices which indirectly discouraged retailers from reducing their prices.[100] Threats consist of any communication in advance of an adverse future action which will be taken if a suggested course of action is not

---

[95] *Ibid.* at s. 2.2.2. Some have argued that willingness to consider intent and effects on competitors simply muddies the analysis: see *e.g.* Hunter & Hutton, *supra* note 25 at 854. There are many problems when relying on evidence of intention in these circumstances, and the attitude of the courts is difficult to predict given the different approaches taken in *Hoffmann-La Roche*, *supra* note 67, and *Consumers Glass*, *supra* note 69. Davies, Ward & Beck, *supra* note 52 at 4-89 – 4-91 gives examples of language reflecting aggressive competition versus predation from the *Hoffmann-La Roche* case. On the difficulty of assessing intention from statements made, see Lott, *supra* note 17 at 7, and *Consumers Glass* at 247. Nevertheless, the precise wording of the section requires that it be taken into account. Hunter & Hutton argue at 836 that the *Guidelines* adopt a purposive interpretation focusing on the harm that the section was intended to address.

[96] Where the person attempting to influence the conduct of that other person and that other person are affiliated or are principal and agent, the prohibition does not apply: *Competition Act*, s. 61(2).

[97] *R.* v. *Les Must de Cartier Can. Inc.* (1989), 45 B.L.R. 167, 27 C.P.R. (3d) 37 (Ont. Dist. Ct.) [hereinafter *Cartier*].

[98] Resale price maintenance has been prohibited in Canada since 1951: *An Act to amend the Combines Investigation Act*, S.C. 1951 (2d Sess.), c. 30, s. 1. The provision was slightly revised by S.C. 1952, c. 39, s. 4. In 1960, the law was amended to add the current defences to the related offence of refusing to supply a customer because of the customer's low pricing policy discussed below: S.C. 1960, c. 34, s. 14. In 1976, the law was further amended to broaden its reach to include all forms of price maintenance, including price maintenance engaged in by competitors, or horizontal price maintenance. The amendments also brought within the ambit of the section transactions involving services and intellectual property rights. An excellent overview of the legislative history of price maintenance provisions is set out in Davies, Ward & Beck, *supra* note 52 at 4-97 – 4-100.

[99] *R.* v. *Schelew* (1984), 52 N.B.R. (2d) 142, 78 C.P.R. (2d) 102 (C.A.).

[100] *R.* v. *Sunoco* (1986), 11 C.P.R. (3d) 557 (Ont. Dist. Ct.); *R.* v. *Petrofina Can. Ltd.* (1974), 20 C.P.R. (2d) 83 (Ont. Dist. Ct.).

carried out.[101] Threats have been held to include statements from a supplier that it would refuse to supply, reduce credit available or limit sales options to a customer if prices were not maintained.[102] Promise refers to holding out benefits in the future if prices are maintained. "[L]ike means" has been interpreted restrictively to include only things like or akin to an agreement, threat or promise. So, for example, an unaccepted offer of a benefit was considered to be like means.[103]

Section 61(3) provides that suggested resale prices or minimum resale prices are not prohibited so long as it is made clear to the reseller that the reseller is under no obligation to accept the suggestion and would in no way suffer in its business relations with the person making the suggestion or anyone else if it failed to accept the suggestion.[104] The standard is a strict one. Where a resale price or minimum resale price is suggested, an "attempt" to influence the pricing of the person to whom the suggestion is made is proved in the absence of further proof that the proviso is also satisfied. Similarly under section 61(4), if the suggested price appears in an advertisement, it must be expressed in such a way that it is clear to any person who looks at the advertisement that the product may be sold at a lower price, otherwise an attempt to influence price upward will be found.[105] It has been held, however, that proof of an attempt for the purposes of these provisions is not proof of the offence; the Crown must still show an agreement, threat, promise or like means.[106]

Refusing to supply a person because of that person's low pricing policy is similarly prohibited. It is sufficient for a conviction if the low pricing policy is a reason for the refusal. It does not have to be the only reason. Refusals of new as well as existing customers are caught by the section.[107] It is also an offence to "otherwise discriminate" against a person because of their low pricing policy, such as by charging higher prices to a discounting reseller. A person may be liable for discriminating within the meaning of s. 61, in circumstances where the express prohibition on discriminating in section 50(1)(a) of the *Act* is not violated. The scope of permitted discrimination has not been clarified in the case law.

Section 61(10) provides four defences for refusing to supply. These defences are not available to an accused charged with price maintenance. A supplier may refuse to supply a person where that person is making a practice of any of the following:

1. using products supplied as loss leaders (the "Loss Leader Defence");
2. using products supplied not for the purpose of selling them for a profit but to attract customers to buy other products;

---

[101] *R.* v. *Mr. Gas Limited* (unreported, 11 August 1995) at 82 (Ont. Crim. Div.), rev'd, [1999] O. J. No. 3686 (C.A.), online: QL (OJ), on the basis that there was insufficient evidence of a threat.

[102] See cases cited in Davies, Ward & Beck, *supra* note 52 at 4-111 – 4-112.

[103] *R.* v. *Royal LePage Real Estate Services Ltd.*, [1994] A.J. No. 823 (Q.B.), online: QL (AJ) [hereinafter *Royal LePage*].

[104] *Competition Act*, *supra* note 1, s. 61(3).

[105] S. 61(4). No offence is committed if a suggested resale price is affixed or applied to a product or its package or container: s. 61(5).

[106] *R.* v. *Phillips Electronics Ltd.* (1980), 30 O.R. (2d) 129, 116 D.L.R. (3d) 298 (C.A.). Some commentators have suggested that this holding renders the deeming provisions of ss. 61(3) and 61(4) ineffective: see *e.g.* Davies, Ward & Beck, *supra* note 52 at 4-99 – 4-100.

[107] *Royal LePage*, *supra* note 103 at para. 33.

3. engaging in misleading advertising in respect of the products supplied; and
4. not providing the level of service that purchasers of the products might reasonably expect (the "Service Defence").

To avoid liability it is only necessary for a supplier to establish that it, or any person on whom it relied, had reasonable grounds to believe that its customer had acted in one of the ways described.[108] In each case, a practice by the customer must be shown. This has been held to be something other than an isolated act or acts.[109] The Loss Leader Defence has been resorted to most frequently and most successfully. There have been few cases on the Service Defence. In *R.* v. *H.D. Lee of Canada*, it was held that the relevant level of service is that which customers might expect, not the supplier.[110]

Under section 61(6) no person may, by threat, promise or any like means attempt to induce a supplier, as a condition of doing business with the supplier, to refuse to supply a product to a particular person because of the low pricing policy of that person. This section may be broadly interpreted. A complaint by a customer to a supplier about the low pricing policy of a competitor accompanied by a threat to refuse to continue doing business with the supplier if the supplier does not cut off the competitor may be sufficient, even if the supplier does not respond. The Loss Leader Defence and other defences are not available in connection with proceedings under this provision.

Though the price maintenance provisions have been applied primarily in the vertical context, the possibility of dealing with price fixing as horizontal price maintenance under section 61 as an alternative to a conspiracy prosecution under section 45 is attractive because there is no requirement to show any impact on competition under section 61. Horizontal price maintenance has been found in several cases.[111] The precise scope for using section 61 as a substitute for section 45 in relation to agreements on price is not clear.[112]

E. *Abuse of Dominance*

The abuse of dominance provision was introduced into Canadian competition

---

[108] *R.* v. *Salomon Can. Sports Ltée* (1986), 28 C.C.C. (3d) 240 at 247, 251, 37 B.L.R. 192 at 194, 205 (Qué. C.A.).

[109] *Coutts*, supra note 59 at 555 (H.C.). In that case, a one week sale at two locations was considered sufficient to constitute a practice. This definition of a practice has been applied in *NutraSweet*, *supra* note 20, a case interpreting section 79, the abuse of dominance provision.

[110] (1980), 57 C.P.R. (2d) 186 at 198-99; [1981] C.S.P. 1003 at 1009-10 (Qué. Ct. Sess. P.), where it was also held that the provision only applied to after sales service. In *Cartier*, *supra* note 97, the court held that refusal to supply in the interests of preserving the brand image of the supplier's product was permitted. See generally Roberts, *supra* note 47 at 181-84, and S. Wong, "The Law of Price Maintenance in Canada: Review and Assessment" in R.S. Khemani & W.T. Stanbury, eds., *Canadian Competition Law and Policy at the Centenary* (Halifax: Institute for Research on Public Policy, 1991) 339 at 357-58.

[111] See *e.g. R.* v. *Campbell* (1979), 51 C.P.R. (2d) 284 (B.C. Co. Ct.).

[112] In particular, it is not clear whether all agreements relating to price may be contrary to s. 61, when not accompanied by a threat or promise: see H. Chandler & R. Jackson, *supra* note 32.

law in 1986 to replace the criminal monopoly provision.[113] The purpose of the provision is not to address the fact of structural dominance in a market, but to provide relief where dominance has been used to abuse the interests of consumers or producers, such as conduct which is exclusionary, disciplinary or predatory.[114] While the provisions prohibiting price discrimination, predatory pricing, and resale price maintenance create criminal offences, the provisions dealing with abuse of dominant position provide for civil review by the Competition Tribunal applying the civil standard of proof.[115]

Section 79(1) provides as follows:

> Where, on application by the Commissioner, the Tribunal finds that
>
> 1. one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
>
> 2. that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
>
> 3. 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.[116]

---

[113] R.S.C. 1970, c. C-23, s. 33. Predatory behaviour formed part of the basis for the conviction of the accused under the monopoly provision in *R.* v. *Eddy Match* (1953), 20 C.P.R. 107, 109 C.C.C. 1 (Qué. C.A.).

[114] *Alex Couture Inc.* v. *Canada* (1991), 83 D.L.R. (4th) 577 at 608, 38 C.P.R. (3d) 293 at 324 (Qué. C.A.).

[115] The former criminal provision required proof beyond a reasonable doubt and the Bureau had never been successful in proving that the lessening of competition would operate "to the detriment or against the interest of the public" beyond a reasonable doubt. The standard of proof before the Tribunal is proof on the balance of probabilities.

[116] The Competition Tribunal has the power to prohibit dominant firms from engaging in anticompetitive activity in some circumstances. If a prohibition would not be effective to restore competition, the Tribunal may make alternative orders as are necessary to overcome the effects of anticompetitive acts, such as to require firms to take specific actions, including asset or share divestitures: *Competition Act, supra* note 1, s. 79(2), (3) and (5).

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.

