Some Canadian Thoughts on Exclusive Dealing

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LEGISLATION

A. Section 77(1):

For the purposes of this section, *“exclusive dealing”* means

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

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

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

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

LEGISLATION

B. Section 77(2):

Where … the Tribunal finds that exclusive dealing ... because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(*a*) impede entry into or expansion of a firm in a market,

(*b*) impede introduction of a product into or expansion of sales of a product in a market, or

(*c*) have any other exclusionary effect in a market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing … and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

LEGISLATION

C. Section 79:

Where, on application by the Commissioner, the Tribunal finds that

(*a*) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business. (Control has been found to be the equivalent of market power – the ability to profitably set prices above (or below in a monopsony case) competitive levels for a considerable period of time.)

(*b*) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts. (A non-exhaustive list of anti-competitive acts is found in section 78; the key issue is whether the act was done for a predatory, exclusionary or disciplinary reason.)

(*c*) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market. (But-for the conduct in issue, would there be substantially more competition? Typically, competition is prevented or lessened by preserving, entrenching or enhancing market power of the incumbent.)

The Tribunal may make an order prohibiting persons from engaging in that practice.

LEGISLATION

C. Section 79 (cont.):

3.1. If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000.

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

CASES

A. BOMBARDIER

Canada (Director of Investigation and Research) v. Bombardier Ltd. (1980), 53 C.P.R. (2d) 47, 57 C.P.R. (2d) 216 (RTPC)

- Skidoo was a strong brand of snowmobile – some 30% of North American supply; 60% of Quebec and Maritimes supply; and 40% of Ontario supply.
- Arrangements challenged were exclusive contracts with dealers for the supply of Skidoo brand snowmobiles.
- A *major supplier* is one whose conduct has an appreciable or significant impact on the market. Bombardier was found to be a major supplier.

CASES

A. BOMBARDIER (cont.)

- 10% of the North American market was affected by the exclusive dealing policy.
- The exclusive dealing policy did not have a discernible impact at the manufacturing level.
- Market share data suggested that rivals could overcome the effects of the exclusive dealing.
- Most communities had more than one dealer and there was a significant turnover in dealerships.

CASES

A. BOMBARDIER (cont.)

- Accordingly, the RTPC found that there was no evidence of a substantial lessening or reduction of competition, nor a likelihood thereof.

- **RESULT:** Application dismissed.

CASES

B. NUTRASWEET

Canada (Director of Investigation & Research) v. NutraSweet Co., [1990] 32 C.P.R. (3d) 1 (Comp. Trib.)

- Application brought under exclusive dealing, tied selling and abuse of dominance provisions concerning the sale of aspartame.

- NutraSweet was a major supplier, with over 95% of the supply of aspartame in Canada.

- The fact that Coca-Cola and Pepsi were the major customers did not offset the market power.

CASES

B. NUTRASWEET (cont.)

- Mere inclusion of an exclusivity clause in a contract does not amount to “exclusive dealing” if willingly agreed to.

- There was no evidence of a refusal to supply unless customers entered into exclusivity provisions (no exclusive dealing under section 77(1)(a)).

CASES

B. NUTRASWEET (cont.)

- NutraSweet employed a “trade-mark display allowance” system in which customers were paid to display the NutraSweet logo on products, which the Tribunal found was, effectively, a 40% discount for exclusivity (exclusive dealing under section 77(1)(b)).

- Tribunal found that NutraSweet’s conduct resulted in a substantial prevention or lessening of competition.

CASES

B. NUTRASWEET (cont.)

- **RESULT:** Order issued prohibiting NutraSweet from enforcing or entering into terms of contracts for the supply of aspartame to Canadian customers which:
  - require the purchaser to purchase or use only NutraSweet aspartame;
  - provide financial inducements to purchase NutraSweet aspartame through trademark display, advertising, or similar allowances;
  - include meet-or-release terms; or
  - include most-favoured-nation clauses.

CASES

C. LAIDLAW

Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd., [1992] C.C.T.D. No. 1, 40 C.P.R. (3d) 289 (Comp. Trib.)

