EXCLUSIVE DISTRIBUTION AGREEMENTS AND COMPETITION LAW: 
AN ANALYSIS

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A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF 
THE REQUIREMENTS FOR THE DEGREE OF 
MASTER OF LAWS 
in 
THE FACULTY OF GRADUATE STUDIES 
Faculty of Law 
We accept this thesis as conforming 
to the required standard 

THE UNIVERSITY OF BRITISH COLUMBIA 
December 1997 
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Date December 17th, 1997
Abstract

A manufacturer or supplier that wishes to distribute its product and/or to expand its selling operations in its own or a foreign country must be concerned with a large body of specific laws and regulations, among others competition law. This thesis focuses on the Canadian *Competition Act* and its effect on such business relationships, specifically distribution agreements.

In the first chapter I briefly define the distribution agreement, discuss its main legal implications, and deal with exclusivity provisions usually included in such agreements. With respect to the distribution of goods and in particular to an exclusive distribution agreement, the provisions of the *Competition Act* dealing with reviewable matters and resale price maintenance are the most important ones. The second chapter contains an analysis of these provisions in general and in the context of the exclusive distribution agreement in particular. In the third chapter I discuss the impact of these provisions on distribution agreements and the question of whether they are able to serve the main purpose of the *Competition Act*. In doing so, I concentrate on two major issues: What is the impact of Canada’s *Competition Act* on an exclusive distribution agreement, and why does the Act treat resale price maintenance in a different way than it treats non-price vertical restraints?

After having analyzed the most important provisions regarding distribution agreements, I conclude that the impact of competition law on the process of product
distribution, especially with respect to exclusive distribution agreements, is not as significant as it may seem. This is true at least with respect to reviewable practices. Many of the practices a manufacturer or supplier uses to distribute its products are common and not illegal per se. Moreover, the provisions with respect to reviewable matters do not present a significant barrier for a supplier who promotes and sells its product through a vertical distribution system. This is mainly due to the requirements of the different provisions which narrow the scope of their applications significantly. Only where a supplier has a strong position in the market and deals with a particular product which cannot be substituted easily, competition law might have a major impact.

However, the situation is different for the practice of resale price maintenance. A per se offence, the resale price maintenance provision applies to any supplier regardless of its size or position in the market. For this reason and because of the fact that an attempt to influence prices upward is sufficient for a prohibition, this provision is of significant importance for distribution agreements.

In consequence, I argue that these conclusions with respect to both reviewable matters and the practice of resale price maintenance do not collide with the objectives of competition policy that are predominant in Canada in the present day; they rather support this finding.
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Acknowledgement

I would like to thank my supervisor, Bruce MacDougall, for his ideas, patience and encouragement. Thanks also to Joost Blom who graciously agreed to be my secondary reader.

I also wish to thank the Law Foundation of the University of British Columbia for its generous financial support. Thanks go to the faculty and library staff for their help and time, in particular to Lillian Ong, Allan Soroka and Francis Wong.

Many people supported me during my stay in Vancouver. Without my fellow students from my graduate class and all my friends I would not have enjoyed the time in Vancouver as much as I did. I deeply appreciate their support and friendship. However, of all of them I owe my sincerest gratitude to Sally McCausland who not only helped me with my writing but was a very supportive friend through all the tough times. I am indebted to her for her friendship, her good humour and her always being here for me.

Last but not least, a big "thank you" goes to my friends and family back home. Without their encouragement and support I would not be where I am now.
Chapter 1: Introduction

1. Introduction

(a) A company which is manufacturing or selling products or providing services and which wishes to expand its operations in its own or a foreign country has different methods at its disposal. One of the most common forms of product distribution is the distribution agreement between a manufacturer or supplier and a distributor. But there is no one distribution agreement; indeed they may vary significantly depending on the circumstances and the needs of the parties. There may be distributors who directly sell the product to the final customer and probably provide special services regarding the product; they are often called retailer or dealer. On the other hand the distributor may be the "head" of an entire dealer-network and function as a "middle-man" in the process of product distribution. The relationship between the manufacturer and the distributor can also vary depending on the particular situation and has to be adjusted by the provisions in the agreement. The provisions differ from the case where the manufacturer wants a wide range of control and involvement, to a situation where it practically only sells its products to the distributor for resale. Furthermore, specific products and circumstances may call for special provisions, for example, with respect to intellectual property and marketing rights or competition laws. In an international setting other provisions must be taken into consideration, for example, with respect to choice of law and choice of forum.

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1 Distribution agreements may exist at both levels at the same time. Since there is no significant difference between a distribution agreement at the "manufacturer's level" and one at the "retailer's level", I only look at "one level-distribution systems".

2 Depending on the degree of control, it is questionable if such a contract can still be qualified as a distribution agreement.
(b) A manufacturer wants to sell its product in the most effective way. As soon as such a manufacturer tries to enter a new market and to expand its operations there, it has to decide the strategy and the legal vehicle it wants to use. Such a decision requires an analysis of the manufacturer's goals, its resources including its financial possibilities, the economic and social infrastructure of the foreign country, and the characteristics of the product itself and the legal environment. There are different vehicles a manufacturer or supplier can choose to expand its operations to an international level. It can establish a branch office or subsidiary in the foreign country or it can make use of foreign intermediaries, such as sales agents, distributors or franchisees, to name the most common. Which vehicle a manufacturer decides to use depends upon various legal considerations, among them the national laws of the countries involved, as well as treaties and conventions which may be applicable.3

(c) The manufacturer who then decides to use a distributorship system to sell its product in the (foreign) market and the distributor who is ready to do business in the designated territory have particular expectations with respect to their business relationship.

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3 It depends also whether the manufacturer wants to be involved more or less in the distribution process of its products in the foreign country. Economic and social infrastructure in the foreign country may also be important - for example the availability of trained potential business partners. See Jean-François Buffoni, "Drafting International Sales Agency, Dealership, Distributorship & Franchise Agreements", in Canadian Bar Association Institute, ed., *International Trade for the Non-Specialist: What the Generalist Needs to Know* (Montréal: Canadian Bar Association, Continuing Legal Education, 1988).
A manufacturer or supplier, firstly, expects that the expansion into the new market will result in an increasing volume of sale, a higher turnover and, eventually, more profit. Often a manufacturer tries to establish a net of distributing systems in order to be able to cover the whole market in an appropriate and efficient way. A Swiss manufacturer, for example, who is interested in selling its product in the whole of Canada, may, with respect to the size of this country and its market, prefer to conclude distribution agreements with different distributors, each exclusively with respect to a specific territory. In doing so, it is able to build up an effective distributing system. A manufacturer not only expects an increase of the sales figures, but also a strengthening of its image and reputation in the market, and not least of its trademark. This results in a stronger position of the manufacturer's trademark and its products in the market, and hence in an increasing number of purchasers and sales. The building up of a good image and a substantial clientele and the effect of a wide-spread, well-known trademark result in advantages which are of considerable value. They frequently will remain of value and use for the manufacturer even after the termination of the agreement; however, often no indemnification is paid to the distributor for its efforts in this regard.

The marketing of a product in a (foreign) market is not without risks and the manufacturer does not want to take a too high risk. Because a distributor is selling the products on its own account, a great part of the financial risk of such an undertaking is with the distributor, while the manufacturer still has some control over the distribution
of its products. Furthermore, with the establishment of minimum sales quotas the manufacturer shifts the risk of product marketing and sales itself on the distributor.

Where the manufacturer wants to market its product in a foreign market, the decision to appoint a distributor in the foreign country is also often made to avoid an active management of a foreign operation.

(bb) The distributor, on the other hand, is interested in doing business and to sell as many products as possible. It is a characteristic of the distribution agreement that the distributor purchases the manufacturer's or supplier's products for resale at prices - normally - fixed by itself and according to its own method of distribution. In the end, the difference between the price paid for the product and the resale price constitutes the distributor's remuneration. A distributor's interest and expectations lie, therefore, in big sales numbers and an effective, cost-saving distribution method in order to make the most profit. Often a distributor is also interested in providing an after-sales service which may result in a bigger share of the sales.

Normally, a distributor wants to preserve its (legally) independent position. On the other hand, to be part of a bigger marketing and distributing system may be interesting, as this means a decrease of its costs and risk. Furthermore, an exclusivity

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5 Ralph B. Lake, supra note 4, at 2-21.

6 A manufacturer can make price suggestions with respect to the resale price, provided it is made clear to the distributor that there is neither an obligation to accept the suggestions nor a suffering in its business relationship with the manufacturer in case it did not accept the suggestions, see subs. 61(3) Competition Act and infra, chapter 2; 2.4.2.(c).
provision with respect to a designated territory protects the distributor from intra-brand competition. A distributor may also expect to gain new knowledge, information and experience, which may also still be valuable after the termination of the agreement. A distributor, during the business relationship with the manufacturer, often establishes a clientele and helps to improve the manufacturer's position in the market.

(d) As we have seen, there are some interests which manufacturer and distributor have in common, such as the interest to enter a market with a product and to sell it most effectively in order to make a profit. Other interests are rather incompatible, such as the question of the distributor's indemnification for the establishment of the clientele.

However, such agreements, and in particular distribution agreements with respect to a prestigious, highly demanded product, may have a broader impact insofar as it is in the consumer's interest to have access to such products and to a fair price. It is in the consumer's but also in society's interest that such distributing systems are not (mis)used to deliberately constrain supply in order to be able to sell the goods at a higher price.7 With a strictly organized vertical distribution system there may be a risk that it will be used to artificially increase the demand for the products, to foreclose rivals and to lessen competition in the market. It is in such circumstances that

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7 According to Michael J. Trebilcock, vertical integration by agreement is in general "likely to enhance the supply of complements, while horizontal integration (...) may constrain the supply of substitutes", see "The Evolution of Competition Policy: A Comparative Perspective", in Frank Mathewson, Michael Trebilcock and Michael Walker, eds., *The Law and Economics of Competition Policy*, (Vancouver: The Fraser Institute, 1990), 1 at 9. However, with respect to highly demanded, luxurious goods the risk of a misuse of the distributing system cannot be excluded.
competition law may become an issue for the (international) manufacturer or supplier within an exclusive distribution agreement.

(e) A Swiss exporter who wants to sell its product in Canada through Canadian distributors must be concerned with a large body of specific laws and regulations. This thesis, however, focuses only on one aspect: the Canadian *Competition Act* \(^8\) and its effect on such a business relationship. Competition laws often contain rules and restrictions which are important to the distribution process. When drafting such an agreement it is, therefore, essential to make sure that the contemplated restraints are enforceable and consistent with the applicable law.

Before I concentrate on the relevant provisions of the *Competition Act*, I briefly define in the following section the distribution agreement (2.1.), discuss its main legal implications (2.2.) and deal with exclusivity provisions usually used in distribution agreements (2.3.). The third part of this chapter provides an overview of Canada’s *Competition Act*.

With respect to the distribution of goods and in particular to an exclusive distribution agreement the provisions of the *Competition Act* that are dealing with reviewable matters and resale price maintenance are the most important ones. In the second chapter I discuss these provisions in general and in the context of the exclusive distribution agreement. The third chapter is aimed at a further analysis of the discussed

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\(^8\) R.S.C. 1985, c. C-34 as amended by S.C. 1986, c. 26. Where, in the following, only the term "Act" is used it refers always to the *Competition Act*. 
provisions, their impact on distribution agreements and at the question whether they are able to serve the main purpose of the *Competition Act*. I, thereby, concentrate on two major issues: What is the impact of Canada's *Competition Act* on an exclusive distribution agreement, and why does the Act treat resale price maintenance in a different way than it treats non-price vertical restraints in exclusive distribution agreements.\(^9\)

2. Distribution Agreements in General

2.1. Definition

In both countries, Canada and Switzerland, the most common and frequently used methods of product distribution are the use of sales representatives or distributors. A third form of product distribution which has become increasingly popular is the so-called franchise or "business format franchise".\(^10\) The legal concept of the distribution of goods and products and the possible means, such as agency, distribution agreements or

\(^9\) While resale price maintenance constitutes a behaviour which is *per se* prohibited by the *Competition Act*, non-price vertical restraints such as refusal to deal, exclusive dealing, tied selling and market restrictions etc. are regarded as reviewable practices. It is legal to engage in such practices as long as they are not challenged by the Competition Tribunal. See *infra* 3.3.

\(^10\) Barry M. Fisher, "Product Distribution in Canada", (1986) 20 Int'l Lawyer, 45 at 46; Bernhard F. Meyer-Hauser and Hans-Ulrich Schoch, "Agency and Distribution Agreements in Switzerland", in Agustin Jausás, ed., *Agency and Distribution Agreements: An International Survey* (London: Graham & Trotman, 1994), 245 at 245. Note, that in Canada distribution agreements are also known as "product franchises" which may lead to confusion. I use the terms "franchise" or "franchising system" exclusively to describe a "business format franchise", *i.e.* a franchising system where the franchisee operates under precise and uniform controls and where the franchisor provides a range of services. These systems are designed to convey uniformity to the public. See Barry M. Fisher, *ibid*, at 54; Jean-François Buffoni, *supra* note 3, at 10
franchising, are practically the same in Switzerland as they are in Canada. In the following I concentrate on the definition of distribution agreements from the Canadian point of view.

2.1.1. Distribution Agreements

In Canada a distribution agreement can be defined as a written or verbal agreement "by virtue of which one party, typically a manufacturer of a product, grants to another party, typically a distributor or licensee, the right to sell the product to third parties in a given territory, for a given period of time and for a specified consideration".\textsuperscript{11} A distributor purchases the goods from the manufacturer or supplier for resale for its own account. According to one author, "[t]he distributor will typically take delivery and warehouse the goods as purchaser and will bear the credit risk of the sale to the ultimate purchaser".\textsuperscript{12} As such, a distributor is an independent contractor, and has no authority to enter a contract on behalf of the manufacturer, or the ability to affect the manufacturer's legal position.\textsuperscript{13} Consequently, a clear legal distinction can be drawn between sales agency and distributorship in Canada.\textsuperscript{14}

The basis of each relationship between a supplier and a distributor is the written or oral distribution agreement, by virtue of which the supplier of a product grants to the distributor "the right to sell the product to third parties in a given territory, for a given


\textsuperscript{12} Barry M. Fisher, \textit{supra} note 10, at 47.


\textsuperscript{14} Jean-François Buffoni, \textit{supra} note 3, at 7.
period of time, and for a specific consideration." If it is not otherwise contracted by the parties, the distributor is free to resell the products at its own prices and to use its own marketing and distribution methods.

2.1.2. Agency and Franchising

The distributorship concept has to be distinguished from sales agency on one hand and a franchise system on the other hand:

In Canada, sales representatives are either employees or independent contractors, such as sales agents. In general, a sales agent represents, and is empowered to act on behalf of the other party, the principal, and in doing so it does affect the principal's legal position towards third parties, such as the ultimate purchaser. The agent may, for example, enter into a contract of sale for the principal, but the resulting contract arises directly between the principal and the ultimate purchaser. Usually, the purchaser is billed directly by the principal, who thus assumes the credit risk and generally keeps the title to the goods until final payment has been received. The sales agent has no title in the inventory and is normally paid in form of a commission based upon the selling price of the product.

By contrast, if a sales agent is under the exclusive control and direction of the principal and receives a salary rather than a commission, he or she may be qualified by Canadian

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15 Stephen Weinstein, supra note 11, at 67.
16 Cameron D. Stewart, supra note 13, at 10; Barry M. Fisher, supra note 10, at 54.
17 Barry M. Fisher, supra note 10, at 46-47; Jean-François Buffoni, supra note 3, at 5; Cameron D. Stewart, supra note 13, at 9-10.
courts as an employee and in consequence provincial employment standards legislation would be applicable.\textsuperscript{18}

The common law principles regarding agency are also applicable to sales agency. They especially have an impact on issues such as vicarious liability and the relationship between the principal and the third party in case the sales agent did not disclose the agency and purported to act in his or her own name.\textsuperscript{19}

In Canada, only Alberta's \textit{The Franchises Act}\textsuperscript{20} deals with franchise. Other provinces do not have laws specifically on franchises. Nevertheless, franchising systems are recognized in Canada as one of the most popular methods to market a product or service. In general, a franchisor grants a franchisee the right to put a product on the market and provides a tested system as well as the necessary know-how. On the other side, the franchisee is required to conform to the system and to pay a fee for "the privilege of operating a business under a set of operational guidelines established by the franchisor."\textsuperscript{21} Thus, the two main characteristics of a franchising system are the grant of a right to operate a business and to use a trademark or trade name, and the substantial control of the franchisee's business by the franchisor.\textsuperscript{22} There is a variety of different franchising systems,

\begin{itemize}
  \item Barry M. Fisher, \textit{supra} note 10, at 46-47; Jean-François Buffoni, \textit{supra} note 3, at 5. Besides the employment standards legislation, which sets minimum standards regarding wages, hours and vacation, there are labor relations acts which deal with the obligations and rights of both employers and employees when establishing trade unions, and the collective bargaining process. Furthermore, there are a number of other statutes such as safety legislation, workers' compensation plans, and human right codes which may be applicable. See Cameron D. Stewart, \textit{supra} note 13, at 13; Stephen Weinstein, \textit{supra} note 11, at 63-64. It seems that this area of the law is highly regulated and its potential impact must be considered when negotiating and drafting a sales agency contract.
  \item Barry M. Fisher, \textit{supra} note 10, at 47; Jean-François Buffoni, \textit{supra} note 3, at 5-6.
  \item \textit{The Franchise Act}, R.S.A., 1980, c.7-17.
  \item Barry M. Fisher, \textit{supra} note 10, at 54; see also Jean-François Buffoni, \textit{supra} note 3, at 9.
  \item Cameron D. Stewart, \textit{supra} note 13, at 26.
\end{itemize}
with at one end the distributorship-like franchise, where the franchisee simply resells the franchisor's products, and, at the other end, a franchising system, where the franchisor provides a whole range of services and where it controls and supervises to a significant degree the franchisee's business operations. However, in each system the franchisee remains an independent contractor and franchising systems generally are independent businesses. Only where the control of the franchisor over the franchisee and its business is of a very high degree, may a court find that an agency relationship actually exists. In such a case, the "franchisee" is no longer an independent contractor.

2.2. Legal Implications of Distribution Agreements

2.2.1. In General

In Canada a distribution agreement is primarily governed by the principles of contract law. But there is a substantial number of other statutes which relate to distribution agreements and which might affect the distribution of goods by either a foreign or a domestic manufacturer. Furthermore, the application of the legislation may also vary from province to province and depending on the type of product or the needs of the manufacturer and distributor. Eventually, there are also specific international treaties and

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25  The same is valid for Switzerland.
26  Cameron D. Stewart, *supra* note 13, at 11. He emphasizes, that "although the legislation throughout Canada, including Quebec, is often uniform, the differences are sometimes too significant to ignore. As a result, the laws of each province where business will be conducted should be considered", *ibid*, at 11 fn 30.
agreements to which the target countries are parties and which may also have an effect on the particular distribution agreement.27

Distribution agreements between a foreign manufacturer and a domestic distributor can also have an impact on the domestic industry. Imports that are too cheap or simply too damaging to the domestic industry or economy are not in the interest either of industry or society.28 There are several statutes which govern the import and export of goods. In an international business relationship the most relevant legislation in Canada includes the Customs Act,29 the Customs Tariff Act,30 the Export and Import Permits Act,31 and the Special Import Measures Act.32 There are other acts that may regulate the use and importation of the product, depending on its type.33

27 The general rules of public international law that have been incorporated into the Canadian common law should also be taken into consideration; Cameron D. Stewart, supra note 13, at 12.

28 Relief is available to domestic producers. In Canada, for example, anti-dumping relief, countervail relief and safeguard actions are available when the domestic producer can show that the import of the foreign products is causing or likely to cause material injury to the production in Canada of such goods. See Simon V. Potter, "Using and Avoiding Anti-Dumping, Countervail and Safeguard Actions", in Canadian Bar Association Institute, ed., International Trade for the Non-Specialist: What the Generalist Needs to Know (Montréal: Canadian Bar Association, Continuing Legal Education, 1988), 1 and the Special Import Measures Act ("SIMA"), R.S.C. 1985, c. S-15.

29 S.C. 1986, c.1. This Act implements governmental policy in respect to customs reporting and duties; Cameron D. Stewart, supra note 13, at 15.

30 R.S.C. 1985, c. C-54. This Act imposes the duty payable on the goods; Cameron D. Stewart, supra note 13, at 15.

31 R.S.C. 1985, c. E-19. This Act restricts the import and export of certain goods and with certain countries; Cameron D. Stewart, supra note 13, at 15.


33 For example, the Hazardous Products Act, R.S.C. 1985, c. H-3 and the Food and Drugs Act, R.S.C. 1985, c. F-27, which are more of a general nature, and the several other acts which govern liquor, tobacco, radiation emitting devices, explosives, animals, agricultural products, and plants. See Cameron D. Stewart, supra note 13, at 15 fn 56.
A number of different statutes regulate the labeling, packaging and advertising, and language requirements. The application of the different statutes depends in particular on the type of the product involved. Furthermore, a lot of legislation is concerned with consumer protection and covers a wide range of topics such as the sale of goods, consumer credit, unconscionable transactions, unfair trade and business practices, and product warranty and liability. In Canada, such consumer protection legislation aims at the protection from excessive prices, unfair credit terms, defective goods, and questionable sales techniques.

2.2.2. Competition, Taxes and Intellectual Property

(a) The legislation that affects the distribution of goods almost always governs issues such as competition, taxes and intellectual property. This is not different for an exporter, who is selling abroad through foreign distributors. Thus, it is important that the law applicable in the jurisdiction in which the exporter is using the distributor to promote its product is considered.

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34 The primary statute in this regard in Canada is the *Consumer Packaging and Labeling Act*, R.S.C. 1985, c. C-38, "which sets forth a number of things that must be clearly labeled on prepackaged products in both English and French, including the identity and net quantity of the product and the identity and principal place of business of the person by or for whom the prepackaged product was manufactured or produced for resale"; Cameron D. Stewart, *supra* note 13, at 17.

35 Cameron D. Stewart, *supra* note 13, at 14. There are statutes which are concerned with product safety and liability. The *Hazardous Products Act*, R.S.C. 1985, c. H-3, for example, regulates the advertising, sale, and importation of a number of goods; see Cameron D. Stewart, *supra* note 13, at 14 fn 49.


37 See in particular *infra* 3., and chapter 2.
(b) In Canada, the federal government and each of the ten provinces and two territories levies a tax on income. While residents are taxed on their world income, non-residents are taxed on their Canadian-source income. The most likely concern for a non-resident is whether its carrying on business will constitute carrying on a business in Canada and, therefore, being taxable. However, this is often subject to overriding provisions in a tax treaty between Canada and the country from which the non-resident operates, and "all of Canada's comprehensive tax treaties provide that the Canadian source business profits of a non-resident would not be subject to income tax in Canada unless the profits are attributable to a permanent establishment of the non-resident in Canada." Taxes may also be imposed on imports or exports, but international treaties generally serve to eliminate double taxation. The federal Goods and Service Tax ("GST")\textsuperscript{41}, which "is a broad based value added tax that is imposed at each level of supply at the rate of 7% on most goods and services supplied in Canada",\textsuperscript{42} will apply to the goods imported on the value at the time of importation.\textsuperscript{43}

\textsuperscript{38} The Income Tax Act (Canada), R.S.C. 1985 (5th Supp.), c. 1, subs. 2(1) and 2(3); Cameron D. Stewart, \textit{supra} note 13, at 7.
\textsuperscript{39} Cameron D. Stewart, \textit{supra} note 13, at 8. "Permanent establishment" can be defined as a fixed place of business, such as an office or factory, and normally includes an agent who is authorized to negotiate and conclude contracts for the nonresident principal. As long as a nonresident carries on business through an independent intermediary, it will not be deemed to have a permanent establishment in Canada. See Cameron D. Stewart, \textit{ibid}, at 7-9 and at 35; Jean-François Buffoni, \textit{supra} note 3, at 18-19.
\textsuperscript{40} Jean-François Buffoni, \textit{supra} note 3, at 19.
\textsuperscript{42} Cameron D. Stewart, \textit{supra} note 13, at 36.
\textsuperscript{43} Cameron D. Stewart, \textit{supra} note 13, at 36. "To eliminate the cascading effect of the GST, a system of input credits allows most businesses to claim a credit for any GST paid on the purchase of goods or services. The net result is that the GST component on most goods and services ultimately paid by the consumer will be 7% of the final price"; Cameron D. Stewart, \textit{ibid}.
(c) Intellectual property legislation affects the distribution of goods significantly. No matter what form of business organization has been chosen, the intellectual property of a manufacturer or supplier of goods is affected. During a business relationship confidential information is exchanged by the parties; licensing of patents, industrial design and trademarks are also often involved. An appropriate protection of the intellectual property is therefore essential. The legislation which is in particular applicable in Canada includes the *Patent Act*[^44], the *Trade Marks Act*,[^45] and the statutes regarding Copyright[^46] and Industrial Design[^47].

With respect to the distribution of goods in Canada the appropriate protection of the patents and the trademarks associated with the goods is most essential.

(aa) Like in other countries, the basic concept of granting a patent for new inventions in Canada is a "limited term monopoly in an invention in return for full technical disclosure

[^46]: Copyright Act, R.S.C. 1985, c. C-42.
[^47]: Industrial Design Act, R.S.C. 1985, c. I-9. See Cameron D. Stewart, supra note 13, at 37-39; Barry M. Fisher, supra note 10, at 75-79. Besides specific statutes with respect to privacy, access to information, government secrets, and privileged communication, the protection of trade secrets and confidential information is governed by the rules of common law and equity. See Stuart McCormack and Martine Band, "Intellectual Property", in Doing Business in Canada (New York: Matthew Bender, 1997), 11.01 at 11.04[1]. Where a firm has developed a special business process, formula, machine, or other technological know-how, and where these are not public or common knowledge and intended to be secret, the courts usually will extend the protection on behalf of the creator; see Cameron D. Stewart, supra note 13, at 38. Note, that the patent, industrial design and copyright law are governed for the most part by federal legislation, namely by the above mentioned Patent Act, the Industrial Design Act and the Copyright Act and the regulations passed pursuant to these statutes. On the other hand, although the Trade Marks Act and the regulations passed thereunder regulate lots of aspects of the trademark law, there is still a significant body of common law applicable to the protection and enforcement of trademarks. See Robert H. Barrigar, "Intellectual Property & Grey Markets", in The Continuing Legal Education Society of British Columbia, ed., Product Distribution (Vancouver: The Continuing Legal Education Society of British Columbia, 1988), 1.1. at 1.1.07-08.
The purpose is to assist progress of science and technology by disclosing the inventions and in return to give the patent owner the opportunity to bring in the investment made in research and development which finally led to the invention and to obtain due reward for it. In Canada, when the application passes the foregoing test, a patent will be granted for a period of seventeen years with no renewal fees or taxes payable, which grants to the patentee "the exclusive right, privilege, and liberty of making, constructing, using and vending" the invention, covered by the patent during its term. Canadian patents are presumed to be valid, but this presumption can be overcome by an attacker. Under Canadian patent law compulsory licenses may be granted to prevent abuse of monopolies through patents. Section 67 of the *Patent Act* sets out what constitutes abuse of monopoly; most often is this the case, when - without satisfactory justification - a patent is not being worked in Canada on a commercial scale.

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50 S. 46 of the *Patent Act*. Canada is an exception; all other major countries "require the periodic payment of maintenance fees to keep a patent in force for its full term", Robert G. Hirons, *supra* note 48, at 100.


52 The onus of proof is on the person who is alleging invalidity of the patent; Robert G. Hirons, *supra* note 48, at 94.

53 Robert G. Hirons, *supra* note 48, at 97-98; Barry M. Fisher, *supra* note 10, at 75. "A compulsory license may also be sought in the following circumstances: (a) if the working of the invention within Canada on a commercial scale is being prevented or hindered by the importation of the patented article by the patentee, under or through him or by those against whom he is not taking infringement action; (b) if demand is not being met on reasonable terms; (c) if refusal to grant licenses prejudices the trade or industry, and it is in the public interest that licenses be granted; (d) if conditions attached to the use, license or purchase of the patented article by the patentee unfairly prejudice the trade or industry in Canada; or (e) if the patent is utilized to unfairly prejudice the manufacture, use or sale of materials not protected by patent"; Barry M. Fisher, *ibid*, at 76.

There is no world-wide patent. A owner of an invention has to apply for a patent separately in each country where it wants its invention protected. European countries, including Switzerland, have
(bb) A foreign manufacturer or supplier may seek and obtain the protection of its trademark in Canada under the *Trade Marks Act*. An application for registration can be based upon actual use in Canada, proposed use in Canada, making known in Canada, and registration and use in a foreign country. In addition, the trademark must be a registrable trademark. To be a trademark it must be a mark and it must be used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him or her from those manufactured, sold, leased, hired or performed by others. As one of the authors puts it, "[distinctiveness is of the essence of a trade mark."  

Trademarks in Canada are issued for an initial term of fifteen years and they may be renewed every fifteen years, as long as the mark is in use. Protection of the trademark is provided under common law and under the *Trade Marks Act* without obtaining subscribed to a European patent system, with the result that an application for a patent in one country is effective in some or all of those countries. See Robert G. Hirons, *supra* note 48, at 100.


See s. 2 of the *Trade Marks Act*. Section 9 of the *Trade Marks Act* sets out a list of prohibited marks in order to prevent any erroneous identification of goods and services with any of the government or charitable organizations. Furthermore, to be registrable a trade mark must still meet the requirements set out in s. 12 of the Act, that is: (1) it must not primarily be a name or the surname of an individual who is living or who has died within the preceding thirty years, (2) it must be neither clearly descriptive nor deceptively misdescriptive of the character or quality of the goods, or of the person employed in their production, or of their place of origin, (3) no registration will be granted to a word which is the name in any language of the wares or services, and (4) the mark proposed to be registered must not be confusing with a registered mark. See Stuart McCormack and Martine Band, *supra* note 47, at 11.05[4]. See also Robic-Leger, *Canadian Trade-Marks Act, Annotated* (Toronto: Carswell, 1991, released 1997), at 12-1 - 8; Donna G. White, *supra* note 54, at 1-3.

Robert H. Barrigar, *supra* note 47, at 1.1.03.

However, registration of the trademark has some advantages, such as deemed distinctiveness throughout the country, the ease of bringing an action for trademark infringement in the Federal Court or a provincial court of competent jurisdiction without having to prove a reputation for the trademark, and the advantage of public notice. Furthermore, after registration for five years the trademark is accorded a measure of incontestability.

In the context of product distribution, the licensing of a trademark is an area of particular concern. Section 50 contains the conditions according to which the owner of a trademark may allow its licensee to use the trademark without impairing the distinctiveness of the trademark. Licensed use of the trademark is deemed to be use by the trademark owner "provided that such use is under the direct or indirect control of the owner with respect to the character of quality of the wares produced and services performed by the licensee in

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58 Section 7 of the Trade Marks Act contains a statutory statement of a law of passing off. A passing off action may, therefore, be based on either the common law or s. 7. This two-sided nature of passing off is of some concern to the practitioner. Whereas an order of a provincial court in a common law action is limited to the province in which the order is issued, the Federal Court of Canada may issue an order which is binding throughout Canada. On the other hand, the jurisdiction of the Federal Court is limited to actions based on s. 7 of the Trade Marks Act which is, arguably, more limited in scope than the common law action of passing off. See Stuart McCormack and Martine Band, supra note 47, at 11.06[05].

59 Robert H. Barrigar, supra note 47, at 1.1.03. See also Donna G. White, supra note 54, at 21-22.

60 The trademark "cannot be invalidated on the ground of prior use of a confusing mark unless it is established that the person who adopted the registered mark did so with knowledge of the prior use", Donna G. White, supra note 54, at 20.

61 Robic-Leger, supra note 55, at 50-4. This legislation was introduced in 1993 by the Intellectual Property Law Improvement Act (S.C. 1993 c.15 s. 69) and repealed the former concept of registered user. According to this "old" legislation, the only possibility for one, who was not the registered owner of a trademark to utilize the trademark without infringing or invalidating it, was to file an application for registered user with the Canadian Trademarks Office. Any licensing outside of the registered user provisions or failure to file such applications could have lead to the invalidity of the trademark due to loss of distinctiveness. See for the former legislation Barry M. Fisher, supra note 10, at 77 and Stuart McCormack and Martine Band, supra note 47, at 11.05[10].
association with the mark”.\textsuperscript{62} Section 50 applies to registered and unregistered trademarks, and both, to past or future use of the trademark by a controlled licensee.\textsuperscript{63} Normally, only the owner can sue for infringement of a registered trademark. Under subs. 50(3) of the \textit{Trade Mark Act}, however, a licensee may take an action for infringement of the trademark in its own name as if it were the owner, provided that the licensee has called "on the owner to take proceedings for infringement" and that the owner has refused or neglected "to do so within two months after being so called on".\textsuperscript{64} It should be noted, that this right of the licensee is subject to any agreement to the contrary between the owner and the licensee itself.\textsuperscript{65}

The parties may also consider using the so-called certification marks\textsuperscript{66} for licensing purposes.\textsuperscript{67} But they have some limitations, since the use by the owner of the certification mark itself "will disentitle the mark to protection of the statute".\textsuperscript{68} Therefore, where the

\textsuperscript{62} Donna G. White, \textit{supra} note 54, at 107.
\textsuperscript{63} Donna G. White, \textit{supra} note 54, at 108.
\textsuperscript{64} Subs. 50(3). See also Robic-Leger, \textit{supra} note 55, at 50-8.
\textsuperscript{65} Subs. 50(3).
\textsuperscript{66} See s. 23 of the \textit{Trade Marks Act}. "A certification mark is one owned by a person who is not a trader in the wares or services in connection with which the mark is used, but whose licensees are permitted to use the mark to indicate that the wares or services upon which or in connection with which it is used, meet the owner's defined standard"; Peter A. Brown, \textit{supra} note 54, at 103. See also Stuart McCormack and Martine Band, \textit{supra} note 47, at 11.05[10].
\textsuperscript{67} This was the case under the "bid" legislation. By using certification marks the parties did not have to follow the process of registration as registered user, which was only available for registered trademarks. Furthermore, a designated licensee could use the trademark not until it was registered and he or she had been recorded as registered user, which process could take several months or sometimes a year. See Barry M. Fisher, \textit{supra} note 10, at 77.
\textsuperscript{68} Barry M. Fisher, \textit{supra} note 10, at 77-78. See also Stuart McCormack and Martine Band, \textit{supra} note 47, at 11.05[10].
trademark owner itself wishes to use the mark in Canada, the use of such a certification mark can only be of limited value.\textsuperscript{69}

Trademark owners who have either abandoned the mark or, pursuant to s. 45 of the Act, have been required to declare that the mark is in use and have not satisfied that requirement, can lose their rights in the trademark; if the reason for the non-use of the mark is insufficient, the mark may be expunged or amended.\textsuperscript{70}

\section*{2.3. Exclusivity Provisions}

\subsection*{2.3.1. In General}

Distribution agreements often contain provisions for exclusivity. Their existence and their meaning normally depends on the relative bargaining power of the parties when negotiating the agreement.