Examples of Anticompetitive Acts Listed in Section 78

The threshold requirement for the application of section 79 is that a firm be dominant. This is captured in section 79 by the requirement that a firm substantially control a class or species of business throughout Canada or any part of Canada. The courts have held that, to apply this rather vague criterion, it is necessary to first define the relevant product and geographic market.[117] In order to define the product market, the Tribunal has looked to such factors as direct and indirect evidence of substitutability and functional interchangeability of products, trade views on what constitutes the same product and the costs of switching from one product to another.[118] The Tribunal has

---

[117] *NutraSweet*, *supra* note 20 at 9-10.

[118] In *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 at 316 (Comp. Trib.) [hereinafter *Laidlaw*], the Tribunal held that it is only the existing situation which is relevant for the purposes of this inquiry. See generally R.D. Anderson & J. Monteiro, *Market Definition in Abuse of Dominance Cases: The Pragmatic Approach of the Competition Tribunal* (Hull: Competition Bureau, 1994). A. N. Campbell, *Merger Law and Practice* (Toronto: Carswell, 1997) at 54-77 argues that rather than the hypothetical monopolist test used in the *Merger Enforcement Guidelines*, the determination of product market should be made using the substitutability test based on buyer price sensitivity

defined the relevant geographic market by reference to the boundaries within which competitors must be located if they are to compete with each other and where prices tend toward uniformity.[119] The Tribunal has recognized that the definition of the market will have a significant impact on any conclusion regarding the effect of the dominant firm's behaviour on competition.[120] In general, the more broadly the market is defined, the less likely it is that firm's behaviour will be found to substantially lessen competition.

Once the market is defined, the degree of control by the allegedly dominant firm must be assessed. "[S]ubstantial control" has been equated with market power, meaning that the allegedly dominant firm has the ability to maintain prices above competitive levels for a considerable period.[121] The primary indicators of market power are market share and barriers to entry.[122] High market share alone will give rise to a presumption of dominance.[123] In *Laidlaw*, the Tribunal stated that dominance would not be presumed where market share is below 50 per cent. The Tribunal has yet to deal with a contested claim of dominance where the allegedly dominant firm has a market share lower than 85 per cent.[124] The 50 percent threshold is higher than the 35 per cent threshold set in the *Merger Enforcement Guidelines*[125] and the *Predatory Pricing Enforcement Guidelines*. With respect to barriers, the Tribunal will consider sunk costs and economies of scale, as well as other barriers. Sunk costs or economies of scale on

---

adopted in: *NutraSweet, ibid.*; *Laidlaw* at 320; *Canada (Director of Investigation & Research)* v. *D & B Co. of Canada* (1995), 64 C.P.R. (3d) 216 at 241, 24 B.L.R. (2d) 20 at 47 (Comp. Trib.) [hereinafter *Nielsen*]; and *Tele-Direct, supra* note 23 at 24-35. The substitutability test is a general standard: products are in the same market if they are close substitutes in the sense that small price changes would cause buyers to switch from one to the other. This is a difficult test to apply in practice and the Tribunal has indicated that what factors are relevant will depend on the circumstances of each case: *Nielsen* at 241. This test was accepted by the Supreme Court of Canada in *Canada (Director of Investigation and Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 748 at 759-60, 144 D.L.R. (4th) 1 at 7 [hereinafter *Southam* cited to S.C.R.]. At 759-60, the Court, quoting the Tribunal, held that because direct evidence of substitutability is rarely available, recourse may be had to indirect evidence such as the "physical characteristics of the products, the uses to which the products are put, and whatever evidence there is about the behaviour of buyers that casts light on the willingness to switch from one product to another in respond to changes in relative prices." At 781, the Court held that weighing the criteria is a matter within the discretion of the Tribunal to be exercised in accordance with the facts of each case. The substitutability test has also been applied in a criminal context in *R.* v. *Clarke Transport Canada Inc.* (1995), 130 D.L.R. (4th) 500 at 522-23, 64 C.P.R. (3d) 289 at 310-11 (Ont. Gen. Div.).

[119] *NutraSweet, ibid.* at 20-21.

[120] *NutraSweet, ibid.* at 10. In *Laidlaw, supra* note 118 at 296, the Tribunal considered the anticompetitive acts to assess whether there was market power.

[121] *Laidlaw, ibid.* at 325; *NutraSweet, ibid.* at 28; *Tele-Direct, supra* note 23 at 85; and *Nielsen, supra* note 118 at 254.

[122] *NutraSweet, ibid.*

[123] *Laidlaw, supra* note 118 at 325; *Nielsen, supra* note 118 at 255. However, in *Tele-Direct, supra* note 23 at 85, it was held that the absence of barriers to entry will mean that dominant firms cannot exercise market power. This suggests that barriers to entry should always be considered one of the prerequisites of *effective* market power. No other kind of market power is relevant.

[124] *NutraSweet, supra* note 20 at 9-10 (95%); *Laidlaw, ibid.* at 326 (87%); *Nielsen, ibid.* (100%); *Tele-Direct, ibid.* (96%).

[125] *Supra* note 79 at s. 4.2.1.

their own are likely to be regarded as insufficient.[126] The Tribunal will also consider the number of competitors, their relative market shares and whether there is excess capacity in the market.[127] Notwithstanding the guidance provided by the Tribunal in past cases, predicting when the Tribunal will find dominance often will be difficult.

Once dominance is established the Tribunal must determine that the dominant firm has engaged in a practice of anticompetitive acts which has had, is having or is likely to have the effect of preventing or lessening competition substantially. Section 78 of the *Competition Act* lists a number of anticompetitive practices which the Competition Tribunal may find to constitute abuse. The list is not exhaustive and, in several cases, acts outside those specified in section 78 have been found to be abusive.[128]

Subjective intent is not required in order for a practice to be anticompetitive under section 79.[129] Nevertheless, for all acts listed in section 78, the Tribunal must find that the alleged abuser have an anticompetitive purpose.[130] This has been held to mean an intention to cause some predatory, exclusionary or disciplinary effect on a competitor. Intent may be established by direct evidence or may be inferred from the circumstances.[131] Indeed, the Tribunal has gone so far as to state that parties are deemed to intend the effects of their acts, if they cannot provide evidence to the contrary.[132] The Tribunal has also considered the existence of an economic or business explanation as very important in determining whether a practice is anticompetitive, but the existence of a legitimate business rationale, alone, is not sufficient to justify an anticompetitive practice.[133]

If the Tribunal finds that particular actions are abusive, it must go on to find that they constitute a "practice" of abuse. The Tribunal has held that a practice may consist of anything more than an isolated act or acts and that different anticompetitive acts can together constitute a practice.[134]

Finally, the Tribunal must ascertain whether the practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially. In general, the Tribunal will find a substantial lessening of competition where the anticompetitive acts of the dominant firm preserve or add to the dominant firm's market power.[135] In particular, the Tribunal will ask whether the action creates or strengthens barriers to entry[136] as well assessing the magnitude of this effect.[137] In *NutraSweet* and *Tele-Direct* the Tribunal indicated that a sort of proportionality test must be applied as well. The more dominant a firm is, the smaller will be the required lessening of

---

[126] *NutraSweet, supra* note 20 at 29; *Southam, supra* note 118, aff'g (1992), 43 C.P.R. (3d) 161 (Comp. Trib.), and (1993), 48 C.P.R. (3d) 224 (Comp. Trib).

[127] *Laidlaw, supra* note 118 at 325.

[128] See e.g. *NutraSweet, supra* note 20; *Laidlaw, ibid*; *Nielsen, supra* note 118; *Tele-Direct, supra* note 23.

[129] Intent evidence, may, however, be considered: *Laidlaw, ibid.* at 342-43.

[130] *NutraSweet, supra* note 20 at 37. An anticompetitive purpose has been held to be a general requirement for an act to be anticompetitive under s. 79: *NutraSweet* at 34-35.

[131] *Laidlaw, supra* note 118 at 342-43, and *Nielsen, supra* note 118 at 257.

[132] *Laidlaw, ibid.*, cited in *Nielsen, ibid.*, and *Tele-Direct, supra* note 23 at 179.

[133] *Nielsen, ibid.* at 270-71; *Tele-Direct, ibid.* at 236.

[134] *NutraSweet, supra* note 20 at 35.

[135] *Ibid.* at 47.

[136] *Nielsen, supra* note 118 at 267.

[137] *Ibid.* at 266; *NutraSweet, supra* note 20 at 47.

competition for an abuse to be found.[138]

The Tribunal must also give consideration to the possibility that the practice is a result of "superior competitive performance." It must not punish firms who achieved their success through fair competition in the marketplace.[139] The Tribunal noted in *NutraSweet* that no provision directs it to take into account efficiencies associated with a dominant firm's abusive behaviour.[140] In *Neilsen* and *Tele-Direct*, however, the Tribunal indicated that efficiencies may be relevant to determining whether an act is anticompetitive.[141]

Access to relief under section 79 is limited in several ways. Section 79(5) expressly carves out the exercise of an intellectual property right. Under section 79(6), a three year limitation period is imposed for applications to the Tribunal and section 79(7) provides that no application may be made under section 79 if proceedings have been commenced under the conspiracy provision (section 45) or the mergers provision (section 92).

1. *Application to Anticompetitive Pricing*

The types of behaviour referred to in subsections (a), (c), (d) and (i) of section 78 all relate directly to pricing. More generally, price manipulation may be used by a dominant firm in a wide variety of ways to discipline, deter or eliminate competitors. In the abuse cases so far, however, pricing issues have played a relatively small role.

One of the anticompetitive acts alleged in *NutraSweet* was predatory pricing. Although, ultimately, the Tribunal did not find evidence of predation it made several comments which will undoubtedly inform the manner in which predation will be dealt with in future cases.[142] First, the Tribunal accepted that predation could be an anticompetitive act under section 79 but suggested that the specific reference in section 78(i) to sales below acquisition cost would make that specific provision inapplicable to abuse by a manufacturer. The Tribunal also noted that only acquisition costs were relevant under section 78(i) and not other costs such as overhead and distribution.[143] In considering how predation allegations should be addressed under section 79, the Tribunal endorsed the Areeda-Turner test under which pricing below marginal cost is deemed predatory.[144] The Tribunal also noted, as do Areeda and Turner, that average variable cost is a reasonable proxy for marginal cost only so long as the alleged predator has excess capacity. Where the predator is operating at full capacity, average total cost

---

[138] *NutraSweet*, *ibid.* at 48-49; *Tele-Direct*, *supra* note 23 at 247.