- Application brought under abuse of dominance provision.
- Laidlaw supplied lift-on-board waste disposal services in defined areas on Vancouver Island (87% market share).
- Key anti-competitive practices in Laidlaw's standard form contracts included exclusivity provisions, evergreen provisions, right of first refusal and right to match competitors' prices.

CASES

C. LAIDLAW (cont.)

- **RESULT:** Order issued requiring Laidlaw to, among other things:
  - provide the Bureau with copies of its existing and future contracts and to provide its customers, each time their contracts are modified, with an explanation of the effect of the changes;
  - restricted the terms of Laidlaw's customer service contracts to an initial one-year term automatically renewable for one further year only; and
  - Laidlaw no longer be permitted to require that its customers obtain waste collection service from Laidlaw exclusively.

CASES

D. NIELSEN

Canada (Director of Investigation & Research) v. D & B Company of Canada Limited., (1995), 64 C.P.R. (3d) 216 (Comp. Trib.)

- Application under abuse of dominance provisions.
- AC Nielsen collected data from both suppliers and retailers and in turn sold this information, along with other information and market analysis.
- The Tribunal found that D&B structured its contracts with the providers of information so that the necessary data would not be available to any other competitor. (exclusive purchase arrangements)

CASES

D. NIELSEN (cont.)

- Nielsen paid for exclusivity, and imposed financial penalties if a retailer supplied data to a competitor.

- Contracts also included most-favoured-nation clauses as well as strict conditions for termination (including monetary penalties for early termination).

CASES

D. NIELSEN (cont.)

- Further practice of entering into long-term exclusive contracts with manufacturers (customers) also prevented entry of competitors

- The Tribunal found that signing exclusive agreements to prevent an entrant from doing the same thing is no "excuse" for a dominant firm entering into exclusive agreements.

CASES

D. NIELSEN (cont.)

- **RESULT:** Order issued prohibiting Respondent from entering into contracts or enforcing terms of existing contract that, among other things:
  - contain exclusivity provisions;
  - contain most-favoured-nation provisions (for a 2 year period)
  - preclude customers from giving notice of termination during any "minimum commitment period"
  - require customers to give more than 8 months notice of termination

- For nine months following the order, Nielsen was also required to provide historical scanner data to other suppliers of scanner-based market tracking services.

CASES

E. CANADA PIPE

Canada (Commissioner of Competition) v. Canada Pipe (2005), 40 C.P.R. (4th) 453, 44 C.P.R. (4th) 241 (F.C.A.)

- Application under exclusive dealing and abuse of dominance provisions.
- Product involved was cast iron pipe.
- Allegation was that a “Stocking Distributor Program” amounted to exclusive dealing

CASES

E. CANADA PIPE (cont.)

- Program offered distributors point-of-purchase discounts and quarterly and annual rebates if all pipes were purchased from Canada Pipe.
- Point-of-purchase discounts amounted to up to 40%; quarterly rebates amounted to 7-15%; and annual rebates amounted to 1-4%.
- At the beginning of every calendar year, distributors were free to terminate their participation in the Stocking Distributor Program.

CASES

E. CANADA PIPE (cont.)

- Tribunal found that while Canada Pipe had market power, the program did not have the necessary impact of preventing or lessening competition substantially for the purpose of s. 79(1)(c).

- FCA held that, among other things, the Tribunal failed to employ the correct test in evaluating the program. The Tribunal should have considered whether, without the rebate program, the relevant product market would be *substantially more competitive*. (but-for test)

- The matter was remitted back to the Tribunal for further hearing, then settled.

CASES

E. CANADA PIPE (cont.)

- **RESULT:** Consent order reached in which Canada Pipe was required, among other things, to implement and offer a modified rebate program as an alternative to the Stocking Distributor Program to all distributors and prospective distributors, pursuant to which:
  - quarterly or annual rebates may not be conditioned on the purchase of any other product from Canada Pipe; and
  - distributors may not be required to deal only in products supplied by Canada Pipe.