The term "exclusivity" can have different meanings. In most cases exclusivity is limited as to the territory and/or a certain type of product.\textsuperscript{71} It is important that the parties deal explicitly with exclusivity and that they clearly state their intentions regarding territory, products to be sold, quotas, prices and other restrictive provisions. For example, if there is no provision in the agreement dealing with exclusivity regarding the territory, the court will not imply a restriction on the manufacturer to deal or to contract with others in the

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\textsuperscript{69} Barry M. Fisher, supra note 10, at 78, gives the example of a franchisor, who contemplates the possibility of taking over a franchise in the event of a default by the franchisee.

\textsuperscript{70} Barry M. Fisher, supra note 10, at 78.

\textsuperscript{71} Stephen Weinstein, supra note 11, at 68; Cameron D. Stewart, supra note 13, at 30. Stewart understands exclusivity also with respect to the limitation of the duration of the agreement. Furthermore, exclusivity can also be understood in respect to a group of customers to which the product can or cannot be sold, for example, a restriction that the product should not be sold to "discounters".
same territory unless the true construction of the agreement requires the implication of such a term. Furthermore, the court will imply an exclusivity term only "to give business efficacy" to the contractual arrangements made by the parties.\(^7^2\)

Such exclusivity provisions in a distribution agreement are not invalid \emph{per se}.\(^7^3\) They may be entered into to encourage trade and business or they may provide the restricted party with the opportunity to perform its profession or business, because it would not be engaged in the specific business without the arrangements with the manufacturer.\(^7^4\)

2.3.2. Exclusivity with Respect to Territory

(a) The exclusive appointment of a distributor with respect to a particular territory is almost customary in Canada.\(^7^5\) It means that the manufacturer agrees not to name any other distributor of its products in the same territory. Depending on the specific terms in the agreement the manufacturer may also agree that all orders and inquiries with respect to the product and territory have to be dealt with by the distributor, even those which the manufacturer has received independently. A distributor may also seek a covenant that the

\(^7^2\) Cameron D. Stewart, \emph{supra} note 13, at 30.
\(^7^3\) G.H. Fridman, \emph{The Law of Contract}, 3rd. ed. (Toronto: Carswell, 1994), at 415; see also infra, chapter 2.
\(^7^4\) This was the situation in \emph{Great Eastern Oil & Import Co. v. Chafe} (1956) 40 M.P.R. 21., where the manufacturer provided the distributor with premises to favorable terms and the product to sell. But even without such advantages for the distributor such an exclusive agreement may be held valid and enforceable.
manufacturer does not sell its products to any third party who is selling the product, or who is selling to another party who is selling the product in the territory.\textsuperscript{76}

(b) The reasons for appointing an exclusive distributor are diverse. However, most often such exclusivity provisions are a means of building up a more effective distributing system by organizing co-operation among the different distributors of one manufacturer and in doing so by preventing intra-brand competition.\textsuperscript{77} To this extent, such exclusivity provisions are in the interest of both the manufacturer and the distributor. An exclusively appointed distributor can concentrate on the distribution of the goods in its territory without being worried about competition from other distributors of the same manufacturer in that territory. Furthermore, a distributor, who may have provided capital and resources for the development of the market and the marketing of the product prefers to establish its business in a somehow "protected" area. On the other hand, a manufacturer may seek to secure that its products are being promoted and sold in the most effective way by imposing provisions regarding sales quotas. It may also allow the distributor to appoint sub-distributors or to establish a sales staff in case the distributor's operations are not expansive enough to cover the designated territory.\textsuperscript{78} In such cases the manufacturer may wish to have certain control regarding the selection and activities of the sub-distributors and staff.

\textsuperscript{76} Barry M. Fisher, \textit{supra} note 10, at 48-49; Cameron D. Stewart, \textit{supra} note 13, at 30.

\textsuperscript{77} "Intra-brand competition" is the competition within an individual product brand or distributing system. By contrast, "inter-brand competition" describes the competition among competitive brands.

\textsuperscript{78} Stephen Weinstein, \textit{supra} note 11, at 68.
(c) Typically a sole distributorship system represents a special form of a selective-distribution system and is then a means for the manufacturer to sell its products in a very effective, "monopolized" way. However, an exclusive distributor of a product is not protected from the grey market. Products which are legally imported into Canada, but sold through a non-official distributor, do not affect the exclusivity provisions in the agreement between the exclusive distributor and the manufacturer.

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79 Such systems may be prohibited by the Competition Act, see infra, chapter 2.
80 Stephen Weinstein, supra note 11, at 68. The term "grey market" is used for an unauthorized market for goods which were legally introduced into the marketplace in some other countries but were not intended to be sold ultimately in the first country. Such goods are not counterfeit goods, they emanate from the expected manufacturer or original source of goods, but they have reached the unauthorized market through channels of trade not authorized by the original source of trade. See Robert H. Barrigar, supra note 47, at 1.1.27.
81 However, the authorized Canadian distributor of the products may be able to bring a cause of action against the unauthorized importer. Such action can be based on trademark infringement, if the distributor is the owner of the trademark rights in Canada. But the problem may still be that the trademark is held to be invalid because it fails to distinguish the goods of the Canadian trademark owner (the authorized distributor) from the goods of others, such as the goods sold by the original manufacturer. In Breck's Sporting Goods v. Magder (1975) 17 C.P.R. (2d) 201 and Wilkinson Sword (Canada) Ltd. v. Juda [1968] Ex. C.R. 136, the courts have found the trademark registrations invalid and the trademark unenforceable because of nondistinguishability. However, in case the authorized distributor does not own the trademark rights in Canada it may base its cause of action against the unauthorized importer on the concept of "passing-off". This was the case in Consumer's Distributing Co. Ltd. v. Seiko Time Canada Ltd. (1985) 1 C.P.R. (3d) 1. Seiko Time, the exclusive distributor of Seiko watches in Canada brought an action against the unauthorized importer and argued that its product comprised not only the watch itself, but was a packaged product consisting of four elements, namely, the watch, the point of sale service and an instruction booklet, the warranty properly filled out by an authorized dealer, and the after sale service. Since Consumer's only provided the watch, it was held at the trial (and confirmed by the Court of Appeal) that Consumer's were passing off a different product under the Seiko name and that it was creating confusion in the market place and damage to the goodwill of the authorized Seiko distributor. The Supreme Court of Canada was of another view and "characterized the point of sales services as being merely a technique of doing business which was not subject to a monopoly". The warranty and the after-sales services were held to be the same thing and gratuitously provided by Seiko. In effect, it was held that the relationship between Seiko customers with Seiko was the same as the one between the customers of Consumer's with Consumer's. See Peter A. Brown, supra note 54, at 125; Robert H. Barrigar, supra note 47, at 1.1.30. For further information see also Jacques Picard, "The Legality of International Gray Marketing: A Comparison of the Position in United States, Canada and the European Union" (1996) 26 Canadian Business Law Journal, 422 at 432-433.
2.3.3. Exclusivity with Respect to the Product

(a) As mentioned before exclusivity can also be agreed upon the type of product to be sold by the distributor. In such cases the distributor agrees to deal exclusively with the manufacturer's products (or its products specifically described in the agreement) and not to sell, at the same time, other products or products which are in competition with the manufacturer's products.\(^\text{82}\)

(b) The question which arises is whether such an agreement is in restraint of trade. A contract is in restraint of trade when a party is restricted in its future freedom to act regarding its trade, business or professional life.\(^\text{83}\) The two classic situations which raise discussion about restraint of trade have been the sale of a business and the regulation of the after-termination conduct of the employee in an employment contract. Since then the courts have recognized other contracts which may - as long as it is "in the public interest" - be equally in restraint of trade as the traditional ones.\(^\text{84}\) This development has also involved distribution agreements where the manufacturer supplied the distributor with its product, on the condition that the distributor "accept(ed) the obligation of selling only the manufacturer's (...) product, or otherwise fetter(ed) his, the trader's, future liberty with respect to trading".\(^\text{85}\) However, distribution agreements typically do not involve a master-

\(^{82}\) Stephen Weinstein, supra note 11, at 68.
\(^{83}\) G.H. Fridman, supra note 73, at 389, and about the doctrine of restraint of trade, its development and application, see 388-415. See also Davies, Ward & Beck, Competition Law of Canada (Toronto: Juris Publishing Inc., 1996), at 2-3.
\(^{84}\) G.H. Fridman, supra note 73, at 408; the "public interest" principally depended on the social and economic climate of the time.
\(^{85}\) G.H. Fridman, supra note 73, at 410. Agreements to purchase from designated sources, agreements to resell products at specified prices and agreements tying the sale of one product to another have also been regarded as in restraint of trade; see Davies, Ward and Beck, supra note 83, at 2-3 and the there mentioned jurisdiction.
servant relationship; indeed, it can be said that the parties are - more or less - bargaining equally. It depends on the circumstances and the nature of the agreement in each case, whether such a covenant can be considered as an unreasonable restraint of trade.

There are cases where exclusivity agreements have been protected and there are cases where such agreements have been held to be too restrictive and going beyond what was necessary. The test is reasonableness; the restriction has to be reasonable with respect to the interests of the parties and the interest of the public. Actually, there are at least two questions to be asked: (1) Is the contract under review an agreement in restraint of trade, and (2) once categorized as such, whether is it reasonable or not. However, the validity of a covenant "can be determined only upon an overall assessment of the covenant, the agreement in which it is found, and all of the surrounding circumstances".

In the Esso case the House of Lords made an important distinction "between an agreement under which a current trader agrees to give up some of his present freedom to

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86 G.H. Fridman, supra note 73, at 410.
88 G.H. Fridman, supra note 73, at 411; Davies, Ward & Beck, supra note 83, at 2-4 - 8. But it seems that according to the Esso-case reasonableness with respect to the public interest is possibly the true and correct basis for any decision; G.H. Fridman, ibid, at 411-412.
89 Stephens v. Gulf Oil Canada Ltd. (1974) 3 O.R. (2d) 241 at 249-250. According to G.H. Fridman, supra note 73, at 392, the doctrine of restraint of trade requires a four stage inquiry: (1) is the covenant in restraint of trade, (2) is the restraint against public policy and therefore void, (3) can the restraint be justified as reasonable with respect to the interest of the parties, and (4) can it be justified as reasonable with respect to the public interest.
90 G.H. Fridman, supra note 73, at 392.
91 The petroleum company and a company which was operating two garages entered into two agreements, each related to a garage, under which the company agreed to purchase its motor fuel exclusively from Esso. One agreement was secured by a mortgage of five years, the other was secured by a mortgage to last 21 years. The result of these arrangements was that the garage company was bound to the covenant for the duration of the respective mortgages. However, the company was also enabled to carry on
trade in return for some advantage from the party claiming the benefit of the covenant in restraint, and an agreement under which a person not a trader obtains the ability to trade (...) on the terms which include the restraint".92 The former gives up a part of its freedom which will only be good if its surrender is reasonable, the latter has no prior freedom to lose and can be a subject of restraint as long as it is reasonable with respect to the public policy.93 In Canada, Esso was followed by the already mentioned Stephens case. The Ontario High Court accepted the reasoning and principles of the decision in Esso and the distinction made by the House of Lords "between buying property subject to a restraint and granting a restraint on property already owned by the covenanator".94

(c) Despite the existence of the Competition Act, common law actions remain important in situations where restraint of trades are involved. This because the basis for recovery under a common law action is often wider than the basis provided by the Competition Act.95 Furthermore, as we have seen agreements in restraint of trade are first of all its business. But when the cheaper petrol was sold on the market the garage company wanted to stop selling Esso's petrol and to do its business with the other "cheaper" petrol company. Esso sought injunctions restraining the company from buying or selling motor fuels other than its own. The House of Lords applied the doctrine of restraint of trade and held that the first agreement over five years was reasonable and enforceable but that the second agreement was too long and therefore void as being unreasonable in restraint of trade. Esso, [1968] A.C., 269-271; G.H. Fridman, supra note 73, at 411-412.

92 G.H. Fridman, supra note 73, at 412. "... the agreements in the present case were within the scope of the doctrine of restraint of trade inasmuch as the appellants (the garage company) gave up their previous rights to sell other petrol", Esso, [1968] A.C., 271. See also the judgment of Lord Reid at 298f.

93 G.H. Fridman, supra note 73, at 412.

94 G.H. Fridman, supra note 73, at 414.

95 With respect to reviewable matters, there is no private right of action to force the Tribunal to issue an order. Only if an order is issued and breached by the supplier a right of action is provided to recover damages suffered from such breach and other costs. See s. 36 of the Act and Davies, Ward & Beck, supra note 83, at 5-38.
unenforceable; only if they are reasonable in the interest of the parties and the public, they are valid and enforceable. This fact can constitute an important defense.96

3. Competition Law

3.1. Introduction and History

(a) The distribution of products, goods and services,97 is vital in every society and has a major impact on the whole economy. Distribution arrangements such as franchise systems, distributorship and agency agreements all depend on a more or less extensive co-operation between the different companies in the market that are involved in the distributing process. Such arrangements often contain restrictions concerning the conduct of the individual distributor and supplier, franchisee and franchisor, or agent and principal. However, depending on each case and its facts, such arrangements can raise issues under the Competition Act.98

(b) The Competition Act as it is now in force in Canada marks the end of a long evolution which started in the 16th century with the common law doctrine of restraint of trade. The common law of restraint of trade was primarily concerned with disputes between individuals and not much affected by cartels or other restraints of trade on economic

97 In the Competition Act, R.S.C., c. C-34, goods and services are referred to as "products", and goods alone are called "articles", see subs. 2(1) of the Act.
98 Competition Act is the short title of this statute. The long title is An Act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition. The long title may be helpful as an aid in interpretation, but the Interpretation Act, R.S.C. 1985, c. I-21, is silent on this point. See Robert S. Nozick, The 1997 Annotated Competition Act (Toronto: Carswell, 1996), at 1.
welfare. In the last decade of the nineteenth century the first combines or antitrust statute in the U.S. and Canada emerged. This was mainly in recognition that contractually imposed restraints between the parties of an agreement may have a negative impact on the welfare of consumers and also on the welfare of rivals. In 1889, Canada passed an Act which made conspiring, combining, agreeing or arranging in order to lessen competition unduly a criminal offence. During the general codification of the criminal law in 1892 this act became part of the Criminal Code, where the provisions remained until 1960 when they were brought into the Combines Investigation Act.

In 1910 the Combines Investigation Act was enacted and dealt mainly with combinations of mergers and monopolies. The legislation was subsequently amended to cover price discrimination and predatory pricing in 1935, resale price maintenance in 1951 and misleading advertising and disproportionate promotional allowances in 1960.

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101 Davies, Ward & Beck, supra note 83, at 1-2; Bruce Dunlop, David McQueen, Michael Trebilcock, supra note 99, at 46 and at 49; R.J. Roberts, supra note 99, at 15.

(c) In 1966 the government attempted to enact major revisions to the *Combines Investigation Act* and in 1969 the Economic Council of Canada released its *Interim Report on Competition Policy*.\(^{103}\) However, the proposed legislation which appeared in 1971 as Bill C-256 was strongly opposed by the business community in Canada and the government was eventually forced to withdraw the Bill. As a result, the government decided to revise the Act in two distinct stages.\(^{104}\) The first stage of amendments became law on January 1, 1976, which added, *inter alia*, civil damages and civil reviewable matters to the Act. Reviewable practices such as refusal to supply, consignment selling, exclusive dealing, tied selling and market restrictions had been “treated” and could have been reviewed by the Restrictive Trade Practices Commission (“RTPC”).\(^{105}\) The price maintenance and misleading advertising provisions were also substantially revised and the Act was extended to include services as well as articles.\(^{106}\) On June 1986, the second stage of the amendments occurred when the government enacted the new titled *Competition*
The new legislation abolished the RTPC and replaced it with the Competition Tribunal. Under the *Competition Tribunal Act* the Tribunal was structured as an adjudicative body and it was deemed a court of record with the same powers as a superior court with respect to the examination of witnesses and the enforcement of its orders. The 1986 amendments also incorporated new administrative provisions and enforcement powers which were consistent with the *Charter of Rights and Freedoms*. On the other hand, they carried over the basic criminal provisions regarding conspiracies, price discrimination and price maintenance as well as the civilly reviewable matters with respect to refusal to deal, consignment selling, exclusive dealing, tied selling and market restriction.

Today, the *Competition Act* represents a combination of both criminal and administrative approaches to the regulation of anti-competition activities. It also includes civil remedies that may be pursued by persons or companies who suffered losses or damages as a result

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of violations of the criminal prohibitions of the Act or orders issued by the Tribunal pursuant to this Act. 112

3.2. The Purpose of the Competition Law

(a) In Canada, the aim of both the common law and the restrictive trade practices legislation is the preservation and protection of competition. It is intended that the industry should be regulated by the forces of competition and the free market, rather than the government or dominant members of the business world. Hence, only such activities that restrict or interfere with competition are governed by the law. 113 Most of the anti-competitive activities are now regulated and controlled by the Competition Act. The Act is designed to eliminate those practices that interfere with free competition and to control industry and trade by way of prohibiting and remedying collusive, restrictive and exclusionary activities in order to ensure that economic resources are allocated beneficially within society. 114


A bill to amend the Competition Act was proposed on November 7, 1996 (Bill C-67). This was after a public consultation by the Bureau and mainly as a reaction to the change in the business and enforcement environment, in particular the growth of technology and the liberalization of global trade; see Competition Act Amendments, June 1995, Discussion Paper, in Donald S. Affleck and K. Wayne McCracken, Canadian Competition Law (Toronto: Carswell, 1992, released December 1996), at 50-49, and Davies, Ward & Beck, supra note 83, Legal Letter No. 3 and 5. However, the proposed amendments do not suggest any changes with respect to the provisions discussed in chapter 2 of this paper.


114 Cameron D. Stewart, supra note 13, at 33; Donald S. Affleck and K. Wayne McCracken, supra note 112, at I-2; John A. Willis, supra note 113, at 479.
The Act is designed to preserve the conditions within which the market is able to operate freely. It prevents companies from creating conditions and rules which are able to inhibit or prevent competition in any major way. Moreover, deception in the marketplace and certain trade practices are prohibited or may at least be challenged. The Act also contains complex rules with respect to the prices which may be charged and to the promotional allowances which may be offered by the supplier. With this legislation competition should be protected and promoted in order to encourage productivity, enterprise and efficiency. It is believed that increased competition will provide the consumer with quality products, choice and the best possible price and should make Canada more competitive abroad.

From an economic viewpoint, the ultimate goal of competition law is the maximization of consumer welfare, which can best attained by promoting efficiency. Underlying this economic view is the argument that "consumers benefit from a competitive market in which rival firms bid down prices as they compete for market share. (...) The interests of the consumer are often undermined when there are few sellers, because the absence of rivals confers power on the few sellers to maintain higher prices and to obtain greater profits at the expense of the consumer and of efficiency. Thus, market share, and its frequent consequence, market power or the ability to affect prices in the market, are

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115 Donald S. Affleck and K. Wayne McCracken, supra note 112, at 1-2.
116 Director of Investigation and Research, Competition Act, An Overview of Canada's Competition Act - Information Bulletin No. 4, Consumer and Corporate Affairs, Canada, 1990, at 1.
important factors in assessing the performance of a market". Eventually, in promoting the economic efficiencies consumer welfare should be improved and maximized.

(b) An exclusive distribution agreement is one example of a "vertical restraint", a term often used in connection with competition issues. As we have seen, it describes an arrangement between individuals or firms in a vertical relationship for the distribution or production of products. In such arrangements a supplier may require a particular resale price for the product and in doing so restrict the freedom of the distributor to sell the product (resale price maintenance). The distributor's freedom to dispose of the products may also be limited by a supplier requiring that the product be sold only to certain customers, or from a certain territory (market restrictions). Vertical restraints often contain terms requiring a customer to deal exclusively with the supplier's product or to buy another product from the supplier in order to acquire the one product it wanted (exclusive dealing and tied selling). In certain circumstances such arrangements may have an anti-competitive impact and may then become an issue in relation to the Competition Act.

Marilyn MacCrimmon and Asha Sadanand, supra note 117, at 720. Market share and market power can have an impact on the entry into the market by a potential rival and therefore lessen competition substantially.

Bruce Dunlop, David McQueen, Michael Trebilcock, supra note 99, at 63.

Marilyn MacCrimmon and Asha Sadanand, supra note 117, at 713.

Other provisions of the Act which should be considered when dealing with distribution agreements are "refusal to deal", "consignment selling", "abuse of dominant position" and "delivered pricing".
3.3. The Structure of the *Competition Act*

(a) The conduct dealt with in the Act can be categorized into two groups. Certain types of conduct are prohibited by the Act; those prohibitions are part of the criminal law. Conspiracies and combinations that unduly lessen competition and price fixing and price discrimination methods are examples of such criminal offences. They are subject to criminal law procedures and penalties.\(^\text{122}\) The prosecution of these prohibited practices is subject to the standard of proof of the criminal law, that is, that the Crown has to prove beyond any reasonable doubt that the accused committed the offence.\(^\text{123}\) Vertical price restraints such as resale price maintenance belong to this group of criminal offences.

Another type of conduct is identified by the Act as "reviewable trade practices" or "restrictive trade practices". Non-price vertical restraints such as the already mentioned refusal to deal, exclusive dealing, tied selling, market restrictions, consignment selling and abuse of dominant position are part of this second group; they are not illegal *per se* but can be challenged in a civil procedure on application by the Director of Investigation and Research (the "Director") to the federal Competition Tribunal (the "Tribunal"). Until the Tribunal prohibits such a reviewable practice, it is absolutely legal to engage in such

\(^{122}\) See the list of the criminal prohibitions of the Act in Donald S. Affleck and K. Wayne McCracken, *supra* note 112, at 1-1.

\(^{123}\) See John A. Willis, *supra* note 113, at 480, and the there cited case *R. v. British Columbia Sugar Refining Co. Ltd. and B.C. Sugar Refinery Ltd.* (1960) 32 W.W.R. 577 at 596, where the onus in such cases has been described in the following words: "As this is a criminal prosecution there are certain principles that I must apply to its consideration. They are: (1) The onus is on the crown throughout to prove its case and every essential part of it by relevant and admissible evidence beyond a reasonable doubt; (2) This onus never shifts; (3) There is no onus on the accused to prove their innocence; (4) To the extent that the guilt of the accused depends on circumstantial evidence, that evidence must be consistent with the guilt of the accused and inconsistent with any other rational conclusion; (5) In the construction of a penal statute, such as the *Combines Act*, if there are two or more reasonable interpretations possible, the interpretation most favorable to the accused must be adopted."
practices.\textsuperscript{124} Indeed, those practices are very common in business activity. Even where the Tribunal has prohibited a certain trade practice, it is only prohibited against the person or company named in the order; the Tribunal has no power to forbid practices in general. Furthermore, by contrast to the offences, the standard of proof is that of the civil law, which means balance of probabilities and preponderance of evidence.\textsuperscript{125} It follows, that an appropriate assessment of a practice in question can only occur on a case-by-case basis.

(b) The Act regulates the inquiry procedure relating to the reviewable matters as well as the criminal offences. The investigation of any complaint regarding a violation of the Act lies in the hands of the Director.\textsuperscript{126} He or she is provided with broad investigatory powers, including powers to search and seize, to require the production of documents and of information and to examine witnesses in the course of an inquiry.\textsuperscript{127} In the case of a criminal inquiry, the Director may, "in addition to or in lieu of continuing the inquiry, remit any records, returns or evidence to the Attorney General of Canada for consideration as to whether an offence has been or is about to be committed against this Act and for such action as the Attorney General of Canada may wish to take".\textsuperscript{128} Such criminal conduct may be prosecuted by the Attorney General in the Federal Court of Canada or in superior

\textsuperscript{124} Donald S. Affleck and K. Wayne McCracken, \textit{supra} note 112, at I-2; Robert S. Nozick, \textit{supra} note 98, at 160-161.
\textsuperscript{125} Robert S. Nozick, \textit{supra} note 98, at 161.
\textsuperscript{126} An inquiry can be initiated by either the Director him- or herself or by "any six persons resident in Canada" who may apply to the Director for an inquiry; see ss. 9 and 10(1)(a) and (b).
\textsuperscript{127} Section 10 of the Act regulates the commencement of the inquiry; ss. 11, 12 and 15 empower the Director to gather the information. See Donald S. Affleck and K. Wayne McCracken, \textit{supra} note 112, at 30-1 - 9; John A. Willis, \textit{supra} note 113, at 480-481. Those powers are provided for inquiries relating to both civil and criminal matters. See also Gordon E. Kaiser, I. Nielsen-Jones, \textit{supra} note 99, at 498-503 and Davies, Ward & Beck, \textit{supra} note 83, at 3-4 - 17.
\textsuperscript{128} Subsection 23(1) of the Act. Subsection 23(2) empowers the Attorney General to institute and conduct any prosecution or other criminal proceedings under the Act.
provincial courts of criminal jurisdiction.\footnote{S. 73 of the Act.} By contrast, cases involving reviewable matters are dealt with by application of the Director to the Tribunal. Any decision or order made by the Tribunal can be appealed to the Federal Court of Appeal.\footnote{Sections 8 and 13 of the \textit{Competition Tribunal Act}. However, according to subs. 13(2) an appeal on a question of fact is only possible with the leave of the Federal Court of Appeal.} The Competition Tribunal is composed of judicial and lay members in order to provide both judicial competence and economic expertise.\footnote{The judicial members are judges of the Federal Court, Trial Division, the non-judicial specialists are appointed by the Minister of Consumer and Corporate Affairs. In each panel of the Tribunal at least one judicial and one non-judicial member must be present; the presiding member must always be a judge. Furthermore, the power to determine questions of law and to deal with applications for interim orders is reserved to the judicial members only. See ss. 10(1), (2) and 12 of the \textit{Competition Tribunal Act}; R.J. Roberts, \textit{supra} note 99, at 479. The Quebec Superior Court in \textit{Alex Couture Inc. c. Canada (Procureur général)} (1990) 47 B.L.R. 154, emphasized that the lay members' dismissal and remuneration was subject to governmental control and, therefore, held that they do not have the necessary independence and impartiality required for those who sit on a tribunal whose powers are equivalent to a Canadian superior court. This decision, however, was reversed by the Quebec Court of Appeal. See R.J. Roberts, \textit{ibid.}}
Chapter 2: Competition Law

1. Introduction

We have already learnt that the conduct dealt with in the *Competition Act* can be categorized in two groups: reviewable matters and criminal offences. A number of these provisions are directly relevant to the distribution of products and in particular to exclusive distribution agreements. The application of these provisions depends on the particular circumstances in each case and is limited to situations that can be described as likely to be harmful to competition. In order to identify such anti-competitive conduct the Act provides specific statutory tests.

Vertical price restraints, such as resale price maintenance, constitute a behaviour which is *per se* prohibited by the Act, whereas non-price vertical restraints are regarded as reviewable practices. One of the reasons why non-price vertical restraints are regarded as reviewable practices in the Act is the underlying assumption that such restraints, depending on the circumstances and conditions of each case, may be sometimes anti-competitive, at other times perfectly pro-competitive or may have no impact on competition at all.\(^{132}\)

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\(^{132}\) Robert S. Nozick, *supra* note 98, at 161. Already in 1969 the Economic Council of Canada concluded in its *Interim Report on Competition Policy* that "while it was appropriate to subject to essentially *per se* prohibition horizontal price-fixing between competitors, horizontal allocation of markets between competitors, group boycotts preventing entry of new competitors or expansion of new competitors, and vertical price restraints such as resale price maintenance under the criminal law, it was not appropriate to treat as *per se* offences under the criminal law non-price vertical restraints such as refusals to deal, exclusive dealing and tying arrangements, market-access arrangements and consignment selling", R.J. Roberts, *supra* note 99, at 205. This recommendation was followed by the Parliament in 1976; see *supra* chapter 1; 3.1.(c) at fn 105.
In the context with exclusive distribution agreement the sections with respect to refusal to deal (s. 75), exclusive dealing, tied selling and market restrictions (s. 77), abuse of dominant position, consignment selling and delivered pricing (ss. 79, 76 and 81) and resale price maintenance (s. 61) are the most relevant. In the following I will examine these provisions and jurisprudence and concentrate on their potential impact on exclusive distribution agreements.133

2.1. Refusal to Deal

2.1.1. Introduction

(a) One may think that a manufacturer or supplier who has its own business can sell its products to whom it wants. However, under Canadian legislation this is not the case.134 According to the Competition Act, a supplier is not allowed to exercise this right to deal with whom it pleases "if it is used in abuse of a dominant position, enforcement of an illegal resale price maintenance scheme or if it forms part of a group boycott by suppliers".135 But even in the absence of resale price maintenance, attempt to monopolize and group boycott, Canadian legislation, i.e. s. 75 of the Competition Act, prohibits a unilateral refusal to deal.136

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133 This paper does not deal with the merger or conspiracy provisions or other price related criminal offences of the Act, although they may - under certain circumstances - affect distribution agreements.
136 R.J. Roberts, supra note 99, at 208-209. This in contrast to U.S. law which prohibits the refusal to deal only in connection with provisions preventing monopolization, abuse of dominant position etc. See the statement of the U.S. Supreme Court in United States v. Colgate Co., 250 U.S. 300 (1919) at 307: "In the absence of any purpose to create or maintain monopoly the act [Sherman Act] does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise
Under this section the Tribunal has the authority to order one or more suppliers in a market to accept a customer or distributor. Such an order may be issued when the Director is able to establish that in the particular case the buyer cannot obtain adequate supplies of the product in the market, that its business is substantially affected by this inability, and that this inability exists because of insufficient competition between suppliers of the product. Where these criteria are met, the Tribunal may order that the supplier "accept the person as a customer within a specified time on usual trade terms".

Despite its title, it is important to say that the refusal to deal provision does not focus on the refusal itself but rather on the inability to obtain adequate supplies.

(b) An example of a typical refusal to deal case is an exclusive distribution agreement, where the supplier agrees to sell its products exclusively to one distributor. A competitor of that distributor, who is unsuccessful in purchasing products from the supplier may make
a complaint to the Director. Another example may be a manufacturer who decides to terminate the agreement with its distributor and to discontinue the supply of the product. As it will be shown below, it seems that in individual cases s. 75 can be used to break down exclusive arrangements between suppliers and their distributors and to require the supply of the product to an individual complainant, despite the existence of an exclusive dealing arrangement,\textsuperscript{140} or, to force the refusing supplier to accept its former distributor as a customer. However, the refusal to deal provision contains several vague terms and it is therefore difficult to predict whether in a specific case a supplier will be subject to an order or not. For example, it is unclear from the statutory text which type of products are affected by s. 75. Do repair products or parts of the product also qualify as products under s. 75? How has the "market" to be defined in which the customer is unable to obtain adequate supplies? When is a supply product adequate? What happens if the consumer is able to obtain supplies of a product but only at greater costs? When is a refusal to deal substantially affecting the buyer's business? Is this an objective or subjective test? Does "business" refer to the whole business or only to the business which is related to the refused product? How can "substantially" be measured? Does this mean a major impact on the business? When is competition between suppliers insufficient?\textsuperscript{141}

\textsuperscript{140} This even if such an arrangement is not subject to an order under the exclusive dealing provision of the Act (subs. 77(2)). While an order under s. 75 is selective and only requires the supply of an individual complainant, an order under subs. 77(2) requires the abandonment of the entire exclusive dealing scheme, see R.J. Roberts, \textit{supra} note 99, at 222-223.

2.1.2. The Cases

The Tribunal had recently the opportunity to address some of these questions in two cases: *Chrysler*\(^{142}\) and *Xerox*\(^{143}\).

(a) In *Chrysler* the complainant, Mr. Brunet, carried on a successful business of exporting parts for Chrysler automobiles to markets outside of North America. In 1977 he commenced dealing with Chrysler Canada, purchasing from it automotive parts for the sale outside of Canada. In August 1986, he was informed that all his orders with Chrysler Canada were placed on hold. At the same time instructions were given to dealers of Chrysler Canada not to sell Chrysler automotive parts for export. On December 14, 1988, the Director filed an application with the Tribunal under s. 75 requesting to order Chrysler Canada to supply Chrysler automotive parts for export to Brunet.\(^{144}\)

The Tribunal first of all defined the meaning of "product" and "market" in order to be able to determine whether the business of the complainant has been substantially affected and whether he has been unable to obtain supplies because of inadequate competition in the market.\(^{145}\) The problem was whether the products in question were Chrysler Canada auto parts, Chrysler auto parts or auto parts in general. The Tribunal stated that "[p]roducts

\(^{142}\) *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1990) 27 C.P.R. (3d) 1, affirmed (1992) 38 C.P.R. (3d) 25.

