Competitors at the Gate: The Evolution of Canada's Abuse of Dominance Regime and its Application to Digital Players

JAMES MUSGROVE, NEIL CAMPBELL & JOSHUA CHAD
MCMILLAN LLP*

I. INTRODUCTION 1000
II. GATEKEEPER BEHAVIOUR 1003
A. Denial of Access and the Essential Facilities Doctrine 1005
B. Self-Preferencing 1006
C. Ties Between Markets 1008
D. Exclusivity Arrangements 1009
E. Most-favoured Nation Arrangements 1010
F. Control and Use of Data 1011
III. THE CANADIAN COMPETITION LAW FRAMEWORK 1013
A. Abuse of Dominance 1015
1. Dominance 1015
2. Abuse 1016
3. Substantial Prevention or Lessening of Competition 1020
4. Enforcement and Remedies 1022
B. Other Reviewable Practices 1022
1. Refusal to Deal (Refusal to Supply) 1022
2. Tied Selling 1024
3. Exclusive Dealing 1024
C. The Special Intellectual Property Remedies 1025

*The authors are partners in the Competition Group of McMillan LLP, based in Toronto. The assistance of David Zhang, Jessie Treagus, and Kendra Wilson is gratefully acknowledged.

IV. THE APPLICATION OF THE COMPETITION ACT TO GATEKEEPER ISSUES—SOME CASE GUIDANCE 1028
A. Refusal to Supply Cases *1029*
1. The *Chrysler* and *Xerox* Aftermarket Cases 1029
3. *Warner Music* 1030
4. *Used Car Dealers Association* 1031
B. Abuse of Dominance Cases *1031*
1. *Interac* 1032
2. *Tele-Direct* 1034
3. *Nielsen* 1035
4. *Toronto Real Estate Board* (*TREB*) 1036
5. *Vancouver Airport Authority* 1042
C. Discontinued and Pending Investigations *1045*
1. Google I 1045
2. Google II 1047
3. Amazon 1048
V. SOME TENTATIVE CONCLUSIONS 1049

I. INTRODUCTION

It is an exciting time in the antitrust arena! As Carl Shapiro noted in 2018, "[n]ot since 1912, when Teddy Roosevelt ran for President emphasizing the need to control corporate power, have antitrust issues had such political salience."[1] Political, media, and academic interest in antitrust issues continues to intensify in the United States, Europe and elsewhere. Numerous proposals are before the U.S. Congress[2] and state legislatures[3] to "toughen" antitrust enforcement. In July 2021 President Biden issued a broad Executive Order to promote

1. Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 715 (2018).

2. *See, e.g.*, Lauren Feiner, *Lawmakers Unveil Major Bipartisan Antitrust Reforms that Could Reshape Amazon, Apple, Facebook and Google*, CNBC, https://www.cnbc.com/2021/06/11/amazon-apple-facebook-and-google-targeted-in-bipartisan-antitrust-reform-bills.html (last updated Dec. 13, 2021, 1:35 PM).

3. *See, e.g.*, Twenty-First Century Anti-Trust Act, H.R. 933, 2021–2022 Leg., Reg. Sess. (N.Y. 2021); H.R. 4143, 92nd Leg. Sess. (Minn. 2022); Assemb. Con. Res. 95, 2021–2022 Leg. Reg. Sess. (Cal. 2021).

competition[4] and new leadership at the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ), and his administration is expected to take a more aggressive approach to antitrust enforcement. Across the Atlantic, the European Commission and the competition authorities in Germany and the UK are highly focused on the application of current and/or proposed new laws to the digital economy.[5] Canada has also commenced a consultation on possible amendments to modernize its Competition Act.[6]

Within this heightened enforcement environment, there is no greater area of focus than giant firms in the tech sector.[7] These firms are said by some to have more economic and political power than at any time in U.S. history except, perhaps, at the height of the challenge to the trusts over a century ago. The populist and political calls to reign in the power of large firms are focused not only on economic or market power issues, but also on the perceived social and political influence of these firms. Further, there are active debates about whether to continue or modify the focus on consumer welfare as the primary competition

4. Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021).

5. European Commission Press Release IP/20/2347, Europe Fit for the Digital Age: Commission Proposes New Rules for Digital Platforms (Dec. 15, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2347; *Digital Economy*, BUNDESKARTELLAMT, https://www.bundeskartellamt.de/EN/Economicsectors/Digital_economy/digital_economy_node.html (last visited Aug. 18, 2022); *The CMA's Digital Markets Strategy: February 2021 Refresh*, COMPETITION & MKTS. AUTH., https://www.gov.uk/government/publications/competition-and-markets-authoritys-digital-markets-strategy/the-cmas-digital-markets-strategy-february-2021-refresh (last updated Feb. 9, 2021).

6. Letter from The Honourable Howard Wetston, Sen. of Ontario, Senate of Canada, Re: Consultation Invitation – Examining the Canadian Competition Act in the Digital Era (Oct. 27, 2021), https://sencanada.ca/media/368379/letter-pdf.pdf; Edward M. Iacobucci, *Examining the Canadian Competition Act in the Digital Era* (Sept. 27, 2021), https://sencanada.ca/media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf.

7. *See, e.g.*, Eleanor M. Fox, *Platforms, Power and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide*, 98 NEB. L. REV. 297 (2019); Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSPS. 69 (2019); STIGLER COMM. ON DIGIT. PLATFORMS, FINAL REPORT (2019), https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf.

policy objective.[8] Some antitrust scholars have responded that existing antitrust law remains well suited to address market power concerns in a digital context but not necessarily these broader social and political issues.[9] These efforts are not merely focused on interpretation of existing antitrust laws. Legislative efforts are underway to specifically regulate certain types of conduct by tech firms.[10] It is not clear whether these legislative initiatives are best seen as an extension of general antitrust laws, as specific regulatory regimes, or as a hybrid approach.

This Article focuses on one specific and challenging issue: the treatment of firms that effectively operate as gatekeepers in markets. Debates about the proper focus of antitrust enforcement and proposed regulatory responses to the emergence of giant tech firms extend well beyond this Article's scope. Specifically, this Article assesses how fit Canada's unilateral conduct laws—in particular its abuse of dominant market position law—are to deal with anti-competitive gatekeeping behaviour. These issues are not unique to the tech sector but obviously have particular importance in that area. We conclude, after reviewing the structure of the Competition Act and the interpretation which it has been given through case law, that while the Act is not perfect, it is broadly capable of responding to competition law concerns posed by tech gatekeepers.

8. *See, e.g.*, AM. BAR ASS'N: ANTITRUST L. SECTION, REPORT ON THE TASK FORCE ON THE FUTURE OF COMPETITION LAW STANDARDS (Aug. 3, 2020), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/vault-01/aba-antitrust-standards-task-force-report.pdf; *see also* Leon B. Greenfield, Perry A. Lange & Nicole Callan, *Antitrust Populism and the Consumer Welfare Standard: What Are We Actually Debating?*, 83 ANTITRUST L.J. 393, 393–94 (2020). Greenfield and his colleagues note that in modern sectors, such as internet search engines, social networking, and e-commerce, there are critics of the consumer welfare standard and its focus on prices, output, and product quality. The authors explain that there is concern whether the consumer welfare standard can address harmful concentrations of economic power, with populists proposing alternatives to the existing consumer welfare framework for online platforms.

9. *See, e.g.*, Shapiro, *supra* note 7, at 79 ("Antitrust is not designed or equipped to deal with many of the major social and political problems associated with the tech titans, including threats to consumer privacy and data security, or with the spread of hateful speech and fake news.").

10. *See, e.g.*, American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021).

Gatekeeper behaviours are briefly discussed in Section 0 of this Article. The common theme is the ability of an actor in one market—generally through its control of an essential input, platform, or essential distribution channel—to impact the competitive dynamic in another (upstream or downstream) market. Section 0 provides a brief overview of the Canadian legal framework. Section 0 examines recent Canadian jurisprudence that has begun to grapple with some of these issues. Section 0 draws some tentative conclusions.

II. GATEKEEPER BEHAVIOUR

The term "gatekeeper," as used in this Article, refers to a company or a particular platform that significantly controls access to or the rules for competing within a particular market and which may or may not itself compete in a separate market. Gatekeeper issues are not exclusive to tech markets, but such markets, which often involve characteristics such as tipping, low marginal costs, two sidedness, and network effects, are particularly susceptible to these issues. As Professor Sean Sullivan observes, a market with some or all of these characteristics (or similar barriers to entry) often give rise to dominant firms, with or without firms using specific exclusionary behaviour to achieve or maintain dominance. The existence of a dominant firm in such circumstances may be a natural consequence of market dynamics which drive towards "winner take most" as an efficient outcome.[11] Shapiro notes, moreover, that "there is convincing evidence that larger, more efficient firms have been growing at the expense of their smaller, less effective rivals."[12] This description may be apt for many tech sector markets.

Whether a firm's dominance in such a market gives rise to gatekeeper concerns with respect to an adjoining market depends, in our view, on whether the gatekeeper firm's conduct in relation to the adjacent market is based on efficiency or exclusionary considerations.[13] As Shapiro explains:

11. Sean P. Sullivan, *Anticompetitive Entrenchment*, 68 KAN. L. REV. 1133, 1137 (2020).

12. Shapiro, *supra* note 7, at 71.

13. This issue has been recognized at least since *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945), and *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 268 (2d Cir. 1979).

> Following this core principle, the basic antitrust question for each tech titan is whether that company has engaged in practices that go beyond competition on the merits and are likely to (1) exclude its rivals and fortify its market position or (2) extend its power to adjacent markets. If so, a remedy is needed to restore competition. A behavioral remedy imposes limits and obligations on the company's conduct; this was the outcome in the Microsoft case 20 years ago. A structural remedy breaks up the company; this was the result in the AT&T case in the 1980s. Talk of breaking up the tech titans without reference to a specific antitrust violation is putting a very large cart before the horse.[14]

In Canadian jurisprudence, as explored below, a practice of anti-competitive acts is generally required to challenge "gatekeeping" conduct. But the increased prevalence of markets which enjoy a relatively higher likelihood of dominance highlights the increased importance of gatekeeper concerns. As more markets arise that have dominant firms, there will be an increased prevalence of firms that have the capacity to act as gatekeepers whose conduct might need to be reviewed. What is most important is to understand the types of behaviours that these gatekeeping firms can engage in that might raise competition concerns.

14. Shapiro, *supra* note 7, at 80. Relatedly, Professor Eleanor Fox explains that:

> A handful of high tech giants dominate markets. The firms were started from scratch by entrepreneurs with great ideas, and they attract millions of users every day. They are networks and platforms, have economics of scale, and feature network effects and winner-take-all markets. On the one hand, the network effects please users (who get more "friends" or suppliers or buyers), but on the other hand, they create uncommonly high barriers to entry and reinforce their market power. The firms offer their products "free" on one side of the market (but users give up their data); on the other side, they make huge revenues from advertising, including by selling the data of their users.

Fox, *supra* note 7, at 304

A. Denial of Access and the Essential Facilities Doctrine

An obvious and perhaps self-evident behaviour that a gatekeeper can take which might be seen to be anticompetitive is to deny or limit the ability of third parties' access to the market that it controls. In addition, a dominant firm can act as a gatekeeper by limiting the ability of other firms to compete in a market on a timely and cost-effective basis. In controlling who can access a market, there is a potential for the market to have insufficient competition.

Historically, one response to denial of access by a dominant player in antitrust law has been with the "essential facilities" doctrine. While the term has multiple meanings, the "essential facilities doctrine" seeks to determine when a facility should be treated as "essential," thereby preventing the controller of the facility from denying access. Under this doctrine, access to the facility is mandated to be provided to third parties at a reasonable cost.

The use of the essential facility doctrine is controversial in many antitrust regimes, including the Canadian regime, where the concept has never been expressly adopted in a contested case. Part of the challenge, particularly under U.S. antitrust law, is the concern as to what the doctrine specifically requires. For example, if supply is to be mandated, on what terms? However, some U.S. cases have explored the boundaries of the conduct.[15]

Many natural monopolies are subject to regulation, but where that has not occurred, unilateral conduct laws have potential application. In the U.S., as noted, there has been skepticism with the concept of essential facilities and forced access. In Canada, while there appears to be a reluctance to embrace the terminology of essential facilities, the refusal to deal provision of the Competition Act, discussed below, specifically contemplates that supply may be ordered on "usual trade terms."

15. *See, e.g.*, United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383 (1912); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985); Lorain J. Co. v. United States, 342 U.S. 143 (1951); Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

B. Self-Preferencing

Self-preferencing can occur when a platform operator allows competitors on its platform but also has its own proprietary products competing against such competitors. The self-preference issue arises if the operator of the platform finds ways to use the platform to advantage its own products or disadvantage the products of third parties which are using its platform. Self-preferencing issues have arisen in various settings. Examples include Google apparently favouring its own advertising server over those of rivals and publishers,[16] and Amazon offering its own products for sale in competition with third-party retailers using the Amazon marketplace.[17] Moreover, it is a key focus of the proposed American Innovation and Choice Online Act.[18]

Self-preferencing is less absolute than a full denial of access but may still have significant consequences for other firms that need, or are significantly benefitted, by access to and use of the platform. In addition to operational self-preferencing, platforms or networks may be able to set rules which provide the operator with competitive advantages for its own products and services. Self-preferencing can also raise exclusionary issues if the platform operator has a dominant market position. However, there may be efficiency or technological reasons why products may work "better" or be supplied more effectively and efficiently together.