[139] Efficiency defences were not accepted in *NutraSweet*, *ibid.* at 68-69, 90, apparently because of strong evidence of exclusionary intent. This aspect of the decision is criticized in J. Church & R. Ware, "Abuse of Dominance under the 1986 Canadian Competition Act" (1998) Rev. Indus. Org. 85 at 103-04. Several commentators have suggested that the result of the decision is that if a firm is dominant and engages in legitimate business practices which happen to have an exclusionary effect, it may be liable under the abuse of dominance provision: B.M. Graham, "Abuse of Dominance – Recent Case Law: *NutraSweet* and *Laidlaw*" (1993) 38 McGill L.J.800, and J. Musgrove, "Use and Abuse of Dominance: A Brief Review of *NutraSweet*, *Laidlaw*, and *Nielsen*" (1995) 16 Can. Comp. Pol. Rec. 52.

[140] *NutraSweet*, *ibid.* at 51-52.

[141] *Nielsen*, *supra* note 118 at 261-63, 265; *Tele-Direct*, *supra* note 23 at 236.

[142] *NutraSweet*, *supra* note 20 at 9, 33-35, 43-45.

[143] *Ibid.* at 34, 43.

[144] *Ibid.* at 44.

is a better proxy because of the necessity to expand production facilities to increase production.[145]

The Tribunal indicated that predation is not a rational strategy unless there is some prospect of recoupment and accepted that a firm may signal an intention to predate in one market by predatory activity in another.[146] Recognition of this possibility, discussed in Part II, suggests a greater scope for predatory behaviour because the effect of such signaling may be to reduce the costs and enhance the prospects of recoupment.[147]

In *Tele-Direct*, price discrimination by the dominant firm, which had the effect of discriminating against customers using advertising services consultants who competed with the dominant firm, was found to be an indicator of market power.[148] The Tribunal did not find, however, that price discrimination was an abuse of dominance.

IV. Enforcement of the Pricing Provisions by the Competition Bureau

A. *Introduction*

Having looked at the economic rationale for competition rules dealing with anticompetitive pricing practices and the law in Canada, this Part examines the application of the law in practice beginning with a brief overview of the process by which the Bureau deals with complaints and followed by a statistical profile of the Bureau's enforcement experience for all complaints dealt with by the Bureau over the five-year period beginning April 1, 1994 and ending March 31, 1999 (the "Review Period")[149] which concerned price discrimination, predatory pricing or price maintenance. Finally the criteria used by the Bureau to select cases for enforcement action are discussed.[150]

B. *Complaints Process*

Complaints are received by the Bureau in a variety of ways from the public and may be referred to the Bureau by Members of Parliament, government ministers or

---

[145] *Ibid.*

[146] Squeezing under s. 78(1)(a) was alleged but not found in *Tele-Direct*, *supra* note 23. It was also the main anticompetitive act alleged in the High-Speed Internet access case, an inquiry discontinued by the Commissioner in 1999: Competition Bureau, News Release, "Competition Bureau Reaches Decision in Internet Inquiry" (17 March 1999), online: Competition Bureau <http://strategis.ic.gc.ca/SSG/ct01475e.html> (date accessed: 26 March 2001). McFetridge, *supra* note 9 at 92-93, suggests that it is possible to interpret s. 78(i) as expressing a standard that is breached when an integrated seller sells at retail for a price less than its wholesale selling price plus transportation costs.

[147] Within the context of the sale by a vertically integrated supplier of gasoline to a retailer, the Restrictive Trade Practices Commission had suggested the application of the Areeda-Turner standard (see *supra* notes 19 and 20 and accompanying text) to determine if there has been squeezing under s. 79: Restrictive Trade Practices Commission, *Competition in the Canadian Petroleum Industry* (Ottawa: Minister of Supply and Services Canada, 1986) (Chair: O.G. Stoner).

[148] *Tele-Direct*, *supra* note 23 at 102-05.

[149] Only complaints which were made and concluded within the Review Period were reviewed in the *Pricing Report*, *supra* note 3.

[150] A more detailed statistical presentation is provided in the *Pricing Report*, *ibid.*

officials in other branches of government who have received a complaint. The Commissioner may self-initiate an investigation in circumstances where an issue has come to the Commissioner's attention.

Bureau Commerce Officers are responsible for making a preliminary assessment of each complaint received. In cases where the responsible officer determines that the complaint does not disclose any basis for proceeding under the *Act*, the officer may terminate the investigation. If, after a preliminary assessment, it appears to the officer and his or her supervisor that there is a basis for a more thorough review, a complaint is designated as a "project" and further work is done, including gathering more complete information, identifying and assessing the strength of the evidence and applying the case selection criteria developed by the Bureau.

In light of the results of the application of the case selection criteria and this more comprehensive analysis, a decision is made as to whether the case has sufficient merit to justify going forward to the next stage, the commencement of an inquiry by the Commissioner. There is a formal procedure in section 9 of the *Act* under which any six Canadian residents may make a complaint to the Bureau. When this process is used, a formal inquiry must be initiated by the Commissioner. The Commissioner may initiate an inquiry in other circumstances where he or she believes on reasonable grounds that an offence has been or is about to be committed or that grounds exist for the Tribunal to make an order in relation to one of the provisions in the civil part of the *Act*.[151] Once an inquiry has been commenced, the Commissioner can use his or her formal investigative powers, including seeking an order directing a person to be examined under oath[152] or a warrant authorizing the searching of premises and the seizing of documents.[153]

At any stage of an inquiry, the Commissioner may refer a matter to the Attorney General of Canada for consideration as to whether an offence has been committed under the *Act*.[154] The Attorney General must then decide whether to prosecute.[155] In relation to a complaint under the civil provisions, the Commissioner may make an application for relief to the Competition Tribunal.[156]

Alternatively, at any stage, the investigation of a complaint may be terminated or some kind of alternative case resolution ("ACR") reached. An ACR may take various forms from a simple information visit by Bureau staff to explain the *Act* to formal undertakings monitored by the Bureau and consent prohibition orders by the Competition Tribunal. If an inquiry has been commenced, only the Commissioner may discontinue it. On discontinuing the inquiry, the Commissioner must make a report to the Minister of Industry showing the information obtained and the reason for discontinuing the inquiry, as well as advising the complainants and giving them the

---

[151] *Competition Act*, *supra* note 1, s. 10. The civil part of the *Competition Act* is Part VIII.

[152] S. 11.

[153] S. 15.

[154] S. 23(1).

[155] S. 23(2).

[156] It is not necessary for the Commissioner to be on inquiry to make an application to the Tribunal, but it is usually the case. In addition to the relief which may be obtained under each specific civil and criminal provision, the *Competition Act* contains general provisions providing for interim relief: ss. 33, 34(2) and 104.

grounds for the decision to discontinue.[157] If no inquiry has been commenced, the Bureau staff may decide to terminate the investigation or seek an ACR.

C. *Statistical Record of Enforcement Experience*

The following table provides a profile of the manner in which all complaints received and completed within the Review Period were dealt with. With the assistance of the Bureau staff, all electronic records on the Bureau's file tracking system and all physical files relating to complaints made and disposed of within the Review Period which were considered under the main criminal provisions dealing with price discrimination, predatory pricing and price maintenance (sections 50 and 61) and all complaints relating to pricing dealt with under section 79, the abuse provision, were identified. The profile is based on a review of all relevant electronic records and physical files within the Review Period.

*Overview of Enforcement During Review Period - All Pricing Complaints**

	Price Discrimination	Predatory Pricing	Price Maintenance	TOTAL
Complaints (including projects)	88 (9%)	382 (41%)	461 (50%)	931 (100%)
Projects	13 (20%)	27 (40%)	26 (40%)	66 (100%)
Inquiries	5 (26%)	7 (37%)	7 (37%)	19 (100%)
Formal Enforcement Proceedings	0	0	3 (100%)	3 (100%)
Alternative Case Resolutions	4 (4%)	9 (10%)	77 (86%)	90 (100%)

* Includes all complaints dealt with under the relevant criminal provisions and complaints under the abuse of dominance provision relating to pricing. Complaints in the Bureau's file tracking system not identified by section were not reviewed, though it is likely that some related to pricing. That no section number was identified, however, suggests that complaints did not involve the elements of the identified anticompetitive pricing practices: price discrimination, predatory pricing and price maintenance.

Even viewed at this level of aggregation, some observations may be made regarding the Bureau's enforcement activities during the Review Period. Most significantly, only 66 of 931 complaints (7%) rose to the level of the more intensive review characterizing the project stage. Of the complaints which did become projects, in fewer than 1/3 was an inquiry initiated and formal enforcement proceedings were extremely rare.[158] By contrast, ACRs were successfully used in 90 of 931 complaints

[157] S. 23(2) and (3).

[158] Inquiries were commenced in 19 of 66 projects (29%) and 3 of these (16%) resulted in formal enforcement proceedings.

or about 10%. Most complaints (88%) were terminated by Commerce Officers and their supervisors.[159] The critical role played by Commerce Officers underlines the importance of ensuring that Commerce Officers have the appropriate tools to differentiate complaints that have merit from those that do not.

Price maintenance was the most frequently complained about anticompetitive pricing practice, though it was fairly closely followed by predatory pricing. Price maintenance was also the most likely to be the subject of the Bureau's use of formal enforcement proceedings, though the number of occasions on which formal enforcement occurred was very small even in price maintenance cases.

With respect to price maintenance, the rare use of formal enforcement during the Review Period is consistent with a longer term trend in enforcement. Stanbury's study found that formal enforcement actions against price maintenance reached a high of 58 in the five year period from 1981 to 1985, falling to 38 from 1986 to 1990 and 10 from 1991 to 1995. Formal enforcement activity during the Review Period was largely replaced by some form of alternative case resolution.[160]

In contrast to price maintenance, the number of formal enforcement actions with respect to price discrimination and predatory pricing has never been substantial. That there were none during the Review Period is consistent with earlier enforcement activity.[161] Moreover, unlike price maintenance complaints, the proportion of price discrimination and predatory pricing complaints resolved through alternative case resolutions during the Review Period was very small.

Notwithstanding the pervasiveness of price discrimination as described in Part II, the number of price discrimination complaints is a relatively small proportion of the total. There may be several explanations for this. The *Price Discrimination Enforcement Guidelines* are very specific regarding how the Bureau interprets the price discrimination provision, section 50(1)(a), and, in light of this high degree of predictability, businesses are able to implement compliance programs successfully. Some industry organizations interviewed for the *Pricing Report* suggested that they were able to obtain compliance with the provision by advising the businesses with which they dealt regarding its requirements. Consequently, one must be careful about concluding that the provision is ineffective simply based on the relatively small number of complaints.

Another interesting feature of the statistics on price discrimination is that, of the small number of complaints, there would seem to be a disproportionately high number of projects and inquiries.[162] This apparent anomaly may be explained in part by the fact that all five complaints in which inquiries were commenced were initiated using the six-resident process described above under which the Commissioner is obliged to commence an inquiry.