CASES

E. CANADA PIPE (cont.)

- Additionally, Canada Pipe was prohibited from refusing to supply, delay shipments of products or otherwise discriminate, directly or indirectly, against any distributor solely because that distributor has elected to participate in the modified rebate program.

REMEDIES

A. GOALS

- Terminate the impugned conduct
- Prevent reoccurrence
- Establish conditions to support competition
- Punishment? / Disgorge improperly achieved advantage?
- Compensation?

REMEDIES

B. TYPES OF REMEDIES

- Structural:
  - Self-policing
  - Can be difficult to break-up unified enterprises
  - Sub-division may not address the substantive problem
  - May be or be seen to be overly punitive

- Monetary Penalties:
  - Relatively simple
  - May be a “fairness” issue without fully defining problematic conduct
  - Danger of chilling pro-competitive vertical integration

REMEDIES

B. TYPES OF REMEDIES (cont.)

- Injunctive Remedies
  - Relatively simple for *de jure* exclusivity arrangements
  - Much more complex for bundled pricing, volume discounts, etc.
  - Difficulty in creating sufficient but not overly prohibitive orders
  - Need for prohibition to be “bright line”
  - Avoid deterring growth or aggressive competition
  - May also require a positive obligation to restore competitive landscape – but tough to define and may require policing – access pricing, etc.
  - Particularly challenging in rapidly evolving markets

REMEDIES

C. ISSUES

- Sufficient vs. Overbreadth
- Flexibility
- Need to be self-policing
- Avoiding injury to efficient distribution arrangements
- Avoid deterring aggressive competition

Thank you.

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International
Competition
Network

Legal and economic assessment of exclusive dealing

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ICN Unilateral Conduct Working Group

Exclusive dealing

ICN UCWG Webinar

Simon Roberts
Competition Commission South Africa

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International Competition Network

Overview of key principles

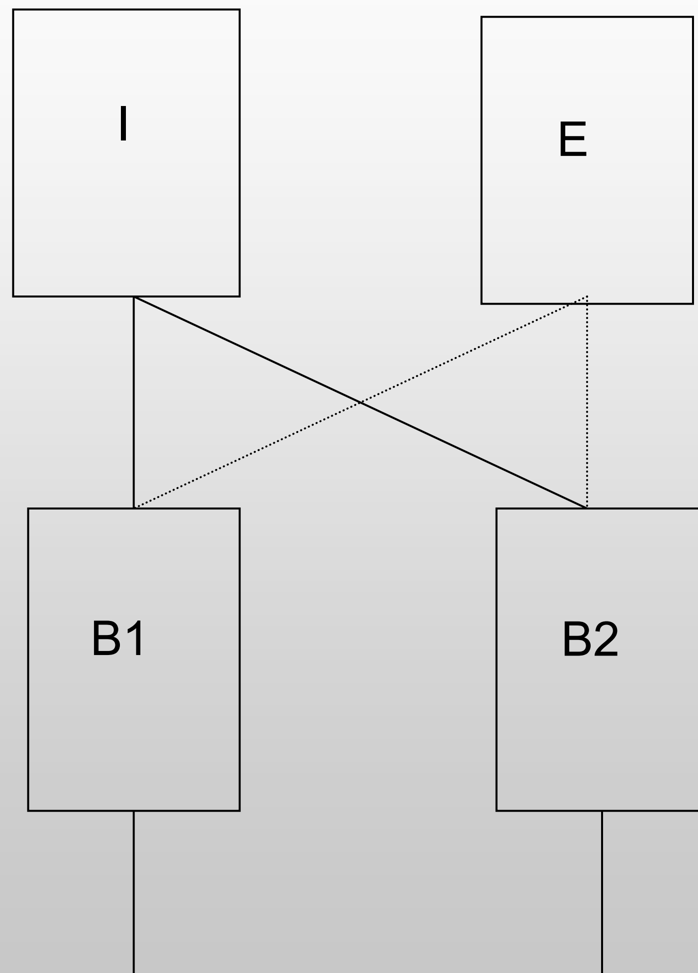
- Exclusive dealing can be understood within wider framework of exclusionary abuse
- Critical questions are around understanding incentives, mechanisms and effects
- About abuse of substantial market power (SMP)
- With exclusive dealing, customers (also could be suppliers) of a dominant firm sign up to exclusive deals and agree not to deal with rivals
  - If there is effective rivalry upstream, then even with exclusive deals there will be competition between vertically integrated groupings
  - But, in the case of SMP, agreements appear anti-competitive, as they undermine rivalry?