16. *See, e.g.*, Sam Shead, *Google Agrees to Change Global Advertising Practices as France Imposes Unprecedented $268 Million Fine*, CNBC, https://www.cnbc.com/2021/06/07/google-fined-by-france-for-abusing-online-advertising-position.html (last updated June 10, 2021, 1:55 PM); Press Release, Autorité de la Concurrence, L'Autorité de la Concurrence Sanctionne Google à Hauteur de 220 Millions D'euros pour Avoir Favorisé ses Propres Services dans le Secteur de la Publicité en Ligne [French Competition Authority fines Google 220 million euros] (July 7, 2021), https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/lautorite-de-la-concurrence-sanctionne-google-hauteur-de-220-millions-deuros.

17. *See, e.g.*, European Commission Press Release IP/20/2077, Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-public Independent Seller Data and Opens Second Investigation into its E-commerce Business Practices (Nov. 10, 2020) (Fr.), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.

18. American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021).

An example of this issue is the European Commission's investigation into Apple's restrictions on how third-party developers are required to use Apple's own in-app payment system, launched in 2020 in response to complaints received from Spotify and an e-book and audiobook distributor.[19] Following its investigation, the European Commission issued a Statement of Objections to Apple on April 30, 2021, in relation to its conduct in respect of music streaming, arguing that Apple "abused its dominant position for the distribution of music streaming apps through its App Store" and that "Apple distorts competition in the music streaming market to the benefit of Apple's own music streaming service, Apple Music."[20] Similarly, in June 2017, the European Commission found that Google had abused its dominant position in the market for online general search services by favouring its own comparison shopping service over competing comparison shopping services. Google and Alphabet challenged this decision, with the General Court of the European Union largely dismissing the challenge in November 2021, finding (1) an anticompetitive nature to the practice at issue, (2) harmful effects on competition, and (3) no objective justifications for Google's conduct.[21]

Antitrust is experienced with dual distribution issues,[22] but the need to use the platform—rather than simply obtain an input product in

19. European Commission Press Release IP/20/1073, Antitrust: Commission Opens Investigations into Apple's App Store Rules (June 16, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073.

20. European Commission Speech SPEECH/21/2093, Statement by Executive Vice-President Margrethe Vestager on the Statement of Objections Sent to Apple on App Store Rules for Music Streaming Providers (Apr. 20, 2021), https://ec.europa.eu/commission/presscorner/detail/en/speech_21_2093.

21. General Court of the European Union Press Release No. 197/21, The General Court Largely Dismisses Google's Action Against the Decision of the Commission Finding that Google Abused its Dominant Position by Favouring its Own Comparison Shopping Service Over Competing Comparison Shopping Services (Nov. 10, 2021), https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf.

22. "Dual distribution" refers to a supplier, often a manufacturer, offering its products to customers at different levels of the supply chain. For example, a manufacturer that makes sales to wholesale distributors and end-users would be an example of a "dual distribution." *See* William B. Slowey, *Dual Distribution: Definition, Legislative Background and Specific Attempts at Regulation*, 48 ANTITRUST L.J. 1799, 1799 (1979).

a dual distribution system—may result in more factually complex issues. Designing effective remedies may also be very challenging, since the blunt remedy of prohibiting the platform owner from also operating on the platform itself is likely to produce inefficient results in many cases. Further, even if the platform owner itself does not compete on the platform, common interests can be created between platform owner and firms competing on the platform through contractual mechanisms, so additional preferencing issues may remain.

C. Ties Between Markets

Tying and bundling are one mechanism that a dominant gatekeeper firm could use to extend market power that it may have in one market (whether legitimately earned or not) into other markets. One example is bundling proprietary apps with the use of a major technology platform. Another recent example is the Bundeskartellamt's abuse of dominance proceeding based on concerns that Facebook would be linking the use of its Oculus virtual reality product to users having Facebook accounts.[23] Similarly, the European Commission investigated and fined Google for, among other things, engaging in illegal tying by bundling the Google Search app and the Google Chrome browser with the Google Play store for manufacturers using Google's Android operating system on their phones. Device manufacturers that wanted to include the Google Play Store on their devices, which was viewed as a "must-have" app, were required to also install the Google Search app and the Google Chrome browser on their devices.[24]

These and other recent examples echo the 2001 *United States v. Microsoft Corp.* decision that found Microsoft restricted manufacturers that used its Windows operating system from uninstalling its Internet

23. Press Release, Bundeskartellamt, Bundeskartellamt Examines Linkage Between Oculus and the Facebook Network (Dec. 10, 2020), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/10_12_2020_Facebook_Oculus.html?nn=3591568.

24. European Commission Press Release IP/18/4581, Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581.

Explorer browser application.[25] The settlement between the U.S. DOJ and Microsoft required, among other things, Microsoft to share interfaces and the establishment of a three-person Technical Committee.[26] It is clear that antitrust jurisprudence is intimately familiar with responding to tying behaviour that raises anticompetitive concerns.

D. Exclusivity Arrangements

Exclusivity arrangements may be problematic where a dominant firm enters exclusive arrangements that limit competitors from accessing a market effectively or that limit a rival's ability to get sufficient scale to offer a competitive product. However, there are also potentially significant efficiencies that can arise from mechanisms requiring or incentivising exclusive dealing. Such arrangements are common and do not necessarily, or even usually, have anti-competitive effects.

Exclusive contracts can, in theory, create or maintain a gatekeeper's position.[27] For example, if all or most suppliers of key input products are required or induced to agree to supply their products to only one firm, the exclusivity arrangements can effectively establish and protect a gatekeeper firm.[28] There are a few recent examples from China where the State Administration for Market Regulation (SAMR) fined the e-commerce platform Alibaba and the online-service app Meituan for a variety of practices, most notably forced exclusivity. In April 2021, SAMR released a decision fining Alibaba RMB 18.2 billion (2.8 billion U.S. dollars) concluding that Alibaba had abused its market dominance in China by imposing forced exclusivity on merchants resulting in merchants only being able to sell their wares through Alibaba.[29] In October 2021, SAMR released a decision fining Meituan

25. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

26. United States v. Microsoft Corp., No. 98-1232, 2002 WL 31654530 (D.D.C. Nov. 12, 2002).

27. *See, e.g.,* Canada (Competition Act, Dir. of Investigation & Rsch.) v. D&B Cos. of Can. Ltd., 1995 CCTD 20 (Can.).

28. *See Exclusive Dealing or Requirements Contracts*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-supply-chain/exclusive-dealing-or-requirements-contracts (last visited Aug. 20, 2022).

29. *See, e.g.*, Wei Sheng and Emma Lee, *What is 'Forced Exclusivity'? And Why Did It Get Alibaba Fined $2.8 Billion?*, TECHNODE (Apr. 15, 2021),

RMB 3.4 billion (533 million U.S. dollars) concluding that Meituan had abused its market dominance in the online food and beverage delivery platform service market in China by requiring vendors to use the Meituan platform exclusively.[30] Similar to anticompetitive tying arrangements, antitrust jurisprudence is familiar with exclusivity concerns and can fashion effective remedies to address such behaviour to the extent that it becomes anticompetitive.

E. Most-favoured Nation Arrangements

Most-favoured nation (MFN) clauses can give rise to gatekeeper concerns when, as a condition of selling one's product on a gatekeeper's platform, the supplier must agree that the terms being offered on the platform will always represent the best terms provided to any other customers. This type of concern has arisen in cases in the hotel online booking sector.[31] It also arose in Amazon's terms for users selling through its Amazon Marketplace.[32]

https://technode.com/2021/04/15/what-is-forced-exclusivity-and-why-did-it-get-alibaba-fined-2-8-billion/.

30. *See, e.g.*, Ding Yining, *Meituan Nailed for Antitrust Violations, Cops US$533 Million Penalty*, SHINE (Oct. 8, 2021), https://www.shine.cn/biz/tech/2110086125/; Phate Zhang, *Meituan Fined $533 Million For Forced Exclusivity*, CNTECHPOST (Oct. 8, 2021), https://cntechpost.com/2021/10/08/meituan-fined-533-million-for-forced-exclusivity/.

31. *See* Philippe Chappatte & Kerry O'Connell, *European Union – E-commerce: Most Favoured Nation Clauses*, GLOB. COMPETITION REV. (Dec. 3, 2020), https://globalcompetitionreview.com/guide/e-commerce-competition-enforcement-guide/third-edition/article/european-union-e-commerce-most-favoured-nation-clauses; *see also, e.g.*, Press Release, Hungarian Competition Auth., Gigantic Fine Imposed on Booking.com by the GVH (Apr. 28, 2020), https://gvh.hu/en/press_room/press_releases/press-releases-2020/gigantic-fine-imposed-on-booking.com-by-the-gvh; European Commission Press Release IP/20/2444, More Transparency: Following EU Action, Booking.com and Expedia Align Practices with EU Consumer Law (Dec. 18, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2444.

32. *See, e.g.*, Council Regulation 1/2003 of 4.5.2017, Case AT.40153 – E-book MFNs and Related Matters, 2017 O.J. (C 2876) 1, https://ec.europa.eu/competition/antitrust/cases/dec_docs/40153/40153_4392_3.pdf; Complaint, District of Columbia v. Amazon.com, Inc., No. 2021-CA-001775-B (D.C. 2021), https://oag.dc.gov/sites/default/files/2021-05/Amazon-Complaint-.pdf.

MFN clauses can restrict the nature of offers that can be made in other distribution channels. These restrictions may extend to a supplier's use of competing platforms and to its own online direct sales.[33] Historically, MFN clauses did not raise antitrust concerns as they generally resulted from good faith negotiations between a supplier and a customer with both parties ultimately benefiting from the terms of the agreement. With the rise of certain tech companies attempting to include MFN clauses in all their contracts with customers wanting to sell on their platforms there are concerns that these agreements could raise anticompetitive concerns.[34] The use by a gatekeeper of MFN clauses is essentially a modified and slightly more permissive version of exclusivity arrangements, and antitrust law is familiar with addressing anticompetitive exclusivity, as noted above.

F. Control and Use of Data

One of the most important business trends in the twenty-first century has been the collection and use of enormous volumes of data—often about actual or potential customers and suppliers, but also about the marketing, supply, and distribution of products more generally.[35] The antitrust issues related to accumulation and deployment of data generally focus on whether the data's owner becomes an overwhelmingly effective and dominant competitor.[36] Data-related questions include: Can the data act like some sort of "essential facility"? If so, is the collection of such data anti-competitive conduct, such that it should

33. *See* Chappatte & O'Connell, *supra* note 31.

34. *See supra* note 31–32.

35. There are significant privacy issues surrounding data practices, but those issues are not a focus of this article. *See, e.g.*, *Guidance on Inappropriate Data Practices: Interpretation and Application of Subsection 5(3)*, OFF. OF THE PRIV. COMM'R OF CAN., https://www.priv.gc.ca/en/privacy-topics/collecting-personal-information/consent/gd_53_201805/ (last updated May 24, 2018); *Personal Information Retention and Disposal: Principles and Best Practices*, OFF. OF THE PRIV. COMM'R OF CAN., https://www.priv.gc.ca/en/privacy-topics/business-privacy/safeguards-and-breaches/safeguarding-personal-information/gd_rd_201406/ (last updated Aug. 13, 2021).

36. Competition Bureau Can., Big Data and Innovation: Implications for Competition Policy in Canada (Nov. 17, 2017) (draft discussion paper), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Big-Data-e.pdf/$file/Big-Data-e.pdf.

not be permitted—or such that the owner should be forced to "share" the data it has amassed with competitors or potential competitors? Does it matter if the data is accumulated from third parties or gathered by the firm through its own efforts? What about a platform that sells both on its own behalf and offers a marketplace for others while gathering detailed data on the third parties' sales?

As with many gatekeeper practices, the use of data may well make the firm much more effective and efficient—potentially able to serve customers better or at a lower cost.[37] Dynamic efficiency may be affected if compulsory sharing reduces the incentives to collect and use such data.[38] In 2017, the Canadian Competition Bureau (CCB) published a consultation paper on the competition law impacts of big data.[39] The paper touched on several potential concerns and benefits associated with big data. With respect to potential platform and gatekeeper concerns, the paper noted that:

> Data are increasingly becoming a critical input in certain markets and may serve as a significant barrier to entry or expansion. In certain cases, access to and control over critical data that serve as an essential input may confer market power.
>
> Switching costs related to data can constitute significant barriers to entry and expansion. For example, consumers may find it costly to transfer their data from one platform to a competing platform. In some cases, dominant firms may take actions to increase switching costs, for example by restrictive contracts. Such a practice can further entrench dominance, which may harm competition and constitute an abuse of dominance.
>
> Data may also represent a barrier because of network effects. Network effects exist when the value or benefit derived from using a product increases with the number of other users. For example, search engines gather and analyze data from users who click on links and ads. Additional use, therefore, leads to

37. *Id*. at 24.
38. *Id*. at 28.
39. *Id*.