\(^{143}\) *Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1991) 33 C.P.R. (3d) 83. These two cases are the only jurisprudence regarding refusal to deal. Under the former refusal to deal provision (s. 31) the Director made three applications to the Restrictive Trade Practices Commission, but they have all been withdrawn because the complainants were subsequently given access to an adequate supply of the product. See I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, *supra* note 111, at 3.1.11. See also Davies, Ward & Beck, *supra* note 83, at 5-5.


\(^{145}\) The elements in subs. 75(1)(c) and (d) were not in dispute.
and markets can only be meaningfully defined in a particular context and for a particular purpose" and that "[i]n the case of para. 75(1)(a) the ultimate test concerns the effect on the business of the person refused supplies". The Tribunal went on that in the export business the effect on the business of the refused person depends on "the demand of the person's customers and whether substitutes are acceptable to them". Because evidence showed that Brunet's customers wanted genuine Chrysler parts and that substituting parts of other suppliers for those of Chrysler was out of the question, the Tribunal defined the products in question as Chrysler auto parts. The statutory exception in subs. 75(2) did not help Chrysler to alter that definition. The Tribunal made it clear that the "product" was Chrysler auto parts not only because of its trademark, since "not only the existence of the trademarks (...) determines the definition [of the product] but rather the demand of Brunet's customers". Yet, the Tribunal recognized that, however rarely, a case may arise where a trademarked product dominates the market because of the specific needs of the

146 (1990) 27 C.P.R. (3d) 10. Davies, Ward & Beck, supra note 83, at 5-10, fn 13, cite the American case Eastman Kodak Co. v. Image Technical Services Inc., 1992-1 Trade Cases, 67,959, where the U.S. Supreme Court reached a similar conclusion in stating that 'because service and parts of Kodak equipment are not interchangeable with their manufacturers' service and parts, the relevant market from the Kodak-equipment owner's perspective is composed of only those companies that service Kodak machines". This case was cited by the Tribunal in Xerox.

147 (1990) 27 C.P.R. (3d) 11. Subsection 75(2) establishes an important exception for products bearing trademarks and brand names. It specifies that an article is not a separate product in a market only because it is differentiated from other articles in its class by a trademark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated. Hence, if a company refuses to supply its goods which possess a trademark or tradename, the potential purchaser cannot complain only because it is not able to obtain this specific brand of product. Michael O. Mungovan, supra note 141, at 72; Davies, Ward & Beck, supra note 83, at 5-13 - 14. Barry M. Fisher, supra note 10, at 71, argues, however before Chrysler was decided, "that this statutory provision with respect to trademark items removes exclusive distributorships from the refusal to supply provisions". See, on the other hand, R. v. Grange (1978) 40 C.P.R. (2d) 214, where the B.C. County Court, after referring to subs. 75(2) and the absence of a similar provision applicable to the price maintenance provision in s. 61 of the Act, held that a particular brand constituted a separate product for the purposes of subs. 61(1)(b), notwithstanding the supplier's offer to supply alternative items of virtually the same quality under a different brand name; Davies, Ward & Beck, ibid, at 5-14, fn 21.
ultimate customers and where the refused person's business is substantially affected due to its inability to obtain supplies of that product.\textsuperscript{148}

It was also emphasized that market power or absence of market power and efficiency reasons for the cut-off are not required in determining the definition of the specific elements of s. 75, such as product and market.\textsuperscript{149}

The relevant geographic market was held to be Canada, even though the auto parts available from Chrysler Canada were identical with those from Chrysler U.S. The Tribunal came to this conclusion mainly because of the different market conditions in the U.S. and Canada which were reflected in the difference between the part prices and the service obtainable.\textsuperscript{150}

After having defined relevant product and market, the Tribunal went on to consider whether Brunet was substantially affected in his business by the refusal of Chrysler Canada. It stated that "the effect on the entire activity of which the refused supplies are a

\textsuperscript{148} Whereas in most situations a refused person is able to obtain supplies of competitive products, in a case with a "dominant product" the would-be-purchaser cannot be competitive, even though it might be able to obtain competitive products other than the refused "trademarked" product. See Donald S. Affleck and K. Wayne McCracken, supra note 112, at 15-6.

\textsuperscript{149} (1990) 27 C.P.R. (3d) 12. In its conclusion the Tribunal (at 27) stated: "The test whether the elements in the section are satisfied is not the effect on competition or efficiency. These considerations enter, where applicable, in the exercise of discretion". Insofar is s. 75 different than other sections dealing with reviewable matters. That a s. 75 order could be issued without reference to the effect on competition, caused in Xerox questions about the constitutionality of this section; see, infra, fn 157. See also Davies, Ward & Beck, supra note 83, at 5-16 -17. Frederick H. Webber, supra 139, at 8; Davies, Ward & Beck, supra note 83, at 5-16 -17. In Xerox the geographic market was not an issue, it was "tacitly assumed to be Canada", (1991) 33 C.P.R. (3d) 103.
part should be used. However, to understand and establish the effect of the refusal it is not enough solely to examine the over-all business. It is necessary to consider whether the product in question accounts for a large percentage in the over-all business, whether it can easily be replaced by other products, whether the sale of the product uses up capacity that could be devoted to other activities, and whether the product is used or sold in conjunction with other products so that the effect on the over-all business may be greater than indicated by the volume of the product purchased. The Tribunal then concluded that Brunet's business was in fact substantially affected by the refusal of Chrysler Canada. It was also clear that, because of the restrictions Chrysler Canada imposed on its dealers, which prohibited them from reselling the products in question to auto parts dealers such as Brunet, there was no adequate competition in the market. Chrysler Canada alone controlled the supply of auto parts and its dealers could not provide competition in this regard.

Even if all the elements of s. 75 have been established, it is still in the Tribunal's discretion to issue an order. Regarding the exercise of this discretion the Tribunal stated that several

152 Ibid, 18.
153 The meaning of "substantially" is not clear in Canadian Competition Law. The French version of the Competition Act describes "substantially affected" with the term "sensiblement gênée". The problem is that "sensiblement" does not mean exactly the same as "substantially" and that accordingly the French version requires an impact of a smaller degree as the English version. In Chrysler the applicant submitted that "substantially affected" means simply more than a de minimis effect, because an earlier draft of the Act required that the person should be "adversely affected". The Tribunal did not consider the French version in particular, but it decided that "substantial" should be given its ordinary meaning which means more than something beyond de minimis, and which means rather "major" or "significant". It furthermore stated that "while terms such as 'important' are acceptable synonyms, further clarification can only be provided through evaluations of actual situations"; ibid, 23. See also Donald S. Affleck and K. Wayne MacCracken, supra note 112, at 15-3.
areas of evidence and argument should be taken in consideration. In this case these were "the reasons behind Chrysler Canada's decision to discontinue supplying Brunet; the market position of Chrysler and the changes that it was making in its distribution system; the long association between Brunet and Chrysler Canada; the unquestioned encouragement that Chrysler Canada provided Brunet; and the manner in which the cut-off was implemented".\(^{155}\)

(b) In the \textit{Xerox} case the Tribunal addressed again some of the questions stated above. It followed the \textit{Chrysler} decision in respect of the determination of the elements "product" and "market". But the situation and the facts in this case were different. Since 1983, Exdos Corporation, an independent service organization, sold and serviced used photocopier machines of Xerox Canada and also served new copiers sold by Xerox itself. Xerox at that time followed the practice of freely selling parts of its copiers to any purchasers willing to pay the list price; it did this without regard to the use subsequently made of the parts. Exdos and other independent service organizations openly and without restrictions purchased post-1983 copier parts. However, in 1988, in response to a policy originating with Xerox Corp. (U.S.), but adopted by Xerox Canada, the supply of such parts was refused. As a result Exdos was not able to carry on its business. The Director, pursuant to s. 75, asked for an order to require Xerox Canada to accept Exdos as a customer for the supply of Xerox brand copier parts.\(^{156}\) The main issue in \textit{Xerox} was, whether "s. 75 encompass[es] a situation in which the product was proprietary and derives largely from a

\(^{155}\) (1990) 27 C.P.R. (3d) 24. See also Frederick H. Webber, \textit{supra} note 139, at 12; Davies, Ward & Beck, \textit{supra} note 83, at 5-32 - 33.

single source" and whether it can be said "that Exdos' inability to obtain adequate supplies arose because of 'insufficient competition among suppliers of the product in the market'. 157

As to the relevant product the Tribunal found that s. 75 is not limited to final products in contrast to intermediate products such as replacement parts. It concluded that there was "no compelling reason flowing from either the legislative text of s. 75 or from general economic principles which requires that proprietary replacement parts should not be considered to be a relevant product for s. 75 purposes." 158 The Tribunal stressed again that the respondent's market power is not an element of s. 75. It is only required to show that the complainant's inability to obtain adequate supplies of copier parts occurred "because of insufficient competition among suppliers of the product in the market". 159 But not all situations where a supplier decides not to sell to a customer fall within s. 75. A particular market situation, that can be described as "insufficient competition among suppliers", must

157 Ibid, 100-101. That the parts in question were in adequate supply and that Exdos was willing and able to meet the usual trade terms was not disputed. There was also little doubt that Exdos was unable to obtain adequate supplies of the parts and that this inability would substantially affect its business. The Tribunal had also to deal with issues regarding the constitutionality of s. 75 (ibid, 119-128). Among other things, the respondent challenged the constitutional jurisdiction of the Parliament to enact s. 75 arguing that if an order can be made without reference to the effect on competition that section is legislation with respect to property and civil rights and therefore falling under provincial jurisdiction (pursuant to subs. 92(13) of the Constitution Act, 1867). The Tribunal agreed that a s. 75 order may affect the property and civil rights of both the person who is ordered to supply and the person who is receiving the supply, but stated that the section is not primarily aimed at governing or regulating contractual relations. It characterized s. 75 "as ancillary to the main purpose of the legislative scheme as well as having an intimate connection thereto. The immediate effect of an order to supply is to open up channels of distribution and free competitive forces hindered by lack of access to supplies. The section's objective is to promote and preserve competition" and it operates within the statutory regulating parameters (ibid, at 126). Accordingly s. 75 was held to be constitutional.

158 Ibid, 112.

159 Ibid, 116. See also Donald S. Affleck and K. Wayne McCracken, supra note 112, at 15-5; Davies, Ward & Beck, supra note 83, at 5-12.
exist at the time of the refusal. However, the question how much or how little competition is insufficient depends on the facts of each particular case. In the view of the Tribunal it was clear that solely "a market composed of numerous suppliers acting independently would not qualify". In order to fall within the scope of s. 75 it must be clear that adequate supplies are unavailable because of the insufficient competitive conditions in the product market.\textsuperscript{160} As the relevant product market was Xerox parts and because those parts were not obtainable from other sources than Xerox, the market situation in this case was described as insufficiently competitive.\textsuperscript{161} In fact, regarding the relevant product market of Xerox parts, Xerox had almost a monopoly position in that market.

In both cases, \textit{Chrysler} and \textit{Xerox}, the elements of s. 75 had been established and the Tribunal eventually decided to order the respondent company to accept the complainant as a customer for the supply of the products in question.\textsuperscript{162}

2.1.3. Significance for Exclusive Distribution Agreements

(a) What, then, are the consequences for exclusive distribution agreements and especially for a supplier or manufacturer? Which conclusions can be drawn from the legislation and jurisprudence discussed above? What are the most important elements supplier and distributor (terminated or refused) have to consider?

\textsuperscript{160} (1991) 33 C.P.R. (3d) 116.
\textsuperscript{161} \textit{Ibid}, 116-117.
\textsuperscript{162} \textit{Chrysler} appealed (and the Director cross-appealed) the order to the Federal Court of Appeal. The court addressed only two arguments raised by Chrysler and eventually dismissed both, appeal and cross-appeal. Among other things, it confirmed that it is not required "that the refusal to trade and the resulting inability to obtain adequate supplies be the only factor substantially affecting the business; it is sufficient that it have a substantial effect whatever the impact of other factors"; (1992) 38 C.P.R. (3d) 25, at 29.
(b) First of all: exclusive distribution arrangements can be attacked by a competitive distributor under this section and, depending on the situation and provided that all requirements are met, broken down, despite the grant of exclusive rights to the distributor.\footnote{Indeed, already in 1971 when this section was incorporated into the proposed \textit{Competition Act}, Bill C-256, several businesses and trade associations worried about the potential impact of this section. According to their briefs many practices of suppliers could have been negatively affected by this provision. See for the history of the refusal to deal provision, R.J. Roberts, \textit{supra} note 99, at 209-216. Furthermore, the supplier could face contractual liability in such a case, since it might find itself in breach of contract with the distributor to whom exclusivity has been granted. This should be considered when drafting an exclusive distribution agreement in making it subject to any order of a court or tribunal to the contrary; see Frederick H. Webber, \textit{supra} note 139, at 22.} But this is a difficult task. The different elements of s. 75 are - as we can conclude from the cases discussed - not easy to establish; especially criteria such as the inability to obtain adequate supplies and that this inability occurred because of insufficient competition among suppliers are difficult to prove. But, first of all, the complainant has to prove that its business has been substantially affected due to the refusal to deal and its inability to obtain adequate supplies.

(c) The criteria and the chances for obtaining an order are not the same for a distributor whose contractual relationship has been terminated by the supplier and a would-be-distributor who has never before dealt with the product in question.\footnote{According to a statement by the Bureau of Competition Policy in its 1976 Background Paper a new entrant to a market can rely on this section when the refusal causes him or her to lose the possibility to make any additional sales or profits or to be precluded from carrying on business; Davies, Ward \& Beck, \textit{supra} note 83, at 5-22. These authors, however, point out ‘that the Tribunal did not order Xerox Canada to supply the complainant with parts for new models which it had not supplied to the complainant in the past. The Tribunal did not discuss this aspect of its decision in detail, and the exclusion of these parts from the order in \textit{Xerox} may have resulted only from the fact that ‘no evidence was led with respect to the effect that the non-supply of [such] parts would have on [the complainant]’”; \textit{ibid}, 5-23.} This is mainly because the refused person has to prove that his or her business has been substantially
affected. According to Chrysler, "business" means the entire activity of which the refused supplies are a part. However, despite this broad interpretation, the effect of the refusal has to be established in a narrower framework by examining the business in direct relation to the product refused; a simple examination of the over-all sales and profit figures is not enough. Only in cases where a more detailed and focused analysis is too difficult, reliance on an examination of the over-all business can - according to the Tribunal - be appropriate.\(^{165}\) The problem is that a refused person who has never before done business with the product in question might have serious difficulties in arguing that his or her business has been substantially affected. The Tribunal's reasoning in Chrysler implies that the business as it is after the refusal has to be compared with the situation of the business before the refusal. But this requires that the refused person has already dealt with the product before the refusal occurred; otherwise a comparison is not possible.\(^{166}\) Another problem for a would-be distributor is that it may not be substantially affected in its business as long as other manufacturers of the product are willing to supply it, whereas the business of a distributor who has been supplied by the specific manufacturer in the past may, on the standard applied in Chrysler, well be substantially affected, even if it could sell the products of another manufacturer.\(^{167}\) However, in a case where the supplier has a monopoly position in the market and where the refused person depends on the product in

\(^{165}\) (1990) 27 C.P.R. (3d) 19.

\(^{166}\) See also Donald S. Affleck and K. Wayne McCracken, supra note 112, 15-3. "It is easier to measure the loss of actual sales made in the past than the failure to obtain new sales for a product which the complainant has not previously carried"; Davies, Ward & Beck, supra note 83, 5-23. As a practical matter, a manufacturer, may have more problems to cut off supply to a distributor who has in the past purchased a large portion of the product from the manufacturer than to refuse to supply to a person who has not purchased from the manufacturer before; Davies, Ward & Beck, ibid, at 5-24.

\(^{167}\) Davies, Ward & Beck, supra note 83, at 5-23.
question in order to carry out or to continue its business, it should be possible to argue that its business is substantially affected by the refusal to deal.\footnote{168}

The situation is different for a refused person who has already dealt with the product in question and where the product was part of its business. In a case, where a supplier, for example, in order to reorganize its distribution system refuses to supply the product furthermore to its former customer, or where a manufacturer decides to favour its more loyal distributors and to terminate the relationship with distributors who carry competitive products, the refused person should be able to argue that its business involving the product has been affected. If the effect of the refusal was of a major impact, i.e. substantial, and provided that all the other requirements of s. 75 are met, the Tribunal might order the supplier to accept the refused person as its customer.

(d) The definition of ‘business” and the question if it is substantially affected, depends largely on the definition of the “product” and “market” in question. With \textit{Chrysler} and \textit{Xerox} in mind it is clear that the meanings of “product” and “market” are rather narrowly interpreted, as they must be defined from the point of view of the complainant. A determining factor is the effect of the refusal on the refused person’s business, i.e. the demand of its customers, their (un)willingness or (in)ability to accept substitutes. Neither

\footnote{168 For example, where several major film distributors refuse to supply a theater chain with commercially valuable films (i.e. first run movies) on usual trade terms, the theater chain might be substantially affected in its business due to the lack of access to those movies. This was the situation in the Cineplex-case, one of the three applications brought by the Director under the “bid” law. Since the film distributors altered their practices and by that ensured greater competition in the distribution of films and improved access to commercially valuable films for exhibitors, the Director withdraw its application; see I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, \textit{supra} note 111, at 3.1.11-12.}
the effect of the refusal on competition nor the fact alone\textsuperscript{169} that the article has a trademark are criteria to be considered in defining the product in question. It follows that the rather broad definition of 'business' has to be understood in relation to the Tribunal's narrower interpretation of 'product'. This has an impact on the situations described above. For example, a supplier who restricts the supply of repair parts for its brand of products to specially franchised dealers, makes it difficult or impossible for an independent dealer of the products to obtain these parts. Its business might then be substantially affected by the refusal to supply the repair parts. If the product in question can be defined as 'repair parts' - and after \textit{Xerox} this might well be the case - the probability that the Tribunal will issue an order under s. 75 will be increased.\textsuperscript{170}

(e) In both cases the Tribunal examined whether there had been adequate supply of the product, i.e. whether the complainants had been able to obtain supplies from other sources than the refusing supplier. In \textit{Xerox} the complainant was able to obtain a small amount of parts directly from Xerox, from the "cannibalization" of used machines and from independent manufacturers of Xerox parts.\textsuperscript{171} The Tribunal concluded that in the face of Xerox's refusal these sources of Xerox part were inadequate. It seems that the supplies were held to be inadequate based on the facts that the amount of parts obtained was too

\textsuperscript{169} A case can be made, where a trademarked product dominates the case \textit{because} of the specific needs of the ultimate customers. See \textit{supra}, fn 147.

\textsuperscript{170} Canadian Courts have applied the principle that if a distributorship agreement does not contain a provision for termination without cause it is so terminable only upon giving reasonable notice of termination, see the leading case \textit{Hillis Oil & Sales Limited v. Wynn's Canada Ltd.} [1986] 1 S.C.R. 57 (S.C.C.). The question remains, whether in a case where a supplier provided a termination notice of reasonable length and therefore made it possible for the distributor to start carrying on its business with another line of products, the requirement that the distributor's business is substantially affected can still be met; Davies, Ward & Beck, \textit{supra} note 83, at 5-24.

small and - partly - of inferior quality. However, the statute refers to the person's *inability* to obtain adequate supply. Does this mean that in a case where it is only very difficult or very expensive to obtain adequate supply the statutory requirement has not been met?\textsuperscript{172} Or is the supply inadequate, because it is not economic and efficient?\textsuperscript{173} One would think the former. But there are some indications that the Tribunal could decide the other way.\textsuperscript{174}

In *Chrysler* the complainant could obtain the auto parts in question from Chrysler U.S. but only at greater costs. The Tribunal stated "that the critical difference between the two sources of supply is price" and concluded that because of the price difference (and inadequacies in the service offered by Chrysler U.S.) the supplies were not adequate.\textsuperscript{175}

(f) A supplier who instructs its dealers or distributors not to sell the product in question to the refused person makes them "inferior sources of supply"; furthermore, the dealers do not provide sufficient competition to the refusing supplier.\textsuperscript{176} In both cases there was only a single supplier with almost a monopoly position with respect to the product and market in question and this was enough to argue that the competition was insufficient.\textsuperscript{177}

For suppliers in a monopoly or quasi-monopoly situation the situation is therefore clear.

\textsuperscript{172} Frederick H. Webber, *supra* note 139, at 6.
\textsuperscript{173} Donald S. Affleck and K. Wayne McCracken, *supra* note 112, at 15-4, suggest that "adequate" should be read as "economic and efficient".
\textsuperscript{174} See also Donald S. Affleck and K. Wayne McCracken, *supra* note 112, at 15-4.
\textsuperscript{175} *(1990)* 27 C.P.R. (3d) 13-15. In neither case did the Tribunal analyze the situation with regard to the required inability.
\textsuperscript{176} See *Chrysler* *(1990)* 27 C.P.R. (3d) 23.
\textsuperscript{177} In *Xerox* the question arose whether the market must consist of more than one supplier since subs. 75(1)(b) used the term "insufficient competition among suppliers". According to the Tribunal the use of the plural in this section includes also the singular and it concluded that "[i]t would import a logical inconsistency into the section to hold that a supplier of the relevant product, in, for example, a market with three or four suppliers, could be subject to review by the tribunal for refusing to supply while a supplier with a monopoly position could not be"; *(1991)* 33 C.P.R. (3d) 117. See also Donald S. Affleck and K. Wayne McCracken, *supra* note 112, at 15-5; Davies, Ward & Beck, *supra* note 83, at 5-30.
Before they terminate a distribution agreement or refuse a request for product from a potential distributor they have to consider their position carefully, otherwise their case might be reviewed by the Tribunal.\footnote{Donald S. Affleck and K. Wayne McCracken, \textit{supra} note 112, at 15-5.} But when is the competition insufficient in a market with more than one supplier? Section 75 requires that the refused person is unable to obtain supplies \textit{because} of insufficient competition among the suppliers and not because of the refusal to supply. This means that at the time of the refusal a particular market situation which can "fairly be described as "insufficient competition among suppliers"" is required.\footnote{\textit{Xerox} (1991) 33 C.P.R. (3d) 116.} It is, as the Tribunal pointed it out, difficult to imagine a situation where so many suppliers (of a multitude of suppliers) refuse to supply the product to the person so that his or her business could be substantially affected. Then, if one supplier does not want to supply, another supplier steps in and is "more than happy" to do the business with the refused person.\footnote{\textit{Ibid}, 116.} Accordingly, only an agreement among \textit{all} suppliers not to supply the person could satisfy this requirement.\footnote{According to Frederick H. Webber, \textit{supra} note 139, at 10, the requirement of insufficient competition is not met "[i]f the underlying reason for such an agreement were unrelated to competition among the suppliers (e.g. the person refused is a poor credit risk), [since] the Director would be unable to establish the necessary causal relationship". This may be right, but this argument can also be raised with respect to the requirement that the person is willing and able to meet the usual trade terms of the supplier (subs. 71(1)(c)). The question is rather whether the fact that one or more persons are not able to obtain adequate supplies (provided that there is ample supply) is evidence enough to say that competition is insufficient, or has the Director to prove that the suppliers' (tacit or express) agreement not to supply limits the distribution of their product and therefore competition. Or, can all suppliers choose to limit the}
product and it becomes more and more likely that there is a single suppliers (in a quasi monopoly position) left.\textsuperscript{182}

\textbf{(g)} The criterion that the person is “willing and able to meet the usual trade terms”\textsuperscript{183} was an issue neither in \textit{Chrysler} nor in \textit{Xerox}. In a single-supplier-market the situation is clear. The Director has to establish that the potential distributor can meet the usual trade terms of the supplier.\textsuperscript{184} Yet, unclear is what the usual trade terms in a market of more than one supplier are. Does this term still refer to the usual trade terms of the refusing supplier or has the Director to prove that the person is willing and able to meet the usual trade terms of \textit{all} suppliers, that is the standard trade terms.\textsuperscript{185} Arguably, the section refers to the usual trade terms of the \textit{particular refusing supplier}. Anything other would make it more difficult and unpredictable for the refused person to meet this requirement, as the different suppliers may use different trade terms. Furthermore, if the usual trade terms are defined with reference to the practice in the whole business, a supplier whose trade terms do not...

\footnotesize
\textsuperscript{182} The Tribunal discussed the hypothetical question whether in a situation where a manufacturer or supplier of proprietary parts had never unbundled the sale of its parts from the sale of its machines an order might be issued. In such a case it is questionable whether the Director “would be able to prove the existence of a market for the product in question” and/or whether a complainant could argue “that his or her business was substantially affected by such a refusal to supply”. However, in the \textit{Xerox} case the manufacturer did create a market for Xerox copier parts and it created that market by selling to anyone who wished to purchase. See (1991) 33 C.P.R. (3d) 118-119.  
\textsuperscript{183} Subs. 75(1)(c).  
\textsuperscript{184} According to Michael O. Mungovan, \textit{supra} note 141, at 11, this section contains a loophole for the reluctant supplier, who can argue “that the complainant could not possibly meet his rigorous or demanding terms of payment, volumes to be supplied, technical requirements or servicing”. However, these trade terms must be the suppliers usual and regular terms and must not be specially invented for this particular person.  
\textsuperscript{185} Frederick H. Webber, \textit{supra} note 139, at 11.
conform to the industry standard, could be ordered to supply on terms other than those it imposes on its other customers.\textsuperscript{186}

(h) The requirement of ample supply was in neither case an issue. However, this element of the provision may implicate that a supplier who does not have excess supply, is free to exercise its own discretion to sell the product to the customer he wants to, without being at risk to get an order under s. 75.\textsuperscript{187}

(i) From the wording in subs. 75(1), confirmed by Chrysler and Xerox, it is clear that it is alone in the Tribunal’s discretion to issue an order or not. In Chrysler the Tribunal established the factors which in exercising of its discretion should be borne in mind. A supplier who wants to terminate the agreement with its distributor should especially pay attention to factors such as the reasons for the termination (and the discontinuance of the supply), the duration of the relationship and the manner in which the cut-off was implemented. Furthermore, the Tribunal’s discretion is also be influenced by the degree to which the refusal to deal affects competition.\textsuperscript{188} On its own merits it might be wise for a

\textsuperscript{186} Davies, Ward & Beck, supra note 83, at 5-27.
\textsuperscript{187} Davies, Ward & Beck, supra note 83, at 5-32. According to these authors “a supplier could presumably even decide to keep supplies in reserve to meet anticipated demand from new customers with whom the supplier wants to deal”; ibid. For Frederick H. Webber, supra note 139, at 11, on the other side, this element could be critical, for example, ‘where a manufacturer decides to forward, integrate and retain for its own downstream operation, the products that it previously sold to an outside organization which it now wishes to cut off’.
\textsuperscript{188} Davies, Ward & Beck, supra note 83, at 5-34. The Tribunal stated in Xerox (1991) 33 C.P.R. (3d) 126: “The immediate effect of an order to supply is to open up channels of distribution and free competitive forces hindered by lack of access to supplies. The section’s objective is to promote or preserve competition.”
supplier to act objectively and reasonably when executing its decision to cease supplying the distributor any longer.\textsuperscript{189}

Most of the written distribution agreements include provisions with respect to termination. Other agreements which are concluded orally or do not contain specific termination provisions can be terminated on reasonable notice. The question then arises whether a supplier can be ordered to accept its former distributor as a customer even if the contractual relationship has been terminated in accordance with the termination provisions in the agreement. It seems so. According to \textit{Xerox} the Tribunal can interfere with contractual provisions, if all the elements of s. 75 are established.\textsuperscript{190} A supplier who wants to get out of the agreement because things do not work out cannot, therefore, necessarily rely on its contractual termination provisions.\textsuperscript{191} Whereas other factors, such as the duration of the contractual relationship and the reasons of its termination, may convince the Tribunal to exercise its discretion in favour of issuing an order, unlawful conduct of the complainant might cause the Tribunal not to grant the order.\textsuperscript{192}

\textsuperscript{189} Donald S. Affleck and K. Wayne McCracken, \textit{supra} note 112, at 15-7. Davies, Ward & Beck, \textit{supra} note 83, at 5-33. They argue that the Director’s discretion to commence and proceed the case before the Tribunal may probably be more important than the Tribunal’s discretion. As already mentioned, only the Director can apply to the Tribunal for an order under s. 75. According to these authors a ‘former Director has indicated that ‘as a matter of policy, the Bureau has been concentrating on refusal to deal applications where there is a lessening of competition’ and ‘given the large number of complaints filed with the Bureau in this area, priority has been given to cases with the aforementioned significant economic impact’\textsuperscript{1}, \textit{ibid}, at 5-34. It seems that the Director is unlikely to bring an application under s. 75 before the Tribunal if the case does not involve some “significant economic impact”.

\textsuperscript{190} In answering the constitutional question the Tribunal agreed that a s. 75 - order may affect the property and civil rights of the person who is ordered to supply, see, \textit{supra} fn 157.

\textsuperscript{191} Frederick H. Webber, \textit{supra} note 139, at 19.

\textsuperscript{192} In \textit{Chrysler} the respondent company argued that the cut-off was in response to the complainant’s breaking of one of the supply conditions (namely not to sell to franchised dealer outside of North-America in competition with Chrysler U.S.). As there was no written agreement and no further evidence for the existence of such an agreement, the Tribunal concluded that there was no breach of contract. However, it
An order issued by the Tribunal imposes a contractual relationship on the supplier and the customer. Since s. 75 poses some limitations on the subject matter of the order, the imposed contractual substitute is of limited extent and cannot replace a freely negotiated contract that might better serve the parties' interests. The limited extension of the order was acknowledged by the Tribunal in *Chrysler*, where it stated that "a proper balancing of interests in this case might be better accomplished with an order that was limited with respect to time, or perhaps with respect to the category of buyers that would be open to Brunet" and that "such an order could probably best achieved through negotiations between the parties". Because of this limited authority with respect to the subject matter of the order, the Tribunal should not be able to order the supplier to accept the refused person as its distributor. However, the supplier might prefer to integrate the customer in its distribution system as a distributor with its rights and obligations in order to maintain its vertical system.

2.1.4. Conclusion

In summary the following conclusions with respect to vertical distribution systems can be drawn:

seems that a breach of a contractual provision by the customer could cause the Tribunal not to grant an order. See also Frederick H. Webber, *supra* note 139, at 13.

An order is limited as to specific supplier(s) and product, and to the trade terms. According to the wording of the provision and the two cases, an order can only apply to the product of which the customer could not obtain adequate supplies; it cannot be extended to products which were not on the market at the time of the refusal or which were not the specific product the customer was not able to obtain. See Frederick H. Webber, *supra* note 139, at 16; and *Xerox* where the order especially did not include parts for copiers which had not been supplied to the complainant; (1991) 33 C.P.R. (3d) 127.

A supplier or manufacturer who terminates the distribution agreement with one of its distributors or stops selling its product to a consumer in order to reorganize its distribution system, must be aware that this decision may become an issue under the refusal to deal provision. In a situation where a potential distributor or consumer, who has not dealt with the product before, is refused supplies, a case under s. 75 can only be established in certain exceptional cases, for example, where the potential distributor is able to prove that its business depends on that particular product and that this product would be only obtainable from the refusing supplier.\textsuperscript{196}

One of the main problems for a terminated or refused distributor or consumer is to establish that he or she was unable to obtain adequate supplies of the product \textit{because} of insufficient competition among the suppliers in the market. That a manufacturer refuses to supply certain customers or former distributors because it wants to change its distribution system, does not necessarily mean that this requirement is met. In such circumstances it may well be that the inability to obtain supplies is related to legitimate business decisions which are not connected to anti-competitive factors.\textsuperscript{197} It seems that as long as the underlying reasons for the refusal to supply are not connected to or motivated by any anti-

\textsuperscript{196} It is not required by s. 75 that the reasons for the refusal or their adequacy are being scrutinized by the Tribunal (they still may be considered by the Tribunal when exercising its discretion). According to Michael O. Mungovan, \textit{supra} note 141, at 71, this is a serious deficiency of the legislation. He argues that a supplier who exercises significant power in the market should have a responsibility to furnish its products to anyone who wants them (unless there are valid reason for refusing), because without such responsibility on the supplier, entry into the market of competitors is prevented and/or competition is damped. However, I argue, that in view of the two cases discussed above a supplier in a monopoly position could be ordered to accept a potential customer, if the latter is able to establish that his or her business substantially depends on this particular product.

\textsuperscript{197} This example was mentioned by the Tribunal in \textit{Xerox} (1991) 33 C.P.R. (3d) 119.
competitive strategies the refused person will have serious problems to establish the required casual relationship.

Through the whole discussion of s. 75 and the two cases *Chrysler* and *Xerox* it becomes evident that the definition of the meaning of "product" and "market" is decisive for the determination of the statutory requirements and eventually for the outcome of the case. A manufacturer who produces a particular, trademarked product which is highly demanded by end-users will have more difficulties getting around s. 75, when it wants to get out of the relationship with its distributor, than a manufacturer of a more common product.