Research conducted for the *Pricing Report* showed that complaints about anticompetitive pricing are received from a wide variety of industries. With the notable

---

[159] This figure was arrived at by subtracting the number of inquiries (19) and ACRs (90) from the total number of complaints (931) and dividing by the total number of complaints.

[160] W.T. Stanbury, "Expanding Responsibilities and Declining Resources: The Strategic Responses of the Competition Bureau" (1998) 13 Rev. Indus. Org. 205 at 228. At 228-30, Stanbury recites some other explanations for this trend.

[161] *Ibid.*

[162] Price discrimination represented 9% of complaints, 20% of projects and 26% of inquiries.

exception of gasoline – 16.7% of complaints – no single industry appeared to be the source of a disproportionate number of complaints. There were certain industries in which there were serious enough concerns that projects were commenced in a significant number of cases: gas, groceries, telecommunications and waste together accounted for almost 50% of total Bureau projects relating to pricing. It is also notable that the overwhelming significance of gasoline in complaints did not follow through into projects, where groceries, telecommunications and waste were all more frequently the subject of the more thorough investigations to which projects are subject.[163]

D. *Case Selection Criteria*

1. *Introduction*

In an era of continually shrinking resources, it is essential for any government organization to put in place systems which will assist it to marshal its resources most effectively to accomplish its mandate. In response to its expanded responsibilities and constrained resources,[164] the Bureau has adopted criteria for selecting cases for enforcement action intended to ensure that competing priorities are evaluated in a systematic way and that resources within each branch are efficiently allocated.

While there are differences in the criteria applied by the Criminal Branch and the Civil Branch, the core of the case selection criteria consists of four categories of factors:

1. Economic Impact
2. Enforcement Policy
3. Strength of the Case
4. Management Considerations

The first category, the economic impact of the alleged anticompetitive activity, is assessed by reference to several subcategories, including the following: what volume of commerce is affected; what is the market power of the person alleged to have engaged in an anticompetitive act (determined by reference to market shares and barriers to entry); are prices expected to rise, by how much and over what period; and the length of time that practice has been engaged in. Under the Civil Branch criteria, the effect on any aspect of competition, not just the effect on price, is taken into account.

With respect to enforcement policy considerations, again there are a number of subcategories of factors which are taken into account. The only pricing practice addressed in this study which is accorded priority in enforcement under the Criminal

---

[163] More detailed statistics are included in the *Pricing Report*, *supra* note 3 at 61. The statistics gathered have some limitations. In some cases multiple complaints were received but they were not all separately recorded and may have been the subject of a single project. For example, over 100 complaints were received regarding the auto-glass industry, but they were recorded as a single project file.

[164] From 1978-79 to 1995-96, the Bureau's operating budget increased slightly from $16.7 million to $17.5 in real terms. From 1991-92 to 1995-96, the budget fell 13.5% in real terms: Stanbury, *supra* note 160 at 211-12.) Stanbury also notes that the costs of key inputs, such as hiring experts has increased and that dealing with challenges under the *Canadian Charter of Rights and Freedoms* has taxed resources.

Branch criteria is horizontal price maintenance. Under the Civil Branch criteria, abuse of dominance is a priority, though few pricing cases have been dealt with under section 79.[165] Several other factors which weigh in favour of formal proceedings are (1) the deterrence value of a formal enforcement action, (2) the jurisprudential value of a decided case, (3) whether the alleged perpetrator has a history of engaging in anticompetitive acts, (4) whether the behaviour is covert and (5) the geographic scope of the offence. Under a separate category, a case also receives points, however, if the matter can be resolved through an ACR. Finally, "public sensitivity" in the sense that the case is likely to attract significant public attention also leads to a higher score.

The third category in the Criminal Branch criteria, strength of the case, refers to specific offences. In all cases, the strength of both documentary evidence and witnesses are assessed. For predation, the only issues considered in the criteria are (1) the market power of the alleged predator, based on market shares, their stability over time, barriers to entry and the existence of other large rivals, (2) whether prices are less than average variable cost and (3) whether low pricing is a policy. The analysis for price maintenance is much more straightforward, reflecting the degree of certainty in the law. The only issue is the evidence of the existence of an attempt to maintain prices by "agreement, threat, promise or other means," or of a refusal to supply because of low pricing. No reference at all is made to price discrimination though the Bureau's files disclosed that the case selection criteria are applied to price discrimination cases. Under this category, the Civil Branch criteria refer only to the likelihood that a case will be successful.

Management considerations, the fourth category, involves a consideration of the financial resources and investment of personnel time needed to bring the case to its anticipated conclusion. The longer a case is likely to take and the more financial and human resources that will be required, the lower the score on this factor. The urgency of proceeding with the case is a basis for an increased score.

2. *Application to Pricing Practices*

From the interviews conducted for the *Pricing Report*, it became clear that the case selection criteria are used as a guide to management decision-making, not as a substitute. Often, it was suggested that if a case was considered to have sufficient merit, it could be proceeded with notwithstanding a low score. Consequently, while, as discussed below, there are several aspects of the case selection criteria which may tend to produce low scores when applied to pricing cases, it seems that this would not necessarily prevent a meritorious case from proceeding.

The case selection criteria give more weight to cases where there is a large economic impact based, in part, on market power.[166] With respect to market power, it

---

[165] *Pricing Report*, *supra* note 3 at 58-62.

[166] Does the emphasis on the economic impact of anticompetitive behaviour in the case selection criteria limit access to relief for small businesses? The answer will depend on the circumstances. A small business hurt by anticompetitive activity may operate in a big market and, to the extent that a behaviour is widespread or engaged in by a dominant firm, the size of the victim complaining will not be an impediment. As well, where multiple complaints are made with respect to the same behaviour, the likelihood that the Bureau will proceed will be enhanced. To the extent that the criteria do tend to limit formal enforcement actions in relation to small businesses, other types of relief may be available. Particularly where low volumes of commerce

may be expected that price discrimination and price maintenance cases which have merit based on the provisions of the statute will not be favourably judged since market power is not required under the *Act* for these offences. The economic analysis in Part II suggests that market power is a necessary condition for most price discrimination and price maintenance to be anticompetitive, so market power is an appropriate consideration if enforcement efforts are to be concentrated on price discrimination and price maintenance with anticompetitive effects. Nevertheless, using market power as a criterion creates a gap between what the statute expressly contemplates and what the Bureau does. With respect to predation, there is no statutory market power test either, but imposing market power as an enforcement criterion is consistent with the Bureau's *Predatory Pricing Enforcement Guidelines*. Market power is required under the abuse provision and so using it as an enforcement criteria is consistent with the statute.

The volume of commerce affected is another factor in the Criminal Branch criteria which often will not be present in price discrimination or price maintenance cases. The review of Bureau files conducted for the *Pricing Report* disclosed that many such cases involve a single supplier and single customer.[167] The *Pricing Report* also suggests that an effect on high volumes of commerce may be rare in relation to allegations of predation, most of which involved local markets.[168] Thus, while consideration of the volume of commerce may be desirable from the perspective of effective allocation of scarce enforcement resources, it may discourage the bringing of pricing cases.

Perhaps the most obvious aspect of the case selection criteria which would work against high scores in pricing cases as opposed to some other kinds of cases is that the only pricing practice addressed in this study which is identified as an enforcement priority is horizontal price maintenance. At least in relation to predation, however, the weight accorded to public sensitivity and the jurisprudential value of a case may push strongly in favour of taking a case in some circumstances.

The likelihood of success using an ACR approach appears to be high in price maintenance cases but relatively low in price discrimination cases and predatory pricing cases based on the statistical profile above. This seems to have an ambiguous effect under the case selection criteria. Cases are scored higher if a prosecution or application to the Tribunal is thought to be needed based on the history of the perpetrator and the need for deterrence, in other words when an ACR is not feasible. At the same time, if an ACR is a reasonable strategy, this is also accorded points. The likelihood of a successful ACR would also result in a more positive score under the management

---

are at stake, the Bureau has tried to work toward ACRs, ranging from visits to the alleged perpetrator to advise it on the requirements of the *Act*, to more formal resolutions involving undertakings to the Bureau and monitoring. The Commissioner has promoted a continuum of case resolution strategies to provide faster, cost-effective relief. A draft information bulletin setting out this policy was released on June 16, 2000: see *Conformity Continuum Information Bulletin*, online: Competition Bureau <http://strategis.ic.gc.ca/SSG/ct01768e.html> (date accessed: 21 March 2001). As the statistics set out above indicate, this has been extremely successful in relation to price maintenance complaints, but much less so for price discrimination and predatory pricing. Finally, the review of project files examined for the *Pricing Report* disclosed substantial time and effort expended by Bureau officers on complaints in which the volume of commerce at stake was relatively small but where there was a serious issue on the merits, suggesting that small business complaints are taken seriously.

[167] *Pricing Report*, *supra* note 3 at 66.

[168] *Ibid.*

considerations category, while cases taken all the way to a contested trial or application to the Tribunal would score very poorly. On balance, given the significant weight accorded to management considerations, it would appear that cases which are good candidates for ACRs are likely to score higher than cases which are not. This would seem to systematically favour price maintenance cases and disfavour predation cases, where the only enforcement options are a long drawn out trial or application to the Tribunal with heavy commitments in terms of the financial and human resources of the Bureau, including the hiring of outside experts. The effect on price discrimination is less clear. One would expect that a prosecution or application to the Tribunal in relation to price discrimination would be much more straightforward and therefore quicker and less expensive. On the other hand, the statistics set out above show little success in resolving price discrimination cases through ACRs.

Finally, regarding the strength of the case category, price maintenance cases are likely to be assessed either very favourably or very unfavourably, since the evidence on the narrow elements required to be met will be present or it will not. By contrast, rarely will the strength of evidence in a predation case be assessed in a highly favourable way. The elements will always be difficult to assess much less to prove. As well, under the case selection criteria there is no possibility to bolster the assessment of a predation case with evidence of intent to eliminate a competitor or to lessen competition substantially. Only evidence on the two dimensions of the two-part test set out in the *Predatory Pricing Enforcement Guidelines* and the existence of a policy count. Indeed, the case selection criteria are more stringent than the *Predatory Pricing Enforcement Guidelines* in this regard because they only permit consideration of pricing below average variable cost. No comment may be made on the application of this category to price discrimination because price discrimination is not mentioned.

In sum, the case selection criteria include factors which will tend to both enhance and reduce the score of pricing cases, depending on the specific anticompetitive behaviour concerned. This is inevitable in the application of any general criteria to a range of different behaviours.

In relation to price discrimination and vertical price maintenance cases, the low priority attached to enforcement and the significance given to the economic impact of the anticompetitive conduct under the case selection criteria may lead to lower scores. In the case of price maintenance, this negative effect may be significantly offset by the likelihood and availability of ACRs, which may improve scores as well as providing a meaningful alternative to prosecution. Also, meritorious price maintenance cases are likely to receive high scores on the strength of case criterion.