> improvements in algorithms that display more relevant search results and ads. While quality improves by exploiting network effects, the same mechanisms can create barriers to entry and expansion.
>
> Similarly, an increase in quality can co-exist with barriers to entry and expansion when a firm has exclusive access to proprietary data. On the one hand, those data may improve the products and services available to consumers. On the other hand, those data can make entry and expansion by rivals more difficult.[40]

As noted below, at least two contested Canadian cases have turned on access to data, one in a clear gatekeeper context.[41]

III. THE CANADIAN COMPETITION LAW FRAMEWORK

Jurisdictions around the world continue to examine whether their antitrust laws are appropriate for the current challenges, including those posed by tech companies.[42] As recently as the Big Data 2017 consultation mentioned in Section II, the CCB concluded that Canada's existing abuse of dominance framework within the Competition Act is sufficient for addressing gatekeeper issues.[43] That framework defines abuse of dominance as conduct undertaken by a dominant firm or firms (that is, a firm that "controls" a relevant market), which involves anti-competitive acts (actions undertaken for a predatory, exclusionary, or disciplinary purpose), and which create a market outcome in which there is substantially less competition than there would have been, but for such conduct.

40. *Id.* at 15.

41. See discussion *infra* Section III.

42. *See, e.g.,* European Commission Press Release IP/22/1978, Digital Markets Act: Commission Welcomes Political Agreement on Rules to Ensure Fair and Open Digital Markets (Mar. 25, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1978; Press Release, Fed. Trade Comm'n, FTC and DOJ Meet with Fellow G7 Enforcement Partners on Competition in Digital Markets (Nov. 29, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-doj-meet-fellow-g7-enforcement-partners-competition-digital-markets.

43. *See supra* note 36.

Possible amendments to the Competition Act are now being debated, both considering the ongoing worldwide review of antitrust laws and given domestic Canadian political developments. In the fall of 2021, the Commissioner of Competition (Commissioner) raised the possibility of Competition Act amendments, but the potential amendments raised by the Commissioner did not touch on the substantive tests for gatekeepers.[44] In late 2021, the Prime Minister's "mandate" letter to the Minister of Industry mandated him to review Canada's competition laws to, among other things, introduce legislation to advance digital rights, including fair competition in the online marketplace, as well as undertaking a broad review of competition legislation.[45] At the same time, Senator Howard Wetston, a former Commissioner of Competition, invited submissions with respect to potential competition law reform from interested stakeholders.[46] Some of the submissions received touch, at least tangentially, on gatekeeper issues, although such issues were not the focus of the submissions.[47] This Article returns to reform proposals in its conclusion.

In Canada, gatekeeper issues are usually dealt with under the general abuse of dominant position reviewable practice in the Competition Act. For completeness, this Article also briefly considers the scope for some gatekeeper issues or other reviewable practices to be addressed or the use of special remedies related to intellectual property rights. Further, the CCB, headed by the Commissioner, has authority to investigate all matters arising under the Competition Act.[48] For abuse of dominance and other reviewable practices, enforcement action is taken by way of an application to the Competition Tribunal, a

44. Matthew Boswell, Comm'r of Competition, Competition Bureau Can., Remarks at the Canadian Bar Association Competition Law Fall Conference: Canada Needs More Competition (Oct. 20, 2021), https://www.canada.ca/en/competition-bureau/news/2021/10/canada-needs-more-competition.html.

45. Letter from Justin Trudeau, Prime Minister of Can., Off. of the Prime Minister, to François-Philippe Champagne, Minister of Innovation, Sci. and Indus., Innovation, Sci. & Econ. Dev. Can. (Dec. 16, 2021), https://pm.gc.ca/en/mandate-letters/2021/12/16/minister-innovation-science-and-industry-mandate-letter.

46. Wetston, *supra* note 6.

47. *See*, *e.g.,* Competition Bureau Can., *Examining the Canadian Competition Act in the Digital Era – Submission by the Competition Bureau*, GOV'T OF CAN. (Feb. 8, 2022), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html.

48. Competition Act, R.S.C. 1985, c C-34, §7(1) (Can.).

specialized court.[49] Private rights of action for affected customers, suppliers, and competitors are quite limited.[50]

A. Abuse of Dominance

Unlike its counterparts in the U.S.,[51] EU,[52] and many other jurisdictions,[53] Canada's abuse of dominance provisions (the "anti-monopoly" provisions of Canada's Competition Act) in Sections 78 and 79 of the Competition Act are very detailed. They specify three core elements for the adjudication of a dominant firm's conduct—dominance, anti-competitive conduct (abuse), and harm to competition in the market—as well as potential remedies and sanctions.

1. Dominance

The requirement that a firm have a dominant position[54] has been interpreted to mean that it has some market power in some relevant market.[55] While technically it is not necessary to define a product or

49. Competition Tribunal Act, R.S.C. 1985, c 19 (2nd Supp.) (Can.).

50. Competition Act, R.S.C. 1985, c C-34, §36 (Can.)

51. Sherman Antitrust Act, 15 U.S.C. § 2.

52. Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. (C 326) 47.

53. For a comprehensive (albeit now somewhat dated) comparative survey of the unilateral conduct laws of Canada, the U.S., the EU, Australia, and South Africa, see A. Neil Campbell & J. William Rowley, *The Internationalization of Unilateral Conduct Laws—Conflict, Comity, Cooperation and/or Convergence?*, 75 ANTITRUST L.J. 267 (2008).

54. Competition Act, R.S.C. 1985, c C-34, § 79(1)(a) (Can.). The Act also provides for the possibility of "joint" abuse of dominance. However, the level of "joint" activity short of an explicit agreement that may constitute joint dominance has not been determined by the Competition Tribunal. The CCB has addressed it in Competition Bureau Can., *Abuse of Dominance Enforcement Guidelines*, GOV'T OF CAN. ¶ 46 (Mar. 7, 2019) [hereinafter *Abuse of Dominance Guidelines*], https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04420.html. In any event, gatekeeper issues usually do not involve joint dominance. A rare exception is the formation of the "Interac" debit card/ATM network. See the discussion below of *Can. (Dir. of Investigation & Rsch.) v. Bank of Montreal* (1995), CT-1995-002, 7 (Comp. Trib.) (Can.).

55. *See, e.g.*, Toronto Real Est. Bd. v. Comm'r of Competition, 2017 FCA 236, ¶¶ 11–12 (Can.).

geographic market[56] the Commissioner normally does define a market and seeks to demonstrate the firm's significant market share as well as barriers to entry to prove the existence of market power.[57]

2. Abuse

The second key requirement to establish abuse of dominance is a "practice of anti-competitive acts" by the dominant firm(s).[58] This element is likely to be a focal point in gatekeeper cases. That is because the other two elements necessary for a finding of abuse of dominant market position—"control" of a market, and substantial prevention or lessening of competition, are likely to apply to gatekeeper cases as they do to other abuse of dominance cases, but the third element, "a practice of anti-competitive acts"—needs a somewhat different approach in gatekeeper cases due to the requirement of an intended negative effect on a competitor.

This "practice of anti-competitive acts" requirement has been interpreted as requiring conduct which is predatory, exclusionary, or disciplinary and aimed at a competitor. This determination of the Competition Tribunal and courts arose from a need to find indicia to distinguish anti-competitive conduct from aggressive competition on the merits and was inspired by the list of illustrative anti-competitive acts in Section 78 (all but one of which refers to conduct aimed at a competitor, as discussed below). That requirement is the key guidepost for gatekeeper cases, as is explored below. The Competition Tribunal has

56. *See* Comm'r of Competition v. Toronto Real Est. Bd., 2016 Comp. Trib. 7, ¶ 132, *aff'd*, 2017 FCA 236, *leave to appeal to SCC refused*, 2018 CarswellNat 4555.

57. *Abuse of Dominance Guidelines*, *supra* note 54, at ¶ iii.

58. Competition Act, R.S.C. 1985, c C-34, § 79(1)(b) (Can.). Alleged anti-competitive acts may overlap in some cases with conduct covered by other provisions of the Competition Act—for example, refusal to deal (section 75), price maintenance (section 76), and exclusive dealing and tied selling (section 77), each discussed briefly below. As a result, abuse of dominance applications are often coupled with applications brought under these other provisions based on substantially the same facts. This occurred, for example, in *Canada (Dir. of Investigation & Rsch.) v. NutraSweet Co.*, 1990 CCTD 17 (Can.), *Canada (Dir. of Investigation & Rsch.) v. Tele-Direct (Publ'ns) Inc.*, 1997 CCTD 8 (Can.), and *Canada (Comm'r of Competition) v. Can. Pipe Co.*, 2005 CCTD 3, *rev'd*, 49 C.P.R. (4th) 286, *leave to appeal to SCC refused*, 2007 CarswellNat 1107 (Can.).

held that the "practice" requirement may be satisfied by a single substantial act, or, alternatively, a series of different acts.[59] Thus the focus is usually on the nature of the conduct rather than whether it rises to the level of a "practice."

Determining what constitutes an anti-competitive act is difficult for several reasons. Most fundamentally, aggressive competition on the merits can negatively affect competitors as much or more than anti-competitive exclusion, yet it is that very competitive conduct which is valued by competition policy as a long-term driver of consumer welfare.[60] This challenge is compounded in markets which are subject to economies of scale and network effects, often leading to "winner take most" situations.

The Competition Act's Section 78 contains an illustrative list of various conduct which can constitute anti-competitive acts:

> (a) a vertically integrated supplier squeezing the margin available to an unintegrated customer;

59. *See* Canada (Dir. of Investigation & Rsch.) v. NutraSweet Co., 1990 CCTD 17, ¶¶ 91–92.

60. *See, e.g.*, *Abuse of Dominance Guidelines*, *supra* note 54, ¶ ix. The guidelines provide that:

> When enforcing section 79, a significant consideration for the Bureau is to avoid chilling or deterring pro-competitive or efficiency-enhancing conduct. The Bureau recognizes that it is often challenging to distinguish anti-competitive conduct from aggressive competition on the merits, as in many cases the goal of aggressive competition is to marginalize rivals or eliminate them from a market. The Bureau recognizes that firms may acquire a dominant position by simply out-competing their rivals, for example, by offering higher quality products to consumers at a lower price. In these cases, sanctioning firms for simply being dominant would undermine incentives to innovate, outperform rivals and engage in vigorous competition. Such vigorous competition is the sort of competitive dynamic that the Act is designed to preserve and, where possible, enhance, as it ultimately leads to a more efficient allocation of resources.

Id.

(b) acquisition of a customer (or supplier) who would otherwise be available to a competitor of the supplier (or customer);
(c) freight equalization on the plant of a competitor;
(d) use of "fighting brands";
(e) pre-emption of scarce facilities or resources required by a competitor;
(f) buying up of products to prevent the erosion of price levels;
(g) adoption of incompatible product specifications;
(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor; and
(i) selling goods below acquisition cost.[61]

Most of these examples have limited relevance to gatekeeper situations. Still, this list of possible anti-competitive acts is not exhaustive.[62] As noted above, except for buying up products, all the illustrative anti-competitive acts include a requirement that the conduct be targeted at current or potential competitors. As a result, the Competition Tribunal and Federal Court of Appeal (FCA) determined in *Commissioner of Competition v. Canada Pipe Co.* that for conduct to constitute an anti-competitive act it is essential to determine whether the dominant firm had an anti-competitive purpose: intentional predatory, exclusionary, or disciplinary conduct that is targeted at a competitor or potential competitor is an anti-competitive act.[63]

Most gatekeeper situations are likely to focus on potentially exclusionary conduct. The CCB's *Abuse of Dominance Guidelines* discuss various types of exclusionary conduct including exclusive dealing,

61. Competition Act, R.S.C. 1985, c C-34, § 78(1) (Can.).

62. *See Abuse of Dominance Guidelines*, *supra* note 54, ¶¶ 53–55.