All in all it seems that the refusal to deal provision does not present a big obstacle for suppliers who distribute their products through a vertical distribution system. This mainly because of the severe requirements of s. 75, which are not only difficult to meet, but which also narrows its scope of application. In the end it all depends on the circumstances and the context of each case. However, it is safe to say that a decision to refuse to supply by a supplier or manufacturer who has a strong market position with respect to the product in question might more likely be reviewed under s. 75, than the same decision by a less dominant supplier.
2.2. Exclusive Dealing, Tied Selling and Market Restriction

2.2.1. Introduction

Under s. 77 of the Act the Competition Tribunal has the authority to prohibit one or more suppliers from continuing to engage in exclusive dealing, tied selling or market restriction. 198

According to the wording of the section exclusive dealing can take two forms. The supplier, as a condition of supplying its product to a customer, requires that this customer deals only or primarily 199 in products supplied by the supplier, or agrees not to deal in a specified kind of product except as supplied by the supplier. 200 Tying or tied selling is the practice whereby a supplier agrees to provide one product but only under the condition that the customer accepts either another - the tied - product from the supplier or the supplier's nominee, or not to purchase a product from a competitor. 201 It can be argued

198 Subs. 77(2) and (3).
199 This means that a supplier who allows its customer to deal with an insignificant number of articles supplied by other sources, which does not threat the supplier's position, cannot preclude that its practice might be considered as engaged in exclusive dealing. See Davies, Ward & Beck, supra note 83, at 5-65 - 66; Mark Q. Connelly, "Exclusive Dealing and Tied Selling Under the Amended Combines Investigation Act" (1976) 14 Osgoode Hall L. J., 521 at 534.
200 Subs. 77(1). Both practices defined as exclusive dealing under the Act describe actually the same situation. See Mark Q. Connelly, supra note 199, at 524; I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, supra note 111, at 3.1.14.
201 Subs. 77(1). "Where the supplier of the tied product is not the supplier of the tying product but rather a source designated by the latter, the arrangement is referred to as 'direct buying'". This normally implies some form of "market access arrangement", e.g. that the supplier of the tied product has to pay a commission to the supplier of the tying product on the purchases made by the customer under such a tying agreement; Mark Q. Connelly, supra note 199, at 524.
that a tying arrangement is a special form of exclusive dealing that involves (at least) two distinctive products.\textsuperscript{202}

Market restriction, finally, can be defined as any practice under which the customer is required by the supplier, as a condition of supplying, to compete in all but a defined market, or is penalized for supplying any product outside a defined market.\textsuperscript{203} An agreement may contain a provision which restricts a party as to the customers it can deal with, and/or the territories where it can conduct its business; an agreement may also have provisions which penalizes a party who deals with certain customers inside or outside a specific area.\textsuperscript{204}

Pursuant to subs. 77(1)(b) exclusive dealing and tied selling also include any practices whereby a supplier \textit{induces} the customer by offering to supply the product to the customer on more favorable terms or conditions if the customer agrees to meet the conditions set out above.\textsuperscript{205} Market restriction, however, does not include this concept of inducement.\textsuperscript{206}

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\textsuperscript{202} Mark Q. Connelly, \textit{supra} note 199, at 524. Or, as this author, \textit{ibid}, puts it: "To summarize: in exclusive dealing, the supplier says to the customer, 'I will sell you my widgets only if you will buy all of your widgets from me'; in tying, the supplier says, 'I will sell you my widgets only if you buy my gidgets'."
\textsuperscript{204} Donald S. Affleck and K. Wayne McCracken, \textit{supra} note 112, at 17-2; R.J. Roberts, \textit{supra} note 99, at 256.
\textsuperscript{206} Davies, Ward & Beck, \textit{supra} note 83, at 5-73.
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2.2.2. The Essential Requirements

(a) Before the Tribunal can issue a remedial order under s. 77, the Director has to establish that the alleged practice of exclusive dealing, tied selling or market restriction meet the specific statutory tests. It must be shown that a major supplier is engaged in the practice or that this practice is widespread in the market. In addition it must be demonstrated that the practice is likely to (a) impede entry into or expansion of a firm in the market, (b) impede introduction of a product into or expansion of sales of a product in the market, or (c) have any other exclusionary effect in the market, with the result that competition is or is likely to be lessened substantially.²⁰⁷

However, the Act provides several exemptions from the provision with respect to the facilitation of entry into a new market, the technological relationship between or among products, the money lending business, and the conduct between affiliates.²⁰⁸

If the Tribunal finds that exclusive dealing or tied selling indeed exists and that these practices have lessened competition substantially, it may issue a prohibition order directed to all or any suppliers against whom an order is sought. In addition, such orders may include any other requirements that, in the Tribunal's opinion, is necessary to overcome the effects of the practice in the market or to restore or stimulate competition in the market.²⁰⁹ Thus, the Tribunal has a fairly wide power in this regard.²¹⁰ Nevertheless,
according to the wording of subs. 77(2) it is still in the Tribunal's discretion to issue an order or not.211

(b) Exclusive dealing, tied selling and market restriction arrangements are common in Canada and appear often in franchise and distributive agreements, dealer appointments or other business relationships.212 Especially exclusive distribution agreements fall within the scope of this section and might be prohibited by the Tribunal under the circumstances required by the Act. Those practices are as already mentioned legal, they are "only unlawful when the Competition Tribunal has issued an order against a particular person prohibiting such conduct".213

In most cases distribution agreements contain exclusivity provisions, either limited to a certain type of product or a territory or both. They are often arranged to be complementary. For example, the manufacturer expects exclusivity from the distributor (that it will not sell any products in competition) and the distributor expects from the manufacturer that it will not sell the product in the territory or to other distributors in the

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211 Subs. 77(2) says that "the Tribunal may make an order (...)". The Tribunal’s discussion with respect to its discretion in the context of the refusal to deal provision (s. 75) may also be relevant to some point regarding its discretion in the context of this section. See Davies, Ward & Beck, supra note 83, at 5-88. However, it should be borne in mind that an order under s. 75 can be issued without reference to the effect on competition and that this element is only considered by the Tribunal in the exercise of its discretion, whereas under s. 77 a substantial lessening of competition must be established to get an order. Donald S. Affleck and K. Wayne McCracken, supra note 112, at 18-2; Davies, Ward & Beck, supra note 83, at 5-61.

territory. Such agreements will also be subject to s. 77 of the Act, even if the initiative for exclusive dealing has come from the distributor.

(c) Besides the already mentioned statutory elements which have to be established in order to get an order under s. 77 other issues may play a defining role such as the practice requirement, the definition of the relevant product market and the possible exemptions from the provision. Furthermore, the wording of subsections 77(2),(3) and (4) is not all that clear. The meaning of phrases such as "widespread", "reasonable period of time", "facilitate entry" and "reasonable in relation to the technological relationship" is not certain yet, still, the meaning of such phrases can be very important in a specific case.

2.2.3. The Cases

(a) While many franchise or distribution arrangements include exclusionary clauses and practices which could be reviewed by the Tribunal with respect to the issues of exclusive dealing, tied selling and market restriction, the Director has brought relatively few applications under this section. The reason might be that it is often unclear whether the

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214 Often the agreement not to sell other products in competition is the "counter-promise" for the grant of an exclusive territory.
215 See Mark Q. Connelly, supra note 199, at 566. As long as the agreement contains the provision that the supplier requires "the distributor to deal only or primarily in products supplied by the supplier" it will be subject to the exclusive dealing provision. Only where it is a condition for the consumer to deal with the supplier that it be the exclusive outlet for the supplier's products and that the supplier ought not sell to the consumer's competitors, the exclusive dealing provision, which speaks of requirements imposed by suppliers, will not apply. Yet, such arrangements can have some serious anti-competitive effects in the customer's industry or market. A retailing giant, such as Eaton's, for example, is often a more powerful company than many of its suppliers and is, therefore, able to dictate the requirements. See Mark Q. Connelly, ibid. However, the use of exclusionary clauses by a dominant customer in order to preempt scarce facilities or resources required by a competitor is regulated by subs. 78(e) of the Act. See Marilyn MacCrimmon and Asha Sadanand, supra note 117, at 714-715.
216 Donald S. Affleck and K. Wayne McCracken, supra note 112, at 18-6.
required anti-competitive effects are involved and can be established. There is, therefore, not a lot of jurisprudence dealing with s. 77 and the issues mentioned above and some questions are still open. However, three cases have come before the former RTPC and the Tribunal since 1976. The cases of Bombardier and BBM had been decided by the RTPC in 1981 and 1982, respectively; and the Tribunal gave its decision in NutraSweet in 1990. While Bombardier dealt with the provisions regarding exclusive dealing, BBM was a tied selling case. And in NutraSweet the Tribunal primarily focused on the provisions regarding abuse of dominant position (s. 79 of the Act), but did also consider the issue of exclusive dealing.

Until now, neither the Tribunal nor the former RTPC have had to deal with market restriction arrangements. According to Davies, Ward & Beck there was only one

217 Davies, Ward & Beck, supra note 83, at 5-62. According to these authors inquiries and applications with respect to exclusive dealing, tied selling or market restriction are not on the Director's list of enforcement priorities; ibid, at 5-63 and fn 11.
218 The exclusive dealing, tied selling and market restriction provisions have been incorporated into the Combines Investigation Act as s. 31.4 already during the first stage of amendment in January 1976. Since then, no substantive changes have been made to the provisions which are now in s. 77 of the Act. As the RTPC has been replaced by the Competition Tribunal only later (during the second stage of amendment in 1986), there are still cases decided by the RTPC which have to be considered when discussing these provisions. See Gordon E. Kaiser, Ian Nielsen-Jones, supra note 99, at 405-406; Davies, Ward & Beck, supra note 83, at 5-60 - 61. For the history of the Competition Act, see supra, chapter 1; 3.1.
219 Director of Investigation and Research v. Bombardier Ltd. (1980) 53 C.P.R. (2d) 47.
222 In a case before the Ontario General Division, the plaintiff distributed photographic products to dealers for resale and further distribution. The plaintiff was concerned that its products purchased in Canada were being exported for resale outside established distribution systems, and, therefore, decided to institute an export price policy and established a price list. The court held that the export price policy was in restraint of trade, but not against public policy and therefore not void. The policy could not only be justified as reasonable in the interests of the parties, but also as not contrary to the public interest. Even though the export price policy might have been characterized as a market restriction under s. 77 (and therefore not reasonable in the public interest), this was irrelevant unless and until there was an application to the Tribunal and an order by it. Only market restrictions recognized by the Tribunal are illegal and inconsistent with the public interest; see Polaroid Canada Inc. v. Continent Wide Enterprises Ltd. (1994) 54 C.P.R. (3d) 257; Robert S. Nozick, supra note 98, at 166.
reported inquiry by the Director in this regard. This inquiry took place in August 1979 and involved a supplier of a telephone answering system who was allegedly engaged in market restriction and exclusive dealing. However, the inquiry was discontinued because the evidence showed that there was no such practice.223

(b) In 1980 the Director brought an application against Bombardier, a manufacturer of snowmobiles and snowmobile accessories and parts, regarding its policy to require from its dealers that they deal exclusively in Bombardier’s products. Bombardier admitted that it entered into exclusive agreements with dealers in the specific geographic areas (in case the provinces of Ontario and Quebec and the Maritimes without Newfoundland) and that it enforced the exclusive clauses in the agreements. The major issues that the Commission had to deal with were whether Bombardier was a major supplier and whether its policy of exclusive dealing resulted or was likely to result in a substantial lessening of competition. Whereas the Commission found that Bombardier was a major supplier of the product in question, it held that the exclusive agreements did not result in a substantial lessening or a reduction of competition. There was evidence that entry into the market was easy and that there had even been an expansion of sales and dealerships by the competitors of Bombardier. The application by the Director was therefore dismissed.224

223 Davies, Ward & Beck, supra note 83, at 5-73.
In its background papers to the stage I amendment of the Combines Investigation Act the government gave an example for an unlawful extraterritorial sale which is of interest for distribution agreements and which shows the intention of the legislator in this regard: A European manufacturer "gave each dealer a particular sales territory, and where sales by a dealer were made outside its territory, it was forced to pay most of its profit to the dealer in whose territory the customer lived. Naturally, dealers were discouraged from selling to customers living outside their designated territories and the customers were thereby deprived of price competition"; R.J. Roberts, supra note 99, at 257.
A year later, in 1981, the RTPC issued for the first time an order under the tied selling provisions of s. 77 and required BBM to cease the tying of sales of its radio audience data with sales of its television audience data. BBM was the supplier of local and national radio and television audience data for advertising agencies and electronic media. It was the sole supplier in Canada of radio data, and with respect to the television data there was only one other supplier on a regular basis. The Commission found that BBM induced advertising agencies to buy both, radio and television audience data, by offering television data on more favorable terms if the agencies agreed to acquire its radio data. It was stated that BBM was a major supplier of both, radio and television data, and that the tied sales constituted a barrier to entry and lessened competition substantially. Accordingly the Commission prohibited BBM from continuing to engage in tied selling of both, radio and television audience data. 225

The third case, NutraSweet, involved allegations regarding abuse of dominant position, exclusive dealing and tied selling (ss. 79 and 77 of the Act). NutraSweet is a major producer of aspartame (a low calorie sweetener) and accounted for 95% of its sales in Canada. There was only one producer of aspartame selling in competition with NutraSweet in Canada. The principal allegations of the Director were that NutraSweet’s supply contracts contained terms that created an exclusive supply relationship between it and its customers and thus restricted entry or expansion of would-be or existing competitors, and that NutraSweet had been selling below its acquisition costs. With

respect to the allegations made under s. 77 the Tribunal found that NutraSweet induced exclusive dealing with its customers through financial incentives or fidelity rebates, and its exclusive dealing clauses. It also found that these inducements amounted to a practice and that NutraSweet’s conduct had lessened or was likely to lessen competition substantially. It, therefore, issued a remedial order, prohibiting the enforcement of certain terms of NutraSweet’s supply contracts.226

2.2.4. Significance for Exclusive Distribution Agreements

(a) What impact does s. 77 have on exclusive distribution agreements? What are the consequences of this legislation for suppliers, manufacturers and distributors? What do they have to consider when drafting an exclusive distribution agreement?

There is no question that distribution agreements with the typical exclusionary clauses can be subject to an inquiry under s. 77 of the Act. However, the mere inclusion of such clauses in a contract does not constitute exclusive dealing. In order to fall within the definition of s. 77 a supplier must have refused to supply the product or threatened to do so, unless its customer did agree to the exclusionary clauses in the contract.227 It is

226 (1991) 32 C.P.R. (3d) 2 - 3 and 57 - 58. However, there was no exclusive dealing within the meaning of subs. 77(1)(a) as there was no evidence that NutraSweet refused to supply aspartame or threatened not to supply unless its customers agreed to purchase exclusively from NutraSweet. Furthermore, the Tribunal made no finding with respect to tied selling.

227 See NutraSweet (1991) 32 C.P.R. (3d) 53. The Tribunal stated: "The Director may be correct in his submission that the exclusivity clauses constitute a 'condition' of the contract once the contract is entered into, in the sense that under contract law they must be complied with or certain rights will flow, including the right to repudiate", but "in considering an allegation of exclusive dealing it is the circumstances in which the particular terms of supply were agreed upon that are critical. The ordinary meaning of the words used in para. 77(1)(a) is that the supplier must have refused to supply the product unless the buyer agrees to the terms described in subpara. 77(1)(a)(i) or (ii)". Because there was no evidence that NutraSweet refused to supply or threatened to do so if its customer did not enter into
presumable that such an element of "enforcement" must also be involved in tied selling and market restrictions in order to constitute such conduct within the meaning of s. 77.  

On the other hand, inducements to the customer in order to achieve an exclusive relationship might be subject to a prohibition in the same way as it would be had the supplier included an express exclusionary clause in the contract.  

(b) Section 77 applies to a wide range of articles and services, which means real and personal property, including money and intangible property, and services of any description.  

Especially the inclusion of intangible property within the meaning of "product" expands the potential application of s. 77 on tying arrangements. In *NutraSweet* the Tribunal recognized that in appropriate circumstances a trademark might constitute the tying product. This can be of significance with respect to distribution agreements, since they often contain clauses, whereby the distributor is allowed to use the trademark in exclusive contracts, there was no exclusive dealing within the meaning of subs. 77(1)(a). See also Davies, Ward & Beck, *supra* note 83, at 5-66.

See Davies, Ward & Beck, *supra* note 83, at 5-67 and 5-69, and particularly their reference to a case where the Director decided to discontinue an inquiry into alleged tied selling because there was no evidence that the company "ever made it a practice to enforce the alleged tie or that the conduct was continuing". See Director of Investigation and Research, *Annual Report, Combines Investigation Act, for the Year ended March 31, 1985*, at 49-50.

Subs. 77(1)(b). Donald S. Affleck and K. Wayne McCracken, *supra* note 112, at 18-2. In *NutraSweet* contractual provisions provided rebates and discounts in case the customers agreed to display the NutraSweet logo on their packaging and in their advertising, with the consequences that only NutraSweet brand aspartame could be used in the products to which the packaging and advertising belonged. Because the customers agreed to deal only or primarily in NutraSweet's product and in return received various rebates whose existence depended on the exclusive use of this product, the Tribunal concluded that this practice amounted to exclusive dealing within the meaning of subs. 77(1)(b); (1991) 32 C.P.R. (3d) 54.


(1991) 32 C.P.R. (3d) 57. However, the Tribunal was not convinced that this was the case on the facts in *NutraSweet*, mainly because the Director's allegation regarding the tying product were not clear (sometimes it was alleged that the tying product was NutraSweet brand aspartame, sometimes it was the trademark itself). See Davies, Ward & Beck, *supra* note 83, at 5-74. See also R.J. Roberts, *supra* note 99, at 241-242.
connection with the sale of the product. To be characterized as a tying product a trademark must constitute a separate product from the product it stands for. There is no doubt that a trademark can be a separate product, however, it is also simply the name of a product. When is a trademark separable from the product for which it serves as a name? In the United States a trademark is considered to be able to stand apart from the product it serves to when it has acquired "sufficient substance" to do so. Such consideration might indicate that where a supplier allows the use of its trademark only in connection with the sale of its product, the trademark might not be able to serve as a tying product. But, where the trademark, for example, is used for advertisement reasons or sold separately, it might very well constitute the tying product.233

(c) The supplier’s conduct must be part of a practice, otherwise it cannot be characterized as exclusive dealing, tied selling and market restriction within the meaning of s. 77. The Act does not define the term practice. In NutraSweet, however, it was held that “a practice may exist where there is more than an ‘isolated act or acts’.” This means that two or more contractual relationships involving exclusive dealing or inducements to behave in


233 NutraSweet would have been a “good” case, since the well known trademark and logo appeared on the packaging of the products which contained NutraSweet’s aspartame and could be used to attire customers. In this case both, Pepsi and Coke, indicated that diet consumers may feel that the NutraSweet logo on the label shows a safer product, see NutraSweet (1991) 32 C.P.R. (3d) 50. See also R.J. Roberts, supra note 99, at 244-245.

234 (1991) 32 C.P.R. (3d), 35 and 54. The Tribunal adopted the definition of “practice” applied by the Ontario High Court in R. v. William E. Coutts Co. (1968) 52 C.P.R. 21, affirmed 54 C.P.R. 60, a case dealing with the issue of resale price maintenance even though resale price maintenance is a criminal offence. See also Davies, Ward & Beck, supra note 83, at 4-132, and infra 2.4. The Tribunal applied the same definition of the term practice to both, the abuse of dominant position and exclusive dealing.
such a way constitute already the required element of practice. Yet, it does not mean, that the supplier has to deal with all or most of its distributors in that way; repeated exclusive dealing with only one of its distributors should also be enough to constitute the required practice.235

(d) Before addressing the main statutory requirements of s. 77 certain issues such as the definition of the relevant product and the product market must be discussed. Since subs. 77(1) refers to a supplier of a product, the relevant product has to be identified in each case.236 This means to decide whether the specific product in question can sufficiently be distinguished from other (similar) products “in order to decide whether it should be treated as a separate product or as a part of a broader class” of products (in case of sweeteners).237 Similar as argued in the refusal to deal section, the definition of the relevant product market can be conclusive for the further analysis of the statutory requirements. Especially, the definition of the supplier’s market power depends on the particular product market.238

In Bombardier239 and BBM240 the relevant product was not discussed in detail; in both cases the products dealt with also constituted the relevant product. Following the

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235 See Donald S. Affleck and K. Wayne McCracken, supra note 112, at 18-3.
237 Ibid, 10
238 See ibid, 10, where the respondent company submitted, that a too narrowly defined product market could lead to the conclusion that it has market power. As we will see, with respect to the analysis whether the supplier’s arrangement lessened competition substantially, market power and its evolvement during the relevant time can be an important factor.
240 (1982) 60 C.P.R. (2d) 32.
argument in *NutraSweet*, the relevant product has to be defined in relation to its substitutability in use with other products, the relevant prices and other factors.\textsuperscript{241} The Tribunal discussed the different sweeteners (caloric sweeteners such as sugar and high-intensity sweeteners such as aspartame, saccharine etc.) and concluded that there was no evidence of direct competition between aspartame and caloric sweeteners and only some competition from other high-intensity sweeteners, but none itself was a good substitute.\textsuperscript{242} It, consequently, defined the relevant product as aspartame.\textsuperscript{243}

It seems that there is a tendency to define the relevant product rather narrowly. Obviously a lot depends on the question of substitutability which itself depends on factors of use, price, composition of the product, etc. The more particular a product is the less are the possibilities that it may be substituted by another product and be characterized as part of a broader class of product.

As to the geographic market the critical question is "whether an area is sufficiently insulated from price pressures emanating from other areas so that its unique characteristics can result in its prices differing significantly for any period of time from those in other

\textsuperscript{241} Factors such as delays in development and obtaining regulatory approvals as well as possible health consequences of their use had been considered by the Tribunal; (1991) 32 C.P.R. (3d) 12-15. See also Donald S. Affleck and K. Wayne McCracken, *supra* note 112, at 18-3; Davies, Ward & Beck, *supra* note 83, 1995 Recent Developments Pamphlet, at 41.


\textsuperscript{243} However, according to the Tribunal it did not matter a lot whether the relevant product was defined as "aspartame" or "high-intensity sweeteners", since the only high-intensity sweetener allowed in Canada with respect to industrial use (which was by far the most important use) as a food additive was aspartame; *ibid*, 20.
areas. Country-specific clauses in multi-country contracts and the average price differences between Canada, the U.S. and Europe (particularly the European Economic Community) indicated that the market conditions in Canada produced significantly different prices. It was, therefore, reasonable to define the geographic market as Canada.

(e) Subsection 77(2) and (3) require that a major supplier must be engaged in the alleged practice of exclusive dealing, tied selling and market restriction or that this practice is widespread in the market, and that this practice has some exclusionary effects with the result that competition is or is likely to be lessened substantially. The most important of these elements is the third one, that the alleged practice is or is likely to lessen competition substantially. As stated by one of the authors, the first element is a sine qua non for the third, for "competition cannot be lessened substantially by a practice that is neither engaged in by a major supplier of a product nor widespread in the market." The second element, too, is not of significant weight as it is difficult to imagine how competition can be lessened substantially without impeding entry or expansion of sales of a firm or a product in the market, or some other exclusionary effects.

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244 NutraSweet (1991) 32 C.P.R. (3d) 20-21. Or how the Tribunal stated in other words: "Geographic market definition represents an attempt to determine the extent of the territory where there is competition and in which prices for a product tend toward uniformity"; ibid, 21.

245 Ibid, 22. In Bombardier, (1981) 53 C.P.R. (2d) 51-55, the RTPC divided the snowmobile market in three levels (manufacturing, distribution and retail) and defined the relevant geographic market accordingly (North America at the manufacturing level, the provinces named in the application at the distribution level, and the local markets in each region at the retail level). In BBM, (1982) 60 C.P.R. (2d) 60, the geographic market was simply defined as Canada. However, the Commission defined without further discussion two separate product markets (radio and television audience data).

246 Mark Q. Connelly, supra note 199, at 535.

247 Mark Q. Connelly, supra note 199, at 536. Thus, as this author suggested, ibid, "the first and second factors are simply basic, perhaps gratuitous, economics lessons delivered by Parliament for the
However, these factors are still important to determine whether competition has been lessened substantially.

(aa) The law does not define the meaning of “major supplier”, but this requirement has been discussed in detail in Bombardier. In approaching the definition the RTPC first stated that “[a] major or important supplier is one whose actions are taken to have an appreciable or significant impact on the markets where it sells. Where available a firm’s market share is a good indication of its importance since its ability to gain market share summarizes its capabilities in a number of dimensions. Other characteristics of a supplier which might also be used in assessing its importance in an industry are its financial strength and its record as an innovator. However, the characteristics which are most relevant will vary from industry to industry.”

After examining Bombardier’s market share in the three levels of manufacturing, distribution and retail, the Commission found that Bombardier was a major supplier at each of those levels in the relevant market. The RTPC and later the Tribunal had been consistent about their approach to define this phrase. In BBM the Commission followed Bombardier and focused again on the market

Commission's edification concerning just how the practices in question could be likely to result in substantial lessening of competition”.


249 Ibid, 54. Further important factors for the Commission were also Bombardier’s “historical position in the industry” and its “strong participation in innovation, in trail setting and in racing”. See Davies, Ward & Beck, supra note 83, at 5-80.

250 Bombardier's shares of snowmobile sales in the relevant geographic market were approximately 30% at the manufacturing level and 40 to 60% at the distribution level. With respect to the retail level the Commission stated that the provincial sales figures "are not to be looked upon as providing market shares typical of all local markets", but that they may “coupled with other evidence, provide an acceptable rule of thumb of the sales position generally in local markets” and eventually concluded that “Bombardier was in a strong market position in a large number of local markets and thus was a major supplier at the retail level in the geographic areas in question”; (1981) 53 C.P.R. (2d) 56.

share to determine whether BBM was a major supplier, and in NutraSweet the Tribunal expressly adopted the definition of "major supplier" established by the Commission in Bombardier.

There can be more than one major supplier in a market. The RTPC noted that s. 77 refers to a major supplier and not to the major supplier of a product and argued further, to decide that only one, the most important, supplier can be a major supplier would mean to limit the legislative provision in a way which is not discernible from its drafting.

(bb) Even if the supplier who is engaged in exclusive dealing, tied selling or market restriction is not a major supplier, s. 77 may still apply if the practice of doing so is "widespread in the market" and lessens competition substantially. The phrase "widespread in the market" is not defined in the Act and in none of the three cases the Commission or the Tribunal had to deal with this question as in each case the supplier was held to be a major supplier. In NutraSweet, however, the Tribunal noted that the respondent company did not dispute that the practice of exclusive dealing is widespread

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252 Since BBM was the only provider of radio audience data in Canada and had a share of over 80% regarding the television audience data, the Commission found that it was a major supplier with respect to both, the radio data and the television data market; (1982) 60 C.P.R. (2d) 34.
253 (1991) 32 C.P.R. (3d) 56. NutraSweet admitted that, if "major" meant nothing else than quantitative sales share, it would be a major supplier, and since it did not advance any other factors that might have been taken into account, the Tribunal held that NutraSweet was a major supplier; ibid, 55; Davies, Ward & Beck, supra note 83, at 5-81.
255 The wording with respect to market restriction is "widespread in relation to a product", see subs. 77(3).
256 Subs. 77(2).
in Canada since virtually all customers buy pursuant to requirements contracts from either
[NutraSweet or its only competitor in Canada]".\footnote{257} Davies, Ward & Beck, in adopting the
definition of widespread in the \textit{Oxford English Dictionary} which defines it as “distributed
over a wide region; occurring in many places or among many persons”, argue that the
threshold for a practice of exclusive dealing or tied selling to ‘be ‘widespread in the
market’ may not be difficult to meet if it is a common practice among suppliers”\footnote{258}
In any case, since exclusionary clauses are common in Canada in distribution agreements,
there might be a risk for a supplier that its practice of exclusive dealing or market
restriction could become a subject to s. 77 even if it is not a major supplier in the market.
The law does not require that the Director challenge the conduct of the supplier’s
competitors, who are engaged in the same practice and who establish the necessary
requirement, namely that the practice is widespread in the market. In the result, this could
mean that a non-major supplier, who is involved in a case before the Tribunal for the
alleged practice of exclusive dealing or market restriction, because its competitors are
engaged in the same practice, could get an order prohibiting it from continuing its practice
while its competitors would still be free to continue the “prohibited” practice.\footnote{259}
Nevertheless, a careful competitor of the supplier might in view of such a decision change
its own practice in order not to become the “next” subject for a prohibition order under s.

\footnote{257} (1991) 32 C.P.R. (3d) 55.
\footnote{258} \textit{Supra} note 83, at 5-82. However, it seems that the Tribunal’s definition of “widespread in the
market” is more difficult to meet, since “virtually all customers” have to buy pursuant to the exclusive
contract.
\footnote{259} Donald S. Affleck and K. Wayne McCracken, \textit{supra} note 112, at 18-5.
77. Furthermore, according to subs. 77(2) the Tribunal may issue an order directed to all or any of the suppliers against whom an order is sought.\(^{260}\)

One must not forget, however, that from a practical point of view, the requirements of major supplier or that the practice is widespread in the market do not limit the application of s. 77 significantly. Then, any supplier who is able to lessen competition substantially in a relevant market by exclusive dealing, tied selling or market restriction is likely to hold a sufficient market share to be defined as a major supplier; and a practice which has resulted in a substantial lessening of the competition is likely to be widespread in the market, when not engaged in by a major supplier.\(^{261}\)

(f) The main issue is whether the alleged practice of exclusive dealing, tied selling or market restriction does lessen or is likely to lessen competition substantially in the market. In determining this question the Tribunal has to find out whether the supplier's practice is likely to have any anti-competitive effects. According to subs. 77(2) the practice must be likely to impede entry or expansion of a firm or a product in the market or have any other exclusionary effects.\(^{262}\) However, as long as exclusive dealing or tied selling arrangements exist and are "enforced" by the supplier it should not be very difficult for the Director to

\(^{260}\) Where an alleged practice is widespread in the market the Director's application might include all or most of the suppliers who are engaged in this practice.

\(^{261}\) Davies, Ward & Beck, \textit{supra} note 83, at 5-81 - 5-83; Mark Q. Connelly, \textit{supra} note 199, at 535.

\(^{262}\) According to the wording of subs. 77(3) it seems that in a case of market restriction the substantial lessening of competition or its likelihood does not involve the impediment of entry or expansion or other exclusionary effects; R.J. Roberts, \textit{supra} note 99, at 257. Nevertheless, it can be suggested that this does not mean that the Tribunal will apply a different test in this regard on market restriction cases, since elements like the creation of entry barriers and other exclusionary effects are also relevant in the context of market restriction.
prove that those preconditions are met. Then, any such arrangement has, by definition some actual or potential exclusionary effect.\footnote{Donald S. Affleck and K. Wayne McCracken, \textit{supra} note 112, at 18-4; Mark Q. Connelly, \textit{supra} note 199, at 535-534; Davies, Ward & Beck, \textit{supra} note 83, at 5-84. Note, that complete exclusion or an exclusion of some degree is not required by the law.}

According to the Tribunal these preconditions make clear "how the required effect on competition would be achieved".\footnote{\textit{NutraSweet} (1991) 32 C.P.R. (3d) 56. The Tribunal adopted the approach made in \textit{Bombardier} (1981) 53 C.P.R. (2d) 56, where it was stated that "whether exclusive dealing by a supplier impedes expansion or entry of competitors in the market is most easily and meaningfully considered as part of the determination of whether there is or is likely to be substantial lessening of competition as a result of the practice".} Exclusionary effects such as impediments to entry or expansion can be a clue that competition might have been lessened substantially. However, merely impeding entry or expansion is not enough; entry or expansion must be impeded to such extent that competition is likely to be lessened substantially.\footnote{Marilyn MacCrimmon and Asha Sadanand, \textit{supra} note 117, at 755; Davies, Ward & Beck, \textit{supra} note 83, at 5-84.}

Whether competition is or is likely to be lessened substantially is a question of fact, which has to be answered according to the circumstances in each case.\footnote{Davies, Ward & Beck, \textit{supra} note 83, at 5-84; Donald S. Affleck and K. Wayne McCracken, \textit{supra} note 112, at 18-4.} This means that the impact on competition has to be assessed in each case separately. It is often called the rule of reason analysis, which can be compared to the \textit{per se} rule.\footnote{These two rules have been developed by American Antitrust law.} Whereas the former requires a balancing of anti- or pro-competitive effects of such practices in individual cases, the latter is a "conclusive presumption",\footnote{Marilyn MacCrimmon and Asha Sadanand, \textit{supra} note 117, at 755.} under which a conduct is presumed to be
anti-competitive once it has triggered the significant threshold requirement;\textsuperscript{269} the defendant cannot escape liability by demonstrating that its conduct is not anti-competitive, but rather has pro-competitive or no effects on competition.\textsuperscript{270} In Canada and in the United States, exclusive dealing, tying and market restriction arrangements, are all subject to the same statutory language (for the U.S.: S. 3 of the \textit{Clayton Act}). However, American courts apply a different test of substantial lessening of competition to these arrangements; the \textit{per se} rule is applied to tying arrangements, whereas cases of exclusive dealing and territorial restraints are analyzed under a rule of reason approach. The practice of tying has a status of \textit{per se} antitrust violation on the theory that its sole purpose and effect is to limit competition in the market for the tied product.\textsuperscript{271} It is deemed to be much more restrictive on competition than exclusive dealing.\textsuperscript{272} In contrast to this American jurisprudence the Canadian jurisprudence does not - so far - apply a different test on tied selling and exclusive dealing or market restriction arrangements.\textsuperscript{273} It is difficult to predict whether the Tribunal will decide to follow the U.S. jurisprudence in this regard. However, there are reasons to believe that a strict \textit{per se} rule will not be applied in Canada since there is a development in the United States towards a more "reasonable" approach on


\textsuperscript{271} Mark Q. Connelly, \textit{supra} note 199, at 531.