With respect to predation cases, several features of the Criminal Branch criteria seem likely to reduce scores in most cases. Like price maintenance and price discrimination, predation cases are not a priority and tend to be in local markets in which the volume of commerce may be low. As poor candidates for ACRs, the only option for resolving a predation case is likely to be a drawn out prosecution which will score poorly on the management consideration criteria. Given the analytical and evidentiary challenges associated with meeting the two-part test established in the criteria, the restrictive cost/price comparison considered and the lack of recognition of intent evidence, predation cases are unlikely to score well under the strength of case criteria either.

The more flexible and open-ended Civil Branch criteria may not have the same limiting effects in cases of predation because the strength of case category plays a less significant role, and in relation to price discrimination and price maintenance, because

a broader conception of anticompetitive effect is taken into account. Nevertheless, the overall structure of the Civil Branch criteria are the same as the Criminal criteria and no specific priority is accorded to pricing cases. Consequently, there is no reason to expect dramatically different results in the application of the Civil Branch criteria to pricing cases.

V. ASSESSMENT OF COMPETITION ACT PROVISIONS RELATING TO PRICE DISCRIMINATION, PREDATORY PRICING AND PRICE MAINTENANCE

A. *Price Discrimination*

1. *Adequacy of Existing Provisions*

The current criminal price discrimination provision, section 50(1)(a), is not adequate to address anticompetitive price discrimination. The economic analysis in Part II concludes that whether there is any possibility that price discrimination will have an anticompetitive effect depends on the facts of each case. The current provision does not require a discriminating supplier to have market power, a prerequisite to true discrimination, nor does it require any assessment of the effect of discrimination on competition. More specifically, it does not accurately reflect the legitimate bases upon which customers may be treated differently. The economic analysis in Part II suggests that the relevant test as to whether charging different prices is discriminatory should be whether price differences reflect differences in the costs of serving different customers rather than simply differences in the quantity or quality purchased by different customers, as is provided in section 50(1)(a).[169] To this extent, the provision is likely over-inclusive. At the same time, by failing to include discrimination in services and discrimination in forms of transactions other than sales, the provision arbitrarily excludes important areas of economic activity in the contemporary marketplace.[170]

In its present form, the criminal price discrimination provision is not an accurate tool for addressing anticompetitive behaviour and imposes excessive compliance and monitoring costs on business. Because price discrimination is a criminal offence, this chilling effect is exacerbated.[171]

Dealing with price discrimination as a species of abuse of dominance under

---

[169] The National Competition Law Section of the Canadian Bar Association expressed its opposition to permitting cost-justified discrimination in its May 2000 brief to the Standing Committee on Industry on the *Pricing Report*: "Submission on *Anticompetitive Pricing Practices and the* Competition Act*: Theory, Law and Practice*" in *Roundtable on* Competition Act *Amendments*, *supra* note 32, 127 [hereinafter *CBA Brief*].

[170] Lawson Hunter is skeptical regarding how one could apply price discrimination to services transactions in practice: L.A.W. Hunter, "Pricing Practices: The VanDuzer Report" in *Roundtable on* Competition Act *Amendments*, *supra* note 32, 165 at 174. The National Competition Law Section of the Canadian Bar Association is opposed to expanding the price discrimination provision to cover transactions relating to services on the basis that there is no evidence that such discrimination is a problem: *CBA Brief*, *ibid.* at 134. Both Hunter and the CBA favour repeal of the price discrimination provision: *see infra* note 173 and accompanying text.

[171] The practical burden imposed by the price discrimination provision is discussed in detail in R. Patton, "A Business Perspective on the Application of Criminal Law to Pricing Practices under the *Competition Act*" in *Annual Fall Conference on Competition Law*, *supra* note 3 at 7-8.

section 79 has the potential to address some of the defects in the criminal price discrimination provision. The abuse provision incorporates the market power test which economic theory identifies as a prerequisite to discrimination and requires there to be an assessment of the effect of the discrimination on competition.

The abuse of dominance provision also provides a process which would require the Competition Tribunal to determine how to accommodate the prescriptions of economic theory and the interests of individual businesses seeking to be protected from being discriminated against by their suppliers. The weight of economic theory suggests that the purpose of the *Act* should be the protection of competition in the interests of efficiency and not individual competitors, and the purpose clause of the *Act* as well as many provisions in the *Act* reflect this emphasis. Nevertheless, the legislative history of section 50(1)(a), as well as the purpose clause of the *Act*, speak to the need to ensure, in the words of section 1.1, that competition be maintained in order to ensure "that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy." Under section 79, it would be up to the Tribunal to decide whether relief was appropriate given the effects on competition in general, including any prejudice experienced by individual competitors in the context of particular cases.[172] Compared to the existing *per se* rules for price discrimination, dealing with price discrimination under section 79 is more likely to provide better results in more cases and will minimize the competition and efficiency chilling effects associated with the current over-inclusive *per se* rule.[173]

Nevertheless, applying section 79 to price discrimination complaints faces several challenges. The approach to market power in the abuse provision may have to be adapted for price discrimination cases. Consideration will have to be given to the appropriate market share threshold. As well, thought will have to be given to how to assess anticompetitive effects in the downstream market in which the buyer who is discriminated against operates. In practice, dealing with price discrimination under section 79 would be much less certain and predictable than the existing criminal provision, though this problem is somewhat mitigated by the requirement for market power which significantly limits the circumstances in which liability may arise.

2. *Adequacy of the* Price Discrimination Enforcement Guidelines

---

[172] The Interac case, in which there were numerous interventions before the Tribunal, is a good example of the use of the Tribunal to resolve complex issues where there are competing interests at stake: *Canada (Director of Investigation and Research)* v. *Bank of Montreal* (1996), 66 C.P.R. (3d) 409 (Comp. Trib.).

[173] Repeal of the criminal price discrimination provision has been endorsed by the National Competition Law Section of the Canadian Bar Association: *CBA Brief, supra* note 169 at 134. The same view has been expressed by Lawson Hunter, *supra* note 170 at 173, and Warren Grover: W. Grover, "Pricing Practices: The VanDuzer Report" in *Roundtable on* Competition Act *Amendments, supra* note 32, 107 at 111. Regarding earlier calls for repeal, see *supra* notes 55-56 and accompanying text. The Standing Committee on Industry also recommended that Parliament consider eliminating the criminal provision, though it did not recommend repeal unequivocally and called for consultations with interested stakeholders. The Committee appeared to take seriously the advice of the Commissioner that some unidentified small businesses felt their interests required the protection of the criminal provision (*Industry Committee Interim Report, supra* note 3 at 40-41, citing testimony of Konrad von Finckenstein to Standing Committee on Industry. The Committee also noted that the Canadian Chamber of Commerce did not view the provision as protecting small and medium-sized businesses.

In their current form, the *Price Discrimination Enforcement Guidelines* are useful, though the *Guidelines* cannot fully correct for the defects in the criminal price discrimination provision by recasting it in a form consistent with the economic analysis in Part II. As well, although there is no technical impediment to applying section 79 to price discrimination, in order to ensure that price discrimination is routinely analysed under the abuse provision, the *Guidelines* would have to be revamped to designate section 79 as the preferred enforcement approach and to describe how this would be done in light of the issues raised in the preceding section.[174]

If the price discrimination provision is maintained in its present form, work needs to be done to revise the *Guidelines* to render them more consistent with the *Competition Act*. The current approach to "availability" of price concessions requires that an offer of a price concession be made by a supplier in some circumstances. It is difficult to square such an interpretation with the statute. Since "offer" is used in section 51 dealing with promotional allowances, "availability" should not be interpreted to mean offer. Also, the approach taken to the interpretation of sales needs to be reconsidered. The *Guidelines* create exemptions for enforcement purposes for transactions involving affiliates, franchise systems and international volume discounts which require an interpretation of sale that, arguably, is inconsistent with established jurisprudence.[175]

3. *Adequacy of Enforcement Activity*

Without assessing the relative value of the Bureau's many other activities, it is impossible to draw any definitive conclusion regarding the Bureau's enforcement record with respect to price discrimination. One can say that the present criminal provision is sufficiently defective that, in pursuing its general mandate to protect competition, it is appropriate for the Bureau to adopt the very conservative enforcement approach reflected in its case selection criteria to the relatively few complaints made regarding discriminatory pricing. As well, the case selection criteria do focus on considerations which the economic analysis in Part II suggests should be relevant: market power, duration of the activity and its anticompetitive effect.

As noted above, with respect to taking price discrimination cases under the abuse provision, there are a variety of questions which would arise with respect to how the Competition Tribunal would deal with a price discrimination case. It is not obvious that pursuing cases to resolve these questions would be a responsible use of the Bureau's constrained resources, except perhaps where price discrimination is one of a number of alleged anticompetitive acts or the anticompetitive effect is substantial.

---

[174] The draft guidelines on the Bureau's enforcement of the abuse of dominance provisions circulated for comment on May 18, 2000, do not refer to price discrimination: *Enforcement Guidelines on The Abuse of Dominance Provisions*, online: Competition Bureau <http://strategis.ic.gc.ca/SSG/ct01756e.html> (date accessed: 21 March 2001) [hereinafter *Draft Abuse of Dominance Guidelines*]. Guidelines for the application of the abuse provision to price discrimination were recommended in the *CBA Brief*, *ibid.* at 138, but only after repeal of the current criminal provision.

[175] The *Pricing Report*'s interpretation in this regard has been criticized by J. Musgrove & S. Luciw, "VanDuzer Considered: A Preliminary Commentary on 'Anticompetitive Pricing Practices and the *Competition Act*: Theory Law and Practice'" (2000) 20 Can. Comp. Pol. Rec. 111 at 115.

B. *Predatory Pricing*

1. *Adequacy of the Existing Provisions*

Designing rules to deal effectively with predation is the thorniest problem related to the anticompetitive pricing practices examined. The effects of predation can be devastating but are extremely difficult to distinguish from the effects of aggressive competition, even with the expenditure of substantial resources. One thing seems clear. The existing criminal provision suffers from some serious defects as an instrument to provide relief in circumstances where predation exists.[176]

Because the case law does not provide a complete methodology for determining when the prices of an alleged predator are unreasonably low under section 50(1)(c), the section is, potentially, very broad.[177] An intention to eliminate a competitor or the elimination of a competitor in fact, combined with low prices, may be sufficient for liability. The existing provision can be construed as protecting competitors, regardless of the overall effect on competition or efficiency. To this extent, the provision is in conflict with the economic analysis of predation.