63. Canada (Comm'r of Competition) v. Can. Pipe Co., [2007] 2 F.C.R. 3, ¶ 68 (Can.); Canada (Comm'r of Competition) v. Can. Pipe Co., 2005 CCTD 3, ¶¶ 178–179 (Can.); *see also Abuse of Dominance Guidelines*, *supra* note 54. The *Abuse of Dominance Guidelines* reiterate that an anti-competitive act is defined by reference to its purpose, and the requisite anti-competitive purpose is an intended negative effect on a competitor that is "predatory, exclusionary or disciplinary." *Abuse of Dominance Guidelines*, *supra* note 54, at ¶ 78(1). Further, the purpose of an act, its overall character, and its motivation for the conduct should be assessed. *See id*. ¶¶ 53–55.

tied selling, refusals to supply, margin squeezing of a downstream competitor by a vertically integrated supplier, or other conduct that raises rivals' costs or reduces rivals' revenues.[64] Conduct which has been held to be an exclusionary anti-competitive act, in particular situations, includes various types of restrictive conditions in contracts (such as exclusivity, tying, "meet or release" and "most favoured nation" clauses);[65] requiring customers to reveal quotes or bids provided by competitors;[66] policies and practices that create artificial barriers to entry;[67] threatening customers with spurious litigation to prevent them from switching to competing suppliers;[68] "artificial" efforts to extend patent and trade mark rights;[69] the acquisition of competitors;[70] denying competitors access to a data or a network controlled by the dominant entity;[71] and trade association membership rules that discriminate against some members.[72]

Canada (like the U.S., but unlike the EU) does not recognize "exploitative" abuses of dominance (e.g., charging prices above

64. *Abuse of Dominance Guidelines*, *supra* note 54, ¶¶ 62–74. "Predatory conduct" includes selling at a price below some measure of cost to harm a competitor. *Id.* ¶¶ 59–61. "Disciplinary conduct" includes selling articles at a price lower than their acquisition cost for the purpose of disciplining or eliminating a competitor and actions that facilitate or encourage coordinated behaviour. *Id.* ¶¶ 75–79.

65. Canada (Dir. of Investigation & Rsch.) v. NutraSweet Co. 1990 CCTD 17 (Can.); Canada (Dir. of Investigation & Rsch.) v. D&B Co. of Can. Ltd. 1995 CCTD 20 (Can.); Canada (Comm'r of Competition) v. Can. Pipe Co., [2004] 40 C.P.R. (4th) 453, *rev'd*, [2007] 2 F.C.R. 3 (Can.).

66. *See* Canada (Dir. Of Investigation & Rsch.) v. Laidlaw Waste Sys. Ltd., 1992 CCTD 1 (Can.).

67. *See* Canada (Comm'r of Competition) v. Reliance Comfort Ltd. P'ship (2014), CT-2012-002 (Comp. Trib.) (Can.); Canada (Comm'r of Competition) v. Direct Energy Mktg. Ltd. (2015), CT-2012-003 (Comp. Trib.) (Can.).

68. *See Laidlaw Waste Sys. Ltd.*, 1992 CCTD 1 (Can.).

69. *See NutraSweet Co.*, 1990 CCTD 17 (Can).

70. *See Laidlaw Waste Sys. Ltd.*, 1992 CCTD 1 (Can).

71. *See* Canada (Comm'r of Competition) v. Toronto Real Estate Bd., 2013 CCTD 9, ¶¶ 20–21, *rev'd*, 2014 F.C.J. 113, *leave to appeal to SCC refused*, 2014 CarswellNat 2755 (Can.); Canada (Comm'r of Competition) v. Canadian Real Estate Ass'n, 2010 CCTD 12, ¶ 11 (Can.).

72. *See* Canada (Comm'r of Competition) v. Toronto Real Estate Bd., 2016 CCTD 7, ¶ 769, *aff'd*, [2018] 3 F.C.R. 563, *leave to appeal to SCC refused*, 2018 CarswellNat 4555 (Can.).

competitive levels, in the absence of any conduct that preserves or enhances market power). That limitation is noteworthy since some EU gatekeeper challenges focus on dominant firms extracting "unfair" terms from trading partners or consumers.[73]

The jurisprudence has established a further screening mechanism to determine what constitutes an anti-competitive act: the concept of "valid business justification."[74] If the purpose of the dominant firm's conduct is not to injure or exclude competitors, but instead to benefit its own business (e.g., by offering a better, more efficient product), then the firm's intention will not be anti-competitive (even if it may have exclusionary effects). But the dominant firm must demonstrate a credible efficiency or pro-competitive rationale to establish a valid business justification for conduct that would otherwise be characterized as anti-competitive act.[75]

3. Substantial Prevention or Lessening of Competition

Even abusive conduct by a dominant firm is not problematic under the Competition Act unless the conduct has caused or is likely to cause injury to the marketplace in the form of a "substantial lessening or prevention of competition."[76] Harm is to be assessed using a "but

73. JAMES MANCINI, ORG. FOR ECON. COOP. & DEV., ABUSE OF DOMINANCE IN DIGITAL MARKETS 52 (2020), https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf.

74. Virtually all cases decided under the abuse of dominance provisions of the Competition Act, including *Canada (Dir. of Investigation & Rsch.) v. NutraSweet Co.* 1990 CCTD 17 (Can.), *Canada (Dir. of Investigation & Rsch.) v. Tele-Direct (Publ'ns) Inc.*, 1997 CCTD 8 (Can.), *Canada (Comm'r of Competition) v. Can. Pipe Co.*, [2007] F.C.R. 3 (Can.); *Comm'r of Competition v. Toronto Real Est. Bd.*, [2018] F.C.R. 563 (Can.), and *Comm'r of Competition v. Vancouver Airport Auth.*, 2019 CCTD 6 (Can.), have considered whether the challenged conduct resulted from an anti-competitive purpose or from a legitimate business purpose.

75. Canada (Comm'r of Competition) v. Can. Pipe Co., [2007] F.C.R. 3, ¶¶ 67, 73, 87–88 (Can.); Canada (Comm'r of Competition) v. Vancouver Airport Auth., 2019 CCTD 6, ¶¶ 536, 620–29 (Can.).

76. Competition Act, R.S.C. 1985, c C-34, § 79(1)(c) (Can.).

for" analysis: absent the challenged conduct, would there likely be a substantially more competitive market?[77]

In practice, this element of abuse of dominance focuses on whether the conduct has or will enhance, preserve, or entrench the dominant firm's market power by, for instance, increasing barriers to entry or expansion, or reducing the scope for effective competition. Where the anti-competitive allegations involve the lessening of competition, the focus will be on possible increases in market power. Where the allegations involve the prevention of competition, the focus will be on whether the dominant firm's market power will be preserved.[78] In either case, the injury must be expected to endure for a significant amount of time—generally considered to be a two year period.[79] The Commissioner must also demonstrate that the enhanced market power would be likely to translate into meaningful price or non-price effects, although the magnitude of effects that are required to be shown is not settled.[80]

In determining whether the practice of anti-competitive acts challenged has led or likely to lead to a substantial prevention or lessening of competition, the Tribunal is also required to "consider whether the practice is a result of superior competitive performance."[81] This provision appears to reflect an understanding that aggressive competitive performance should not be condemned, even if it results in high market shares and relatively little effective remaining competition. However, the awkward formulation of this statutory admonition means that it does not operate as a defence, and it has been of much less practical importance than the "valid business justification" doctrine.

77. Canada (Comm'r of Competition) v. Can. Pipe Co., [2007] F.C.R. 3, ¶¶ 33, 41 (Can.).

78. *See* Canada (Comm'r of Competition) v. Vancouver Airport Auth., 2019 CCTD 6, ¶¶ 635–37 (Can.).

79. *See* Comm'r of Competition v. Toronto Real Est. Bd., 2016 CCTD 7, ¶ 465, *aff'd*, [2018] 3 F.C.R. 563, *leave to appeal to SCC refused*, 2018 CarswellNat 4555 (Can.).

80. *Id.* ¶¶ 460–67.

81. Competition Act, R.S.C. 1985, c C-34, § 79(4) (Can.).

4. Enforcement and Remedies

Only the Commissioner can seek remedies under the abuse of dominance provisions. Since abuse of dominance is not a criminal provision, private parties cannot bring actions to recover damages or other remedial orders (unless the dominant firm fails to comply with a remedial order issued by the Competition Tribunal).[82]

The primary remedies the Commissioner can seek under the abuse of dominance provisions are (1) cease and desist (prohibition) orders with respect to the anti-competitive acts, and/or (2) administrative monetary penalties of up to C$10 million (C$15 million for repeat conduct). If the Tribunal finds, however, that a prohibition order is not likely to restore competition, it may order additional actions to be taken, including potentially the disposition of assets or shares.[83]

B. Other Reviewable Practices

While abuse of dominance is the provision most directly applicable to gatekeeper issues, the Competition Act also contains several other "reviewable practices." These include conduct that can be the subject of a Competition Tribunal cease and desist order but cannot be remedied by penalties or civil damages. Three of these reviewable practices have some potential applicability to gatekeeper issues: refusal to deal, tied selling, and exclusive dealing.

1. Refusal to Deal (Refusal to Supply)

The Competition Act allows the Commissioner, or a person whose business has been directly affected by a refusal of supply, to apply to the Competition Tribunal for a compulsory supply order.[84] Refusal to supply situations typically involve a circumstance in which a supplier of a product with respect to which there is not meaningful supplier competition refuses to continue supply to customers, and as a result customers are injured. There are several prerequisites to obtain this remedy:

82. *Id.* at § 36(1).
83. *Id.* at § 79(1).
84. *Id.* at §§ 75, 103.1.

> (a) the person's business must be substantially affected (or they are prevented from carrying on business);
> (b) because of their inability to obtain adequate supplies of a product anywhere in the market on usual trade terms, which is due to insufficient competition with respect to supply of the product;
> (c) the person is willing to meet the usual trade terms;
> (d) the product is in ample supply; and
> (e) the refusal to deal is likely to have an adverse effect on competition in a market.[85]

When the Parliament of Canada amended the Competition Act in 2002 to allow applications to the Competition Tribunal by persons "directly and substantially affected" by the conduct, the legislature also added the requirement that the conduct be likely to have an "adverse effect on competition."[86] The "adverse effect on competition"[87] test is similar to the "preventing or lessening competition substantially"[88] test used for abuse of dominance (and most other reviewable practices), but it requires somewhat less impact on competition.[89] Consequently, if the Commissioner declines to bring an abuse of dominance case, or if the impact on competition may be negative, but less than "substantial," refusal to deal may provide a customer with a route to a compulsory supply remedy.

The refusal to supply provision has potential application to gatekeeper issues where the excluded party is in a downstream market and needs supply of a key input, such as a dominant platform refusing to allow access to the platform. The most notable examples to date have been "aftermarket" cases in which an original equipment manufacturer

85. *Id.* at § 75(1).

86. An Act to Amend the Competition Act and the Competition Tribunal Act, S.C. 2002, c 16 (Can.).

87. Competition Act, R.S.C. 1985, c C-34, § 75(1)(e) (Can.).

88. *Id.* at § 79(1)(c).

89. *See* Nadeau Poultry Farm Ltd. v. Groupe Westco Inc., 2009 CCTD 6, ¶ 367 (Can.).

impeded other firms from competing in the market for parts and services for its equipment.[90]

2. Tied Selling

Tied selling is defined as conditioning the supply of one product on the acquisition of a second product (or the customer refraining from using or distributing the product of another supplier).[91] It also includes inducing bundled purchasing by offering more favourable terms to customers.[92]

Tied selling is ubiquitous. It is only challengeable by the Commissioner, or by a directly affected person, when: (1) it is engaged in by a major supplier or is widespread in the market; (2) it is likely to have an exclusionary effect in a market; and (3) it is likely to lead to a substantial lessening of competition.[93] Tied selling is less obviously applicable to gatekeeper issues than is refusal to deal, but could nevertheless apply to gatekeeping issues insofar as the tie strengthened the dominant firm's market position. However, we do not anticipate significant use of the tied selling provisions in addressing gatekeeper concerns.

3. Exclusive Dealing

Exclusive dealing is defined as the conditioning of supply of a product on the customer committing to exclusive (or near-exclusive) purchasing from the supplier (or the customer refraining from dealing with competing suppliers).[94] It also includes inducing such exclusivity or near-exclusivity by offering more favourable terms to customers.[95]

90. See below for a discussion of *Canada (Dir. of Investigation & Rsch.) v. Chrysler Can. Ltd.*, 1989 CCTD 49 (Can.), and *Canada (Dir. of Investigation & Rsch.) v. Xerox Can. Inc.*, 1990 CCTD 18 (Can.). It should be noted that both cases pre-date the 2002 amendments that added the "adverse effect on competition" requirement in the Competition Act. Competition Act, R.S.C. 1985, c. C-34, § 75(1)(e) (Can.).

91. Competition Act, R.S.C. 1985, c C-34, § 77(1) (Can.).

92. *Id*.

93. *See id.* at §§ 77(2), 103.1.

94. Competition Act, R.S.C. 1985, c C-34, § 77(1) (Can.).

95. *Id*.

Exclusive dealing is obviously commonplace in the economy. Like tied selling, it is only subject to challenge before the Competition Tribunal by the Commissioner, or by a directly affected person, when "it is engaged in by a major supplier or is widespread in the market, it is likely to have an exclusionary effect in a market, and it is likely to" lead to a substantial lessening of competition.[96]

Like abuse of dominance, exclusive dealing requires evidence of a relatively high impact on competition —"substantial lessening of competition." However, the firm's market position may be much more modest (merely a major supplier, rather than dominant firm) and the exclusion of rivals is assessed by reference to actual or likely effects, rather than the purpose of the conduct. Further and as mentioned above, exclusive dealing does not have frequent application to gatekeeper situations, although such conduct could reinforce a gatekeeper's position in some circumstances.