\textsuperscript{272} R.J. Roberts, \textit{supra} note 99, at 227-228; I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, \textit{supra} note 111, at 3.1.23. In \textit{Standard Oil of California v. United States}, 337 U.S. 293 (1949) at 305, the United States Supreme Court stated that "[t]ying agreements serve hardly any purpose beyond the suppression of competition". The application of this \textit{per se} rule on tying arrangements has been criticized by Mark Q. Connelly, \textit{supra} note 199, at 568-569.

\textsuperscript{273} BBM is the only case which dealt with tying arrangements. However, the RTPC did neither discuss nor consider the U.S. jurisprudence in this regard.
tying. In a more recent decision, the United States Supreme Court declared that "as a 
threshold matter there must be a substantial potential for impact on competition, in order
to justify per se condemnation".\textsuperscript{274} With this decision the application of the per se rule has
been limited and placed near the rule of reason approach. It seems that the U.S. law in this
regard has moved closer to the Canadian law.\textsuperscript{275}

The meaning of the word “substantially” is not clear. As already demonstrated with
respect to the refusal to deal provision there is a significant difference between the English
and the French version.\textsuperscript{276} However, it seems that an exclusive dealing arrangement to be
challenged successfully has to have a \textit{major} impact on competition.\textsuperscript{277}

In \textit{Bombardier} the RTPC found that at the manufacturing level Bombardier accounted for
about 10% of the North American sales and that "[t]he long-term viability of Bombardier's
competitors would not be threatened if they were denied access to that portion of market
shares".\textsuperscript{278} In fact, the evidence showed that there was very active and effective
competition in innovation. In addition, the Commission stated that "[t]he existence and

\begin{footnotes}
\item[274] \textit{Jefferson Parish Hospital District No. 2 v. Hyde}, 466 U.S. 2 (1984) at 16. This in addition to the
already mentioned requirement of substantial power over the tying product. See Phillip E. Areeda, \textit{supra}
\item[275] I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, \textit{supra} note 111, at 3.1.23. See also Phillip E.
Areeda, \textit{supra} 269, at 413, who recommends abandoning the \textit{per se} rule against tying and to assess each
tie instead for the reasonability of its effect.
\item[276] See \textit{supra}, 2.1.2. fn 153.
\item[277] In a refusal to deal case the Tribunal stated that "substantial" should be given its ordinary
meaning which means rather "major" or "significant"; see \textit{Chrysler} (1990) 27 C.P.R. (3d) 23. Note, that
the Tribunal's approach was to look on the affected part of the business rather than at the impact on the
whole business (Brunet's total sales had increased despite Chrysler's refusal to deal).
\item[278] (1981) 53 C.P.R. (2d) 56. But see, Donald S. Affleck and K. Wayne McCracken, \textit{supra} note 112,
at 18-4.
\end{footnotes}
continued viability of strong competitors to Bombardier means that the most serious potential effects of an exclusive dealing policy are not present". With respect to the two remaining levels the Commission concluded that competition for dealers was an important form of rivalry among snowmobile distributors but that the entry at the retail level was easy. There was also a high rate of turnover and recruitment of dealers by the competitors in the market. Furthermore, the sales figures showed an increase in the competitor's market share which was higher than Bombardier's. Hence, the Commission concluded that "Bombardier's competitors were able to overcome whatever barriers to their expansion were created by Bombardier's exclusive dealing policy", and therefore competition had not been lessened substantially.

In BBM the Commission agreed that the alleged tying arrangements lessened competition substantially by impeding entry by newcomers in both markets and by impeding expansion of BBM's sole competitor in the television market. There was enough evidence that BBM's competitor suffered "a severe competitive disadvantage in selling its television rating service where the prospective customer must buy radio data from BBM", because "the cost of buying radio data from BBM and television data from [BBM's competitor] was excessively higher than BBM's price for both data". It was also clear that a

280 Ibid, 55 and 56.
281 Ibid, 60. The Commission, however, observed that if there were a number of communities where Bombardier was the only dealer a more serious problem would be raised. Yet, there was no evidence on this matter; Ibid, 61.
newcomer to either radio or television data market could not compete in fair terms for customers, because of BBM's tying arrangements.\textsuperscript{284}

In NutraSweet, finally, the Tribunal indicated that the fundamental test of substantial lessening of competition is the same with respect to s. 79 and s.77 of the Act.\textsuperscript{285} To determine whether the practice of anti-competitive acts has or is likely to have "the effect of preventing or lessening competition substantially in the market",\textsuperscript{286} the same factors that were discussed in concluding that NutraSweet has market power have to be considered. The question to be decided is whether NutraSweet's anti-competitive acts preserve or add to its market power.\textsuperscript{287} Eventually, the Tribunal concluded that NutraSweet substantially controlled, through its market power, the sale of aspartame in Canada, and had engaged in anti-competitive acts, and that these practices were "having the effect of preventing or lessening competition substantially".\textsuperscript{288}

With regard to the definition of market power the Tribunal stated that it "is generally accepted to mean an ability to set prices above competition levels for a considerable period".\textsuperscript{289} It agreed that this is a "valid conceptual approach". However, this approach

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\item \textsuperscript{284} Ibid, 36-37.
\item \textsuperscript{285} (1991) 32 C.P.R. (3d) 56; Davies, Ward & Beck, supra note 83, at 5-86.
\item \textsuperscript{286} Subs. 79(1)(c).
\item \textsuperscript{287} (1991) 32 C.P.R. (3d) 47; Davies, Ward & Beck, supra note 83, 1995 Recent Developments Pamphlet, at 57.
\item \textsuperscript{288} (1991) 32 C.P.R. (3d) 52.
\item \textsuperscript{289} (1991) 32 C.P.R. (3d) 28. According to Herbert Hovenkamp, "The Measurement of Market Power: Policy and Science", in Frank Mathewson, Michael Trebilcock and Michael Walker, eds., \textit{The Law and Economics of Competition Policy} (Vancouver: The Fraser Institute, 1990), 43 at 44, there are two definitions of market power, one drawn from economics and the other drawn from policy. The first defines market power as "the power of a firm to increase its profits by raising its price above marginal cost; the greater the ratio of price to marginal cost at the firm's profit-maximizing level of output, the more market
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cannot be readily applied; "one must ordinarily look to indicators of market power such as market share and entry barriers; [t]he specific factors that need to be considered in evaluating control or market power will vary from case to case". This must be also valid for tied selling and market restriction and it appears that the issue whether competition is lessened substantially depends in particular on the ability of the supplier to exercise its market power and to create entry barriers in the relevant market. However, market share and the question whether an exclusive dealing, tied selling or market restriction arrangement raises entry barriers are not the only factors to be examined. Other issues such as whether the exclusive arrangement prevents competitors from pursuing other distribution channels, drives them from the market, or increases their costs to distribute

power the firm has"; the second defines market power as the "ability of a firm to make a profit by raising its price to unacceptably high levels". For Hovenkamp the second definition is much more "spongy", not even mentioning marginal cost, and containing subjective elements. However, he also admits, and NutraSweet is an example, that for purposes of competition policy, "the second definition of market power is far more useful than the first". The reasons are, firstly, that the real world market is too complex producing different kind of costs over different period of times, so that it becomes difficult for the Tribunal to measure marginal cost, and secondly, market power according to the first definition is a widespread phenomenon (most of the firms in the real world maximize their prices above marginal cost) and policy-makers must rather "make some kind of assessment about how much market power is too much". But there is no objective answer, then the "socially undesirable amount (of market power) varies from one industry to another"; ibid, at 44-45.

(1991) 32 C.P.R. (3d) 28. The fact that NutraSweet had a market share of over 95% of sales in Canada, the existence of serious entry barriers and the constraints operating on NutraSweet's largest customers (Coke and Pepsi) were compelling enough to conclude that NutraSweet had market power; ibid, 29-31.

See Davies, Ward & Beck, supra note 83, at 5-86 - 87. See also R v. Nova Scotia Pharmaceutical Society (1992) 93 D.L.R. (4th) 36 at 68, a conspiracy case (s. 45 of the Act) where the Supreme Court of Canada emphasized that market power is a relevant element to the assessment whether the alleged anti-competitive agreement has the effect of lessening competition unduly. The Supreme Court also stated that market share is an important factor in determining market power, but that many other factors such as the number of competitors and the concentration of competition, barriers to entry, geographical distribution of buyers and sellers etc. are also relevant, ibid, 67.

The Tribunal's approach in NutraSweet was criticized for being too much influenced by the "admittedly striking figures defining the respective market shares" and failing "to look beyond the figure" and thereby overlooking "a number of crucial considerations"; see Paul J. Collins, "The Law and Economics of 'Abuse of Dominant Position': An Analysis of NutraSweet" (1991) 49 U. T. Fac. L. Rev., 275 at 284. This author suggests that the "threshold question must be whether the market is contestable", then "as the contestability of the market increases, the potential for 'anti-competitive effects' diminishes";
and sell their (competitive) product to the customer might also be part of an appropriate
analysis in a s. 77 case. Furthermore, elements such as number and relative strength of
competitors, the kind of the industry involved, geographical significance of the economy,
and factors such as the duration of the exclusive dealing contract and the reasons for
imposing such requirements may also be important in a particular case.

However, with respect to market restriction and also to exclusive dealing cases another
element might become relevant in answering the question whether competition has
lessened substantially. This, if we consider American jurisprudence in this regard and
especially the U.S. Supreme Court decision in Continental T.V. Inc. v. GTE Sylvania
Inc., which dealt with territorial restraints. From that decision it appears that the
relevant question depends upon "whether the reduction of intrabrand competition
occasioned by market restriction is compensated for by the possibility of increased
interbrand competition". Market restriction (often connected with exclusive dealing),

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ibid. Or, how Herbert Hovenkamp, supra note 289, at 59, puts it: "if entry is easy and takes a relatively
short time, then a firm lacks substantial market power, notwithstanding its high market share".
See Kevin J. Arquit, "Market Power in Vertical Cases" (1991) 60 Antitrust L. J., 921 at 929, and
supra note 289, at 45; R.J. Roberts, supra note 99, at 248. However, there are other sources which may
influence market power significantly. For example, patent and also copyright laws create substantial
market power for certain companies in rewarding innovation with profits which are higher than usual.
Further, trade restrictions such as tariffs and quotas which protect domestic firms from foreign
competition often create substantial market power. See Herbert Hovenkamp, ibid, at 45.
433 U.S. 36 (1977). In this case the U.S. Supreme Court overruled its prior ruling in United
suppliers was a per se violation of the conspiracy provisions of the Sherman Act"; R.J. Roberts, supra note
99, at 236. See also Phillip E. Areeda, supra note 269, v. VIII, at 465.
R.J. Roberts, supra note 99, at 258. Intrabrand competition means competition within the
individual product brand while interbrand competition is defined as competition among competing
brands; see I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, supra note 111, at 3.1.23.
unlike tied selling, has the potential to reduce the competition within the suppliers brand while stimulating interbrand competition at the same time, i.e. competition between the brand of the supplier and the brands of the same product of its competitors.\textsuperscript{297} The U.S. Supreme Court stated that "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These 'redeeming virtues' are implicit in every decision sustaining vertical restrictions under the rule of reason. Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers. (...) For example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products".\textsuperscript{298} In other words, it might be likely that the Tribunal in determining whether an alleged market restriction is or is likely to lessen competition substantially will take into account both the anti- and the pro-competitive effects of this practice and weigh a probable increase of interbrand competition against the decrease in intrabrand competition.\textsuperscript{299}

\textsuperscript{297} R.J. Roberts, supra note 99, at 258. See also Sylvania, 433 U.S. 36 (1977) at 51.
\textsuperscript{298} Sylvania, 433 U.S. 36 (1977) at 54-55.
\textsuperscript{299} I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, supra note 111, at 3.1.23. See also R.J. Roberts, supra note 99, at 258. According to this author the assessment of the supplier's market power might be relevant in this process, as "the question whether the market-restricting supplier has power in the product market might well affect the question whether the reduction in intrabrand competition accomplished by the restriction is outweighed by probable increases in interbrand competition"; ibid.
(g) The Act provides several exemptions to the provisions outlined above. Subsections 77(4), (5) and (6) describe the circumstances in which a party may be allowed to engage in exclusive dealing, tied selling or market restriction, even though it provides enough grounds for a prohibition order under s. 77. Exemptions are provided for temporary exclusive dealing or market restriction arrangements in order to facilitate entry of a new supplier or a new product in the market, for tying arrangements with a technical relationship between or among the products to which they apply, for tying arrangements pursued by a person in the business of lending money in order to better secure the loans, and for exclusive dealing, tied selling or market restriction among enterprises that are affiliated. Several of these exemptions are of particular importance to product distribution systems.

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301 See Subs. 77(4). Subs. 77(5) clarifies that enterprises are deemed to be affiliated, when one company is the subsidiary of the other or both are the subsidiaries of the same company, when two companies are affiliated with the same time, and when a partnership or sole proprietorship and another partnership, proprietorship or company are controlled by the same person. In addition, subs. 77(5)(d) provides an exemption for companies, partnerships or sole proprietorships which do not have common ownership or control but are deemed to be affiliated where one party grants by agreement to the other party the right to use a trademark or tradename to identify the business of the grantee. This exemption is called the "Canadian Tire Exemption" and is only applicable if "the business is related to the sale or distribution, pursuant to a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers, and no one product dominates the business"; subs. 77(5)(d)(i) and (ii); see I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, supra note 111, at 3.1.18; R.J. Roberts, supra note 99, at 240-241; Davies, Ward & Beck, supra note 83, at 5-91. This exemption is made for the classical franchise system, but is of no direct relevance to exclusive distribution systems, since they usually do not involve a multiplicity of products from competing sources of suppliers. And even a non-exclusive distribution agreement hardly falls within this exemption because one product often dominates the others. For the history of this exemption see Mark Q. Connelly, supra note 199, at 537-538. Subs. 77(6), eventually, provides an exemption exclusively for market restriction, also called the "Coca-Cola exemption", which is applicable to food and drink franchising.

302 It may be questionable whether these exemptions cover all the situations which should be exempted from a prohibition under s. 77; see, for example, Mark Q. Connelly, supra note 199, at 567-569. However, it should be recalled that it is in the Tribunal's discretion not to issue an order even if all the elements of s. 77; see also Davies, Ward & Beck, supra note 83, at 5-88.
Of most importance for exclusive distribution agreements is the exemption for temporary exclusive dealing and market restriction in order to facilitate the entry in the market. In such a case a supplier has to establish that the otherwise prohibited conduct is to be engaged in only for a limited time, that this time is of reasonable length, and that it serves to facilitate the entry of either a new supplier or a new product. There are some open questions. Firstly, what constitutes a reasonable period of time? Does it depend on the time needed for a successful entry? However, a new supplier who has established itself as a "major supplier" in the market has passed the reasonable time. It might be difficult and not appropriate to fix the same length of "reasonable" time for all cases or to stipulate a maximum time period for entering into the market. The reasonable time period may vary significantly depending on the particular industry involved, the market situation, and the resources of the supplier to promote the new product efficiently. In short, the reasonable time period should be assessed in accordance of the circumstances of each case. Secondly, the exemption is provided for the entry of a new supplier or a new product in the market. But what qualifies a product to be a "new product"? Is a new model of an already marketed car a new product that justifies the engagement in exclusive dealing or market restriction arrangements by a major supplier? Or has the new car model to differ

303 Davies, Ward & Beck, supra note 83, at 5-88.
304 Davies, Ward & Beck, supra note 83, at 5-88. According to these authors there is no reason to limit the reasonable time period to two years (as other authors with reference to the merger guidelines suggested), because s. 77 seeks to promote new entry and it might well be that effective entry takes longer than two years, see their discussion, ibid, at 5-89.
305 In fact, the exemption might be very useful for a new supplier who wants to entry in a market in which the practice of exclusive dealing or market restriction is widespread; see Davies, Ward & Beck, supra note 83, at 5-88.
substantially from the established, "older" car model, and if yes to what extension? There is no jurisprudence, not even American, which would provide an answer to this question. However, it can be argued that the "new product" in the context of this exemption must be so new or so different from the "old product", that a (reasonable) period of time is needed to promote this new product and to entry the market.

(bb) With respect to tying arrangements the defense that the tied selling is "reasonable having regard to the technical relationship between or among the product to which it applies", is of most relevance. An obvious example for technically related products is an automobile and its tires. The technological relationship exemption was briefly considered in BBM. BBM argued that its practice to tie radio and television data is covered by this exemption because there were common "administrative costs" (including salaries and benefits, rent, travel, meeting expenses etc.), and "process costs" that shared "many points of convergence" (such as software, computer programs, sample design etc.). The RTPC did not accept this view. Instead it held that the exemption "applies to the reasonable requirement of the sale of two products together for technological reasons, not to their production". It furthermore added, that "the section provides a defense or justification of a tied sale on the basis that the reputation of the tying product might be

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307 Subs. 77(4)(b).
308 R.J. Roberts, supra note 99, at 238. This author suggests that this exemption would also permit the tying of a service to the sale of a product where it is technically justified. According to the Director tied selling may be allowed when there is a technological relationship between products such as computers and software, Davies, Ward & Beck, supra note 83, at 5-90.
310 Ibid, 33 (first emphasis added).
injured or destroyed if the supplier cannot insist on a purchaser using only the tied product in conjunction with it".  

2.2.5. Conclusion
Without doubt, the provisions in s. 77 can be relevant for exclusive distribution agreements and many suppliers should be concerned with the extent to which its exclusionary practices may be reviewed. However, the statutory requirements are various and often difficult to prove for the Director when asking for a prohibition order. The supplier must not only be a major supplier or engaged in a practice that is widespread in the market, it must also be demonstrated that the alleged practice results or is likely to result in a substantial lessening of competition. As we have seen the latter is not easily established and its examination depends on several elements which might be of significant influence. As it was argued for a refusal to deal case, it is evident that a lot depends on the meaning of “product”, “market” and “market power” when deciding whether competition has been lessened substantially. In addition there are still several exemptions provided by the Act which prevent the Tribunal from issuing an order even if all the requirements are met and the supplier is engaged in anti-competitive practice. Of those, the exemption for temporary exclusive dealing and market restriction arrangements has arguably the greatest impact on distribution systems, exclusive distribution agreements are often used to

311 Ibid, 33. In case there was no suggestion that the reputation or goodwill of BBM would have suffered, if customers bought only one of its services. See also Davies, Ward & Beck, supra note 83, at 5-90; R.J. Roberts, supra note 99, at 239.
312 In branches or industries where distribution agreements are usually used to distribute and sell the product (for example the cosmetic industry) this requirement does not establish a high hurdle to overcome.
facilitate the entry into a new market. It seems, then, that the impact of s. 77 of the Act is not as important as it might have been assumed to be at first glance. And this might even be more true when we consider the following.

Exclusionary practices are not always anti-competitive, they may also have pro-competitive effects or be competitively neutral depending on the circumstances of each case. There are various economic explanations that exclusive dealing, market restriction, and to a lesser degree tied selling arrangements can enhance efficiency which may justify that competition is limited to some degree. 313

Furthermore, such practices may, while restricting competition within the individual product brand and - sometimes - creating entry barriers, at the same time enhance interbrand competition; this by allowing the manufacturer certain efficiencies in the distribution of its products. 314

313 Robert D. Anderson and S. Dev Khosla, *Competition Policy as a Dimension of Economic Policy: A Comparative Prospective* (Occasional Paper Number 7, May 1995), at 12; Frank Mathewson and Ralph Winter, "The Law and Economics of Vertical Restraints", in Frank Mathewson, Michael Trebilcock and Michael Walker (eds.), *The Law and Economics of Competition Policy* (Vancouver: The Fraser Institute, 1990), 109 at 141; I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, *supra* note 111, at 3.1.23. Such efficiency enhancing factors are, for example, the principle that manufacturers in the bidding process for retail outlets have to lower their prices with the consequence that the retail prices the consumers have to pay are low enough to compensate them for any reduction in their choice. Incentives for dealers to provide non-price services or control, and lower distribution costs for manufacturers may also have efficiency enhancing effects; see Frank Mathewson and Ralph Winter, *ibid*, at 130-136 and at 141. Territorial restrictions also enhance the services provided by retailers and may protect the return on the retailer’s investments against appropriation by the manufacturer; see Frank Mathewson and Ralph Winter, *ibid*, at 126. Tied selling agreements, finally, can also serve effective control of distributors and retailers and of the quality of the product; they may also enhance the reputation of the product. However, there is no unified economic theory with respect to tying. Some economists do not agree and are of the view that tied selling is being used to engage in price discrimination, and, eventually, to earn a higher profit than otherwise made; see again Frank Mathewson and Ralph Winter, *ibid*, at 139.

314 I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, *supra* note 111, at 3.1.23. This is mostly the case in the context of territorial restrictions. For an example of a thorough discussion and evaluation of the respective economic principles by a court, see *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36.
2.3. Abuse of Dominant Position, Consignment Selling and Delivered Pricing

2.3.1. Introduction

The remaining three practices which are identified by the Act as "reviewable trade practices" are abuse of dominant position (s. 79), consignment selling (s. 76) and delivered pricing (s. 81). In the context of exclusive distribution agreements these sections do not play a very significant part and they hardly affect such agreements.\(^{315}\) However, in some special circumstances some of those provisions might be relevant.

2.3.2. Abuse of Dominant Position

The abuse of dominant position section of the Act refers to "a person or persons" who "substantially or completely control throughout Canada or any other area thereof, a class or species of business", and who "have engaged in or are engaging in a practice of anti-competitive acts" that "has had, is having or is likely to have the effect of preventing or

\(^{315}\) One section, it will be argued, is not applicable in the case of a distribution agreement at all.
lessening competition substantially in a market". Section 78 contains a non-exhaustive list of anti-competitive acts.

Both s. 79 and s. 78 were enacted in 1986 and replaced the former monopoly provision which then belonged to the group of criminal offences. Since then the Tribunal has dealt with these provisions in three cases. One is the already well-known NutraSweet-case, the other cases are called Laidlaw and Nielsen.

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317 See s. 78 which starts as follows: "For the purposes of section 79, 'anti-competitive acts', without restricting the generality of the term, includes any of the following acts: (...)". See also NutraSweet (1991) 32 C.P.R. (3d) 1, where seven out of the eight alleged anti-competitive acts were not listed in s. 78, among others exclusionary terms in NutraSweet's supply contracts; see R.J. Roberts, supra note 99, at 296; Davies, Ward & Beck, supra note 83, 1995 Recent Developments Pamphlet, at 47; I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, supra note 111, at 3.1.27; Paul J. Collins, supra note 292, at 281.

318 Robert S. Nozick, supra note 98, at 171; R.J. Roberts, supra note 99, at 265; Michael O. Mungovan, supra note 141, at 79. For the reasons to change legislation, see Background Paper, 1984, supra note 316, lat 9-20.


320 Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd. (1992) 40 C.P.R. (3d) 289. For a discussion of this case and NutraSweet, see Davies, Ward & Beck, supra note 83, 1995 Recent Developments Pamphlet, at 38-63. For an analysis of NutraSweet, see especially the articles by Paul J. Collins, supra note 292, at 275-290 and Donald N. Thompson, supra note 316, at 17-42.

321 Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd. (1996) 64 C.P.R. (3d) 216. The respondent was formed by amalgamation of the A.C. Nielsen Company of Canada Ltd. with Dun & Bradstreet Canada Ltd. and Media Measurement Services Inc. Since the application was only concerned with the business operated by Nielsen, the respondent was referred to by the Tribunal as Nielsen; ibid, 220.
It is not very likely that the Tribunal will exercise its powers and issue an order under s. 79 in a case of an exclusive distribution agreement.\(^{322}\) It is argued that it is, in general, difficult in all but the most extreme cases to establish an abuse of dominant position. This is not only because all the statutory requirements have to be shown, but also because the anti-competitive acts must have been motivated by an anti-competitive purpose or intent.\(^{323}\)

Only in very special distribution situations may s. 79 play a role. Of the anti-competitive acts listed in s. 78, the ones described in subs. 78(a), (e) and (h) may be relevant in the context of particular exclusionary clauses in distribution agreements. For example: Where the supplier and its (independent) distributor are competing in the same market a situation of margin-squeezing (subs. 78(a)) may arise. By raising the price of the product and meeting the distributor's price on the market, the supplier is able to reduce the distributor's

\(^{322}\) This section, however, might be of more importance for franchise systems; see I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, \textit{supra} note 111, at 3.1.28 - 30.

\(^{323}\) See \textit{NutraSweet} (1991) 32 C.P.R. (3d) 34; Donald N. Thompson, \textit{supra} note 316, at 37; Davies, Ward & Beck, \textit{supra} note 83, 1995 Recent Developments Pamphlet, at 47; Donald S. Affleck and K. Wayne MacCracken, \textit{supra} note 112, at 19-3. See also R.J. Roberts, \textit{supra} note 99, at 288, who concludes that Canadian businesses which have dominant positions "might have few worries about taking actions having an anti-competitive effect, so long as they can show that they were not motivated by an anti-competitive purpose". In \textit{Nielsen} the Tribunal, however, stated that "it is not necessary for the Director to prove subjective intent to restrict competition in the relevant market on the part of the respondent" and that "[t]he respondent will be deemed to intend the effects of its actions"; (1996) 64 C.P.R. (3d) 257, with reference to \textit{Laidlaw} (1992) 40 C.P.R. (3d) 342-343. Donald S. Affleck and K. Wayne MacCracken, \textit{supra} note 112, at 19-11, conclude that this decision "seems to suggest that a company can engage in anti-competitive acts, even if it does not intend those acts to restrict competition and no proof of subjective restrictive intent is presented". The Tribunal acknowledged that the respondent might have a valid "business justification" for its actions, that is that there is "credible efficiency or pro-competitive business justification" for exclusive agreements. It went on to state that "[p]roof of the existence of a business motive (...) that was unrelated to an anti-competitive purpose would undoubtedly be relevant to an evaluation of an allegation of anti-competitive acts. The mere proof of \textit{some} legitimate business purpose would be, however, hardly sufficient to support a finding that there is no anti-competitive act", (1996) 64 C.P.R. (3d) 261 and 265 (emphasis added). It seems that in this regard the onus of proof has shifted from the Director to the respondent.
margin. A situation under subs. 78(e) may arise where a dominant distributor uses exclusive dealing to preempt scarce facilities or resources which are required by a competitor. And a dominant distributor who requires the supplier to supply it the whole output or to cease or refrain from supplying its competitor can be considered to be engaged in an anti-competitive act under subs. 78(h). However, all these practices can only be defined as anti-competitive acts, when their purpose is anti-competitive, that is 'to squeeze competitors’ profit margins, or to raise barriers to new entry or to expansion in the market’.

As we have seen, s. 78 is not exhaustive, and there are exclusionary clauses which can be identified as anti-competitive, although they are not listed in this section. However, when we compare the statutory requirements of s. 79 and s. 77 it is obvious that in a situation of an exclusive distribution agreement where the supplier is held to be engaged in the practice of abuse of dominant position it can - usually - also be held to be engaged in the practices of s. 77. Yet, not every case under s. 77 is also a s. 79 case. For example, it is safe to say, that a supplier who controls or substantially controls the market is always

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324 See Michael O. Mungovan, supra note 141, at 80. Another situation which can be characterized as an anti-competitive act under subs. 78(a) is the so called “bottleneck monopoly”, where the existence of a monopoly at one market level (supplier level) gives the monopolist the power to control the competitive situation in another level (for example a manufacturer who needs the supplier's product to manufacture a competitive product); see R.J. Robert, supra note 99, at 294 and at 272-275, and the there cited Ammunition-case. However, the "bottleneck" situation is not a classical distribution situation since the distributor purchases for resale and not to use the product for manufacturing its own product.

325 Marilyn MacCrimmon and Asha Sadanand, supra note 117, at 714-715. In a situation where a distributor requires that the supplier sells it the entire production, s. 77, which speaks of requirements imposed by suppliers, will not apply. See, supra 2.2.2. fn 215.

326 Michael O. Mungovan, supra note 141, at 83. Any practice where the dominant distributor induces the supplier to do so by, for example, paying more for its product, is also anti-competitive.

327 Donald N. Thompson, supra note 316, at 37.


329 See the exception discussed below.
also a major supplier, whereas not every major supplier is able to control the market in such a degree as it is required by s. 79.\textsuperscript{330}

There is, however, one exceptional situation, where only an application under s. 79 might be successful against an excluding supplier. A supplier who uses exclusive dealing clauses in its contract with the distributor but does not enforce them, that is does not refuse to supply or threaten to do so, could be - provided that all the other requirements are met - considered to be engaged in abuse of dominant position, but not in exclusive dealing under s. 77.\textsuperscript{331}

\textsuperscript{330} In \textit{NutraSweet} (1991) 32 C.P.R. (3d) 27-31, the Tribunal concluded that for the purpose of s. 79 “control” can be treated as synonymous with “market power”. NutraSweet had more than 95% of the Canadian supply of aspartame, which was enough to constitute the required dominant position. In most jurisdictions such a market share means either dominance or monopoly power; in the U.S., for example, a 90% market share is sufficient to constitute monopoly power, whereas a 33% market share is not enough; see Donald N. Thompson, \textit{supra} note 316, at 19. See also Paul J. Collins, \textit{supra} note 292, at 284, who criticizes that “the Tribunal was overly influenced by the admittedly striking figures defining the respective market shares”, that it “failed to look beyond the figure and thereby overlooked a number of crucial considerations”.

However, a supplier with a significant market share is always acting with an “appreciable and significant impact on the markets where it sells”, see \textit{Bombardier} (1980) 53 C.P.R. (2d) 55. In \textit{Bombardier}, having about 30% of the market has been considered to be sufficient to qualify as a major supplier.

\textsuperscript{331} This was the case in \textit{NutraSweet}. The Tribunal concluded that the exclusive supply clauses were anti-competitive having an exclusionary purpose. However, the Tribunal did not find that the exclusive supply clauses constituted exclusive dealing under s. 77 of the Act, because there was no evidence of any refusal to supply or threats to do so; (1991) 32 C.P.R. (3d) 43, 53-54. The mere inclusion of an exclusionary clause in a contract is not enough, the supplier must have refused to supply the product or threatened to do so, unless the customer agreed to purchase exclusively from the supplier. It, nonetheless, must be recalled that the Tribunal in determining whether NutraSweet was engaged in abuse of dominant position focused not separately on the exclusive supply clauses, but rather scrutinized them in a bundle together with other clauses such as logo display allowances, cooperative marketing allowances, meet or release clauses and most-favoured nation clauses; \textit{ibid}, 38-43. The Tribunal called this the “branded ingredient strategy” and stated that such a strategy “becomes a matter of exclusivity wherever the use patent expires and customers have at least the legal opportunity of buying from other suppliers”; \textit{ibid}, 40. Indeed, the Canada patent for the production of aspartame expired two years before the application was brought to the Tribunal. It was “persuaded that the strategy has been and is pursued for the purpose of excluding future or existing competition and not because it is required for efficient distribution or use of the product”; \textit{ibid}, 40. See also Donald N. Thompson, \textit{supra} note 316, at 37-38.
Section 79 provides two defences which might be available for exclusive distribution agreements. One is the so-called efficiency defence (subs. 79(4)), the other is the exception for intellectual property rights (subs. 79(5)).

According to subs. 79(4) the Tribunal is required to "consider whether a practice of anti-competitive acts is a result of superior competitive performance" when determining whether there has been any lessening of competition. The section does not define the meaning of "superior competitive performance". Clear is only that the practice of anti-competitive acts and not the lessening of competition have to be judged with respect to their possibly resulting from superior competitive performance. But can an anti-competitive act be the result of superior competitive performance, and if yes, when is this the case? Or, does the existence of economic dominance create a presumption of superior competitive performance? However, it can be argued, that this subsection intends to make sure that those firms which reached their dominance in the market through a

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332 In NutraSweet the Tribunal did not explicitly address this provision. See the critique by Paul J. Collins, supra note 292, at 289 and Donald N. Thompson, supra note 316, at 40 fn 48. According to the Background Paper, 1984, supra note 316, at 21, "[t]he objective of the new section is to protect the public interest in competition, not to protect particular competitors". It goes on to state, '[i]f, because of lower costs, a firm or a small number of firms gradually acquire the bulk of a market, they will not thereby violate the provisions concerning abuse of dominant position. Canada's competition policy is designed to promote the efficient allocation of our scarce resources, and also to ensure that the competitive process is fair".

333 Donald N. Thompson, supra note 316, at 40 fn 48; R.J. Roberts, supra note 99, at 304; Michael O. Mungovan, supra note 141, at 84.

334 Donald N. Thompson, supra note 316, at 40 fn 48. See also Robert S. Nozick, supra note 98, at 174, who suggests that "expanding in anticipation of future demand, even though it might have the effect of preventing entry of competitors, can just as easily be regarded as superior competitive performance". This was the case in U.S. v. Aluminium Co. of Amer., 148 F.2d 416 (1945); however, the court eventually held that the respondent's conduct was illegal; see Robert S. Nozick, ibid.
superior competitive performance rather than through anti-competitive acts do not have to be worried about consequences from s. 79 of the Act.\textsuperscript{335}

Subsection 79(5) states that an act which is “engaged in pursuant only to the exercise of any right or enjoyment of any interest derived” under the intellectual property statutes, “is not an anti-competitive act”.\textsuperscript{336} The purpose of this subsection is to allow the legitimate exercise of intellectual and industrial property rights. It covers “not only express rights but also interests ‘derived under’ the relevant statutes”,\textsuperscript{337} for example through licensing.