Dealing with predation under section 79 avoids these problems. As prescribed by the economic analysis in Part II, section 79 imposes market power as a threshold for obtaining relief. As well, section 79 requires an assessment of the effect on competition. The Tribunal would be able to consider not only whether there was a prospect of recoupment through supra-competitive pricing, but also the effects of predatory behaviour on the dynamic of competition in the market in which the predation took place. Such effects would include effect of the loss of particular competitors and their prospects for re-entry. The Tribunal could sort out the extent to which it was appropriate to take into account non-efficiency based considerations, such as the fairness of intentionally eliminating a competitor through low prices in the context of particular fact situations. The abuse provision offers the lower civil burden of proof which may be important given the inherently contestable nature of claims regarding predation.

Section 79, however, does not provide a specific methodology for dealing with predation and the existing approach of the Tribunal to the critical concept of market power would have to be developed and adapted for use in predation cases. In particular, as suggested in the *Predatory Pricing Enforcement Guidelines*, there may be cases of predation where the predator has a market share below the rough 50% guide referred to by the Tribunal in its cases to date.[178]

One possible hurdle to obtaining relief from the Tribunal is its expressed

---

[176] F.M. Scherer, "Some Last Words on Predatory Pricing" (1976) 89 Harv. L. Rev. 901 at 903, suggests that an approach like that currently advocated by the Bureau is "impossible to apply in practice."

[177] Most of these comments are equally applicable to geographic price discrimination under s. 50(1)(b). Some have criticized the *Pricing Report* for not addressing predatory geographic price discrimination contrary to section 50(1)(b) of the *Act* in any detail: see *e.g. CBA Brief, supra* note 169 at 143-45. This provision prohibits predatory pricing where the predator does not sell at the predatory price in all markets, in effect subsidizing the predatory campaign in one geographic market with higher price sales in another geographic market. This form of predation may not be caught by section 50(1)(c) in some cases. Any change to section 50(1)(c) without corresponding changes to section 50(1)(b) would be anomalous.

[178] The *Draft Abuse of Dominance Guidelines, supra* note 174 at s. 3.2.1(d), suggest a 35% market share as the threshold for possible concerns about market power.

unwillingness to directly interfere with pricing decisions by firms.[179] It may be reluctant to order a firm to cease specific pricing behaviour such as by setting a minimum price. An order simply requiring a firm to stop predating would be too vague to be enforceable. It may be that there will be cases in which the predatory character of pricing practices can be identified with sufficient specificity that the Tribunal could craft an effective order, but in other cases the Tribunal is likely to have difficulty doing so. Some appropriate remedial approach would have to be developed before section 79 could be relied on as an effective way to deal with predation.

If the current criminal provision were repealed and section 79 relied upon as the exclusive tool for dealing with predation, there is a risk that any deterrent effect of the current provision would be lost.[180] As well, repeal would remove the possibility of bringing private actions under section 36 of the *Competition Act*.[181] It has been argued that criminal prosecution continues to be needed as a way of dealing with egregious cases of predation accompanied by clear intent to eliminate a competitor.[182]

In principle, these are valid concerns. One must be skeptical, however, about the deterrent effect of a provision which has only been successfully enforced twice in the 50 years that it has been in place. Similarly, it is hard to give substantial weight to the need to ensure that private actions under section 36 are available in predation cases when there have been only a handful of private actions under section 36 since 1986,[183] though one must acknowledge that there are various reasons for the infrequent resort to the section 36 procedure.[184]

2. *Adequacy of the* Predatory Pricing Enforcement Guidelines

---

[179] *Laidlaw*, *supra* note 118. As mentioned *supra* in note 70, the court in *Boehringer*, *supra* note 66, followed *Hoffmann-La Roche*, *supra* note 67, and held that matching a competitor's price, even if below cost, cannot be predatory. The court also refused to grant an injunction prohibiting the alleged predator from selling below cost on the additional ground that prices were inherently volatile and the plaintiff would have been free to sell below cost.

[180] This concern was expressed by the Commissioner of Competition in response to the *Pricing Report* (Testimony of Konrad von Finckenstein to Standing Committee on Industry, 25 November 1999), and the National Competition Law Section of the Canadian Bar Association (*CBA Brief*, *supra* note 169 at 141). The same view has been expressed by Lawson Hunter, *supra* note 170 at 175, and Warren Grover, *supra* note 173 at 115. The Industry Committee accepted the basic economic logic of the *Pricing Report* but was moved by the concerns expressed with respect to the need to maintain the criminal provision. The Committee recommended retaining section 50(1)(a), though with an amendment to require that the competitive effects test be met and that the predator intended to eliminate a competitor. This change is designed to ensure that the criminal provision only applies to serious cases of predation. For other cases, the Committee recommended that the government consider amending the *Competition Act* to provide (i) that predatory pricing be dealt with civilly, possibly under the abuse of dominance provision, and (ii) that predation only be actionable if engaged in by a person with sufficient market power and where the result is a substantial lessening of competition.

[181] *CBA Brief*, *ibid.*; Hunter, *ibid.*; Grover, *ibid.*

[182] This argument is made by Hunter, *ibid.*, and by the National Competition Law Section of the Canadian Bar Association: *CBA Brief*, *ibid.*

[183] See cases cited *supra* note 66.

[184] For a discussion of these factors, see K. Roach & M. Trebilcock, *Private Party Access to the Competition Tribunal* (Hull: Competition Bureau, 1996). This concern would be significantly mitigated if private access to the Tribunal were permitted. Such access was recently recommended by the Industry Committee: *supra* note 3 at 48-57.

The approach to enforcement taken in the Bureau's *Predatory Pricing Enforcement Guidelines* is generally consistent with the economic factors indicating predation identified in Part II. Nevertheless, the effect of the Bureau's approach may be to set a standard which is tougher than is appropriate in practice.

The two-part test established in the *Guidelines* is a very high standard. The need to prove market power sufficient to permit recoupment to the criminal standard of proof, beyond a reasonable doubt, is very onerous, given the ultimately contestable nature of claims about market power. Obtaining good evidence of the alleged predator's costs will be extremely difficult in many circumstances, such as where the predator is extensively vertically integrated. In other circumstances, it will be impossible to obtain cost evidence without the exercise of formal search powers and the inability to demonstrate a credible prospect of recoupment may well make it impossible to take this step.

While reliance on intent evidence may relieve some of these problems, such evidence will not be available in some cases and in many others will be unreliable. In any case, the *Guidelines* suggest that intent will play a small role in the Bureau's assessment.

The *Predatory Pricing Enforcement Guidelines* do not emphasize or provide guidance on the possible application of the newer theories suggesting a wider array of situations in which predation may be present. Economists have suggested both market structure and behavioural characteristics which are consistent with the existence of predation. These include whether the alleged predator is active in multiple markets such that predatory activity in one market can have a demonstration effect in the others. Evidence as to whether the predatory activity has been repeated in more than one market or that the predator has publicized the demise of its prey may also be relevant.[185] While the *Guidelines* refer to strategic barriers to entry, they do not fully reflect this new learning regarding how strategic barriers to entry may be identified and measured or how non-price benefits associated with a predatory strategy should be taken into account. Also, as discussed more fully below, the *Guidelines* do not address the challenges of the new economy specifically.[186]

While section 79 could be used to deal with predation cases, as indicated above, there are a range of questions which would need to be resolved with respect to its application and these are not currently addressed in the *Guidelines*.[187]

---

[185] P. Bolton, J. Brodley & M. Riordan (2000, mimeo) at 39-41, described in McFetridge, *supra* note 12 at 7.

[186] Recently, an effort has been made to provide clearer guidance regarding predatory activity in the airline industry. The federal government has issued regulations specifying acts or conduct of a person operating a domestic air service, including predatory pricing, which may be considered anticompetitive acts for the purposes of the abuse of dominance provisions. The regulations were released for comment on July 11, 2000 and came into force on August 23, 2000: *Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service*, S.O.R./2000-324 [hereinafter *Airline Regulations*]. The regulations were enacted under *An Act to amend the Canada Transportation Act, the Competition Act, the Competition Tribunal Act and the Air Canada Public Participation Act and to amend another Act in consequence*, S.C. 2000, c. 15 (royal assent on 29 June 2000).

[187] The *Draft Abuse of Dominance Guidelines*, *supra* note 174 at s. 4.3, in setting out the Bureau's approach to enforcing the abuse of dominance provision, deal specifically with predatory pricing, though in much less detail than the *Predatory Pricing Enforcement Guidelines*, *supra* note 77. There seems to be fairly wide agreement on the desirability of developing

3. *Adequacy of Enforcement Activity*

Prosecutions under the criminal predatory pricing provision have been rare and there has never been a successful application to the Tribunal in relation to predation. While it is impossible to draw firm conclusions regarding this enforcement record without considering the merits of competing enforcement priorities, there are some reasons to be concerned about it.

The Bureau's approach in the *Guidelines* is in need of improvement if it is to be an accurate tool for assessing allegations of predation. As well, the Bureau's case selection criteria appear to disfavour predation cases in two main ways. First, the case selection criteria give weight to a narrower range of predatory behaviour than the *Guidelines* and the economic analysis in Part II would suggest may exist. Second, because ACRs seem to be rarely successful in predation cases and, consequently, there is no alternative to a contested case with the attendant commitments of time and expense, predation cases will rank poorly under the management considerations factor. Finally, the lack of certainty regarding the law on predation argues in favour of the Bureau seeking to initiate predation cases where appropriate.[188] This point is discussed in more detail below.

C. *Price Maintenance*

1. *Adequacy of Existing Provisions*

The present provision dealing with price maintenance is not designed to address anticompetitive price maintenance defined by reference to the criteria suggested by the economic analysis in Part II. Consequently, in its present form, it is not an accurate tool for taking enforcement action and likely imposes excessive compliance and monitoring costs on business. This chilling effect is exacerbated by the criminal nature of the price maintenance provision.[189]

With respect to all forms of vertical price maintenance, the economic analysis in Part II indicates that suppliers should be able to take advantage of efficiency-based defences, such as encouraging customers to devote more resources to the provision of product service. Under section 61, where a supplier refuses to supply or otherwise discriminates against a customer because of the customer's low pricing policy, there are various defences which go some way to providing efficiency-based defences. There is

---

guidelines regarding how to deal with predation under the abuse provision. The Industry Committee recommended that the Bureau develop enforcement guidelines for dealing with predatory pricing under the abuse of dominance provision: see *supra* note 3. The National Competition Law Section of the CBA in its Brief on the *Pricing Report* went on to amplify the *Pricing Report*'s call for more direction on how to analyse new economy markets, describing in some detail some of the kinds of issues which would need to be addressed: *infra* note 198 and accompanying text. The Bureau is currently engaged in drafting new guidelines setting out their enforcement policy with respect to predatory pricing.