In practice, the Commissioner of Competition may challenge conduct under both the exclusive dealing, tied selling, and/or refusal to deal provisions and under the abuse of dominance provisions.[97]

C. The Special Intellectual Property Remedies

In general, the Competition Act does not take issue with the exercise of intellectual property (IP) rights.[98] The main provisions in the Act only apply to conduct involving IP where such conduct represents "something more" than simply the "mere exercise" of an IP right. The abuse of dominance provisions contain a specific exception to this effect.[99] The CCB's *Intellectual Property Enforcement Guidelines* (IPEGs) provide that "[t]he mere exercise of an IP right is not cause for

96. *See id.* at §§ 77(2), 103.1.

97. See the detailed discussion of *Canada (Dir. of Investigation & Rsch.) v. Tele-Direct (Publ'ns) Inc.*, 1997 CCTD 8 (Can.), below.

98. *See* Competition Bureau Can., *Intellectual Property Enforcement Guidelines*, GOV'T OF CAN. (Mar. 13, 2019), https://www.ic.gc.ca/eic/site/cb-bc.nsf/eng/04421.html.

99. *See* Competition Act, R.S.C. 1985, c C-34, § 79(5) (Can.) ("[A]n act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trademarks Act*, or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.").

concern under the general provisions of the Act."[100] The Competition Tribunal has also concluded that the refusal to deal provision does not apply to IP rights.[101]

In addition to the general framework of the Competition Act, the Act contains provisions with respect to special IP remedies. Section 32 of the Competition Act gives the Federal Court the power, on application by the Attorney General of Canada (not the Commissioner), to issue various special remedial orders that interfere with IP rights. The Court may do so if it finds that the exclusive rights conferred by intellectual property have been used to unduly restrain trade or lessen competition. The remedies available include: (1) issuing a remedial order declaring any agreement or license relating to the anti-competitive use void; (2) requiring the licensing of the IP right; (3) revoking the IP right; or (4) requiring additional steps be done to prevent the anti-competitive use.[102]

The CCB's *Intellectual Property Enforcement Guidelines* note that the Attorney General likely would only make an application pursuant to Section 32 on the recommendation of the Commissioner.[103] The CCB has indicated that it will only seek the special intellectual property remedies in the rare situations where: "1. The holder of the IP is dominant in the relevant market; and 2. The IP is an essential input or resource for firms participating in the relevant market," such that "the refusal to allow others to use the IP prevents other firms from effectively competing in the relevant market."[104] And "invoking a special remedy" under section 32 "would not materially alter the incentives of the [IP] holder or others to engage or invest in research and development."[105]

Only two cases have arisen under Section 32, both decades ago and both settled prior to proceeding to full hearings. However, the IPEGs note that the special IP remedies could be used in a network industry "when the combination of IP protection and substantial

100. Competition Bureau Can., *supra* note 98, at ¶ 36.

101. See detailed discussion of *Canada (Dir. of Investigation & Rsch.) v. Warner Music Can. Ltd.*, 1997 CCTD 53 (Can.), below.

102. Competition Act, R.S.C. 1985, c C-34, § 32(1) (Can.).

103. Competition Bureau, *supra* note 98, at ¶ 25.

104. *Id*. at ¶ 49.

105. *Id.* at ¶ 50.

positive effects associated with the size of the network could create or entrench substantial market dominance so that the protected technology is necessary for a competitor's products to be viable alternatives."[106] While Section 32 has not yet been used to challenge gatekeeper conduct, in a scenario where it is the exercise of an IP right that is being used by an alleged gatekeeper to limit competition, this provision could come into play.

If the special IP remedies are not invoked, and the conduct involving intellectual property rights is examined under the main provisions of the Act, such as the abuse of dominance provisions, as noted the CCB has indicated that the mere exercise of an IP right is insufficient to implicate Competition Act enforcement; there must be "something more" than that if there is to be a challenge. When considering what is meant by "something more," the CCB considers whether there has been conduct extending beyond a refusal to license the IP, such as a transfer, licensing arrangement, or agreements which expand or entrench market power. For instance, a license which combines competing technologies.[107] In those circumstances, the CCB will employ the general provisions of the Competition Act to challenge the conduct but will not seek to challenge the intellectual property right itself.[108]

There is a statutory dichotomy between use of the general provisions of the Competition Act to challenge conduct involving intellectual property, but not undermine rights associated with IP grant itself, and the "special IP remedies" provisions of the Act, discussed below, which contemplate orders actually affecting the IP rights themselves. That said, it should be noted that in their most recent consideration of the issue the Competition Tribunal and FCA appear to have restricted intellectual property rights quite considerably in an abuse of dominance case, even without resort to the special IP remedies provisions. In *Commissioner of Competition v. Toronto Real Estate Board*, the FCA found that imposing restrictions on the use of information, even if such information was protected by copyright, could constitute abuse of

106. *Id.* at ¶ 52.

107. *Id.* ¶ 156 n.58.

108. *Id.* ¶¶ 38–39, 156.

dominance if undertaken for an anti-competitive purpose.[109] Further, in *Toronto Real Estate Board*, the FCA stated that:

> Parliament clearly signaled, through the use of the word "only", [sic] to insulate intellectual property rights from allegations of anti-competitive conduct in circumstances where the right granted by Parliament, in this case, copyright, is the sole purpose of exercise or use. Put otherwise, anti-competitive behaviour cannot shelter behind a claim of copyright unless the use or protection of the copyright is the sole justification for the practice.[110]

Future cases must flesh out the meaning of the FCA's decision. On its face, however, it may suggest that licensing terms for IP which restrict its use, even if the restrictions do not go beyond the grant of the property itself, may not be an act engaged in "pursuant only" to the exercise of the IP right[111] if it was undertaken to achieve an anti-competitive purpose. That is a surprising proposition, given that one would not be within the abuse of dominance provision at all, considering the applicability of the section 79(5) defence, unless there were an anti-competitive purpose. As noted, subsequent cases will illuminate the unclear aspects of the *Toronto Real Estate Board* decision.

IV. THE APPLICATION OF THE COMPETITION ACT TO GATEKEEPER ISSUES—SOME CASE GUIDANCE

Existing Canadian jurisprudence demonstrates how gatekeeper conduct can be addressed under the Competition Act as it exists today. The two most relevant provisions that have been applied to gatekeepers are refusal to supply and abuse of dominance. Following a survey of the case law under these two provisions, we review discontinued and pending investigations where tech sector gatekeeper conduct has gained the attention of the CCB, all of which confirms the scope for

109. Canada (Comm'r of Competition) v. Toronto Real Est. Bd., [2018] 3 F.C.R. 563 (Can.).

110. *Id.* at ¶ 180.

111. Competition Act, R.S.C. 1985, c C-34, § 79(5) (Can.).

these mechanisms to be used to address tech gatekeeper issues in the future.

A. Refusal to Supply Cases

The CCB has occasionally used the reviewable practice of refusal to deal to address gatekeeping behaviour in situations where a vertically integrated firm seeks to block competition in its downstream markets by withholding critical upstream market inputs. This approach was successful in two aftermarket cases; a subsequent attempt to apply the provision to IP rights was rejected by the Tribunal (although a private plaintiff was able to apply the provision to services related to data that was subject to IP protection).

1. The *Chrysler* and *Xerox* Aftermarket Cases

The Director of Investigation & Research v. Chrysler Canada Ltd.[112] and *Director of Investigation & Research v. Xerox Canada Inc.*[113] aftermarket cases were two of the earliest decisions made by the Competition Tribunal after it was established in 1986. In *Chrysler*, the Tribunal ordered Chrysler to supply proprietary auto parts to a distributor.[114] Notwithstanding Chrysler's business interest in determining how its products would be distributed, the Tribunal found that there was a significant supply relationship between Chrysler and the distributor, and that the distributor needed proprietary Chrysler parts to satisfy the demands of its customers, that it was unable to obtain them anywhere else on usual trade terms, and that Chrysler's refusal to supply would substantially affect the distributor's business.[115] Similarly, in *Xerox*, the Tribunal ordered Xerox to supply printer and copier parts to independent service organizations that provided maintenance services for Xerox equipment. It found that the refusal to supply "was

112. Canada (Dir. of Investigation & Rsch.) v. Chrysler Can. Ltd., 1989 CCTD 49 (Can.).

113. Canada (Dir. of Investigation & Rsch.) v. Xerox Can. Inc., 1990 CCTD 18 (Can.).

114. Canada (Dir. of Investigation & Rsch.) v. Chrysler Can. Ltd., 1989 CCTD 49 at 47 (Can.).

115. *Id*.

specifically designed to eliminate competition in the service market"[116] and that the independent service organizations' businesses were substantially affected in their ability to obtain authorized Xerox parts from the company.

At the time of those cases, the statutory provision did not require consideration of injury to competition to make a remedial order. The amended formulation of this reviewable practice now requires an adverse effect on competition which would make it necessary to consider interbrand competition, in addition to intrabrand competition, in making an order to assess whether the refusals would likely have adverse effects on competition in a properly defined relevant market. A negative impact on the firm that was refused supply is a necessary, but not sufficient, condition to obtain a remedy.

3. *Warner Music*

In 1997, the CCB attempted to apply a somewhat similar theory of harm to the refusal by Warner Music to license "must have" copyrighted music recordings to the BMG Music Club in *Director of Investigation & Research v. Warner Music Canada, Ltd.* BMG was a U.S. based competitor to Columbia House, a joint venture in which Warner Music owned a fifty-percent interest. The case was also novel in that BMG was seeking to force the creation of a supply relationship where none had existed, rather than the typical application of section 75 to terminations of supply relationships. As noted above, the Tribunal held that the refusal to deal provision did not extend to licensing of IP rights stating: "there is nothing in the legislative history of section 75 of the Act which would reveal an intention to have section 75 operate as a compulsory licensing provision for intellectual property."[117] As a result, BMG was not able to force Warner Music to license its catalogue of music recordings, and Columbia House retained its competitive advantage as the only music club in Canada through which customers could obtain these titles.

116. Canada (Dir. of Investigation & Rsch.) v. Xerox Can. Inc., 1990 CCTD 18, ¶ 115 (Can.).

117. See the detailed discussion of *Canada (Dir. of Investigation & Rsch.) v. Warner Music Can. Ltd.*, 1997 CCTD 53, ¶ 30 (Can.), below. One of this Article's authors was counsel to Columbia House in relation to this proceeding.

4. *Used Car Dealers Association*

In *Used Car Dealers Association of Ontario v. Insurance Bureau of Canada*, the refusal to deal provision was invoked in respect of data related services. The Used Car Dealers Association obtained an interim order restoring data services that had been discontinued by Insurance Bureau of Canada,[118] even though the data itself was subject to IP protection. The case arose after the Insurance Bureau took steps that provided a competitor of the Used Car Dealers Association with exclusive use of certain data. Once the interim supply order was issued, the case settled before the litigation on the merits of the gatekeeping issues.[119]

Collectively, this small group of refusal to deal cases indicate that the provision cannot be used to counter a pure refusal to license IP rights, but that otherwise it is a potentially useful tool to obtain compulsory supply orders against tech or other gatekeepers if their refusal to supply products or services will adversely affect competition in the downstream market.

B. Abuse of Dominance Cases

There are five key abuse of dominance decisions that have addressed various forms of gatekeeper conduct. One involved a joint dominance arising from the introduction of a new financial services network and technology, and another involved quasi-collective action of incumbent competitors that controlled a real estate network and technology through an industry association. The other three were unilateral conduct cases that did not have a significant technology dimension, but that establish principles that are applicable to gatekeepers generally. The CCB was largely successful in four of the five cases. We review them in chronological order to explain the evolution of the jurisprudence.

118. Used Car Dealers Ass'n of Ontario v. Ins. Bureau of Can., 2011 CCTD 20 (Can.). One of this Article's authors was counsel to the Used Car Dealers Association of Ontario in this proceeding.

119. Notice of Discontinuance, Used Car Dealers Ass'n of Ontario v. Ins. Bureau of Can., CT-2011-008 (Comp. Trib.) (Can.).

1. *Interac*

In its 1995 decision *Director of Investigation & Research v. Bank of Montreal*, the Competition Tribunal issued a consent order to address joint dominance in a network industry under Section 79 of the Competition Act,[120] after an extensive hearing prompted by intervenors objecting to the order. The respondents were the nine founding members of the Interac network (all major Canadian banks), as well as Interac Inc. The CCB claimed that the respondents jointly dominated the "intermediate" market for shared electronic network services (SENS) and the "retail" market for shared electronic financial services (SEFS).[121] The purpose of the consent order was to ensure competitive discipline in these markets, and particularly the retail SEFS market, by removing barriers to entry for competing financial institutions. In particular, the Director (now the Commissioner) alleged that there was no reasonable substitute for the Interac electronic funds transfer network, nor a likelihood of new entry, and that access to the network was necessary to provide the retail service to financial service customers. Without such access, competition in respect of retail financial services which required the transfer of value through the network was substantially lessened.