\textsuperscript{335} See R.J. Roberts, \textit{supra} note 99, at 304, and his reference to an article by the then Deputy Director, Howard I. Wetston, “Wetston Discusses New Civil Reviewable Practice” (1987) 8 Canadian Competition Policy Record, at 10. In particular Howard I. Wetston stated: “If competitors leave the market or lose market share because a competitor is more efficient than its rivals or more effective in meeting consumer needs, the lessening of competition does not result from an abuse of market power, but rather it is a natural consequence of the competitive process. This factor is therefore included in the Act to ensure that efficiency, innovation and like considerations are given proper weight by the Tribunal in its assessment of the trade practices of a dominant firm or firms. (...) The indicia which may be included in considering whether the practice results from superior competitive performance may include economies of scale, scope or location, innovation and research, and distribution and marketing methods. As well, the origin of the firm’s dominant market position could also play an important part (...). In this respect, the Tribunal may consider whether the firm acquired its position in the market by way of natural growth stemming from superior skill, foresight or industry, or by way of acquisition, financial power or below-cost pricing.” See also Background Paper, 1984, \textit{supra} note 316, at 21 and especially the passage cited above.


\textsuperscript{337} I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, \textit{supra} note 111, at 3.1.30. However, subs. 79(5) does not provide a “blanket exception” for holders of intellectual property rights. The wording, especially the phrase “pursuant only to the exercise”, suggests that this section is not applicable to the use of “rights” which go beyond the purposes contemplated in these statutes. See also Donald S. Affleck and K. Wayne MacCracken, \textit{supra} note 112, at 19-6, who argue that restrictions which are contained in licenses and which are not contemplated in the intellectual property statute, such as, for example, restrictions on working areas, or “mandatory patent improvement grantback”, are not protected by this exemption and can, therefore, constitute anti-competitive acts. For an overview of the treatment of Intellectual Property Law within the \textit{Competition Act} see, R.D. Anderson, S.D. Khosla, M.F. Ronayne, “The Competition Policy Treatment of Intellectual Property Rights in Canada: Retrospect and Prospect”, in R.S. Khemani and W.T. Stanbury, eds., \textit{Canadian Competition Law and Policy at the Centenary} (Halifax: The Institute for Research on Public Policy, 1991), 497.
2.3.3. Consignment Selling

The Act prohibits under s. 76 a supplier from consignment selling for the purpose of controlling the price of its retailers or dealers, or of discriminating between consignees and other dealers.\(^{338}\)

Consignment selling is the practice whereby a supplier makes its products available to the distributor or retailer without giving up the ownership or the title in the goods until they are sold to the final customer; i.e. consignment selling means basically nothing else than the establishment of an agency relationship.\(^{339}\)

This is the reason why s. 76 can never apply to a distribution agreement as it is defined in this paper. Then, as soon as the supplier starts for whatever reasons to engage in consignment selling, the legal relationship between supplier and distributor is agency and not distributorship anymore.

2.3.4. Delivered Pricing

A supplier may divide the market into different zones and adopt different terms of sale and different prices for each zone. This is often connected with the condition that only distributors and customers in the particular zone are allowed to purchase the articles from


\(^{339}\) Robert S. Nozick, *supra* note 98, at 163; see also Michael O. Mungovan, *supra* note 141, at 68. Consignment selling has the advantage that the ownership remains with the supplier, which means that it is protected in case of the consignee's insolvency. Furthermore, the consignee does not need to raise money or a credit to be able to purchase the product from the supplier, and the supplier can set the retail price by itself.
the supply point situated in that zone and for the particular zone price; no distributor from outside that zone should be permitted to buy the goods from that particular supply zone.\textsuperscript{340}

Such conduct is called “delivered pricing” and the use of such schemes can have anti-competitive effects “when used to maintain price uniformity or to prevent customers from choosing a delivery point that will result in distribution economies that could ultimately result in savings to the public”.\textsuperscript{341} The practice of delivered pricing is, however, not outlawed, but if this practice is engaged in by a major supplier or is widespread in the market it may be reviewed by the Tribunal under s. 81 of the \textit{Competition Act}. And, if the customer or potential customer, as a result of this conduct, is denied an advantage that would be otherwise available to it, the Tribunal can issue an order prohibiting one or more suppliers from engaging in delivered pricing.\textsuperscript{342}

Section 81 is only applicable to the delivery of articles; services are, therefore, exempted. There must be also a practice of refusal to deliver, that is the supplier must refuse to deliver to a location where it had already delivered more than once to at least one other

\textsuperscript{340} See Michael O. Mungovan, \textit{supra} note 141, at 77; Donald S. Affleck and K. Wayne MacCracken, \textit{supra} note 112, at 20-1 - 2; Davies, Ward & Beck, \textit{supra} note 83, at 5-43. The price for the goods in one zone may be higher than in another because of different freight costs.


\textsuperscript{342} Donald S. Affleck and K. Wayne MacCracken, \textit{supra} note 112, at 20-1; R.J. Roberts, \textit{supra} note 99, at 317, Davies, Ward & Beck, \textit{supra} note 83, at 5-46 - 47. The Tribunal is not authorized to impose any other terms or requirements in its order. Furthermore, it is in the Tribunal’s discretion to issue an order; the elements discussed by the Tribunal in the \textit{Chrysler}-case should also be applicable in this context; see \textit{supra}, 2.1.2. at fn 155. The Act itself defines delivered pricing in s. 80 as “the practice of refusing a customer, or a person seeking to become a customer, delivery of an article at any place in which the supplier engages in a practice of making delivery of the article to any other of the supplier's customers on the same trade terms that would be available to the first-mentioned customer if his place of business were located in that place”.
customer.\textsuperscript{343} Furthermore, the Director does not have to show that the practice of delivered pricing results or is likely to result in a substantial lessening of competition. What he has to demonstrate is that the particular customer has been denied an advantage, that in the absence of such practice would have been available to him or her.\textsuperscript{344}

It appears that with this section the supplier's right to deal with whomever it wants is once more limited.\textsuperscript{345} However, it was assured in the Background Paper that "this section does not seek to prohibit basing point or other delivery pricing schemes", but that "it rather seeks to ensure that all customers of a supplier are treated fairly and that the goods move from suppliers to their customers in the least costly manner".\textsuperscript{346}

What impact does this section of the \textit{Competition Act} have on exclusive distribution agreements? A supplier who decides to adopt delivered pricing and to deliver its product to the different distributors, charging different prices according to the zone in which they

\textsuperscript{343} Subs. 81(1). See R.J. Roberts, \textit{supra} note 99, at 317; Donald S. Affleck and K. Wayne MacCracken, \textit{supra} note 112, at 20-2; Background Paper 1984, \textit{supra} note 316, at 22. Two elements of "practice" are required: the practice of refusing delivery to the complaining customer, and the practice of making delivery to another customer, see Davies, Ward & Beck, \textit{supra} note 83, at 5-46. With respect to the elements of "major supplier" and "widespread in the market" the discussions and decisions by the Tribunal for the purposes of exclusive dealing, tied selling and market restriction should be applicable also in this context; Davies, Ward & Beck, \textit{ibid}, at 5-47. These authors point out that a lot depends on the definition of the relevant market and that the Tribunal, in a case of product distribution where the goods are purchased for resale, may in accordance with \textit{Chrysler} focus on the demand of the distributor's customers; \textit{ibid}, at 5-48. See also \textit{supra}, 2.1.3.(d).

\textsuperscript{344} Davies, Ward & Beck, \textit{supra} note 83, at 5-47. If the article in question is otherwise available in the relevant zone, s. 81 will not apply; \textit{ibid}.

The Act provides two exceptions to this provision. Firstly, the Tribunal may not make an order if it finds that the supplier in accommodating the customer's demands would have to make significant investments at the location in question (subs. 81(2)). And, secondly, no order may be issued in respect of an article that the customer sells in association with a trade-mark owned by the supplier and where the Tribunal finds that the practice is necessary to maintain a standard of quality with respect to the goods (subs. 81(3)). See also Davies, Ward & Beck, \textit{supra} note 83, at 5-48 - 49; Michael O. Mungovan, \textit{supra} note 141, at 78; Donald S. Affleck and K. Wayne MacCracken, \textit{supra} note 112, at 20-4.

\textsuperscript{345} See \textit{supra}, 2.1. and also Davies, Ward & Beck, \textit{supra} note 83, at 5-43.

\textsuperscript{346} Background Paper, 1984, \textit{supra} note 316, at 22.
are doing business, should be aware of the possibility that its activities might be reviewed by the Tribunal. But, although the pricing of articles in accordance with a zone scheme is widespread in Canada, it seems that the practical importance of this section is not very significant. There are no reported applications to the Tribunal so far. But there might be also other reasons why - at least in the context of exclusive distribution systems - this section is not very important.

Delivery of the article at another locality, even if the prices charged for the article are lower, may often not be advantageous to the distributor. This may be the case when the costs of transporting the article to the location where the distributor is allowed to do business raise the overall costs so that there is no price advantage left. However, in some circumstances the distributor may be able to save money by arranging its own transportation.

Delivered pricing is not only anti-competitive, but can also have pro-competitive effects, for example, when the supplier is "willing to absorb freight costs in order to compete more aggressively in a given area, or where the arrangements reduce production or accounting expenses associated with administering delivery and accounting systems." In such cases

347 Background Paper, 1984, supra note 316, at 22.
348 Background Paper, 1984, supra note 316, at 22. Where heavy materials are involved, transportation may become a major element of cost. However, "advantage" does not only mean "advantage in price". It can refer also to non-price benefits, such as "more frequent or liberal pick-up scheduling, different quantity or volume of product pick-up permitted, shorter notice requirements for pick-up"; Donald S. Affleck and K. Wayne MacCracken, supra note 112, at 20-2.
349 Davies, Ward & Beck, supra note 83, at 5-43, with reference to the already mentioned article of H.I. Wetston, Deputy Director, "Notes for an Address to the Association of Canadian Franchisers on Franchising and the Competition Act", Toronto, Oct. 15, 1987. "Delivered pricing constitutes something
the Director, even if the impact of the alleged conduct on competition is not an element required by the Act, will hardly pursue the case and make an application.\textsuperscript{350}

Further, according to the wording of subs. 80(1) delivered pricing is the practice of refusing a customer delivery of an article at any place "on the same trade terms" that would be applicable to it if its business were located in that place. This does not mean that the same trade terms are applicable to each customer, rather it means that the relevant trade terms are those which are applied to the customers in that place that are in the same category as the refused customer. If the refused customer cannot comply with the relevant trade terms adopted by the supplier in the preferred location, the supplier can refuse delivery without worrying about potential consequences from s. 81.\textsuperscript{351}

\textsuperscript{350} See supra, 2.1.3. fn 189.

\textsuperscript{351} Davies, Ward & Beck, supra note 83, at 5-45. For the definition of trade terms see subs. 75(3) and for a discussion see supra, 2.1.3.(g).
2.4. Resale Price Maintenance

2.4.1. Introduction

Motivated by the desire to safeguard the “image” of its products or to take advantage of short supplies, a supplier or manufacturer may want to fix the price at which its products should be sold by distributors or retailers. In Canada, however, such practice is prohibited, at least if the supplier attempts “to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply” the products. Furthermore, the refusal to supply a product to a person or distributor because of its low pricing policy and attempts to induce such refusals to supply are also prohibited by the Competition Act. This broad prohibition against resale price maintenance is regulated by s. 61 of the Act, which belongs to the group of criminal offences. Resale price maintenance is a per se offence. Proof of the forbidden conduct is

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352 Unlike Canada, the United States does not deal specifically with price maintenance in antitrust statutes, but it is governed by the judicial interpretation of s. 1 of the Sherman Act. Originally resale price maintenance was deemed to be per se illegal; see Dr. Miles Medical Co. v. John D. Park and Sons Co. 220 U.S. 373 (1911). By now the U.S. Supreme Court has somehow retreated from this point of view. A manufacturer can only be found guilty of resale price maintenance where there is an explicit or implied agreement between the manufacturer and the non-terminated dealer to set resale prices at a fixed level; see Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) and Monsanto C. v. Spray-Rite Service Corp., 465 U.S. 752 (1984). See I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, supra note 111, at 3.1.48; R.J. Roberts, supra note 99, at 185 fn 1, and for a critical discussion of the current approach the there cited articles by W.S. Comanor, “Vertical Price-Fixing, Vertical Market Restrictions and the New Antitrust Policy” (1985) 98 Harv. L. Rev., 983; R.M. Steuer, “Monsanto and the Mothball Fleet of Anti-Trust” [1985] Antitrust Bulletin, 1; and R. Pitofsky, “In Defence of Discounters: The No-Frills Case for a per se Rule Against Vertical Price Fixing” (1983) 71 Georgetown L. J., 1487. For a more detailed overview see infra chapter 3; 4.1.(c).

353 See subs. 61(1)(a) and (b). Donald S. Affleck and K. Wayne McCracken, supra note 112, at 6-2 - 3; R.J. Roberts, supra note 99, at 185-186; I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, supra note 111, at 3.1.02; Davies, Ward & Beck, supra note 83, at 4-100 - 101; Michael O. Mungovan, supra note 141, at 33; Robert S. Nozick, supra note 98, at 139-140. “The purpose of this section is to proscribe the manufacturer dictating the retail price so that the public loses the benefit of competition”; Robert S. Nozick, ibid, at 143, with reference to R. v. Sunoco Inc. (1986) 11 C.P.R. (3d) 557.

354 With the consequence that they are subject to criminal law procedures and penalties. Furthermore, the enforcement is subject to the standard of proof of the criminal law, which requires the
sufficient for conviction; the Crown need not show that competition has been harmed in some way by this practice.\footnote{355} 

The resale price maintenance provisions are in general applicable to most forms of product distribution and especially also to (exclusive) distribution agreements.\footnote{356} Section 61 is of significant relevance and both, suppliers and distributors, must be careful when drafting the terms of the agreement which relate to the resale price.\footnote{357} The Act provides in subs. 61(2) several exemptions from the resale price maintenance provision which, however, are not often applicable to distribution agreements.\footnote{358} 

\footnote{355} Michael O. Mungovan, supra note 141, at 33. 
\footnote{356} A situation which involves the prohibited conduct, often arises when a distributor puts pressure on the supplier to do something about another distributor or purchaser of the product who is cutting the price of the product; Donald S. Affleck and K. Wayne McCracken, supra note 112, at 6-2 - 3; R.J. Roberts, supra note 99, at 188. The attempt of a distributor to persuade its supplier, as a condition of its doing business with that supplier, to refuse to supply a product to another distributor because of its low pricing policy is a criminal offence according to subs. 61(6); see Donald S. Affleck and K. Wayne McCracken, supra note 112, at 6-11; Davies, Ward & Beck, supra note 83, at 4-132. See also infra, 2.4.4. 
\footnote{357} The possible consequences of a contravention are severe (see subs. 61(9)). It "can result in personal as well as corporate charges against offenders and courts can fine the guilty parties, impose jail terms on individuals, prohibit certain kinds of conduct in the future on the part of the convicted"; Donald S. Affleck and K. Wayne McCracken, supra note 112, at 1-2. The principles to be considered in sentencing the convicted party are protection of the public interest, deterrence to others and deterrence to the convicted corporation; the size of the accused company, the scale of its operations, the range of products sold by it and of products affected by the illegal practice are also issues which have to be taken into account; see R. v. Browning Arms Co. of Canada Ltd. (1974) 15 C.P.R. (2d) 97, at 102-103. 
\footnote{358} Where the involved persons 'are affiliated companies, directors, agents, offices or employees of (a) the same company, partnership or sole proprietorship, or (b) corporations, partnership or sole proprietorship', subs. 61(1)(a) does not apply. This section is furthermore not applicable where the involved persons are in a principal-agent relationship. See I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, supra note 111, at 3.1.36; Donald S. Affleck and K. Wayne McCracken, supra note 112, at 6-1. It should be recalled that consignment selling only for the purpose of controlling the price at which a dealer or retailer resells the product is a reviewable trade practice and may be prohibited by the Tribunal under s. 76 of the Act; see supra, 2.3.3.; Donald S. Affleck and K. Wayne McCracken, supra note 112, at 6-4; R.J. Roberts, supra note 99, at 201-202.
Both, concerted and unilateral actions by suppliers are enclosed by the resale price maintenance provision and may give reason for a conviction under s. 61. Furthermore, according to the wording of subs. 61(1)(a) horizontal price fixing agreements, i.e. agreements between competitors, also constitute an offence under this provision.

2.4.2. Attempts to Influence Price Upward

(a) According to subs. 61(1)(a) even an attempt, made in a certain manner, to influence prices upward or to discourage the reduction of prices is prohibited. The attempt to affect the pricing of the products needs not to be successful in order to constitute an offence. Or as one author puts it: "Lack of success is not a defence to a resale price maintenance charge". It is also not necessary for the Crown to demonstrate that the supplier specifically intended to maintain resale prices. To establish the required mens rea it is sufficient to show that the accused supplier "advertently entered into an agreement which had the effect or would have the effect of inducing" the distributor or retailer to maintain resale prices. However, where the terms of an agreement do not require or induce a

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359 In this respect the Canadian provision regarding resale price maintenance goes further than the corresponding U.S. legislation; see I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, supra note 111, at 3.1.34 and supra fn 352.

360 For a further discussion of the application of subs. 61(1)(a) on horizontal price fixing agreements see Davies, Ward & Beck, supra note 83, at 4-106 - 107 and Donald S. Affleck and K. Wayne McCracken, supra note 112, at 6-6 - 7.


person to keep the prices up, it must be considered whether prices have in fact been influenced upward by that agreement.\textsuperscript{364}

(b) Only if the required attempt is made by "agreement, threat, promise or any like means" it will constitute the prohibited conduct.\textsuperscript{365} It has been held that "it is not illegal to attempt to maintain prices by discussion, persuasion, complaints, suggestions, requests or advice, provided that the attempt does not include the means prohibited" by subs. 61(1)(a).\textsuperscript{366} The decision whether an attempt to influence prices upward was made in the manner required by the Act depends on the facts of each case and it is often not clear whether the specific conduct can be determined as an agreement, a threat, a promise or a like means. However, it seems that agreements which indirectly influence a distributor to keep the resale prices up may also constitute an offence under subs. 61(1)(a).\textsuperscript{367}


\textsuperscript{365} For examples of conducts that have been held to constitute the required "agreements", "threats", "promises" or "like means", see Davies, Ward & Beck, supra note 83, at 4-107 - 114. See also Donald S. Affleck and K. Wayne McCracken, supra note 112, at 6-4 - 7 and Stanley Wong, supra note 363, at 351-352.

\textsuperscript{366} \textit{R. v. Les Must de Cartier Canada Inc.} (1990) 27 C.P.R. (3d) 37, at 41. Davies, Ward & Beck, supra note 83, at 4-103; Donald S. Affleck and K. Wayne McCracken, supra note 112, at 6-4 - 5; Stanley Wong, supra note 363, at 351. In \textit{R. v. Cluett, Peabody, Canada Inc.} (1982) 64 C.P.R. (2d) 30 at 34-35, the Court stated that only a request to "please discontinue to supply" the other retailer, is not an agreement or another prohibited means of an attempt to influence prices. However, the risk of such a request is that an acceptance by the other person (the supplier) may eventually form an agreement prohibited by subs. 61(1)(a); see Davies, Ward & Beck, ibid.

\textsuperscript{367} See Davies, Ward & Beck, supra note 83, at 4-107 with reference to \textit{R. v. Moffats Ltd.} (1957) 28 C.P.R. 57, where a so called "cooperative advertising plan", according to which the supplier agreed to pay up to 50% of the advertisement costs provided that the price advertised was not less than the price specified by it, was held to constitute an attempt to influence a person in a manner prohibited by subs. 61(1)(a). Note, that the resale price maintenance section has been amended after the Moffats-case and that now attempts to influence upwards the price at which a distributor or retailer advertises the product are expressly prohibited by subs. 61(1)(a). See also R.J. Roberts, supra note 99, at 192-193.
(c) According to the wording of subs. 61(1)(a) only attempts to influence prices upward or to discourage the *reduction* of prices will constitute an offence. A supplier is, therefore, free to influence its distributor to agree to a maximum resale price (price ceiling) or not to offer a lesser discount than the fixed amount or percentage. Furthermore, suggestions by the supplier regarding resale prices or minimum resale prices are not prohibited by the Act, provided it is made clear to the distributor that it is not under the obligation to accept the suggestion and that it would not suffer in its business relations with the supplier, or any other person, if it did not accept the suggestion. A supplier may also advertise a resale price as long as it makes it clear to the public that the product can be sold to a lower price. The supplier has to prove that it made the required qualified price suggestion. In the absence of such proof the mere suggestion of resale prices is deemed to be an attempt to influence in accordance with the resale price maintenance provisions.

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368 Davies, Ward & Beck, *supra* note 83, at 4-103; Michael O. Mungovan, *supra* note 141, at 35; Donald S. Affleck and K. Wayne McCracken, *supra* note 112, at 6-4. This is only true as long as the maximum resale price is not an attempt by the supplier to suggest a specified price and as long as the distributor is entirely free to charge lower prices and provide greater discounts than suggested by the supplier, see subs. 61(3).


370 See subs. 61(4). Words such as "or less" after a suggested resale price in an advertisement should be sufficient; see Michael O. Mungovan, *supra* note 141, at 36, and Davies, Ward & Beck, *supra* note 83, at 4-116.

371 It is proposed that a supplier who is, for example, using a suggested price list should make a qualified statement such as the following:"The dealer is under no obligation to accept these suggested resale prices and may sell at any price he chooses. If he chooses to sell at prices other than those suggested, he will not suffer in any way in his business relations with ABC Company or any other person (over whom ABC Company has control or influence)"; Michael O. Mungovan, *supra* note 141, at 36; Davies, Ward & Beck, *supra* note 83, at 4-115, with reference to the Background Papers, Stage 1 Competition Policy, Bureau of Competition Policy, April 1976.
(d) Subsections 61(3) and (4) do not constitute offences themselves, but "they are examples of attempts to influence prices that may fall within the conduct described in" subs. 61(1)(a).\(^{372}\) A suggestion or an advertisement is deemed to be an attempt but not an "agreement, threat, promise or any like means" in itself. As a result, the requirement that the attempt to induce was made in a manner described in subs. 61(1)(a), must still be proven by the Crown. In *R. v. Philips Electronics Ltd.* the Ontario Court of Appeal pointed out that the effect of subs. 61(4) is limited only to remove "the necessity of the Crown proving intent or mens rea on the part of the accused in so far as conduct falling within [subs. 61(4)] is concerned".\(^{373}\)

Price-ticketing is specifically exempted by the Act (subs. 61(5)), which means that subs. 61(3) and (4) do not apply to prices which are merely stamped or otherwise applied to the product (or its package or container).\(^{374}\)

(e) It should be noted, that there is no exception for patent, trademarks and the like. According to subs. 61(1) a resale price maintenance which is accomplished through the use of patents, trademarks, copyrights etc. is also prohibited. This means that, for

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\(^{373}\) (1980) 53 C.P.R. (2d) 74, at 81. This decision has been criticized for rendering subs. 61(4) essentially meaningless; see Davies, Ward & Beck, *supra* note 83, at 4-117. See also Stanley Wong, *supra* note 363, at 355.

\(^{374}\) I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, *supra* note 111, at 3.1.37; Michael O. Mungovan, *supra* note 141, at 36; Gordon E. Kaiser, *The Combines Investigation Act: Stage One Amendments And Implications For Management* (Hamilton: The Society of Management Accountants of Canada, 1978), at 18. However, as soon as the supplier tries by agreement or any like means to induce its distributor to resell the product at the price appearing on the product its conduct will constitute a criminal offence; see Michael O. Mungovan, *ibid.*
example, a patent owner is not allowed to specify in its licenses the price at which the patented product might be sold.\textsuperscript{375}

2.4.3. Refusal to Supply

(a) Under subs. 61(1)(b) the Act prohibits the refusal to supply a product to or any other discrimination against any person engaged in business in Canada because of this person’s low pricing policy. In a situation where the low pricing of a distributor or dealer is the only reason for the supplier’s decision to refuse to supply an offence has been clearly committed. Yet, the question remains, whether there is an offence when the low pricing policy is only one of several reasons which together cause the supplier to refuse the supply. According to some trial courts an offence under subs. 61(1)(b) can be committed only if a low pricing policy is the only reason for the refusal to supply.\textsuperscript{376} Arguably, such an approach does not go far enough, since a refusing supplier can easily try to express other reasons to cut off the distributor in order to conceal that the real reason was the low pricing policy to circumvent the provision in subs. 61(1)(b). It should rather be sufficient to commit an offence under this section, if the low pricing policy was the factor that made the difference in the supplier’s decision, even if it in itself would not have been enough reason to cause the supplier to refuse to supply.\textsuperscript{377} However, the determination of the

\textsuperscript{375} Davies, Ward & Beck, \textit{supra} note 83, at 4-144.

\textsuperscript{376} Accordingly, the test is whether the low pricing policy is the “real issue” or the “only real, effective cause” with respect to the decision to refuse to supply; see Davies, Ward & Beck, \textit{supra} note 83, at 4-117, with reference to the unreported case \textit{R. v. Audico Mfg. Ltd.}, Nov. 22, 1983, and to \textit{R. v. Griffith Saddlery and Leather Ltd.} (1986) 14 C.P.R. (3d) 389. See also Stanley Wong, \textit{supra} note 363, at 360-361.

\textsuperscript{377} See Davies, Ward & Beck, \textit{supra} note 83, at 4-117. Donald S. Affleck and K. Wayne McCracken, \textit{supra} note 112, at 6-7, even argue that the offence is already committed “if the reasons for the supplier’s action include the low pricing policy”.
reason(s) for the supplier's decision to refuse to supply a particular distributor or dealer is a question of fact and depends on the circumstances of each case.\footnote{378}

(b) It has been held that for the purposes of s. 61(1)(b) a particular brand constituted a separate product.\footnote{379} Unlike a situation under s. 75, there is no statutory exception for products bearing a trademark and a supplier, therefore, cannot refuse to supply a particular brand item to a distributor because of its low pricing policy, even if it offers to supply another product.\footnote{380}

Examples that a low pricing distributor has been otherwise discriminated against by its supplier under subs. 61(1)(b) might include “certain unfair pressures that do not amount to a direct refusal to supply but that have the effect of disturbing” the distributor or dealer, such as lost or delayed orders.\footnote{381}

(c) The Act provides in subs. 61(10) several grounds according to which a refusal to supply, although caused by the distributor's low pricing policy, might be permitted. In

\footnote{378} See Davies, Ward & Beck, \textit{supra} note 83, at 4-118, and the factors mentioned there which have led to the conclusion that the supplier had other reasons to refuse to supply.

\footnote{379} See \textit{R. v. Grange} (1978) 40 C.P.R. (2d) 214. The B.C. County Court referred to subs. 75(2) and the absence of a similar provision applicable to the resale price maintenance situation.

\footnote{380} The accused supplier was eventually convicted in connection with the refusal to supply of a particular branded mattress because of the customer's low pricing policy, notwithstanding its offer to supply alternative items of virtually the same quality under a different brand name; see Davies, Ward & Beck, \textit{supra} note 83, at 4-119 and \textit{supra}, 2.1.2. fn 147

\footnote{381} Davies, Ward & Beck, \textit{supra} note 83, at 4-122 with reference to the Background Papers, Stage 1 Competition Policy, Bureau of Competition Policy, April 1976. They suggest that in order to establish the required discrimination by the supplier against a particular customer as a result of its low pricing policy, the only element the Crown has to prove is that the supplier has more favorable arrangements with its other customers who do not follow a low pricing policy.
effect, there are four defences available.\textsuperscript{382} Firstly, a supplier is allowed to refuse to supply in case it believes that the distributor was making a practice of using the supplier’s products as \textit{loss-leaders}, that is to say, not for the purpose of making a profit but for the purpose of advertising.\textsuperscript{383} Secondly, a supplier is permitted to refuse to supply if the distributor was making a practice of using the supplier’s products not for the purpose of selling them at a profit but for the purpose of \textit{attracting} customers.\textsuperscript{384} Thirdly, a supplier is excused from supplying if the distributor was making a practice of engaging in \textit{misleading advertising} in respect of the supplier’s products. And, finally, an excuse can be made on the grounds that the distributor made a practice of not providing the \textit{level of service} that might reasonably be expected by the purchasers of that product.\textsuperscript{385}

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\textsuperscript{382} Subs. 61(10)(a)-(d). See for a general analysis of these four defences Davies, Ward & Beck, \textit{supra} note 83, at 4-122 - 131; Donald S. Affleck and K. Wayne McCracken, \textit{supra} note 112, at 6-11 - 12; Stanley Wong, \textit{supra} note 363, at 361-364, and as an illustrative example \textit{H.D. Lee (1980) 57 C.P.R. (2d) 186}, where three of the four defences have been examined.

\textsuperscript{383} For a definition of “loss-leader” see, for example, \textit{R. v. Philips Electronic Industries Ltd. (1966) 52 C.P.R. 224} and \textit{H.D. Lee. (1980) 57 C.P.R. (2d) 186}. See also \textit{R. v. Salomon Canada Sports L\`{e}e (1986) 37 B.L.R. 192}, where it was held that a supplier in interpreting whether its distributor is selling at a profit or not has to consider the distributor’s “net cost price” which means the purchase price plus additions for “overhead and the like”, and not just the wholesale price paid to the supplier. The latter was the findings in \textit{Philips Electronics, ibid, and H.D. Lee, ibid}. See also Davies, Ward & Beck, \textit{supra} note 83, at 4-126 - 130; Donald S. Affleck and K. Wayne McCracken, \textit{supra} note 112, at 6-13 - 14; R.J. Roberts, \textit{supra} note 99, at 196 - 197; I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, \textit{supra} note 111, at 3.1.38 - 39; Gordon E. Kaiser, \textit{supra} note 374, at 18.

\textsuperscript{384} This practice is also called “bait-and-switch”-selling and was described in \textit{H.D. Lee (1980) 57 C.P.R. (2d) 186}, at 197-198, as “the practice by a merchant of attracting customer to his store by advertising a product at a price which includes very little profit or no profit at all with a view of selling instead to these customers other brands or similar articles at a higher price or greater profit”. Davies, Ward & Beck, \textit{supra} note 83, at 4-130.

\textsuperscript{385} The test is not the level of servicing the manufacturer or supplier might expect but rather the level of servicing which the purchaser of such product might reasonably expect. In \textit{H.D. Lee (1980) 57 C.P.R. (2d) 186}, at 198, the Lee-company failed to establish this defence since there was no evidence that it had ever received complaints from retail customers, nor was there reference to inadequate servicing by the retailer. See Davies, Ward & Beck, \textit{supra} note 83, at 4-130.
\end{flushleft}
It should be noted, that these defences are only applicable with respect to a refusal to supply charge under subs. 61(1)(b), but never in relation to the basic offence of maintaining resale prices under subs. 61(1)(a).\textsuperscript{386} This distinction can lead to the strange situation that a supplier who cuts off its distributor because of “loss-leading” without communicating any concerns before may be permitted to do that, while a supplier who expresses concerns with respect to the believed “loss-leading” and threatens to refuse to supply the distributor if it does not cease this practice, risks being convicted for committing an offence under subs. 61(1)(a).\textsuperscript{387} As a result, refusing to supply on the grounds of “loss-leading” or one of the other defences available must be a defensive conduct; “[i]t cannot be an offensive move in the sense of a threat to enforce a plan to increase resale prices”.\textsuperscript{388}

A supplier does not have to prove that the distributor did in fact use its products as, for example, “loss-leaders”. All that has to be established is that the supplier had reasonable cause to believe and did believe that the distributor or retailer was engaging in practices such as “loss-leading”.\textsuperscript{389}

\textsuperscript{386} See the wording of subs. 61(10). See also Davies, Ward & Beck, supra note 83, at 4-123; Michael O. Mungovan, supra note 141, at 37; Donald S. Affleck and K. Wayne McCracken, supra note 112, at 6-11; R.J. Roberts, supra note 99, at 195-196; Robert S. Nozick, supra note 98, at 139 - 140; I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, supra note 111, at 3.1.38. These defences are also of no help in a prosecution regarding attempts to influence the supplier to refuse to supply (subs. 61(6)), see infra, 2.4.4. According to Davies, Ward & Beck, ibid, the above mentioned defences are also not available to other types of discrimination pursuant to subs. 61(1)(b). However, this conclusion cannot not be drawn from the wording of subs. 61(10).

\textsuperscript{387} Davies, Ward & Beck, supra note 83, at 4-123; Donald S. Affleck and K. Wayne McCracken, supra note 112, at 6-12. See also R. v. George Lanthier & Fils Ltée. (1986) 12 C.P.R. (3d) 282, at 285.

\textsuperscript{388} Michael O. Mungovan, supra note 141, at 37.

Further, the defences under subs. 61(10) are not available if the distributor or retailer is not making a *practice* of being engaged in one of the described behaviors. In *R. v. William E. Coutts Co. Ltd.*, the trial judge found that the sale of greeting cards over a week constituted a "practice". He also believed that the word "practice" is used in this section "in the sense that it denotes a distinction from an isolated act or acts". A practice need not to be of indefinite duration.

2.4.4. Attempts to Influence Suppliers to Refuse to Supply

In addition, the Act also prohibits possible attempts by dealers or distributors to induce their supplier to refuse to supply the product to other competing dealers or distributors because of their low pricing policy. A violation of this section constitutes an offence too. An attempt is sufficient to commit the offence, which means that an actual refusal to supply the product to the competing distributor by the induced supplier is not required. However, the defences in subs. 61(10) do not apply and are of no help with respect to a prosecution in connection with subs. 61(6). Unlike subs. 61(1)(b) this section does not require that the competing distributor is either engaged in business, or that the supplier be

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390 (1968) 67 D.L.R. (2d) 88, at 93. This was affirmed by the Court of Appeal, *ibid*, 87. See also Davies, Ward & Beck, *supra* note 83, at 4-131; Donald S. Affleck and K. Wayne McCracken, *supra* note 112, at 6-12 - 13; R.J. Roberts, *supra* note 99, at 197 -198.