[188] The National Competition Law Section of the Canadian Bar Association agreed that more aggressive enforcement is appropriate: *CBA Brief*, *ibid.* at 146. Hunter has expressed the view that the Bureau is enforcing the existing regime in an appropriate manner: *supra* note 170 at 176.

[189] Patton, *supra* note 171 at 9.

no obvious reason that these defences should be restricted to refusal to supply as opposed to all resale price maintenance activities. It may, nevertheless, be preferable to have more open-ended categories given the impossibility of exhaustively listing all possible efficiency defences.[190]

The application of the existing abuse of dominance provision to price maintenance cases would require consideration of the market power of the person seeking to maintain prices and the effect on competition, as suggested by the economic analysis in Part II.[191] As noted above in relation to price discrimination, dealing with price maintenance under the abuse provision would require the Tribunal to consider the need to balance the interests of economic efficiency against the interest of businesses in being free from efforts by their suppliers to get them to maintain their prices on the facts of individual cases.

Relying on section 79 is not without challenges, however. Since section 79 is not specifically adapted to dealing with price maintenance cases, the development of some analytical framework taking into account the efficiency-based explanations discussed in Part II would be necessary. It is not obvious that the market power requirement should be the same in price maintenance cases as in the cases dealt with by the Tribunal so far. The issue of how to deal with the anticompetitive effects in downstream markets would also need to be addressed. As a consequence, in the interest of certainty, guidelines addressing these issues should be considered before section 79 is chosen as the preferred enforcement approach.[192] A final disadvantage associated with dealing with price maintenance under section 79 is that it is substantially less certain than the current criminal provision. The impact that this may have on enforcement is discussed in the next section.

The *Pricing Report* did not address, in any detail, the application of section 61 to horizontal price maintenance. The *Pricing Report* did state that, where price maintenance occurs horizontally between competitors who simply agree to fix their sale prices, it is unambiguously anticompetitive.[193] This is consistent with virtually all economic analysis of such behaviour.[194] From an enforcement perspective, the possibility of dealing with price fixing as horizontal price maintenance under section 61 as an alternative to a conspiracy prosecution under section 45 is attractive because there is no requirement to show any impact on competition under section 61. Horizontal price

---

[190] McFetridge, *supra* note 12 at 19, suggests that *per se* legality "is a compelling alternative." The same view is expressed in F. Mathewson & R. Winter, "The Law and Economics of Resale Price Maintenance (1998) 13 Rev. Indus. Org. 57 at 81-82.

[191] This view was endorsed by the National Competition Law Section of the Canadian Bar Association: *CBA Brief, supra* note 169 at 149.

[192] Grover, *supra* note 173 at 116, suggests that the Bureau should deal with all but egregious forms of vertical price maintenance under the abuse of dominance provision and that the Bureau should adopt guidelines for doing so. The National Competition Law Section of the Canadian Bar Association did not make definitive recommendations to change the provisions of the *Competition Act* dealing with price maintenance. The Section appeared to favour retaining the existing criminal provision but engrafting onto it a requirement that the effect of the price maintenance be to "prevent or lessen competition substantially in any market" and limiting criminal enforcement to "egregious" price maintenance where no efficiency defence is possible: *CBA Brief, ibid.* at 150-51. The *Draft Abuse of Dominance Guidelines, supra* note 173, do not address price maintenance.

[193] *Pricing Report, supra* note 3 at 15.

[194] Kennish & Ross, *supra* note 32.

maintenance has been found in several cases.[195] The precise scope for using section 61 as a substitute for section 45 in relation to agreements on price, however, is not clear.[196] Since the *Pricing Report* was not intended to address section 45, it did not deal with horizontal price maintenance, except to recommend that some guideline be developed to address the relationship between horizontal price maintenance and section 45.[197]

2. *Adequacy of Enforcement Activity*

Formal enforcement actions used to be very common with respect to price maintenance. The enforcement profile in Part IV shows that this has changed dramatically. Formal enforcement actions during the Review Period were rare. During the same time period, the use of ACRs as a substitute has been remarkably successful.

Given the restricted focus of the *Pricing Report*, an overall assessment of the Bureau's enforcement record was not made. Nevertheless, there would appear to be no compelling need to engage in more formal enforcement actions under the existing criminal provision. The criminal provision is very clear and the subject of substantial case law. In any case, the current provision does not accurately target anticompetitive activity and so a cautious and limited approach to the enforcement of section 61 is appropriate, focusing on price maintenance where there is a clear anticompetitive effect. The Bureau's case selection criteria reflect such a focus.

Inevitably, dealing with price maintenance under section 79, imposing a market power requirement and permitting efficiency defences, would make it much more difficult to deal with price maintenance using the ACR approach. The requirement to gather sufficient information to make an accurate assessment, alone will greatly extend the period of time before ACR discussions can begin in many cases. Also, again in many cases, the existence of market power and efficiencies will be contestable

---

[195] See *e.g. R.* v. *Campbell*, *supra* note 111.

[196] In particular, it is not clear whether agreements relating to price may be contrary to s. 61 when not accompanied by a threat or promise: H. Chandler & R. Jackson, *supra* note 112 and accompanying text.

[197] Much recent commentary on section 61 has addressed horizontal price maintenance which, as noted, received limited attention in the *Pricing Report*. Hunter, *supra* note 170 at 176, has criticized the Bureau's enforcement of section 61 to deal with horizontal arrangements, and has described the Bureau's attempts to use section 61 in horizontal cases as "clearly an attempt to circumvent proceedings that are suited for section 45." Grover, *supra* note 173 at 117, has strongly objected to the use of section 61 to take action against small market players who are attempting to protect themselves against large competitors by concerted behaviour. The Industry Committee recommended that horizontal price maintenance continue to be dealt with criminally, but that consideration be given to integrating all the rules dealing with horizontal agreements into section 45. The Committee also recommended that, before any changes are made to the provisions dealing with horizontal agreements, more study and consultation be conducted. How best to deal with horizontal relationships is currently being debated in the context of the amendments to section 45 of the *Competition Act* proposed in Bill C-472, *An Act to amend the Competition Act (conspiracy agreements and right to make private applications), the Competition Tribunal Act (costs and summary dispositions) and the Criminal Code as a consequence)*, 2d Sess., 36th Parl., 1999-2000 (1st reading 6 April 2000). Bill C-472 includes amendments to section 45 to, in essence, create a clear *per se* rule for naked agreements on price, production and market and customer allocation, subject to certain safe harbours and defences, and a new civil provision, section 79.1, providing a flexible rule of reason analysis for other agreements between competitors. No amendment to section 61 is contemplated in the bill.

conclusions in contrast to the relative certainty associated with proving that the very specific requirements in the current section 61 are met. From the perspective of compliance, resort to section 79 would be far less predictable, though, significantly, its application would be limited to firms considered dominant. In any case, the economic analysis in Part II suggests that addressing price maintenance under section 79 should yield more accurate enforcement activity than the *per se* approach in section 61.

D. *General Comments*

1. *Challenges of the New Economy*

In the new economy, competition will continue to increase in intensity and the pace of technological change will continue to accelerate. In industries most affected by these trends, the challenge of accurately identifying and taking enforcement action against anticompetitive pricing behaviour will be increasingly daunting. The Bureau needs to ensure that its enforcement of the *Competition Act* reflects an appreciation of how these industries operate.

The competition policy analysis currently conducted by the Bureau recognizes dynamic efficiency considerations which will become increasingly important in assessing competitive effects in the context of the new economy. The structure of section 79 permits dynamic efficiency considerations to be taken into account. As well, the framework developed for interpreting the predatory pricing provision in the *Predatory Pricing Enforcement Guidelines*, takes into account dynamic efficiency. With respect to neither provision, however, has the Bureau spelled out how it will address dynamic efficiency in the specific context of the industries of the new economy. Accordingly, the *Pricing Report* recommended the development of enforcement guidelines.[198] The National Competition Law Section of the CBA in its Brief on the *Pricing Report* has amplified the *Pricing Report*'s call for more direction on how to analyze new economy markets, describing in some detail some of the kinds of issues which would need to be addressed as follows:

1. the analysis regarding barriers to entry in technology/information markets;
2. the extent to which network effects may create barriers to entry (in addition to having positive efficiency effects);
3. the amplification of the first-mover advantage through the use of low, zero or negative pricing;
4. the tension between the efficiencies and barriers to entry created by standard setting; and
5. product and geographic market definition in the case of Internet sales (*e.g.* does the product market include other retail channels of distribution, and whether it

---

[198] *Pricing Report*, *supra* note 3 at 79-81.

> does or not, how is the geographic market properly defined).[199]

While guidance on the Bureau's analytical approach to enforcement may be sufficient to address dynamic efficiency considerations in relation to predation and abuse of dominance, the current *per se* criminal provisions dealing with price discrimination and price maintenance, on their face, provide little scope for a dynamic efficiency analysis. Accordingly, one may be concerned that these provisions are not well adapted to be responsive to the changes currently transforming the Canadian economy.

2. *Marshalling Industry-Specific Expertise*

Through experience, particular Bureau officers have gained an in-depth understanding of particular industries, but more effective marshalling of industry-specific expertise at the Competition Bureau is critical to ensuring that officers are equipped to make accurate judgements on the high volume of complaints which were disposed of based on their analysis alone. The need for industry-specific expertise is most pressing in relation to predation cases where the assessment of market dynamics is most complex. Enhanced industry-specific expertise may also permit complaints to be processed in a more timely and cost-effective manner.[200]

3. *The Limitations of Guidelines*

Through its *Price Discrimination Enforcement Guidelines* and *Predatory Pricing Enforcement Guidelines*, the Bureau has attempted to provide a coherent rationale for enforcing the criminal provisions dealing with price discrimination and predatory pricing. Despite the criticisms made above, for the most part, this has been a very effective approach to enforcement. Guidelines are significantly more cost-effective than litigation for the purposes of clarifying interpretive uncertainty. They can deal with issues comprehensively and within an analytical framework, while decisions in individual cases contribute only incrementally to the understanding of the law, and may provide analysis which is closely tied to the facts of the case. Guidelines increase the likelihood of consistent and accurate decision making by commerce officers making the difficult assessments of cases at the critical preliminary assessment stage. By disclosing a clear approach to enforcement, guidelines may facilitate ACRs and, more

---

[199] Quoted from *CBA Brief*, *supra* note 169 at 146.