The proposed resolution was to allow all deposit taking institutions to directly connect to the Interac network. The Canadian Life and Health Insurance Association and a group of investment companies intervened in the application and argued that, to effectively eliminate the anti-competitive effects identified by the CCB, their members (non-deposit taking institutions) should be allowed to participate directly in the SENS market (by providing debit cards to their clients), to be able to compete effectively for retail customers in the SEFS market.[122] Their objection was that the proposed resolution did not go far enough, since it was limited to deposit-takers. While the term essential

120. Canada (Dir. of Investigation & Rsch.) v. Bank of Montreal, 1996 CCTD 12, 7 (Can.). One of this Article's authors was counsel to Interac Inc. in this proceeding.

121. *Id.* at 13.

122. *Id.* at 44.

facility[123] was only referenced in the case by one of the intervenors,[124] the case was premised on the fact that access to the Interac network (the SENS) was essential to the provision of these financial services.[125]

Ultimately, the Tribunal recognized the concerns of the intervenors, but determined that it was not able to address these concerns because various regulatory rules established by the Canadian Payments Association (CPA) precluded the participation of non-deposit takers in Interac, since Interac settled its transactions through the CPA system.[126] However, the order of the Competition Tribunal did require that the network be opened up to broader participation (all deposit takers), which would allow additional firms to compete in these evolving markets for electronic financial services. As a result, a much wider range of institutions, particularly small and mid-size banks and credit unions, were able to participate in the Automated Banking Machine network

123. In the telecom context, the Commissioner of Competition previously proposed a definition of an essential facility to include a finding that:

> [T]he firm controlling the facility is dominant in the downstream and upstream (relevant) markets and it is not practical or feasible for competitors to duplicate the facility in question; withdrawal of access to the facility is likely to result in competitors exiting from, or contraction in, the downstream market; and such exit or contraction is likely to result in a substantial lessening of competition in the downstream market.

Submission by the Comm'r of Competition, Competition Bureau Can., Before the Canadian Radio-television and Telecommunications Comm'n, Telecom Notice of Consultation CRTC 2013-551, Review of Wholesale Services and Associated Policies, at n.7 (Jan. 31, 2014).

124. The counsel for the Canadian Life and Health Insurance Association Inc. (CLHIA), an intervenor in this case, "went so far as to argue that Interac is an 'essential facility' for his clients in competing with [financial institutions] for funds." *See* Canada (Dir. of Investigation & Rsch.) v. Bank of Montreal, 1996 CCTD 12, 44 (Can.).

125. *Id.* at 15.

126. *Id*. at 70. After the proceeding, the government changed the regulatory framework to allow non-bank financial institutions such as the intervenors to participate in the SENS market. See, *e.g.,* COMM. ON PAYMENT & SETTLEMENT SYS., PAYMENT AND SETTLEMENT SYSTEMS IN SELECTED COUNTRIES 31, 40 (2003), https://www.bis.org/cpmi/publ/d53.pdf.

and offer shared electronic financial services. The gatekeeper rules that kept them out of the network, and therefore the provision of such services, were set aside. In that respect, the Tribunal order effectively remedied a gatekeeper situation created by the network's founding large bank members.

2. *Tele-Direct*

This somewhat anachronistic case, *Director of Investigation & Research v. Tele-Direct Inc.*, dealt with alleged anti-competitive conduct related to "Yellow Pages" telephone directories.[127] The CCB alleged that Tele-Direct (the Canadian Yellow Pages publisher, affiliated with the land-line telephone company incumbents) engaged in tied selling and abuse of its dominant position. The tying was alleged between space in the directories and the provision of advertising agency services related to directory advertising. The abuse of dominance allegation also included other exclusionary practices as well as discrimination and predation.

With respect to gatekeeper issues, the tying conduct was examined under both the tied selling reviewable practice and as the use of dominance in one market to attempt to exclude competitors in a related market. The CCB alleged that Tele-Direct refused to pay commission to agents on the placement of most Yellow Pages advertising; instead it offered an all-inclusive service (space and advertising services) which effectively excluded the competing suppliers of advertising services (unless advertisers were in effect prepared to pay twice for the advertising agency services).[128]

In considering whether there were two separate products (advertising space and advertising services), the Tribunal adopted the U.S. test from *Jefferson Parish Hospital District No. 2 v. Hyde*,[129] holding tying cannot exist without demand for the purchase of each product. The Tribunal also held that products are not separate if they cannot be efficiently supplied separately.

127. Canada (Dir. of Investigation & Rsch.) v. Tele-Direct (Publ'ns) Inc., 1997 CCTD 8.

128. *Id.* at ¶¶ 4, 331.

129. Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984).

The Tribunal concluded that there was a separate market for Yellow Pages advertising services for large, but not smaller, advertising placements, and that Tele-Direct's conduct was exclusionary because it prevented agents from competing effectively in the supply of advertising services.[130] "[T]he lack of commission in the 'local' market operated as a powerful inducement to acquire both [advertising] space and [advertising] services from Tele-Direct."[131]

The Tribunal ordered Tele-Direct to unbundle the tying product, advertising space, and the tied product, advertising services for certain large multi-market accounts. Tele-Direct was given the option to choose to comply by entering commission arrangements with accredited agents at a minimum rate of fifteen percent, or Tele-Direct could price space and services separately.[132]

3. *Nielsen*

The *Nielsen* case involved a challenge to A.C. Nielsen's exclusive acquisition of scanner data from major supermarket and other retail chains as well as some of its contracting practices with its customers (major suppliers of various consumer products).[133] Nielsen entered into agreements with the retailers that restricted them from providing their scanner data to any other person. As a result of the exclusive purchase of this data, A.C. Nielsen was the only firm able to offer analyses and reports employing scanner sales data to grocery suppliers in Canada,[134] because it was the only firm with access to the data upon which such reports could be based. Nielsen had also, allegedly, sought to "lock up" downstream manufacturer/supplier customers through long-term contracts.

Nielsen's U.S.-based competitor, IRI, sought to enter the market in Canada but was unable to obtain scanner data that would allow it to offer comparable market research services. The CCB brought an

130. Canada (Dir. of Investigation & Rsch.) v. Tele-Direct (Publ'ns) Inc, 1997 CCTD 8, ¶¶ 243–48.

131. *Id.* at ¶ 522.

132. *Id.* at ¶¶ 524, 527–34.

133. *See* Canada (Dir. of Investigation & Rsch.) v. D&B Co. of Can. Ltd., 1995 CCTD 20. A.C. Nielsen was a subsidiary of D&B Co.

134. *Id.* at ¶¶ 39–56.

application to the Tribunal under the abuse of dominance provisions (upstream purchasing and downstream selling markets) as well as the reviewable practice of exclusive dealing (downstream markets).

The Tribunal concluded that the exclusivity restrictions for the scanner data were anti-competitive and were causing a substantial prevention of competition.[135] The Tribunal ordered that Nielsen not enforce the exclusivity provisions in its scanner data contracts. In a remedy foreshadowing concerns regarding "big data," the Tribunal ordered that historic data would also be included if requested by a competing purchaser since market research services for customers require trend data to be effective.[136] With respect to Nielsen's long-term customer contracts the Tribunal ordered that Nielsen's downstream customers be permitted to exit those contracts on eight months' notice.

Notwithstanding the order of the Tribunal, the major grocery retailers apparently chose not to supply the scanning data to Nielsen's competitors, despite being free to do so and despite the Order preventing Nielsen from offering better terms if they did.[137] As a result, IRI did not enter the Canadian market. One possible interpretation of this outcome is that, even when not compelled to provide the data to only one firm, retailers concluded that they would make better returns on the provision of the data if there were only one supplier of scanner data to the market.[138]

4. *Toronto Real Estate Board* (*TREB*)

Between 2011 and 2018, the *TREB* litigation generated two separate decisions by the Competition Tribunal, two decisions on appeal by the FCA, and two applications for leave to the Supreme Court of Canada which were refused.[139]

135. *Id.* at ¶¶ 154, 192.

136. *Id.* at ¶ 220.

137. *See* Michal S. Gal, *The* Nielsen *Case: Was Competition Restored? On the Anti-Competitive Effects of a Partial Enforcement of Competition Laws*, 29 CAN. BUS. L.J. 17, 28 (1997).

138. *See, e.g.*, *id.* at 31–32, 36–37.

139. This Article addressed aspects of that case touching on intellectual property rights above. *See supra* notes 109–110 and accompanying text.

The Commissioner's challenge related to certain data that the TREB collected and maintained relating to (1) sold and pending sold homes, (2) withdrawn, expired, suspended, and terminated listings, and (3) brokers' commission (collectively, the "Disputed Data"). TREB's rules required that Disputed Data not be displayed on members' websites, even though the Disputed Data was allowed to be communicated via other means (e.g., in person and via email, phone, etc.). The Commissioner alleged that these restrictions prevented new and innovative competitors (e.g., online brokers) from entering and expanding in the market.[140]

The Tribunal's initial decision in April 2013 dismissed the Commissioner's application on the basis that TREB, as a trade organization, could not have engaged in a practice of anti-competitive acts against a subset of its members because TREB did not compete with its members.[141] In addition, the Tribunal held that the abuse of dominance provision requires that the firm with market power must compete in the market where it holds such market power.[142]

In February 2014, the FCA set aside the Tribunal's ruling and referred the matter back to the Tribunal for reconsideration.[143] The FCA agreed with the Commissioner's position that a person who is not a competitor in a market could nevertheless control that market substantially for purposes of the abuse of dominance provision by, "for example, controlling a significant input to competitors in the market, or by making rules that effectively control the business conduct of those competitors."[144] In addition, the FCA concluded that the abuse of

140. Notice of Application by Commissioner of Competition, Canada (Comm'r of Competition) v. Toronto Real Est. Bd., 2013 CCTD 9 (Can.).

141. Canada (Comm'r of Competition) v. Toronto Real Est. Bd., 2013 CCTD 9, ¶¶ 11–20 (Can.). This conclusion relied on a prior FCA decision which stated an anticompetitive act must have an "intended predatory, exclusionary or disciplinary negative effect *on a competitor*." *See* Canada (Comm'r of Competition) v. Can. Pipe Co., [2007] F.C.R. 3, ¶ 68 (Can.) (emphasis added).

142. Canada (Comm'r of Competition) v. Can. Pipe Co., [2007] F.C.R. 3, ¶ 24 (Can.).

143. Canada (Comm'r of Competition) v. Toronto Real Est. Bd., 456 N.R. 373 (Can. Fed. Ct.).

144. *Id.* ¶ 13; *see also* Canada (Comm'r of Competition) v. Toronto Real Est. Bd., 2013 CCTD 9 (Can.) (representing an application for leave to the Supreme Court of Canada that was refused in July 2014).

dominance provision was not limited only to actions taken against an entity's own competitors,[145] but rather were applicable to conduct directed at any competitor in a market. It thereby opened the abuse of dominance provisions to application in gatekeeper cases, in which the dominant firm is not itself active in the affected market.

In April 2016, the Tribunal's redetermination decision agreed with the Commissioner that there had been an abuse of dominance by TREB.[146] In finding that a trade association such as TREB could have and exercise market power, the Tribunal commented as follows:

> Trade associations can exercise . . . market power in a broad range of ways, including by establishing or mandating product standards or other rules, by-laws or practices that insulate all or some of its members from one or more sources of actual or potential competition. To the extent that a trade association has such an ability, it has market power. To the extent that its actions can enable or facilitate the ability of its members to maintain higher prices, or to maintain lower levels of service, product quality, variety or advertising levels than would otherwise prevail in the absence of those actions, they meet the definition of market power set forth by the Supreme Court in *Tervita*. The same is true where a trade association has the ability to forestall the entry and expansion of innovative products and services.[147]

The Tribunal's redetermination decision effectively treated TREB as a gatekeeper. The Tribunal found that TREB controlled the market for the supply of Multiple Listing Service (MLS)-based

145. *Toronto Real Est. Bd.*, 456 N.R. ¶¶ 17–20.

146. Canada (Comm'r of Competition) v. Toronto Real Est. Bd., 2016 CCTD 7 (Can.). The FCA denied TREB's appeal in December 2017. Toronto Real Est. Bd. v. Canada (Comm'r of Competition), [2018] 3 F.C.R. 563 (Can.). The Supreme Court of Canada dismissed TREB's application for leave to appeal in August 2018. Canada (Comm'r of Competition) v. Toronto Real Est. Bd., 2018 CarswellNat 4555 (Can. S.C.C.) (WL).