391 The supplier's refusal to sell cards was justified under this section since there was uniformity and consistency for the term of each sale which constituted the required practice; *William E. Coutts* (1968) 67 D.L.R. (2d) 93. This definition of "practice" has been adopted by the Tribunal in cases of reviewable trade practices such as abuse of dominant position and exclusive dealing, see *NutraSweet*, (1991) 32 C.P.R. (3d) 1 and *supra*, 2.2.3. fn 234.


in Canada. As a result, subs. 61(6) is even applicable when a distributor attempts to induce a supplier who is located outside of Canada. For example, a Canadian distributor who attempts to influence its U.S. supplier to refuse to supply another distributor because of its low pricing policy, may commit an offence under subs. 61(6). The attempt must be made by “threat, promise or any like means”; “agreements” are not included in this subsection. It is not clear, if “agreements” have been left out deliberately or if this has happened by mistake. However, a supplier who after being induced by one of its distributor accepts to cut off another distributor because of its low pricing policy, risks committing an offence under subs. 61(1)(b).

2.4.5. Significance for Exclusive Distribution Agreements

It seems that of all the discussed sections of the Competition Act which may have a significant impact on exclusive distribution agreements the resale price maintenance provision is the most relevant. Not only does it apply to any supplier whether of major size or not but there is also no need to establish further elements such as an effect on competition. Furthermore, an attempt to influence the prices upward is sufficient, a success is not required. And, finally, resale price maintenance is a per se offence which involves severe consequences. Suppliers, therefore, have to be very careful when drafting

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394 Davies, Ward & Beck, supra note 83, at 4-133. Gordon E. Kaiser, Ian Nielsen-Jones, supra note 99, at 442. The only requirement is that the other customer is following a low pricing policy and that the distributor attempts to influence the supplier as a condition of its doing business with the latter. On the other hand, it seems that subs. 61(6) does not prevent a distributor from inducing its supplier to refuse to supply a competitor, if there is a reason other than the low pricing policy of the competitor; see R.J. Roberts, supra note 99, at 188.

395 Davies, Ward & Beck, supra note 83, at 4-133.

396 An agreement between distributor and supplier may also constitute an unlawful “group boycott” under the conspiracy provision of the Competition Act (s. 45). However, under this provision it is necessary to demonstrate that the agreement would have an undue effect on competition if carried out.
the contract with respect to resale prices, or when making decisions regarding the supplying of their products to distributors or dealers. Although suppliers are basically free to pick and choose the purchasers as they like, this decision may, under appropriate circumstances, be subject to legal limitations.\(^{397}\)

While the resale price maintenance section is the most important one with respect to distribution agreements, the *Competition Act* has identified and prohibited a number of activities in the distribution process that may affect competition.\(^{398}\) The legislative goal in this regard is to prevent sellers from treating their competing buyers and distributors in an unfair and biased manner and from selling their product in a way which will eliminate or substantially lessen competition.\(^{399}\)

The resale price maintenance legislation, which was enacted in 1952, is still the result of the social perceptions at that time, when it was believed that any limitation of price competition would harm consumers' welfare and support collusion among competing

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\(^{397}\) The *Competition Act* provides at least four limitations. Aside from the one discussed above under subs. 61(1)(b) a supplier's refusal to supply a distributor may, under certain circumstances, be held to be unlawful and forbidden under the conspiracy section (s. 45), or reviewed by the Tribunal under the refusal to deal section (s. 75). Furthermore, provided that the supplier has a substantial control of market power and the refusal to deal had the effect of preventing or lessening competition substantially, such a refusal to supply or to continue to supply a distributor could amount to an anti-competitive act and lead to an order under s. 79 of the Act. See Donald S. Affleck and K. Wayne McCracken, *supra* note 112, at 6-7 - 8 and *supra*, 2.1. and 2.3.2.

\(^{398}\) The practice of discriminating between competing purchasers regarding the price of goods sold may constitute an offence under subs. 50(1)(a). Similar, the granting of special rebates, promotional allowances, or grants for the advertising or promotion of goods, may, if it is not made on a proportional basis, be prohibited under s. 51. A seller, also, must not sell its products in any area of Canada at prices lower than those elsewhere if the sales would have the effect of substantially lessening competition (see subs. 50(1)(b)). And, finally, the establishment of a low price policy for the purpose of lessening or eliminating competition may be an offence under subs. 50(1)(c). See John A. Willis, *supra* note 113, at 486-487.

\(^{399}\) John A. Willis, *supra* note 113, at 487.
manufacturers in the market. Later, in the 1970's and 1980's these concerns have been questioned and some academic commentators have suggested that the use of price maintenance within individual distribution systems does not harm consumers' welfare and may even facilitate the establishment of an efficient distribution system. However, this opinion is not universally accepted and a number of scholars are still of the view that resale price maintenance is in itself harmful to consumers.

Nevertheless, the pro-competitive theories with respect to resale price maintenance have been already accommodated by the law, to some extent, in providing the defences under subs. 61(10). As we know, these defences apply only to a charge of refusal to supply under subs. 61(1)(b) but do not provide any help for a basic resale price maintenance charge.

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401 I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, supra note 111, at 3.1.42, with reference to Frank Mathewson and Ralph A. Winter, *Competition Policy and the Nature of Vertical Restraint* (Toronto: University of Toronto, 1986) and Frank H. Easterbrook, "Vertical Arrangements and the Rule of Reason", (1984) 53 Antitrust L. J., 135. Economists have also suggested that resale price maintenance may create incentives for special services for dealers and that it may be used as a justification against the practice of free-riding; but see also Edward Iacobucci, *The Case for Prohibiting Resale Price Maintenance* (Toronto: University of Toronto, Faculty of Law, 1995) and his analysis of the "free-rider explanation". For a detailed discussion see *infra*, chapter 3; 4.2.(a)(dd).
403 I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, supra note 111, at 3.1.46. In the Unites States, vertical price fixing is also still *per se* illegal, but has been relaxed through a series of judicial decisions, see supra, 2.4.1. fn 352.
Chapter 3: Impact of Competition Law on Exclusive Distribution Agreements

1. Introduction

(a) There are some authors who emphasize the significant impact of competition law on the process of product distribution and especially also with respect to exclusive distribution agreements. After having analyzed the most important provisions regarding distribution agreements, however, I have some doubts that this statement is true; this at least with respect to reviewable practices. Many of the practices a manufacturer or supplier uses to distribute its product are common and not illegal per se. Moreover, it seems that the provisions with respect to the reviewable matters discussed above do not present a big barrier for a supplier who promotes and sells its product through a vertical distribution system. This is mainly because of the requirements of the different provisions, which narrow the scope of their application significantly. It can even be argued that a common manufacturer or supplier who is acting alone does not have to be too much concerned about competition law. However, the situation may be different for a manufacturer or supplier who has a strong position in the market and who deals with a

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405 The exception is the practice of prescribing the price which is illegal per se and only allowed in certain circumstances. The question why the law takes a different approach towards price and non-price vertical restraints will be addressed below, see infra 4.

406 See supra chapter 2; 2.1.4., 2.2.5., 2.3.2. and 2.3.4.

407 Which means to have the ability to make a profit by raising the prices above competition level; see supra chapter 2; 2.2.4. at fn 289.
particular product which cannot be substituted easily. In such a case competition law might have a major impact.

(b) The situation, again, is different for the practice of resale price maintenance. A per se offense, it applies to any supplier regardless of its size or position in the market. Because of that and the fact that an attempt to influence the prices upward is already sufficient for a prohibition, this provision is of significant importance for distribution agreements.\textsuperscript{408}

(c) Saying that, two major issues arise: (1) does the finding that the reviewable matters do not have a major impact on exclusive distribution agreements correspond with the purpose and goals of the \textit{Competition Act}, and (2) why are vertical price restraints treated differently than non-price vertical restraints, and is this different approach justified. Before discussing these two issues, we first have to ask what purpose and role Canada’s \textit{Competition Act} does pursue.

2. Purpose and Role of the \textit{Competition Act}

2.1. Competition Policy

(a) A government, when drawing up legislation which deals with the performance of firms and industries in the economy and tries to stimulate and maintain competitive markets in order to enhance social welfare, has to pursue a policy which provides an adequate

\textsuperscript{408} According to Frank Mathewson and Ralph Winter, supra note 313, at 112, resale price maintenance ‘is the single most important vertical restraint in term of both the frequency of use, and the number of legal cases generated’. 
framework. Competition policy in Canada can then be defined as the government's policy "for the furtherance of competition in a mixed, market economy". However, competition affects practically all members of society and since they have different interests, they also have different views about what competition policy means and which goals should be addressed by it. The interests of consumers, for example, differ from those of small businesses, which, again, differ from the interests larger enterprises may have.

Over the last hundred years a number of different objectives have been associated with competition policy. Of those, Paul K. Gorecki and W.T. Stanbury, identified three major themes and a number of lesser objectives. Preventing abuses of market power, maintaining free competition and achieving economic efficiency have been found to be the three main objectives of competition policy, while objectives such as declaring the common law of restraint of trade, fighting inflation, protecting small businesses, preserving the free enterprise system and ensuring fairness and honesty in the market-place have been found to be of lesser importance over the last hundred years. However, they argue, the objectives of competition policy are the result of a political compromise between the conflicting interests of consumers and producers.

(b) A lot of attention has been focused on the economic implications of competition law in Canada. Most economists agree that the promotion of efficiency as an objective of

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409 Bruce Dunlop, David McQueen, Michael Trebilcock, *supra* note 99, at 58.
412 *Supra* note 411, at 163-169.
competition policy would lessen the need for alternative, more interventionist forms of control by the government, such as tariff regulations or other barriers of trade and public ownership. The view that the achievement of economic efficiency should be the objective of competition policy has been developed by economists since the 1960s and was stressed by the Economic Council of Canada in its *Interim Report on Competition Policy* in 1969. This is in contrast to the earlier competition legislation which focused more on controlling the abuses of conspiring and combining powers without considering economic efficiency. The idea that the principal objective of competition policy should be to promote and achieve economic efficiency is, therefore, "of fairly recent origin".

However, efficiency is not an end in itself. It is rather a means by which "the material well-being of all Canadians can be increased". Or as some authors argue: the ultimate goal of competition policy is the maximization of consumer welfare; and this can best be

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414 Paul K. Gorecki and W.T. Stanbury, *supra* note 411, at 90-92. The Council stated expressly that "the main objective of competition policy should be that of obtaining the most efficient possible performance from the economy ... in dynamic as well as static terms ... and the avoidance of economic waste"; *ibid*, 167.


416 Nor is competition regarded as an end in itself, but rather as a vehicle to achieve economic efficiency.

417 Paul K. Gorecki and W.T. Stanbury, *supra* note 411, at 167. See also Background Paper, 1984, *supra* note 316, at 2, where it was noted that there are two main ways in which the real income of all Canadians can be increased. One was said to be an efficient use of the existing scarce resources, the other was to foster technological change and innovation in the way goods and services are made and created.
attained by the means of efficiency. The economic goal of competition policy is the promotion of efficiency and eventually the maximization of consumer welfare.

2.2. Subsection 1.1 of the Competition Act

(a) Although there has been competition policy legislation since 1889 in Canada, the fundamental purposes of the Competition Act were not spelt out until the stage II amendments of the Act in 1986. In the revised Competition Act the purposes of the legislation are described as follows:

"The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."

This section reflects the view that competitive markets are efficient, and that in order to promote an efficient allocation of resources competition should be enhanced. Indeed, to

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418 Bruce Dunlop, David McQueen, Michael Trebilcock, supra note 99, at 63. These authors identify in particular the means of "allocative efficiency", "productive efficiency", and "dynamic efficiency". See also Marilyn MacCrimmon and Asha Sadanand, supra note 117, at 719, and Paul K. Gorecki and W.T. Stanbury, supra note 411, at 81, who refer to all these efficiencies together as "economic efficiency".

419 Bruce Dunlop, David McQueen, Michael Trebilcock, supra note 99, at 63. Apart from that economic goal of competition policy they also identify distributive and political goals. However, they confine themselves to an economic framework of analysis when evaluating current competition policy in Canada, ibid, at 64-71.

420 See S.C. 1986, c.26, s.19; see also W.T. Stanbury, supra note 108, at 60-61.

421 Subsection 1.1 of the Competition Act.

422 Christopher J. Maule and Thomas W. Ross, "Canada's New Competition Policy" (1989/90) 23 Geo. Wash. J. Int'l L & Econ., 59 at 60. This view has been developed and is still expressed in general in the writings of the members of the 'Chicago School' of law and economics and in particular by R.A. Posner, Antitrust Law, An Economic Perspective (Chicago: University of Chicago Press, 1976) and R.H. Bork, The Antitrust Paradox (New York, Basic Books, 1978). The efficiency approach of the 'Chicago School' is widely accepted among scholars and an "analytical convergence" on efficiency can be found within all different 'Schools'; see Cynthia Shorthill and J.C.H. Jones, 'Ends, Means and Utility
"promote ... efficiency" was made an explicit purpose of the legislation.\textsuperscript{423} That an efficiency concept has been introduced into the Act can also be seen, for example, by the decriminalization of the new merger and abuse of dominant position (the former monopoly) law. The underlying test of whether competition has lessened substantially through such practices has to take into account factors such as foreign competition and barriers to entry and it is clear from the particular provisions that size or market share concentration alone is not enough to determine this test.\textsuperscript{424}

Although economic efficiency appears to be the primary objective of today’s competition legislation,\textsuperscript{425} a reading of subs. 1.1 gives the impression that the legislator also intended to include and emphasize other goals of competition law, which sometimes cannot be achieved simultaneously.\textsuperscript{426} We can classify the different goals the Competition Act is

\begin{itemize}
  \item \textsuperscript{423} Cynthia Shorthill and J.C.H. Jones, supra note 422, at 451.
  \item \textsuperscript{424} Calvin S. Goldman, "The Impact of the Competition Act on Corporate Concentration. Notes for an Address to the Corporate Counsel Section of the Canadian Bar Association", in Donald S. Affleck and K. Wayne McCracken, supra note 112, at 45-352 - 353. The abuse of dominant position provision provides, furthermore, an efficiency-exception in that the Tribunal has to take into account the question of superior competitive performance (subs. 79(4)) and the merger law provides a similar exception where "the gains in efficiency resulting from the merger would more than offset the anticompetitive effects arising therefrom and such gains would not be realized if an order were made by the Tribunal", \textit{ibid}, at 45-353. See also Gordon E. Kaiser, Ian Nielsen-Jones, supra note 99, at 515. According to them, the introduction of the concept of efficiency trade-offs was one of the major innovations of the 1986 amendments.
  \item \textsuperscript{425} Background Paper, 1984, supra note 316, at 3, where the government explained that "Canadians want an economy that allocates our scarce resources in the most efficient way possible at any moment of time. The value of competition as a social process is that it is the greatest spur to efficiency. (...) An efficient economy is also one that is highly responsible to the preferences of consumers." (emphasis in original).
  \item \textsuperscript{426} Bruce Dunlop, David McQueen, Michael Trebilcock, supra note 99, at 286, argue that this section in intending to reassure all relevant political constituencies of the good intentions of the Act, may be a "harmless statutory placebo". Indeed "big business is assured that size and concentration are not bad..."
pursuing as either economic, or political and social. Whereas the preservation of small businesses, freedom of economic opportunity, consumer choice and autonomy, and fairness in the market can be categorized as political and social goals, the ultimate goal from an economic point of view is the maximization of consumer welfare. The dispute about economic and non-economic values is sometimes overemphasized. Often non-economic values are also served by an effective competition that maximizes consumer welfare.\textsuperscript{427} It can be argued that efficiency goals are frequently congruent with the political and social values, and in case they diverge, there is a strong presumption in favor of preferring customers, that is in favor of an economic approach.\textsuperscript{428} However, the particular Canadian economy with relatively small markets which are dispersed over large geographic areas, has to be taken into consideration. Often the demand is not sufficient enough to support many competitive producers and consumers' interests may be better served when a few firms or even only one firm is in the market.\textsuperscript{429}

\textsuperscript{427} Price fixing cartels not only impair production and allocative efficiency but also socially and politically important values; see Phillip E. Areeda, “Introduction to Antitrust Economics”, in Eleanor M. Fox, James T. Halverson, eds., \textit{Antitrust Policy in Transition: The Convergence of Law and Economics} (American Bar Association, 1984), 45 at 56-57. See also Robert D. Anderson and S. Dev Khosla, \textit{supra} note 313, at 29-31. According to them the objectives in subs. 1.1 are clearly consistent with the total welfare approach. Even the objective with respect to the “protection” of small and medium-sized businesses contributes to the total welfare in that those enterprises have been major sources of innovation, efficiency and job creation in the Canadian economy.

\textsuperscript{428} Phillip E. Areeda, \textit{supra} note 427, at 57. Areeda, however, supports a “healthy scepticism toward absolute and abstract statements of antitrust goals”; \textit{ibid.}, at 59.

\textsuperscript{429} Marilyn MacCrimmon and Asha Sadanand, \textit{supra} note 117, at 721. “The trade-off is between a few large low-cost producers with substantial market power or many small competitive, but inefficient, firms”; \textit{ibid.} See also Calvin S. Goldman, \textit{supra} note 424, at 45-350. According to this author, it is explicitly recognized by the Act that firms need to be of some size for achieving economic efficiencies in that the size of a firm \textit{per se} is not the primary concern under the Act, but rather the use and abuse by a firm of its market power.
(b) Economy and trade do not stop at the border of a nation. Without doubt, we live in a world where markets have extended beyond borders to include other countries, and internationalization and globalization of trade are increasingly common. Canada with its particular economic situation - small and geographically segmented markets - is especially dependent on foreign trade. The Competition Act recognizes in subs. 1.1 the importance of international trade both, in putting pressure on and providing export opportunities for its domestic industry.

Canada's economy is in particular affected by the far much larger market of the United States to the south. As a result of their close economic relationship Canada and the U.S. have entered into several agreements that have an impact primarily on the enforcement of competition law. However, far more important and consequential is the NAFTA treaty which establishes a free trade area within Canada, Mexico and the United States. To make free trade possible, NAFTA pursues, inter alia, the elimination of barriers to trade

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430 See Background Paper, 1984, supra note 316, at 1.
431 Calvin S. Goldman, supra note 424, at 45-349; Background Paper, 1984, supra note 316, at 1.
in, and the facilitation of cross border movements of goods and services, and the promotion of conditions of fair trade in the free market.\textsuperscript{434} Chapter 15 includes provisions on competition law. Article 1501 requires that the three countries ‘adopt or maintain, and enforce, measures to proscribe anticompetitive business practices, and cooperate with the other NAFTA parties in the enforcement of such measures’.\textsuperscript{435} In doing so, the parties recognize the value of protecting free trade and fair competition, but other competition policy issues have not been addressed in more detail.\textsuperscript{436} However, most important is that NAFTA creates one big market within Canada, Mexico and the United States which cannot be ignored by competition law and the enforcement agencies. With the increased economic integration and cooperation within NAFTA, cross-border mergers, cartel activities and other economic transactions will have an impact on the competition law of each NAFTA country.

(c) In summary we can conclude that Canada’s \textit{Competition Act} follows a “philosophy” which is accepted by most economists. The Act, first and foremost, seeks “to maintain and encourage competition” thereby achieving economic efficiency in order to enhance and, finally, maximize consumer welfare. Other - more political - goals, which seem to be

\begin{footnotes}
\textsuperscript{434} American Bar Association, \textit{supra} note 432, at 1.
\textsuperscript{435} Davies, Ward & Beck, \textit{supra} note 83, at 13-41. In addition, chapter 15 affirms the right of each party to maintain or create monopolies or state-owned enterprises (Articles 1502 and 1503), and provides in Article 1504 for the establishing of a Work Group on Trade and Competition which shall report and make recommendations to the Free Trade Commission on “relevant issues concerning the relationship between competition law and policies and trade in the free trade area”, see American Bar Association, \textit{supra} note 432, at 2, and Barry Appleton, \textit{supra} note 433, at 113-115. For a detailed discussion of these provisions see Peter Glossop, “Competition Policy, Monopolies and State Enterprises Under Free Trade” [1994] 1 Canadian International Lawyer, 1 at 3-6.
\textsuperscript{436} Davies, Ward & Beck, \textit{supra} note 83, at 13-41. The competition law provisions in NAFTA do not focus on anti-competitive behaviour engaged in by ordinary private entities; this remains subject to the general domestic competition law; see Peter Glossop, \textit{supra} note 435, at 1-2.
\end{footnotes}
contradictory, can make the achievement of all those objectives sometimes a rather difficult task. However, the Act, not only in subs. 1.1, expressly acknowledges the interdependence between domestic competition policy and international trade. Even though it may be sometimes difficult or even impossible to achieve all these different objectives listed in subs. 1.1 of the Act, I would argue, that Canada's competition policy provides a fairly flexible and efficiency guided framework with which the ultimate goal, the enhancement of customer welfare, could be approached.

3. Impact of Canada’s Competition Act on Exclusive Distribution Agreements

3.1. In General

Until the 1960s it was believed that vertical restraints were anti-competitive and the product of monopolies or cartelizing behaviour. Since then this understanding has been changed and over the last three decades the majority of economists argued that such vertical restraints often are efficiency enhancing and that efficiency itself "may well require vertical restrictions". This optic has found its way into the legislation, insofar as today’s competition policy is guided by an efficiency enhancing approach. Moreover, non-price

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437 One of the difficulties might be to protect the interests of small and medium-sized enterprises while recognizing the importance of international trade.

438 The question is rather whether the enforcement of the law is guided by economic efficiency. Cynthia Shorthill and J.C.H. Jones, supra note 422, at 449, however, conclude that the enforcement of the Act from 1970-1981 was not guided by efficiency considerations, since "in most instances, it [was] the nature of constraints (in particular the political ends underlying the legislation and the interpretation of the courts) which determine[d] the patterns of enforcement activity", and not efficiency considerations; ibid, at 454.

439 Frank Mathewson and Ralph A. Winter, Competition Policy and Vertical Exchange (Toronto: University of Toronto Press, 1985), at 1; see also Bruce Dunlop, David McQueen, Michael Trebilcock, supra note 99, at 248.
vertical restraints are not *per se* illegal but reviewable by the Competition Tribunal on a case-by-case basis. Vertical price restraints, on the other hand, are, as we know, treated differently by the Act; they are *per se* illegal. It is therefore appropriate to discuss the impact of the provisions regarding reviewable matters and resale price maintenance separately.

### 3.2. Reviewable Matters

(a) In the introduction to this chapter it has already been argued that the impact of the provisions of the *Competition Act* regarding reviewable matters is not as significant as one may think and that this is even more true for the common supplier or manufacturer who has no major position in the market and is acting alone. This conclusion does not collide with the objectives of competition policy as presented in the previous section and as they are predominant in Canada in the present day, they rather support this finding.

(b) We have seen that exclusionary practices described in s. 77 of the Act are not always anti-competitive and that they may also have pro-competitive effects or be competitively neutral depending on the circumstances of each case. Moreover, exclusionary practices may restrict competition within the individual brand product, but may at the same time enhance interbrand competition and allow the manufacturer certain efficiencies in the distribution of its product. The case-by-case approach and the wording of s. 77 allow the Director and the Tribunal to consider both the anti- and pro-competitive effects of

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440 See *supra* chapter 2; 2.2.5. at fn 313 and fn 313.
441 See *supra* chapter 2; 2.2.5. at fn 314.
practices in exclusive dealing and tied selling or market restriction and to apply economic principles when assessing their impact on competition in each particular case.\textsuperscript{442} A wider (not only legal, but also economic) approach in evaluating whether exclusive dealing, tied selling and market restriction arrangements are lessening competition substantially, might eventually result in a finding that such practices are not unlawful in the particular case, and that the supplier cannot be prohibited from engaging in such practices.\textsuperscript{443} This would mean that some exclusive distribution agreements, which from a narrower legal point of view might be held to be illegal, should then be characterized as not anti-competitive. In summary, such a development is not only in accordance with Canada’s competition policy but also required by its dominant objectives. The diminishing impact of s. 77 on exclusive distribution agreements, therefore, conforms to the purpose and role of the \textit{Competition Act}.

(c) Section 79 (abuse of dominant position) has no impact on an exclusive distribution agreement of a supplier or manufacturer of common-size. Even though the supplier or

\textsuperscript{442} I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, \textit{supra} note 111, at 3.1.23. See also Robert D. Anderson and S. Dev Khosla, \textit{supra} note 313, at 12. It can be assumed that economic principles will be increasingly included in the process of examining vertical restraints such as exclusive dealing and market restriction by the Tribunal. This is according to the respective American case law. In the United States competition policy with respect to vertical restraints has undergone an extensive review; this is, primarily, because economists re-evaluated their impact on competition. Marilyn MacCrimmon and Asha Sadanand, \textit{supra} note 117, at 712. This review of antitrust law in the U.S. was mainly influenced by the members of the “Chicago School” and their view that efficiency promotes public welfare.

\textsuperscript{443} It should be borne in mind that economists take a different approach than the Tribunal. They start with a model and undergo a process of simplification when explaining it in the legal context. The Tribunal, on the other hand, has to deal with the real world market which is most often very complex. Courts “cannot assume away the obvious and cannot choose \textit{ex ante} the market upon which the analysis will be performed”, Herbert Hovenkamp, \textit{supra} note 289, at 63. See also Marilyn MacCrimmon and Asha Sadanand, \textit{supra} note 117, at 718. For a discussion of the incorporation of economic principles into the legal evaluation of vertical restraints see the article by Marilyn MacCrimmon and Asha Sadanand, \textit{supra} note 117.
manufacturer has substantial control "throughout Canada or any area thereof" it is unlikely that it will be prohibited under this section from distributing its product exclusively, since this section only applies in very special distribution systems and requires that the anti-competitive conduct has been motivated by an anti-competitive intention. Furthermore, the abuse of dominant position provision concentrates more on conduct than on market structure and recognizes that concentration is not automatically negative. And after all, "some conduct which appears to lessen competition may, in fact, be the result of a superior competitive performance". Section 79, therefore, almost never deals with exclusive distribution agreements. This also corresponds with the objectives of competition policy, which - as we have seen - primarily focus on efficiency in order to enhance and maximize consumer welfare.

(d) With respect to refusal to deal (s. 75) it was also argued that this provision does not present a big obstacle for suppliers or manufacturers who are distributing their products through exclusive distribution systems. This is mainly because the requirements of s. 75 are difficult to meet for a refused or terminated distributor. The situation for a supplier in a monopoly or quasi-monopoly position, however, could become serious with regard to a possible s. 75 order, when refusing a request for a product by a potential distributor or terminating a distribution agreement. However, the definition of the specific elements of s.

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444 See supra chapter 2; 2.3.2. at fn 323 and 324.
445 Gordon E. Kaiser, I. Nielsen-Jones, supra note 99, at 497. Subsection 79(4) requires the Tribunal to "consider whether a practice of anti-competitive acts is a result of superior competitive performance"; see supra chapter 2; 2.3.2. at fn 332.
446 A manufacturer with a dominant position in the market may sell its product for less than if there were many, but smaller sellers. The lower price may then compensate the consumer for the lack of or a smaller choice of products.
447 See supra chapter 2; 2.1.4.
75 does not depend on factors such as market power or efficiency for the cut-off.\textsuperscript{448} Such considerations may arise, where applicable, in the exercise of discretion by the Tribunal.\textsuperscript{449} In these respects, s. 75 differs from other sections of the Act dealing with reviewable matters.\textsuperscript{450} The impact of this section can, therefore, not directly be discussed in connection with the objectives formulated in subs. 1.1 of the Act. However, that the provision has an impact almost solely on major suppliers is in accordance with the competition policy pursued by the Act, since it is arguably part of free competition in the market that a supplier can sell its products to whom it wants.\textsuperscript{451} Nevertheless, the objectives of competition policy could influence the Tribunal’s discretion when deciding whether an order should be issued or not.\textsuperscript{452}

(e) All in all we can say that the impact of the provisions in the \textit{Competition Act} with regard to the reviewable practices discussed above is not very significant - at least not for

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\item[\textsuperscript{448}] Or as the Tribunal put it in \textit{Xerox} (1991) 33 C.P.R. (3d) 115-116: “In any event, it is useful to stress that the respondent’s market power is not an element which need be proven for the purposes of obtaining a s. 75 order.” The Tribunal, however, went on to state that “[i]t may be that it will be rare to find a situation in which a supplier refuses to supply a would-be purchaser, for anti-competitive reasons, without holding significant market power in the relevant market. It would be counterproductive if the would-be purchaser could easily find an alternate source of supply.”
\item[\textsuperscript{449}] Even if all the requirements of s. 75 are established, it is still in the discretion of the Tribunal to issue an order or not, see \textit{supra} chapter 2; 2.1.2. at fn 155.
\item[\textsuperscript{450}] See \textit{supra} chapter 2; 2.1.2. fn 149, and \textit{Chrysler} (1990) 27 C.P.R. (3d) 12.
\item[\textsuperscript{451}] Only where the refused or terminated distributor’s business is substantially affected \textit{because} of its inability to obtain adequate products the Tribunal may issue an order. See \textit{supra} chapter 2; 2.1.3.(f).
\item[\textsuperscript{452}] That this was indeed the case cannot be said for the two cases, \textit{Chrysler} and \textit{Xerox}, mentioned above. However, a former Director has indicated that “as a matter of policy, the Bureau has been concentrating on refusal to deal applications where there is a lessening of competition” and that “priority has been given to cases with the aforementioned significant economic impact”, see H.I. Wetston, “Recent Developments in Competition Law: The Perspective of the Bureau of Competition Policy”, April 26, 1991, cited in Davies, Ward & Beck, \textit{supra} note 83, at 5-34. The same Director commented on another occasion that refusal to deal cases are on "the lower end" of competition policy. He added that they "look at an efficiency rationale in these kinds of cases" and "at whether or not there is some antecedent competition impact", see H.I. Wetston, “Canadian Antitrust Law: Recent Developments”, 1993, cited in Davies, Ward & Beck, \textit{supra} note 83, at 5-35.
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the common manufacturer or supplier - and that this result is in accordance with the predominating objectives of competition policy and the role of Canada’s *Competition Act*.

### 3.3. Resale Price Maintenance

(a) We have learnt that the resale price maintenance provision does apply to any supplier or manufacturer whether it is of major size or not, that an attempt to influence prices upward is already sufficient for a conviction, and that there is no need to determine further elements such as a negative effect on competition. Furthermore, resale price maintenance is a criminal offense which may involve severe consequences.\(^{453}\) Because of all that, the impact of this provision on exclusive distribution agreements should not be underestimated. Suppliers and manufacturers have to be very careful when drafting agreements with regard to resale prices or when deciding whether products should be supplied to distributors and dealers.\(^{454}\)

(b) The question remains whether the different approach the law takes towards resale price maintenance is justified in view of the competition policy formulated in subs. 1.1 of the *Competition Act*, or should this practice rather be treated like the other non-price vertical restraints? This has been the subject of lots of controversy both, in Canada\(^{455}\) and

\(^{453}\) According to subs. 61(9) a price maintenance offense is punishable by a fine in the discretion of the court and imprisonment for a term not exceeding five years, or both. On June 15, 1996, a Quebec jury for the first time in Canada sentenced an individual to imprisonment in this regard. The individual was held to be guilty for price fixing (s. 45), resale price maintenance (s. 61(10)(a)) and predatory pricing (subs. 50(1)(c) and (b)) and subsequently sentenced to imprisonment for one year. See Davies, Ward & Beck, *supra* note 83, Legal Letter No. 6, October 1996, at 9-11.

\(^{454}\) See *supra* chapter 2; 2.4.5. at fn 397.

the United States.\textsuperscript{456} The issue is - in short - whether resale price maintenance is socially efficient and welfare enhancing and, therefore should be allowed, or, whether its illegality is justified because this practice is in the end welfare reducing. Depending on which theory (or economic belief) is followed, it can be argued that the \textit{per se} illegality of resale price maintenance is in accordance or in conflict with the major objectives of subs. 1.1 of the Act. In the following section I will illuminate the debate on this issue.

4. The Case of Resale Price Maintenance

4.1. Introduction and History

(a) Prior to the 1960s resale price maintenance was regarded as anti-competitive and harmful to consumers’ welfare. In the 1970s and 1980s some experts began to question these concerns and started to view the practice of resale price maintenance in a more favourable light.\textsuperscript{457} Frank Mathewson and Ralph Winter, for example, have argued that where resale price maintenance is introduced by a manufacturer acting alone consumers’ welfare is not harmed and the establishment of an efficient distribution system may even be facilitated.\textsuperscript{458} On this basis, it was suggested that resale price maintenance should be made

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\item See, for example, R. Bork, "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division" (1966) 75 Yale L.J., at 373; Frank H. Easterbrook, \textit{supra} note 401, at 135; John F. Seiberling, "Congress Makes Law, The Executive Should Enforce Them" (1984) 52 Antitrust L. J., at 175 at 175; Robert Pitofsky, \textit{supra} note 352, at 1487.
\item James W. Morrow, \textit{supra} note 455, at 40; I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, \textit{supra} note 111, at 3.1.41 - 42.
\item \textit{Supra} note 439, at 102-103. This book was the result of a special study on the consequences for economic welfare of four vertical trade practices (\textit{inter alia} resale price maintenance) conducted for the Royal Commission.
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a reviewable matter and that a rule of reason approach should be used.\textsuperscript{459} However, this opinion is not universally accepted and there are a number of scholars who defend the \textit{per se} illegality of resale price maintenance.