[200] The importance of improving industry-specific expertise stems from a range of factors disclosed in the *Pricing Report*, *supra* note 3. The Bureau's basic role as an investigative agency is to respond to complaints. This encourages an intensive examination of the current subject of the complaint, but may discourage consideration of longer term trends. The same comment was made in relation to U.K. competition law by Utton, *supra* note 27. Yet it is precisely such trends that may be most relevant to assessing the likely competitive impact of a particular behaviour. Sensitivity to dynamic changes in industries is both more difficult and more important given the current radical transformation taking place in some industries as the Canadian marketplace responds to the challenges of the new economy. Pricing strategies are becoming more sophisticated and the environment for many businesses is evolving quickly in response to accelerated technological change and network effects.

generally, will ease the compliance burden for business.[201]

Nevertheless, guidelines have limits. Bringing some minimum number of cases is essential if the private sector is to regard enforcement activities as a credible threat and an incentive to comply with the law.[202] This is not to suggest that the Commissioner's substantial efforts to seek voluntary compliance are wrong headed. The investment in general education regarding the *Competition Act* and its enforcement, targeted information campaigns and advisory opinions are all useful strategies, especially in the face of constrained resources.[203] At some point, however, formal proceedings are needed to ensure that these voluntary compliance strategies are effective. Several factors support this conclusion.

Guidelines have no binding effect on the Bureau and provide no defence to private enforcement by people injured as a result of a violation of the criminal provisions of the *Competition Act*. Also, guidelines are not capable of correcting basic defects in the law. To the extent that the enforcement policy disclosed in guidelines is at variance with the provisions of the *Act* themselves, the guidelines are less reliable.

As discussed in Part III, there are several ways in which the *Price Discrimination Enforcement Guidelines* and *Predatory Pricing Enforcement Guidelines* adopt interpretations which stretch the provisions of the *Act*. In the case of *Predatory Pricing Enforcement Guidelines,* the elaborate two-step test for predation has not been fully endorsed in the limited case law. As well, the *Guidelines* downplay the role of intent and the significance of eliminating competitors, both of which are referred to in the criminal predatory pricing provision. The *Price Discrimination Enforcement Guidelines* adopt interpretations regarding when terms are available to competitors and when a sale occurs which may be criticized as inconsistent with the statute. When one examines the case selection criteria, one finds additional criteria not specified in the *Act*.

As suggested above, most of these additional criteria may be justified either on the basis of the economic analysis in Part II or prudent management of limited resources. Nevertheless, by applying criteria to the enforcement of the *Act* in relation to pricing practices which are extraneous to the statute and which tend to reduce the likelihood of enforcement action in pricing cases, both the *Guidelines* and the case selection criteria may give rise to several concerns. A disjunction may be created between the expectations of people complaining to the Bureau about pricing practices and what the Bureau is prepared to deliver. This is most serious, in relation to price discrimination and predatory pricing, where the complete absence of formal enforcement actions has opened the Bureau to the charge that it is choosing not to enforce the *Act*. This suggests either that the case selection criteria be revised so as to

---

[201] Various factors have encouraged the adoption of a compliance approach focusing on alternatives to criminal enforcement in contested cases: *VanDuzer on Recent Developments*, *supra* note 3 at 26-27, 29-31.

[202] The *CBA Brief*, *supra* note 169 at 154-60, provides a detailed discussion of the Bureau's enforcement practice. It concludes that enforcement of the pricing provisions in the *Competition Act* has been inadequate and makes several suggestions for improvement. Others commenting on the Report have expressed mixed views on the subject of enforcement. With respect to predation, Hunter has expressed the view that the Bureau is enforcing the existing regime in an appropriate manner: *supra* note 170 at 176. Grover has argued that more vigorous enforcement is needed in general but that it is not appropriate to single out predation: *supra* note 173 at 115-16.

[203] The voluntary compliance activities are summarized in Stanbury, *supra* note 160 at 216-21.

minimize impediments to bringing pricing cases and that the *Guidelines* be revised to more closely follow the *Act*, or that the provisions be reformed to provide a firmer basis for Bureau enforcement policy. Either way, the result would be closer coincidence between what the law says and the Bureau's enforcement of it.

Formal enforcement activity would also clarify the law. By showing the defects in the law, formal enforcement encourages law reform and, as suggested above, law reform may be useful in relation to the pricing provisions of the *Competition Act*. There are significant differences between what economic theory would prescribe and the criminal provisions dealing with anticompetitive pricing. In part, this is because the pricing provisions were designed to protect certain categories of competitors from activities of other competitors perceived to be unfair, rather than the promotion of overall economic efficiency. These conflicts between the protection of competitors and the promotion of efficiency should be resolved in the courts, before the Tribunal or though legislative reform.

Admittedly, the litigation alternative is not a very efficient way of protecting competition,[204] exposing problems with the law or clarifying its operation, and would impose enormous resource demands on the Bureau. Alternative approaches, such as permitting private access to the Tribunal, need to be seriously considered.[205]

V. CONCLUSION AND POSTSCRIPT

The analysis in the *Pricing Report* did not purport to provide a road map to the development of a perfect set of rules to address anticompetitive pricing practices. Its scope did not comprehend horizontal price fixing, nor did it deal with non-pricing practices which may be functionally equivalent to anticompetitive pricing. It does,

---

[204] A practical issue in predation cases is that relief in the form of a criminal conviction or a successful application to the Tribunal will typically not be obtainable on a timely basis. As a consequence, in some cases of predation, the victim will not survive to see the process through. The victim may be run out of business or bought out by the predator. Examples of both occurred in the predation investigations terminated by the Bureau during the Review Period. There is no technical requirement for the victim to participate in a predation case. Indeed, evidence of a bankrupt or bought out victim may make a charge of predation more credible. Nevertheless, in practice it is difficult to pursue a case without the active help of the complainant. While it is possible to obtain interim relief under the *Act* in both criminal and civil cases, this has not proved to be a useful alternative in such situations. This problem is discussed in light of proposals to give the Commissioner a power to issue cease and desist orders in abuse of dominance cases: *VanDuzer on Recent Developments*, *supra* note 3 at 34-39.

[205] Roach & Trebilcock, *supra* note 184. Private litigation has led to a much more robust body of antitrust law in the United States on pricing practices. Private access to the Tribunal in relation to all civilly reviewable matters was recently endorsed by the House of Commons Standing Committee on Industry (see *Report on the Competition Act*, *supra* note 3 at 48-57), and was proposed for exclusive dealing, tied selling and market restrictions in Private Member's Bill C-472, *An Act to amend the Competition Act (conspiracy agreements and right to make private applications), the Competition Tribunal Act (costs and summary dispositions) and the Criminal Code as a consequence)*, 2d Sess., 36th Parl., 1999-2000 (1st reading 6 April 2000). The National Competition Law Section of the Canadian Bar Association has divided views on permitting access to the Tribunal for these vertical practices: National Competition Law Section of the Canadian Bar Association, *Submission on the Public Policy Forum Consultation Concerning Amendments to the* Competition Act *and the* Competition Tribunal Act (July 2000) at 6-9). See generally *VanDuzer on Recent Developments*, *supra* note 3 at 31-34.

however, suggest some of the ways in which the current criminal provisions of the *Competition Act* dealing with price discrimination, predatory pricing and vertical price maintenance are lacking, and concludes that dealing with such practices under the abuse provision has several advantages. Consistent with the economic analysis set out in Part II, for enforcement action to be taken under section 79 the perpetrator must have market power and the effect of the alleged anticompetitive acts on competition must be assessed. More than the current *per se* regime, the abuse provision allows for a case-by-case analysis of behaviour which is sensitive to the specific factors at play in a particular industry. It also permits the Tribunal to look in a holistic way at the aggregate of anticompetitive acts, which may include more than pricing behaviour, in a way that the narrow criminal provisions do not. This ability will become increasingly important as the structure of industries change in different ways in response to the challenges of the new economy, including increased non-price competition.

The *Pricing Report* was completed in October 1999. In June 2000, the House of Commons Standing Committee on Industry issued its Interim Report on the *Competition Act* containing recommendations on reform of the pricing provisions which, in many respects, adopt the conclusions of the *Pricing Report*.[206] The Committee recommended that Parliament consider amending the *Competition Act* to provide (i) that price discrimination, predatory pricing and vertical price maintenance be dealt with civilly, possibly under the abuse of dominance provision, and (ii) that such practices only be actionable if engaged in by a person with sufficient market power and where the result is a substantial lessening of competition. The Committee also recommended that the Bureau develop enforcement guidelines for dealing with price discrimination, predatory pricing and price maintenance under the abuse of dominance provision. With respect to price discrimination and vertical price maintenance, the Committee recommended that Parliament consider eliminating the criminal provisions.[207] Regarding predatory pricing, the Committee recommended retaining the criminal provision, with some amendments designed to limit its application to egregious situations in which intent to predate is present, in addition to a civil approach.[208] The Committee's recommendations in its final report, anticipated this year, may lead to some long overdue legislative changes in this area.

Even in the absence of legislative reform, there appears to be an emerging consensus on the desirability of addressing price discrimination, predation and price maintenance under the abuse of dominance provision, at least in most circumstances. Consequently, as the Committee noted, there is a need for guidance on how to apply the abuse of dominance provision to these pricing practices.[209] One may be somewhat disappointed, therefore, that the draft guidelines setting out the Bureau's approach to the analysis of allegations of abuse of dominance, issued by the Bureau in May 2000, deal

---

[206] *Report on the Competition Act*, *supra* note 3.

[207] With respect to price discrimination, the Committee recommended consultations with stakeholders, including, in particular, small business representatives to determine whether there was any benefit to retaining the provision: see the discussion *supra* in note 173.

[208] The Committee followed the recommendation of the CBA in this regard: *CBA Brief*, *supra* note 169 at 141, and the discussion *supra* in note 180.

[209] Other commentators have also called for guidelines, including: the National Competition Law Section of the Canadian Bar Association, *ibid.* at 8-9, 15, 21; Lawson Hunter, *supra* note 170 at 176; and Warren Grover, *supra* note 173 at 114-15.

only with predatory pricing.[210] Even here, the approach described essentially mirrors the approach currently expressed in the *Predatory Pricing Guidelines*,[211] though in much less detail.[212] One may hope that the final version will be more expansive in this regard. Regardless of what happens in terms of legislative reform, effective guidelines represent an important next step toward developing effective rules to deal with anticompetitive pricing practices in Canada.[213]

---

[210] *Draft Abuse of Dominance Enforcement Guidelines*, *supra* note 174.

[211] *Supra* note 77.

[212] *Draft Abuse of Dominance Enforcement Guidelines*, *supra* note 173 at 41-3.

[213] It is also noteworthy that the government has adopted a different approach to predation in the airline industry. On August 23, 2000, regulations came into force specifying acts or conduct of a person operating a domestic air service, including predatory pricing, which may be considered anticompetitive acts for the purposes of the abuse of dominance provisions: see *Airline Regulations*, *supra* note 186.