147. Canada (Comm'r of Competition) v. Toronto Real Est. Bd., 2016 CarswellNat 1506, ¶ 182 (Can.) (WL).

residential real estate brokerage services because TREB could set the terms of how its members are able to compete through its rule-making ability. The Tribunal elaborated that the abuse of dominance provision is broad enough to treat a party as controlling a market when it "controls *how* competition occurs in a market":[148]

> The source of TREB's substantial market power is its control over its MLS system and how information on that system can be used. As noted above, TREB's control over that system is reinforced by the By-Laws, by TREB's MLS Rules and Policies, and by the terms of the [Authorized User Agreement]. In this context, the potential entry that is relevant is the entry of a competing MLS system, not the potential entry of new Members. The Tribunal accepts [the expert] evidence that, due to the important network effects associated with TREB's MLS system, the entry of a competing MLS system "is extremely unlikely . . . ." The Tribunal also accepts that even in a market with a large number of competitors, a dominant firm can engage in conduct that "results in a market that is less competitive than it would have been otherwise . . . ."[149]

The essential facility doctrine was briefly considered in the redetermination decision, where the Tribunal commented that:

> The Tribunal questions whether it is necessary to establish, in an "essential facilities" case, that the respondent is dominant in both an upstream and a downstream market. The Tribunal does not wish to preclude the possibility that a demonstration could be made, in a particular case, that the respondent substantially controls a market for an upstream input, that it has engaged in a practice of anti-competitive acts in respect of that input, and that such practice has had, or is having the effect of preventing or lessening competition in a downstream market. This could include a downstream

148. *Id.* at ¶ 261.
149. *Id.* at ¶ 264.

> market in which the respondent is a new entrant or, in any event, a competitor that is not yet able to exercise market power in that market.[150]

The Tribunal confirmed the general principle that a practice of anti-competitive acts must have a predatory, exclusionary, or disciplinary negative effect on a competitor which competes in the relevant market or a potential entrant into that market.[151] However, the competitor(s) need not be directly competing with the allegedly dominant firm, if that firm has a "plausible *competitive interest*" in the relevant market.[152] The Tribunal recognized that this expansive approach to the abuse of dominance framework could apply not only to a trade association context but also to other gatekeeping situations:

> In the case of a trade association, this may be as straightforward as demonstrating that it has a plausible interest in protecting some or all of its members from new entrants or from smaller disruptive competitors in the market. In such circumstances, the complete or partial exclusion of potential or actual competitors or new products will be assessed in essentially the same way as similar conduct engaged in by a joint venture (see, for example, Herbert Hovenkamp, "Exclusive Joint Ventures and Antitrust Policy," (1995) *Columb Bus L Rev* 1 at pp. 64-66).
>
> In the case of an entity that is upstream or downstream from the relevant market, this may involve demonstrating that the entity has a plausible competitive interest that is different from the typical interest of a supplier in cultivating downstream competition for its goods or services, or the typical interest of a customer in cultivating upstream competition for the supply of the goods or services that it purchases. Among other things, this will ensure that garden-variety refusals to

150. *Id.* at ¶ 210.
151. *Id*. at ¶¶ 277–78.
152. *Id.* at ¶ 279.

> supply or other vertical conduct that has no link to a plausible competitive interest by the respondent in the relevant market will not be mistaken for the type of anti-competitive conduct that is contemplated by paragraph 79(1)(*b*).
>
> For greater certainty, if a respondent, who is a dominant supplier to, or customer of, participants in the relevant market, is found to have no plausible competitive interest in adversely impacting competition in the relevant market, other than as described immediately above, its practices generally will not be found to fall within the purview of paragraph 79(1)(*b*). This is so regardless of whether that entity's conduct might incidentally adversely impact upon competition. For example, an upstream supplier who discontinues supply to a customer because the customer consistently breaches agreed-upon terms of trade typically would not be found to have engaged in a practice of anti-competitive acts solely because that customer is no longer able to obtain supply (perhaps because of its poor reputation) and is forced to exit the market, or becomes a weakened competitor in the market.[153]

In the result, the Tribunal ordered that TREB remove its restrictions on the Disputed Data. This decision was confirmed by FCA, and the Supreme Court of Canada rejected TREB's leave to appeal. As a result, TREB and many other local real estate boards subsequently reversed their policies relating to the Disputed Data. Since the TREB decision, the CCB reached out to other real estate boards across the country to ensure that they were made aware of the decision.[154] The TREB decision gave rise to new websites, services and software that

153. *Id.* at ¶¶ 280–82.

154. Matthew Boswell, *The Courts Have Been Loud and Clear in* TREB *Case: Time to Move Forward*, COMPETITION BUREAU CAN. (Nov. 12, 2018), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04402.html.

helps brokers analyze market trends using MLS data.[155] However, TREB is continuing in its legal efforts to try and assert copyright over MLS data.[156]

5. *Vancouver Airport Authority*

In *Commissioner of Competition v. Vancouver Airport Authority*, the Commissioner challenged the decision by the Vancouver Airport Authority (VAA) to permit only two in-flight caterers to operate at Vancouver's Airport (YVR) as an abuse of dominant position.[157] VAA had denied the requests of two additional in-flight catering service providers to operate at YVR, on the basis that the market could not support additional providers.[158] This was an extension of the plausible competitive interest doctrine developed in *TREB* beyond the trade association context. Even though VAA was not itself competing to supply catering services, the Commissioner's application claimed that VAA's practice of limiting the number of providers at YVR, and thereby excluding new entrants, was anti-competitive and resulted in a substantial lessening or prevention of competition.[159]

In addition to invoking the regulated conduct defense (which is beyond the scope of this Article) VAA argued that it did not have a competitive interest in the market, that it had a legitimate business justification for limiting the number of providers rather than any anti-competitive purpose, and that its actions did not result in competition being lessened or prevented substantially.[160]

The Tribunal confirmed its view that the market in which a dominant position is assessed may be different than the market in which anti-competitive effects arise.[161] The Tribunal noted that the

155. Tara Deschamps, *3 Years After Supreme Court Decision, TRREB Still Fighting Over MLS Data*, CANADIAN BROAD. CORP. (July 16, 2021), https://www.cbc.ca/news/canada/toronto/trreb-legal-action-mls-1.6106226.

156. *Id.*

157. Canada (Comm'r of Competition) v. Vancouver Airport Auth., 2019 CCTD 6 (Can.).

158. *Id.* at ¶ 84.

159. *Id.* at ¶ 2.

160. *Id.* at ¶ 3.

161. *Id.* at ¶ 298.

dominance requirement[162] would include "a firm that controls a significant input for firms competing in the relevant market."[163] Further, the Tribunal stated that "[t]he power to exclude can be an important manifestation of market power."[164] The Tribunal ultimately determined that the relevant market for assessment of competitive effects was the airlines catering market at the airport, and the "critical input" for firms competing in this market was airside access, a market in which VAA held a dominant (indeed monopoly) position.[165]

As noted, in the *TREB* case the Tribunal and FCA found that where the respondent was not itself active in the market affected, then for its conduct to constitute a practice of anti-competitive acts, the respondent must have a "plausible competitive interest" in the affected market. This was an easy conclusion to reach in the *TREB* case, since TREB was in essence the alter ego of its members. The issue was much less clear in the VAA case. Nevertheless, the Tribunal found that VAA had a plausible competitive interest in the catering market, because it had an interest in the revenue streams from the in-flight caterers that it authorized to operate at YVR.[166] That sort of indirect financial interest is likely to be extremely common—indeed, more likely than not in most cases.

The Tribunal indicated that it would require credible evidence that the alleged dominant firm has a plausible competitive interest in the affected market. It need not, however, be a particularly strong interest. The Tribunal defined "plausible" as "reasonably believable," meaning that there must be a "credible, objectively ascertainable basis in fact" to believe that the dominant person has a competitive interest in the impacted market.[167] The receipt of payments from the incumbent participants in the affected galley services market was sufficient to give VAA a plausible competitive interest in that market, despite the fact that there was no evidence that such payments were unusually inflated for exclusivity—they were simply rental or access payments.

162. *See* Competition Act, R.S.C. 1985, c C-34, § 79(1)(a) (Can.).

163. Canada (Comm'r of Competition) v. Vancouver Airport Auth., 2019 CCTD 6, ¶ 424 (Can.).

164. *Id.* at ¶ 425.

165. *Id.* at ¶ 319.

166. *Id.* at ¶ 506.

167. *Id.* at ¶ 465.

VAA's economic expert argued that VAA had no economic incentive to adversely impact competition for galley services and that a rational economic actor would not have excluded a third competitor as a means of maximizing revenues.[168] The economist that sits on the Tribunal agreed with VAA's economic expert on this point, but the two judicial members disagreed, holding the Commissioner had demonstrated the existence of "some credible, objectively ascertainable basis in fact" to believe that VAA had a plausible competitive interest in galley services.[169]

This relatively low hurdle leaves firms which have control over access to other markets, even in the commonplace sense of owning real-estate, and, even when they have no intention of ever entering an adjacent or downstream market, at significant risk of being found to have a plausible competitive interest in an affected market.

While the Tribunal did find that the airport had a plausible competitive interest in the galley business, it nevertheless found that the Commissioner did not establish that VAA's intention to exclude new entrants constituted a practice of anti-competitive acts. The Tribunal accepted that there were legitimate business reasons to limit the number of in-flight caterers—essentially that one of the two existing full-service caterers at YVR might exit the market if new entry was permitted, with the new entrants not being able to fully replace the departed incumbent.[170] The Tribunal concluded that the reasonably foreseeable anti-competitive effects of excluding additional entrants were not disproportionate to the "pro-competitive rationales" of VAA, meaning that the "overriding purpose" of the conduct in question was not anti-competitive.[171] Additionally, the evidence did not support a conclusion that VAA's conduct "was primarily motived by a predatory, exclusionary or disciplinary intent towards a competitor."[172]

While the Tribunal found that the requirements of a practice of anti-competitive acts had not been met in these circumstances, for completeness it considered whether the conduct prevented or lessened competition, substantially in the relevant market or would be likely to do

168. *Id.* at ¶ 497.
169. *Id.* at ¶¶ 505–06.
170. *Id.* at ¶¶ 512, 526–28.
171. *Id.* at ¶¶ 513, 536, 626.
172. *Id.* at ¶ 621.

so in the future.[173] The Tribunal acknowledged that there may have been "some fairly limited and positive price and/or non-price effects on competition"[174] absent VAA's exclusionary conduct; however, these effects were unlikely to be substantial.[175] The Tribunal stated that "the Commissioner must demonstrate that entry likely would have decreased the market power of the incumbent firms, or that it would be likely to have this effect in the future," and that it was not sufficient merely to demonstrate that there would have been a new entrant competing in the market.[176]

C. Discontinued and Pending Investigations

While the foregoing cases illustrate the general application of the Canadian legal framework to gatekeepers, they do not involve major tech firms. Google and Amazon have come under scrutiny for possible abuses of dominant positions as well, but thus far such investigations have not lead to Tribunal proceedings or consent orders.

1. Google I

In April, 2016, the CCB released a statement summarizing its investigation into allegations that Google Inc. (Google) had engaged in various anti-competitive practices.[177] An inquiry was opened in 2013 in relation to online search and search advertising and later expanded to examine online display advertising.[178] The CCB considered whether Google possessed market power in markets related to these activities, and whether this potential power was used to advantage itself relative to its competitors. The CCB considered "allegations that Google engaged in several practices intended to raise its rivals' costs, inhibit their

173. *Id.* at ¶¶ 628, 630–31.

174. *Id.* at ¶ 797.

175. *Id.* at ¶¶ 797–98.

176. *Id.* at ¶ 803.

177. Competition Bureau Can., *Investigation into Alleged Anti-Competitive Conduct by Google*, GOV. OF CAN. (Apr. 19, 2016), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04066.html.

178. *Id.*

ability to expand and generally make it more difficult for them to compete."[179]

The allegations in relation to search and search advertising concerned AdWords Application Programming Interface (API) Restrictions, search manipulation, preferential treatment of other Google services, syndication agreements, and distribution agreements.[180] The only problematic conduct identified by the CCB involved anti-competitive clauses in the AdWords API Terms and Conditions. The clauses restricted the ability of software developers to help their clients advertise on multiple platforms, and the CCB concluded that Google had the intent to exclude other search engines.[181] The CCB also found that these clauses operated to the detriment of advertisers. However, Google had accepted a remedy to cease using these clauses in the U.S.,[182] and it agreed to remove these clauses from the Terms and Conditions used in Canada for five years.[183]

With respect to display advertising, the CCB considered allegations that Google engaged in conduct to exclude competing ad exchanges and demand-side platforms. However, it did not find sufficient evidence to conclude that there had been conduct seeking to exclude

179. *Id.*

180. *Id.*

181. *Id.*

182. Letter from David Drummond, Senior Vice President of Corp. Dev. and Chief Legal Officer, Google Inc., to The Hon. Jon Leibowitz, Chairman, Fed. Trade Comm'n (Dec. 27, 2012), https://www.ftc.gov/system/files/documents/closing_letters/google-inc./130103googleletterchairmanleibowitz.pdf.