International Competition Network

Suppose I want to exclude E, different practices are possible, including:

- Exclusive dealing
- Price discrimination
- Rebates (quantity discounts)
- Predatory pricing

- a form-based approach does not make sense – need to understand effects
- 'pigeon-holing' conduct may not be helpful
- can understand circumstances where maybe rebuttable presumptions as to effects



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Exclusive dealing

- Why would the customer of the dominant firm agree to such a deal?
  - dominant firm must be providing a benefit to the customer to enter into the deal, outweighing loss to customer from being subject to single supplier
  - Chicago school: should presume exclusive deals do not have anti-competitive effects; agreements are only reached because of efficiencies

- Efficiencies may be substantial
  - stimulating investments (overcoming free-riding)
  - addressing opportunism, facilitating specific investments
  - But, may be other ways to realise efficiencies

→ Understand conditions/tests for assessing exclusive deals

When might customers enter exclusive deals that foreclose actual/potential effective competitors?

- Weak upstream competition (entry/effective rivalry uncertain), requires little compensation for buyer to accept exclusivity
- Multiple uncoordinated buyers
- Network and/or scale economies, meaning entrant's success depends on being able to get a base of customers
- Mean buyers accept some 'compensation' for exclusivity, as believe entry unlikely - each believes other buyers will accept, even if they do not
- Greater likelihood if can discriminate between buyers, 'bribe' some key buyers, or if staggered contracting, the 'early' buyers
- Imperfect information and uncertainty about entrant's offering makes it more risky to reject exclusive offer
- Note: may not be absolute exclusivity but partial, or de facto (loyalty rebates)

Illustrations from SA cases

- Under SA Act can be viewed as: restrictive vertical practice (s5(1)) and/or requierement or inducement not to deal with a competitor (s8(d)(i))

- *Patensie* packaging and distribution of citrus fruit
  - Tribunal found that farmers (also shareholders in the company, a former co-operative) locked into indefinite exclusive supply arrangement with Patensie Sitrus, thus excluding potential competitors from the market for the packing and distribution of citrus fruit in the Gamtoos River Valley

- *Astral – Elite* poultry case
  - Referred by Commission in June 2008, still to be heard by Tribunal
  - Country Bird required to source 90% plus of parent stock requirements from Elite JV/partnership (controlled by Astral). Elite sources grandparent stock from Ross, also controlled by Astral.
  - Country Bird unilaterally exited arrangement and supported entry of rival breeding business

- Both cases are where collective arrangements to ensure investment now may be anti-competitive, considerable time after the investments made

International Competition Network

Computicket

- Alleged anti-competitive conduct, 3-year exclusive contracts by incumbent ticketing agent (Computicket) with inventory providers:
  - Events organisers (concerts, live festivals), Theatres, Sports events
- Referred to the Competition Tribunal in 2010, not yet heard

- Dominance, market power and market share?
  - Computicket with almost all of outsourced ticket sales
  - Alternatives? Own ticket sales (box office)
  - Entry barriers? Low costs of establishing internet business?

- Scale and network effects?
  - Customer awareness, web presence, retail network
  - Risk-aversity of customers (inventory providers), reputation
  - Significance of big buyers (inventory providers) by segment

- Efficiencies?

International Competition Network

Summary of South Africa approach

- Effects-based tests stipulated in Act
- Tribunal has established tests for exclusion based on:
  - Foreclosure of substantial proportion of the market
  - Effects on consumers
- Also considered evidence on actual effects on rival(s)
- Balance against efficiency/pro-competitive justifications
- Typically extensive economic evidence led
- Note other cases related to exclusivity: SAA (loyalty rebates); JTI-BATSA (display space)