(b) In 1952 a specific statutory prohibition against resale price maintenance was enacted,\textsuperscript{460} and Canada became the first country to prohibit this practice \textit{per se}.\textsuperscript{461} In 1960, the Act was amended and the resale price maintenance provision was provided with the several defenses, which we find now in subs. 61(10): loss-leadering, bait and switch, misleading advertising, and inadequate level of servicing.\textsuperscript{462}

In 1976 the provision was again revised and the scope of the legislation was broadened. Firstly, any attempt to influence prices upward, or to discourage the reduction of prices was prohibited by the 1976 legislation. Secondly, the scope of the legislation was extended to services also, and the provision was made applicable to horizontal as well as to vertical price maintenance agreements. Thirdly, it was now clear that price maintenance was also prohibited where it was achieved through the exercise of a patent, trademark, copyright or registered industrial design. Furthermore, a subsection was added dealing with attempts by

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\item[459] Frank Mathewson and Ralph Winter, \textit{supra} note 439, at 104; James W. Morrow, \textit{supra} note 455, at 39 with reference to the report of the Royal Commission on the Economic Union and Development Prospects for Canada, 1985, which followed the conclusions made by Frank Mathewson and Ralph Winter.

\item[460] However, long before this practice has been addressed by the legislator, it was recognized as problematic.


\item[462] I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, \textit{supra} note 111, at 3.1.31; Davies, Ward & Beck, \textit{supra} note 83, at 4-98. See \textit{supra} chapter 2; 2.4.3.(c).
\end{footnotes}
distributors or dealers to induce manufacturers or suppliers to refuse to supply the product to rival distributors or dealers because of price discounting.\textsuperscript{463}

Since then, these provisions have not been changed.\textsuperscript{464} Resale price maintenance is still a criminal offense and \textit{per se} illegal, and it appears that this will not change in the near future.\textsuperscript{465}

(c) In the United States resale price maintenance agreements were originally treated as vertical price-fixing and held to be inherently anti-competitive and therefore illegal \textit{per se} under the \textit{Sherman Act}.\textsuperscript{466} However, since then the U.S. Supreme Court has retreated to some extent from this rather strict standpoint. In \textit{Monsanto v. Spray-Rite Service Corp.}\textsuperscript{467} the Supreme Court did not overturn \textit{Dr. Miles}, but clarified the application of the \textit{per se} rule in that case. Four years later, in \textit{Business Electronics Corp. v. Sharp Electronics Corp.},\textsuperscript{468} following its reasoning in \textit{Monsanto}, it was held by the Supreme Court 'that the termination of a low-price dealer by a manufacturer falls within the \textit{per se} prohibition of resale price maintenance only in circumstances where there is an explicit or implied agreement between the manufacturer and other, non-terminated dealer(s) to set resale

\textsuperscript{464} However, the section has been renumbered and is currently s. 61 of the Act.
\textsuperscript{465} The proposed amendments to the \textit{Competition Act} from November 7, 1996, do not suggest any amendments or changes in this regard; see \textit{supra} chapter 1; 3.1. fn 112.
\textsuperscript{466} See \textit{Dr. Miles Medical Co. v. John D. Park and Sons Co.} 220 U.S. 373 (1911). See also I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, \textit{supra} note 111, at 3.1.47; Edward Iacobucci, \textit{supra} note 401, at 2; Robert Pitofsky, \textit{supra} note 352, at 1487; Frank Mathewson and Ralph Winter, \textit{supra} note 313, at 113.
\textsuperscript{468} 485 U.S. 717 (1988).
prices at some level".\textsuperscript{469} The Court stated further that its "approach to the question presented in the present case is guided by the premises of \textit{GTE Sylvania} and \textit{Monsanto}: that there is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of \textit{GTE Sylvania}".\textsuperscript{470}

In sum, it can be said that while the doctrine of \textit{per se} illegality of resale price maintenance under \textit{Dr. Miles} is still maintained, the U.S. Supreme Court has narrowed the definition of what constitutes an illegal act of resale price maintenance and thereby relaxed this rule.\textsuperscript{471}

\textbf{4.2. Arguments Against a \textit{Per Se} Illegality of Resale Price Maintenance}

(a) One may ask why does a manufacturer or supplier want to impose vertical price restrictions on its distributor or retailer? Setting the resale price for the dealer seems to be rather odd; normally one would think that a manufacturer would prefer "fierce and

\textsuperscript{469} I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, \textit{supra} note 111, at 3.1.50.

\textsuperscript{470} Business Electronics Corp. \textit{v. Sharp Electronics Corp.} 485 U.S. 717 (1988), at 726. See for a more detailed discussion I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, \textit{supra} note 111, at 3.1.46-51. See also Edward Iacobucci, \textit{supra} note 401, at 2-3; R.J.Roberts, \textit{supra} note 99, at 185 fn 1; Frank Mathewson and Ralph Winter, \textit{supra} note 313, at 113-114. All in all, in \textit{Monsanto} the Court stated "that termination of a dealer following a competing dealer's complaints was not sufficient to establish conspiracy in restraint of trade, and the \textit{Sharp} case refined this to establish that a necessary condition for a conspiracy is that the competing dealer agrees to maintain prices"; Frank Mathewson and Ralph Winter, \textit{ibid}, at 115.

\textsuperscript{471} Frank Mathewson and Ralph Winter, \textit{supra} note 313, at 115; Edward Iacobucci, \textit{supra} note 401, at 3. "The legal status of resale price maintenance after \textit{Sharp} rests on a tenuous distinction between an agreement to terminate discounters and an (explicit or implied) agreement to maintain prices. The Court's efforts to relax the law against resale price maintenance without overturning \textit{Dr. Miles} have left the law in a rather convoluted state. The ambiguity of the distinction between terminating discounters and agreeing on price levels seems to warrant further clarification and hence further opportunity to relax the law against resale price maintenance"; Frank Mathewson and Ralph Winter, \textit{ibid}. 
vigorous competition among its distributors”. Three socially negative theories have been identified by the opponents of resale price maintenance to explain why manufacturers would impose this practice: (1) resale price maintenance is a manifestation of monopoly or market power by the single manufacturer, used as part of an efficient distribution system and to evoke adequate retailer service; (2) resale price maintenance is a manifestation of a manufacturers’ cartel and serves to support it, and (3) resale price maintenance is a manifestation of a retailers’ cartel and serves to support it. These explanations have evidently influenced antitrust legislation.

However, following a re-evaluation of the economic effects of resale price maintenance, a number of economists have suggested that a more flexible rule of reason approach should replace the per se enforcement by the law. They offer a number of explanations for the welfare enhancing implications of the use of this vertical restraint.

I first discuss some arguments with respect to resale price maintenance introduced by the single (i.e. not cartelized) manufacturer ((aa)-(dd)), before dealing with the main arguments with respect to the other two explanations ((ee), (ff)).

(aa) The basic idea that resale price maintenance ensures monopoly prices is, according to the reformist economists, a misconception. Their main argument is that a manufacturer will prefer a lower price than raise the price of its product to a level which is not

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472 Robert Pitofsky, “Why Dr. Miles Was Right” (Jan/Feb 1984) 8 Regulation, 27 at 27.
473 Frank Mathewson and Ralph Winter, supra note 313, at 117; Bruce Dunlop, David McQueen, Michael Trebilcock, supra note 99, at 249-250. See also Robert Pitofsky, supra note 472, at 27-28, who identifies a fourth explanation, which rejects the ‘premise that the manufacturer has no interest in its dealers’ prices”.
consistent with sales maximization.\textsuperscript{474} Without being convinced that the raising of the resale price will lead to a greater demand for its product the manufacturer, it is said, will not adopt this practice.\textsuperscript{475} Or, in other words, a manufacturer will impose resale price maintenance only if this practice leads to increased output and, thus, to increased profit; hence, such restraints must be pro-competitive.\textsuperscript{476}

(bb) Concerns that resale price maintenance may be used by an individual manufacturer to deny distribution channels to potential competitors have also been discussed. According to this view it is believed that resale price maintenance involves the establishment of entry barriers.\textsuperscript{477} However, this concern is also a common concern cited in connection with exclusive dealing and market restriction. As mentioned above, such non-price vertical restraints belong to the group of reviewable matters; they are not illegal \textit{per se} but can be challenged in a civil procedure.\textsuperscript{478} It has been argued that in cases where the effects of resale price maintenance are similar to those of non-price vertical restraints, they should be

\textsuperscript{474} I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, \textit{supra} note 111, at 3.1.42; Frank Mathewson and Ralph Winter, \textit{supra} note 439, at 15; Bruce Dunlop, David McQueen, Michael Trebilcock, \textit{supra} note 99, at 249; Frank H. Easterbrook, \textit{supra} note 401, at 141; Robert Pitofsky, \textit{supra} note 352, at 1491.

\textsuperscript{475} Howard P. Marvel and Stephen McCafferty, "The Welfare Effects of Resale Price Maintenance" (1985) 28 J. L. & Econ., 363 at 374. Positive impacts of an increase in price might include better information offered by retailers, post-sales services or other quality dimensions provided by retailers; see Frank Mathewson and Ralph Winter, \textit{supra} note 439, at 15, and infra (dd).

\textsuperscript{476} See Robert Bork, "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division" (1966) 75 Yale Law Journal, at 373, cited by William S. Comanor, \textit{supra} note 352, at 989. Bork's "test was simple: restrictions on output are anticompetitive, and increases in output are procompetitive." Later, however, "Bork acknowledged that the issue was more complex than he had originally indicated, but he argued that a manufacturer would wish to impose restraints only when the value of the services to consumers exceeds their cost"; William S. Comanor, \textit{ibid}, at 988-989.


\textsuperscript{478} See \textit{supra} chapter 1; 3.3.(a).
treated in the same way and be subject to a similar standard under the relevant provision of the *Competition Act.*

(cc) Another argument brought by the opponents of a *per se* treatment of vertical price restraints is that such a practice does help to facilitate an efficient distribution of the product. With resale price maintenance the necessary margins may be provided so that the new product is attractive for retailers, which then may increase the number of outlets stocking the product; finally a more rapid introduction of the new product could be reached. According to this theory the indirect - positive - effect of increasing the number of outlets carrying the product may well offset the direct - negative - impact of higher prices.

(dd) The main argument put forward against declaring resale price maintenance as *per se* illegal is concerned with the services provided by distributors and retailers.

It has been suggested by a number of economists that resale price maintenance is imposed in order to overcome "free-riding" by discounters. Free-rider problems can occur in

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480 I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, *supra* note 111, at 3.1.44; Edward Iacobucci, *supra* note 401, at 25-26. The idea behind this hypothesis is that "the demand for consumer goods is often sensitive to the number of outlets carrying the product, because this number determines the exposure of shopping consumers to the good", thus, "the number of retailers carrying the product determines the availability of the good to consumers, which is an important determinant of demand", Frank Mathewson and Ralph Winter, *supra* note 439, at 16.
482 The "free-rider" explanation was one of the first theories explaining that resale price maintenance may be efficiency enhancing and was advanced by Lester Telser in his article "Why Should Manufacturers Want Fair Trade?" (1960) 3 J. L. & Econ., 86; see Edward Iacobucci, *supra* note 401, at 4.
situations where the demand of consumers for the product may be influenced by expert point-of-sale information and advice. Retailers which provide such information (or other services, such as specially trained sales persons, changing rooms, promotional and advertising activities) risk free-riding by other retailers who, by not providing such services avoid costs and, thus, can sell the same product for a lower price. In short, consumers can get information and advice from a service-intensive store and finally buy the product for a lower price from a no-service discounter. Consequently, retailers providing such special services could not longer operate in a profitable way and would soon be out of business. This finally would result in an overall reduction of available information and services in the market. Hence, manufacturers, distributors and consumers are in the end all worse off.\footnote{However, the free-rider explanation is criticized for several reasons. Firstly, only a few markets are sensitive to free-riding by discounters. The use of resale price maintenance in order to prevent free-riding is limited to markets where demonstration of the product and explanation are required in order to increase the sales of product.\footnote{Examples are markets for computer and audio and video equipment, or situations where a manufacturer puts a new product on the market. See I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, supra note 111, 3.1.45; Edward Iacobucci, supra note 401, at 8.} Furthermore, the provision of special services by one dealer does not always exert significant positive externalities on its competitors,\footnote{In the computer market a different retailer may benefit from the special services provided, however, this is not likely the case in other markets, such as for example the market for jeans; see Edward Iacobucci, supra note 401, at 10, and Ralph A. Winter, “Vertical Control and Price Versus Nonprice Competition” (1993) 108 Quarterly J. of Econ., 61 at 69.} and in many cases manufacturers could simply include special services requirements in the contract instead of

\footnote{Bruce Dunlop, David McQueen, Michael Trebilcock, \textit{supra} note 99, at 252; Edward Iacobucci, \textit{supra} note 401, at 4-6; Frank Mathewson and Ralph Winter, \textit{supra} note 439, at 22-23; Robert Pitofsky, \textit{supra} note 352, at 1942 and \textit{supra} note 472, at 28-29; I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, \textit{supra} note 111, at 3.1.45; William S. Comanor, \textit{supra} note 352, at 986-988.}
using resale price maintenance.\textsuperscript{486} Thus, a market is susceptible to free-riding if services increase the sales of the product, if there are inter-retailer externalities, and if the services may not be contracted for directly. Yet, situations where these conditions are all present are rare.\textsuperscript{487} Secondly, the theory is not only limited to a few market situations, but has according to several critics also its flaws. The practice of resale price maintenance does not prevent free-riding on non-price competition other than the provision of special services. Resale price maintenance restrictions can be circumvented by other efforts, such as "bundling" the product with other products and sell them together for a lower price.\textsuperscript{488} Furthermore, not all customers have the same "taste" regarding the services provided by dealers. Some are looking for extensive demonstration and explanation of the product before purchasing it, others find such services not useful, because they are already informed enough or do not want any information to make their decision, or they do not want to pay for such services.\textsuperscript{489} The problem is that in case of the use of resale price maintenance the latter are forced to pay higher prices for services they do not want or need, and that this loss may outweigh the benefit of the ignorant customers who profit from the provision of such services.\textsuperscript{490} It is also argued that free-riders by the imposition of

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\textsuperscript{486} Edward Iacobucci, supra note 401, at 9-11.
\textsuperscript{487} Edward Iacobucci, supra note 401, at 12; Robert Pitofsky, supra note 352, at 1493.
\textsuperscript{488} Edward Iacobucci, supra note 401, at 12-14. For example, "[w]hen American Airlines tried to constrain travel agents against undercutting their price schedule, agents simply offered exceptionally low prices on hotel and car rental packages with the tickets"; Frank Mathewson and Ralph Winter, supra note 313, at 125.
\textsuperscript{489} Edward Iacobucci, supra note 401, at 17; William S. Comanor, supra note 352, at 990-992.
\textsuperscript{490} Edward Iacobucci, supra note 401, at 18; William S. Comanor, supra note 352, at 992.
\end{flushleft}
resale price maintenance are prevented from passing efficiencies, i.e. cost savings, on consumers which does not seem to enhance consumers welfare at all.\footnote{Robert Pitofsky, \textit{supra} note 352, at 1493; This author also argues that not the manufacturer should be given the power to decide what mix of product and services is desirable. This question should be decided by the competitive process in the market itself.}

Howard P. Marvel and Stephen McCafferty offered a new argument against \textit{per se} prohibition of resale price maintenance. They suggested that resale price maintenance can be useful for manufacturers to ensure that they obtain “certification of quality or stylishness of their products by retailers”.\footnote{Howard P. Marvel and Stephen McCafferty, \textit{supra} note 475, at 369; See also Frank Mathewson and Ralph Winter, \textit{supra} note 439, at 25-26; Edward Iacobucci, \textit{supra} note 401, at 19. The reasoning is that if a product is carried by a high quality retail store, for example Bloomingdale’s, consumers take this as a certification of the products high quality.} This signal is subject to free-riding. Resale price maintenance can be used to make such products attractive for high quality dealers and to prevent a loss of the product’s prestige. This theory has been criticized as not solving the free-rider problem. In a competitive market, discounters who are forced to sell the product for the same price as a prestigious retailer store, will compete away the margins by offering non-price incentives. A discounter with lower costs will compete by bundling the product in question with another product (for example, jeans and belts) and sell them together for an attractive price.\footnote{Edward Iacobucci, \textit{supra} note 401, at 24. For further arguments against this explanation of resale price maintenance, see \textit{ibid}, at 19-24.}

A related explanation for the use of resale price maintenance is the argument that the product will otherwise be used as a loss-leader in order to attract customers.\footnote{For a definition of loss-leader, see \textit{supra} chapter 2; 2.4.3. at fn 383.} Loss-leadering, it is argued, damages the manufacturers’ reputation and image, “and erodes the
normal sales value of their products". This problem was addressed in Canada in 1955 and the Restrictive Trade Practices Commission concluded in its report that the "possibility of grave loss-leadering had been quite exceptional and sporadic in nature, clearly insufficient to warrant new legislation for suppression or control". Moreover, the Commission found no "proof that the abolition of resale price maintenance has led to practices or conditions such as (...) [loss-leadering] as a monopolistic device detrimental to the public interest". However, the 1960 amendment of the then Combines Investigation Act introduced the defense of loss-leadering.

As already mentioned in the introduction to this chapter, a major concern is that resale price maintenance is used as a device to coordinate price-fixing by and establishing a retailer cartel. It is said that the effect of such a practice is the same as that of a horizontal dealer cartel. A manufacturer, it is argued, is often induced to impose retail prices as a means of obtaining supra-competitive retail profit margins and protect the dealers from discounters. Resale price maintenance is, consequently, understood to be "responsible for raising prices and lowering quantity to the advantage of retailers and the

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495 I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, supra note 111, at 3.1.45. See also Howard P. Marvel and Stephen McCafferty, supra note 475, at 373-374; Robert Pitofsky, supra note 352, at 1494.
497 But note, that this defense is only applicable with respect to a refusal to supply charge under subs. 61(1)(b); see subs. 61(10) and supra chapter 2; 2.4.3 (c).
498 Robert Pitofsky, supra note 352, at 1490, and supra note 472, at 28; I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, supra note 111, at 3.1.44; Frank Mathewson and Ralph Winter, supra note 439, at 28; Bruce Dunlop, David McQueen, Michael Trebilcock, supra note 99, at 250-251; Howard P. Marvel and Stephen McCafferty, supra note, 475, at 373; Edward Iacobucci, supra note 401, at 44. If, for example, only the majority of the dealers are willing to engage in horizontal price fixing, they might be not successful, but if the majority can convince the manufacturer to participate and impose resale price maintenance, discounters can be cut-off, see Robert Pitofsky, supra note 352, at 1490.
detriment of consumers and society generally. In response to this concern, economists have argued that entry is normally too easy so that a cartel cannot be established and supra-competitive profit margins cannot be achieved. However, the dealer cartel explanation of resale price maintenance implies that there may result a reduction in welfare in comparison to a market without resale price maintenance.

Another common concern is that resale price maintenance facilitates collusion among manufacturers, because fixed resale prices may prevent individual members of the cartel from reducing their wholesale prices. If there is indeed a manufacturer cartel involved in resale price maintenance cases, it is said to be welfare reducing. In such a case a prohibition is likely to increase economic efficiency. However, it has been argued that this does not justify to upheld the per se illegality of this practice. An attempt to

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499 Edward Iacobucci, supra, at 44. A retailer cartel is also harmful for the manufacturer. However, the latter may nevertheless agree to impose fixed resale prices to stabilize or establish a retailer cartel, in case the retailers have enough power to coerce it. See Edward Iacobucci, ibid, at 44-45; Frank Mathewson and Ralph Winter, supra note 439, at 102; Bruce Dunlop, David McQueen, Michael Trebilcock, supra note 99, at 251.

500 Howard P. Marvel and Stephen McCafferty, supra note 475, at 374, Bruce Dunlop, David McQueen, Michael Trebilcock, supra note 99, at 251. Frank H. Easterbrook, supra note 401, at 141.

501 Frank Mathewson and Ralph Winter, supra note 439, at 34. Bruce Dunlop, David McQueen, Michael Trebilcock, supra note 99, at 250-251.

502 This because [if] all parties in the manufacturer’s agreement adopt vertical minimum price-fixing arrangements with dealers, then all have less incentive to cut a price in the hope of achieving greater sales volume. Since their dealers cannot pass along the price cut to consumers, the dealers will pocket the manufacturer’s price reduction - and hence the price reduction at the manufacturer level is much less likely to occur at all”, Robert Pitofsky, supra note 352, at 1490-1491. See also Edward Iacobucci, supra note 401, at 46-51.

503 The test is that prices are maintained at the same level (no price chiseling), that there is a small number of producers, nearly identical products, and barriers to entry, see Frank Mathewson and Ralph Winter, supra note 439, at 102; Bruce Dunlop, David McQueen, Michael Trebilcock, supra note 99, at 249. See also James W. Morrow, supra note 455, at 44, who criticizes the high standards set for the identification of a cartel; and Edward Iacobucci, supra note 401, at 59-61.

504 Frank Mathewson and Ralph Winter, supra note 439, at 102.
monopolize the market through resale price maintenance agreements can be dealt with directly under the general conspiracy provisions of the Act.505

(b) The controversial debates concentrate mainly on resale price maintenance imposed by a single manufacturer acting unilaterally. That resale price maintenance used by a cartel of manufacturers or distributors/retailers is to the detriment of society is not disputed among most of the scholars; the issue is rather when is a cartel a cartel. The possibility that resale price maintenance is likely to be associated with cartels is for the reformers, however, no reason to uphold the illegality of resale price maintenance. According to them the *Competition Act* is equipped well enough to deal with such anti-competitive behaviour.506

### 4.3. Should Resale Price Maintenance Be Allowed?

(a) The analysis of resale price maintenance by the reformist economists and their conclusion that this practice is socially efficient and welfare enhancing requires careful consideration. Their point of view is, as we have seen, controversial among scholars and not universally accepted.507 Admittedly, the revisionist literature provided some impressive arguments against the idea that resale price maintenance is always and in itself harmful to consumers. These ideas not only provoked an interesting debate among academics but have been also partially addressed by the Canadian legislator. The four defenses available

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505 See Frank Mathewson and Ralph Winter, *supra* note 455, at 48.
506 Frank Mathewson and Ralph Winter, *supra* note 455, at 48, but see the critic by Edward Iacobucci, *supra* note 401, at 62.
507 See, for example, Bruce Dunlop, David McQueen, Michael Trebilcock, *supra* note 99, at 264 and at 292. The three authors did not reach consensus with respect to resale price maintenance; while one author would leave the law at it is, the others would favour the more revisionist view of this practice and would have this practice removed from the list of criminal offenses.
with regard to a charge of refusal to supply under sub s. 61(1)(b) reflect to some extent the pro-competitive rationales of resale price maintenance mentioned above.\textsuperscript{508}

(b) Nevertheless, to make resale price maintenance subject to a rule of reason approach or even \textit{per se} legality, might go too far. This for the following reasons:

The main argument of the supporters of the legality of resale price maintenance is the assumption that if resale price maintenance is imposed all retailers will provide the services the manufacturer is expecting. Their argument goes that resale price maintenance will "provide the proper incentives for retailer service provision".\textsuperscript{509} But it is doubtful, whether retailers indeed provide more or the expected services when confronted with resale prices fixed and imposed by the manufacturer. There is no guarantee that they will and if they find other means to sell the product for a "better" price they certainly will do it.\textsuperscript{510} A retailer may, therefore, rather free-ride on other efforts made by the service providing retailer or provide other non-price services that are not desired by the manufacturer but of value for the customer.\textsuperscript{511} And even if non-price competition is limited to special services,

\textsuperscript{508} I. Nielsen-Jones, S.D. Khosla and R.D. Anderson, \textit{supra} note 111, at 3.1.46. Subsection 61(10)(d) provides a defense on the grounds that the distributor or dealer did not provide the expected level of service. In \textit{H.D. Lee} (1980) 57 C.P.R. (2d) 186, at 198, it was held that the test is the level of service the purchaser might reasonably expect and not the level the manufacturer is expecting. This reasoning was criticized. It was argued that customers who purchase a product at a store that is known to offer low prices for low services do not expect special services and, therefore, are not disappointed; Frank Mathewson and Ralph Winter, \textit{supra} note 439, at 44.

\textsuperscript{509} Edward Iacobucci, \textit{supra} note 401, at 38. See also Robert Pitofsky, \textit{supra} note 352, at 1492.

\textsuperscript{510} An example is "bundling" the product with another product in order to sell the whole package for an attractive price. It is also difficult to see how a manufacturer can induce better services by raising the price with respect to its product if the distributor is "a multiproduct outlet", such as a supermarket or a drug store; see Robert Pitofsky, \textit{supra} note 352, at 1493.

\textsuperscript{511} Benjamin Klein and Kevin M. Murphy, "Vertical Restraints as Contract Enforcement Mechanisms" (1988) 31 Journal of Law and Economics, 265 at 266.
a retailer may rather prefer the short time gain from shirking on service to the minimal returns from upholding the agreement with the manufacturer.512

Secondly, there are suitable alternatives to resale price maintenance available to ensure that the expected services are provided.513 A manufacturer can contract for the provision of special services such as, for example, additional advertising or a warranty program;514 or it may simply make direct payments to those retailers who provide the services expected.515 With those alternatives special services can be induced without price setting by the manufacturer.516

512 Since a co-operative, full service providing retailer earns zero rents the punitive effect of a cut-off by the manufacturer is small; see Edward Iacobucci, supra note 401, at 16, with reference to Benjamin Klein and Kevin M. Murphy, supra note 511, at 266. However, it appears that resale price maintenance might only be effective in inducing the provision of services the manufacturers want, if the latter by monitoring the retailer can determine whether the expected services are being provided, and is able to sanction the retailer; otherwise the retailer has no reason to act the way the manufacturer wishes it to act. This was observed by Benjamin Klein and Kevin M. Murphy, ibid, at 265; see also Edward Iacobucci, ibid, at 38.


514 Robert Pitofsky, supra note 352, at 1493, John F. Seiberling, supra note 456, at 180. However, critics of this alternative argue that an explicit contract for the provision of special services is sometimes economically not feasible because it is "too difficult to specify service levels that could be proved in court"; Edward Iacobucci, supra note 401, at 33, Benjamin Klein and Kevin M. Murphy, supra note 511, at 267-268. According to Robert Pitofsky, supra note 472, at 29, a scenario where "the manufacturer fixes the retail price and, presto, the dealers come up with the right service in the right amount at the right time" is "nonsense". In the "real world, if suppliers want more advertising or more generous warranties, they and their dealers draw up a contract specifying the terms of a cooperative arrangement or the suppliers provide the services themselves".

515 Edward Iacobucci, supra note 401, at 36. The payment would not simply be a compensation for the services provided, it would rather be a lump sum of such amount that "the future stream of payments exceeds the short term gain from shirking"; ibid, at 37 and at 11.

516 Other alternatives to provide the necessary services could be the provision of information through advertising on television. Another alternative would be the restriction of the product distribution by establishing exclusive territories and thus suppress all competition among dealers or distributors; see Howard P. Marvel, supra note 513, at 63.
Further, it appears not to be consistent with the commitment to a competitive market that the manufacturer should be the one to decide what mix of product and service is desirable and not the market (i.e. the consumers) itself. Why should the manufacturer have the power to decide this question and be able to put distributors or retailers that charge lower prices out of business? Should not rather consumers decide "whether they want to buy needed servicing of goods along with the goods themselves, or to obtain servicing from independent specialists"? Free-riders are the discounters who have once been regarded "as the very heart of a free market competitive system". They are able to offer lower prices because they do not provide the desired services. The imposition of resale price maintenance prevents not only customers from making their own choice but prevents also the discounters from passing cost savings to the customers. This, however, does not seem to be beneficial for consumers or to enhance their welfare.

Finally, the social efficiency of resale price maintenance is controversial. Many commentators have concluded that resale price maintenance is socially efficient when it is profitable for the manufacturer or supplier. Or, in other words, that the manufacturer will impose such restraints only when consumers receive a net benefit thereby. Otherwise, they

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517 Robert Pitofsky, *supra* note 352, at 1493. "If the service is indeed essential, distributors may be depended upon to recognize that fact and provide it, or they will be driven out of business. If it is only marginally relevant to the product's success, the manufacturer should be indifferent as to whether it is provided. As to desirable but nonessential services, many products are sold through two kinds of outlets: one that charges a lower price in a no-frills operation, and the other that charges a higher price and provides services"; *ibid.*

518 Bruce Dunlop, David McQueen, Michael Trebilcock, *supra* note 99, at 264.

519 Robert Pitofsky, *supra* note 352, at 1493.

520 They may also be able to offer lower prices because they provide some services more efficiently; Robert Pitofsky, *supra* note 352, at 1493.

argue, it would not be profitable for the manufacturer. \(^{522}\) But this assumption does not acknowledge that consumers do not always react the same way and that they have different “tastes” regarding their preferences for services. Yet, “[w]here such differences exist, manufacturers’ and consumers’ interests do not necessarily coincide.” \(^{523}\) Hence, the mere fact that the increase in services is profitable for the manufacturer does not mean that it is beneficial for most of the consumers. On the contrary, where the losses of such consumers who do not benefit from the provided dealer services outweigh the gains of those who benefit, consumer harm is the result. \(^{524}\) A theory that suggests that the imposition of vertical price restraints always leads to increased consumer welfare is, therefore, unfounded.

(c) We have seen that not each market has a need for special services. \(^{525}\) The use of resale price maintenance as a means to induce better services provided by retailers is limited to the few markets where the provision of such services is likely to increase output. And even then such practice is often ineffective, inconsistent with a competitive market or/and socially inefficient. Moreover the same result - the provision of special dealer services and

\(^{522}\) See James W. Morrow, *supra* note 455, at 39; William S. Comanor, *supra* note 352, at 983; Robert Pitofsky, *supra* note 352, at 1491. Writers who argue that way are, for example, Lester Telser, Robert Bork, and Frank Mathewson and Ralph Winter.  

\(^{523}\) William S. Comanor, *supra* note 352, at 990. See also James W. Morrow, *supra* note 455, at 43. According to this author it is also difficult to understand how changes in welfare of new customers can be measured without having more information about their previous preferences (emphasis added).  

\(^{524}\) William S. Comanor, *supra* note 352, at 999-1000. This is particularly the case when resale price maintenance is imposed to support or induce services for already established products.  

\(^{525}\) In such markets there is no apparent danger of free-riding and the imposition of resale price maintenance, thus, would not be justified. It is, for example, not clear what kind of special services are required to sell jeans. However such products have been subject to litigation; see, for example, *H.D. Lee* (1980) 57 C.P.R. (2d) 186. See Edward Iacobucci, *supra* note 401, at 9; Robert Pitofsky, *supra* note 352, at 1493; Ralph A. Winter, *supra* note 485, at 69.
an increase of the output - could also be reached by other more appropriate and less restrictive methods.

In consideration of all these arguments the current Canadian law on resale price maintenance - *per se* illegality relaxed by various defenses (subs. 61(1) and (10)) - seems to be in accordance with the competition policy stated in subs. 1.1 of the *Competition Act*. Furthermore, a rule of reason review is likely to be more costly than the costs of prohibiting resale price maintenance. Under a rule of reason approach the motivation for the imposition of resale price maintenance has to be determined in order to be able to decide if the use of this practice in the particular case is socially efficient or has a negative effect on competition. Such an approach would produce significant costs and does not provide predictability regarding the likely legal consequences. A *per se* illegality, on the other side, is less costly and uncertain with respect to what can be expected under the law and, therefore, in the interests of judicial economy.

However, it can be argued that in cases where new products or products of new entrants into the market are concerned, vertical price restraints are less likely to be detrimental to consumers’ welfare, since their novelty may create greater demand for information and explanation. In such circumstances, it might be appropriate to allow resale price maintenance for a certain time in order to facilitate the entry of a new product or a new

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526 Robert Pitofsky, *supra* note 352, at 1489.
528 See William S. Comanor, *supra* note 352, at 1002.
supplier in the market. This could be reached by adding an exception for new products and entrants to the resale price maintenance provision which is similar to the one we already know with respect to exclusive dealing. Together with the other defenses, such an exception would be in accordance with the competition policy dominant in the Canada’s competition law.

529 William S. Comanor, supra note 352, at 1002; Bruce Dunlop, David McQueen, Michael Trebilcock, supra note 99, at 292. Some costs may occur with respect to switching from resale price maintenance to other alternatives, but these are considered to be of little significance, see Edward Iacobucci, supra note 401, at 64.

530 See subs. 77(4)(a) and supra chapter 2; 22.4.(g)(aa). But see Edward Iacobucci, supra note 401, at 66, who concludes that if resale price maintenance law “is to be reformed, it should be in the direction of tightening the law by eliminating (...) the defenses in Canada”.

ABBREVIATIONS

A.C. Law Report, Appeal Cases
B.C. British Columbia
B.C.L.R. British Columbia Law Reports
B.C.S.C. British Columbia Supreme Court
B.L.R. Business Law Reports
C.A. Court of Appeal
Comp.Trib. Competition Tribunal
Ct. Court
C.P.R. Canadian Patent Reporter
Dist.Ct. District Court
D.L.R. Dominion Law Reports
ed. editor/edition
eds. editors
e.g. exempli gratia
etc. etcetera
Fed. C.A. Federal Court of Appeal
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<td>H.L.</td>
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<td>Harv. L. Rev.</td>
<td>Harvard Law Review</td>
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<td>Int'l Lawyer</td>
<td>The International Lawyer</td>
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<td>J. L. &amp; Econ.</td>
<td>Journal of Law and Economics</td>
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<td>L. J.</td>
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<td>L. Rev.</td>
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<td>M.P.R.</td>
<td>Maritime Provinces Report</td>
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<td>R.S.C.</td>
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U.S. United States of America; United States Reporter

U. T. Fac. L. Rev. University of Toronto Faculty of Law Review

v. volume

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