183. In 2013, Google made changes to its AdWords API Terms and Conditions in response to concerns raised by the FTC. But Google's commitment to the FTC did not specifically govern the way it does business in Canada, nor did it apply to both its English language and French language AdWords API Terms and Conditions. In response to concerns identified by the CCB, Google has committed to the Canadian Commissioner that it will not reintroduce these restrictive API clauses in Canada or introduce any other API clauses that may have the same effect, in either its English language or French language AdWords API Terms and Conditions, for a period of five years. The CCB believes that, because of these changes, market participants can freely transfer advertising campaign data between competing search advertising platforms, which allows for greater multi homing and, by extension, competition in search advertising. Competition Bureau Can., *supra* note 177.

rivals or that competition had been lessened or prevented substantially.[184]

The CCB concluded by commenting about potential future conduct in the sector: "[T]he Bureau will be closely following developments with respect to Google's ongoing conduct, including the results from investigations of our international counterparts. More generally, the Bureau will continue actively monitoring the digital marketplace given its importance to innovation and the economy."[185]

2. Google II

In October 2021, the CCB obtained a court order to advance an investigation of Google's online advertising business.[186] The new investigation focuses on whether Google is leveraging market power in the supply of in-stream video advertising space into adjacent advertising technology markets.[187] More specifically, the CCB is examining whether Google took steps to harm third-party demand-side platforms by restricting or limiting their ability to access advertising inventory on Google-operated properties, including YouTube.[188] Since Google implemented restrictions in 2016 and 2017, the market shares of the Google-operated demand-side platforms allegedly increased substantially.[189] Similar investigations of Google have been commenced in other jurisdictions.[190]

184. *Id.*

185. *Id.*

186. Press Release, Competition Bureau Can., Competition Bureau Obtains Court Order to Advance an Investigation of Google (Oct. 22, 2021), https://www.canada.ca/en/competition-bureau/news/2021/10/competition-bureau-obtains-court-order-to-advance-an-investigation-of-google.html.

187. Affidavit of Stéphanie Guitard at ¶ 9, Comm'r of Competition v. Google Can. Corp., No. T-1551-21 (Can. F.C. 2021).

188. *Id.* at ¶¶ 25–26.

189. *Id.* at ¶¶ 28–29.

190. *See, e.g.*, European Commission Press Release IP/21/3143, Antitrust: Commission Opens Investigation into Possible Anticompetitive Conduct by Google in the Online Advertising Technology Sector (June 22, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3143; Australian Competition & Consumer Commission Press Release 149/21, Google's Dominance in Ad Tech Supply Chain Harms Businesses and Consumers (Sept. 28, 2021),

3. Amazon

In August 2020, the CCB invited sellers and other businesses with relevant information to provide input for its investigation into "whether Amazon is engaging in conduct on its Canadian marketplace, Amazon.ca, that is impacting competition to the detriment of consumers and companies that do business in Canada."[191] The CCB identified three areas of particular interest:

> [A]ny past or existing Amazon policies which may impact third-party sellers' willingness to offer their products for sale at a lower price on other retail channels, such as their own websites or other online marketplaces;
>
> [T]he ability of third-party sellers to succeed on Amazon's marketplace without using its "Fulfilment By Amazon" service or advertising on Amazon.ca; and
>
> [A]ny efforts or strategies by Amazon that may influence consumers to purchase products it offers for sale over those offered by competing sellers.[192]

There has not yet been an announcement of an application to the Competition Tribunal, a negotiated remedy, or a discontinuance of the inquiry.

Similar issues were examined by the House Judiciary Subcommittee on Antitrust in the United States. Its 2020 report on its

https://www.accc.gov.au/media-release/google%E2%80%99s-dominance-in-ad-tech-supply-chain-harms-businesses-and-consumers (discussing Google's dominance in the ad tech industry).

191. Press Release, Competition Bureau Can., Competition Bureau Seeks Input from Market Participants to Inform an Ongoing Investigation of Amazon (Aug. 14 2020), https://www.canada.ca/en/competition-bureau/news/2020/08/competition-bureau-seeks-input-from-market-participants-to-inform-an-ongoing-investigation-of-amazon.html. The CCB emphasized that "there is no conclusion of wrongdoing at this time." *Id.*

192. *Id.*

investigation of competition in digital markets referred to Amazon's abusive tactics or mistreatment of third-party sellers.[193]

V. SOME TENTATIVE CONCLUSIONS

Gatekeeper issues are complex and difficult. How do we ensure efficient platforms, provide effective user experiences, gather and employ useful data, ensure that platforms are well integrated with the services provided over them, and, at the same time, allow competition to flourish to provide competitive outcomes by way of static allocative efficiency, and more importantly, by way of innovation? Also, how do we ensure effective remedies when problems are identified?

The primary question which this Article asks is whether, given the widespread concern about digital platforms and broad reconsideration of approaches to competition law worldwide, Canada's abuse of dominance provisions are able to adequately address anticompetitive market conduct, particularly related to digital platforms and gatekeeping issues? The answer we offer is a largely unqualified "yes."

Canada's competition law framework for unilateral conduct predominately dates from a two-stage modernization in 1975 and 1986. The law was obviously not designed with tech firms or the digital economy in mind. Amendments in 2009 made few adjustments relevant to the tech or gatekeeper issues now under the antitrust microscope around the world.

The CCB's "Big Data" paper, released in 2018, concluded the "traditional framework of competition law enforcement can usefully continue to guide the Bureau's work."[194] Only one year after completing his tenure as Commissioner, John Pecman referenced the Big Data paper's conclusion as support for the observation that the CCB had

193. STAFF OF SUBCOMM. ON ANTITRUST, COMMERCIAL, & ADMIN. LAW OF THE COMM. ON THE JUDICIARY, H.R. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 247 (Comm. Print 2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

194. COMPETITION BUREAU CAN., BIG DATA AND INNOVATION: KEY THEMES FOR COMPETITION POLICY IN CANADA 14 (Feb. 19, 2018), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-Report-BigData-Eng.pdf/$file/CB-Report-BigData-Eng.pdf.

confirmed that it thought the Act was fit for purpose to handle tech companies at that time.[195]

More recently, the CCB has been putting forward an assortment of changes it would like to see to increase the enforceability of the Act in response to a request for such input by the Minister of Innovation, Science and Industry, who has responsibility for competition law and policy.[196] In October 2021, the Commissioner gave a speech outlining changes he would like to see to the Act, but none related to the substance of abuse of dominance or gatekeeper issues.[197] But a more recent submission in response to Senator Howard Wetston's request for inputs on Canada's competition policy framework ("Examining the Canadian Competition Act in the Digital Era"),[198] the CCB put forward a much more extensive list of possible amendments.[199] The CCB is now calling for larger potential monetary penalties for abuse of dominance[200] and for the possibility of enforcement by private parties.[201] In addition, the CCB proposes two possible substantive changes. First, it

195. John Pecman, *Dethroning the Digital Platform Champions*, COMPETITION POL'Y INT'L (Dec. 3, 2019), https://www.competitionpolicyinternational.com/dethroning-the-digital-platform-champions/.

196. The Minister of ISED asked Commissioner Boswell to examine the law to confirm it is still "fit for purpose" in May 2019. *See* Letter from Minister of Innovation, Sci. & Econ. Dev. to the Comm'r of Competition, https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04464.html (last modified Jan. 20, 2022). In October 2020, Commissioner Boswell gave a speech about needing to ensure the laws and resources are "fit for purpose in the digital and data-driven economy." *See* Matthew Boswell, Comm'r of Competition, Speech at CBA Competition Law Fall Online Symposium (Oct. 21, 2020), https://www.canada.ca/en/competition-bureau/news/2020/10/supporting-competition-on-the-road-to-economic-recovery.html. In June 2021, the CCB's Competition and Growth Summit publication suggested that additional work needs to be done to ensure the Competition Act is "fit for purpose." *See* Competition Bureau Can., *Canada Needs More Competition: Takeaways from the Competition and Growth Summit*, GOV'T OF CAN., https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04595.html (last modified Jan. 20, 2022).

197. Boswell, *supra* note 44.

198. Wetston, *supra* note 6.

199. Competition Bureau Can., *Examining the Canadian* Competition Act *in the Digital Era – Submission by the Competition Bureau*, GOV'T OF CAN. (Feb. 8, 2022), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html.

200. *Id.* at § 3.3.

201. *Id.* at § 3.4.

suggests a switch from a focus on conduct with an intended negative effect on a competitor which is predatory, exclusionary, or disciplinary (the current approach to the "practice of anti-competitive acts" element of Section 79(1)(b), as described above) to an intended negative effect on the competitive process.[202] Second, the CCB suggests that the Act be amended to establish a lower threshold of likely harm (prevention or lessening of competition, without the "substantial" materiality threshold) in respect of emerging competitors in the digital economy.[203]

There is no attempt by the CCB to demonstrate whether the current standards have led to any actual enforcement problem that would support the alternative put forward. The concern articulated with respect to an intended negative effect on a competitor could indeed have posed challenges in enforcement against gatekeepers. However, the reinterpretation of that requirement in the *TREB and VAA* cases has addressed the potential gatekeeper concern. The nascent competitor question is well beyond the scope of this Article.

TREB involved a rule-making gatekeeper, with control of assets necessary for competition (the MLS system). *VAA* involved a literal gatekeeper—the owner of the airside real estate at the airport —on the other side of a locked gate. In deciding those cases, the requirement that abuse of dominance conduct be aimed at a competitor articulated in *Canada Pipe* has been stretched significantly. The early case law suggested that the dominant firm's activity had to be directed to excluding its competitors: if the dominant firm was acting as a gatekeeper with respect to a market in which it did not participate, it could not be found to be abusing a dominant position. The *TREB* and the *VAA* cases expanded the concept of anti-competitive acts from conduct directed at a dominant firm's competitor, to conduct directed at a competitor in a market. While there must be some interest which the gatekeeper has in the affected market to make its conduct anti-competitive, the concept of a "plausible competitive interest" is a very liberal mechanism for assessing the connection between a dominant firm and an affected market in which the dominant firm does not itself compete.[204] This

202. *Id.* at § 3.1.

203. *Id.* at § 3.2.

204. Canada (Comm'r of Competition) v. Vancouver Airport Auth., 2019 CCTD 6, ¶¶ 457, 460.

significantly broadens the reach of the Competition Act to address gatekeepers' conduct.

The CCB's *Abuse of Dominance Guidelines* have enthusiastically embraced this development:

> A firm that does not compete in a market may nonetheless substantially or completely control that market . . . .
>
> Assessing the existence and degree of market power through the ability to exclude is particularly relevant when a firm does not compete in a market in which the alleged anti-competitive effects are alleged to be occurring. A firm that does not compete in a particular market may nonetheless control it, for example, through control of a significant input . . . or the ability to make rules that effectively control the business conduct of those competitors.[205]

The ability to effectively review gatekeeper conduct under the abuse of dominance provision of the *Competition Act* is not just a recent phenomenon. The *Interac* case, from the mid-1990s, was an early and prescient tech gatekeeper case. The CCB and the Tribunal opened access to Interac's automated banking machine network—to the extent that the governing financial services legislative framework would allow—to increase competition in the provision of retail financial services.

The *Tele-Direct* and *Nielsen* cases also showed that gatekeeper conduct could be addressed successfully. In *Tele-Direct*, the Tribunal struggled with the issue of tied selling and the question of whether products were separate or not—with its decision being influenced by whether it was efficient to supply them separately. This efficiency analysis, in our view, is likely to be significant in informing the question of gatekeeping—particularly with respect to competition with integrated platforms and self-preferencing. The *Nielsen* case, additionally, provides guidance on the use of exclusivity contracts that limit an essential input. The Act provided a remedy so that Nielsen could not

205. *Abuse of Dominance Guidelines*, *supra* note 54, at ¶¶ 27, 42.

monopolize access to retail scanner data, an essential gatekeeper input to providing the sales data.

Professor Edward Iacobucci, in his recent paper *Examining the Canadian Competition Act in the Digital Era*,[206] recommends some minor adjustments to aspects of Canada's abuse of dominance law, essentially to clarify certain aspects of the test and adjust remedies. However, after detailed consideration, he concludes that the Canadian *Competition Act* is generally well suited to addressing economic harms in digital markets. Professor Daniel Sokol and Professor Anthony Niblett reach a similar conclusion: "Competition law in Canada does not need an overhaul . . . we argue that dramatic changes to the Canadian Competition Act are not required to best foster competition in the Canadian economy."[207] While Canadian competition law is continuing to develop, and the nature of gatekeeper issues continues to evolve, it appears to us that the abuse of dominance provisions—potentially supplemented by the refusal to deal, tied selling, exclusive dealing, and special IP remedy provisions—provide sufficiently flexible mechanisms to address gatekeeping antitrust issues.

The Competition Act does not—and was not—designed to directly address the concentration of economic or political power, privacy, inequality, or other social issues. Nor was it designed to deal with the exploitation of market power lawfully obtained through superior competitive performance. In our view, however, those potential issues are likely to be more effectively and efficiently dealt with by other policy instruments designed for such purposes. The Competition Act is not the best instrument to do so, but as they say in the tech business, that's a feature, not a bug.

206. Iacobucci, *supra* note 6.

207. ANTHONY NIBLETT & DANIEL SOKOL, UP TO THE TASK: WHY CANADIANS DON'T NEED SWEEPING CHANGES TO COMPETITION POLICY TO HANDLE BIG TECH 9–10 (2021), https://macdonaldlaurier.ca/files/pdf/202110_Up_to_the_task_Niblett_Sokol_PAPER_FWeb.pdf.