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**Canadian Predation Laws and their Application  
To the Airline Industry**

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## INTRODUCTION

The identification of predatory conduct is difficult. When is a low price a predatory price? What measure of costs is appropriate against which to measure prices or revenues? Is all below cost pricing predatory? What business justifications can exist for pricing below costs? Is recoupment a necessary precondition to a finding of predation? Is the intent of the alleged predator a relevant consideration?

In the airline context, predation may be even more difficult to recognize. A full flight does not mean a profitable flight. Each seat on a flight may generate a different amount of revenue, which may not be known until weeks after the flight has departed. Mobile assets make it easier for airlines to shift resources to capture more profitable opportunities, or to implement a predation strategy. For traditional network carriers, operation of some flights or routes below cost may or may not be indicative of predation.

This paper examines the provisions in Canada's law which address predation. We will discuss these provisions generally, and then with regard to airlines.

## PREDATORY PRICING

Canada's *Competition Act*<sup>1</sup> (the "Act") deals with predation through a criminal predatory pricing offence and a civil abuse of dominant position provision.

Section 50(1)(c) of the Act makes it an indictable offence to "engage in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect."<sup>2</sup> The offence is punishable by an unlimited fine for corporations, or a maximum two years imprisonment. The

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<sup>1</sup> R.S.C. 1985, c. C-34

<sup>2</sup> *Competition Act*, supra., section 50(1)(c). In addition, section 50(1)(b) prohibits geographic predation wherein a firm "engage(s) in a policy of selling products in any area of Canada at prices lower than those exacted elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in that part of Canada, or designed to have that effect". In either case, the offence is punishable by an unlimited fine (in the case of corporations) or imprisonment for a term not exceeding two years.

Attorney General may also seek injunctive relief<sup>3</sup> and prohibition orders (which may be issued without any requirement that prosecution for a substantive offence take place and may be in effect for up to ten years)<sup>4</sup>. In addition, the Act creates a civil cause of action for any person who has suffered loss or damage as a result of criminal anti-competitive conduct or failure to comply with an order made by the Competition Tribunal (the "Tribunal") under the civil provisions of the Act.<sup>5</sup> Those persons can recover damages equal to the loss or damage suffered, plus an amount to compensate up to the full cost of his or her investigation and the proceedings. They may also pursue injunctive relief.

In order to determine whether a price is "unreasonably low", Canadian courts have generally used an objective price/cost test to determine if the alleged predator has been acting irrationally by pricing its items below its costs of production. The Courts have not taken a consistent approach to the appropriate measure of costs.

Not all policies of selling products below cost are considered predatory. In *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.*, it was held that a price cannot be predatory when the price reduction was implemented in order to meet (but not undercut) lower prices already charged by a competitor<sup>6</sup>. In essence, a competitor is permitted to "meet" the competition, regardless of whether the price is below the cost of production. In *Boehringer*, an Ontario Court relied on U.S. jurisprudence<sup>7</sup> and held that simply matching the prices of one's rival could not be predation, even if those prices were below the defendant's costs.<sup>8</sup>

A "policy" of selling products at "unreasonably low" prices has been interpreted by Canadian courts as meaning more than the adoption of a temporary measure to counteract an aggressive, competitive move aimed directly at an important customer of the low-pricing firm. In *R. v. The*

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<sup>3</sup> *Competition Act*, supra., section 33.

<sup>4</sup> *Competition Act*, supra., section 34.

<sup>5</sup> *Competition Act*, supra., section 36.

<sup>6</sup> *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.*(1998), 83 C.P.R. (3d) 51 (Ont. Gen. Div.)

<sup>7</sup> *ILC Peripherals v. IBM*, 458 F. Supp. 423 (N.D. Cal. 1978), affirmed *per curiam sub nom. Memorex Corp. v. IBM*, 636 F.2d 1188 (9<sup>th</sup> Cir. 1980), *certiorari* denied, 452 U.S. 972 (1981).

<sup>8</sup> *Supra, Boehringer*, note 26.

*Producers Dairy Limited*<sup>9</sup>, the Ontario Court of Appeal held that the low pricing in question, which lasted two days, did not constitute a policy. Similarly, in *R. v. Hoffmann-La Roche*<sup>10</sup>, the Ontario Court of Appeal held that sales made on a one-time basis are unlikely to constitute a policy. Rather, the selling needs to be ongoing or repeated. In *Hoffman-LaRoche*, the Court held that giving products away at no charge for a six-month period constituted a policy of selling at unreasonably low prices.

The requirement that the alleged predator engage in a "policy" incorporates an element of intent or purpose. In *Hoffman-LaRoche*, the Court held that in order to prove a "policy of selling", the prosecution must establish that below cost pricing was "planned and deliberate" conduct by responsible employees. Discussions and minutes of meetings attended by employees who may not have ultimate decision making authority may be evidence of the "deliberateness" of the conduct as well as the "state of the collective mind" of the company.<sup>11</sup>

In regard to remedies, civil plaintiffs may seek injunctive relief in addition to damages. In a predation case, injunctive relief could be a powerful tool, particularly at the interlocutory stage. If the plaintiff can force the defendant to stop its conduct at the outset of the case, it is more likely to survive to finish the case. A significant difficulty however, is crafting the appropriate injunction. In *Boehringer*, the Court held that even if it had found the defendant's prices to be predatory, it would not have ordered an interlocutory injunction because the courts are not well equipped to determine what a "floor price" ought to be over the course of time.<sup>12</sup>

### *Predatory Pricing Enforcement Guidelines*

In 1992, in order to clarify its approach to enforcing the predatory pricing provisions, Canada's Competition Bureau (the "Bureau") released its *Predatory Pricing Enforcement Guidelines*

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<sup>9</sup> (1966), 50 C.P.R. (2d) 265 (Ont. C.A.)

<sup>10</sup> (1980), 28 O.R. (2d) 164 affirmed (1981), 33 O.R. (2d) 694 (Ont. C.A.)

<sup>11</sup> *R. v. Hoffmann-La Roche*, (1980), 28 O.R. (2d) 164 at 194, affirmed (1981), 33 O.R. (2d) 694 (Ont. C.A.)

<sup>12</sup> *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* supra. at 63-64.

("PPEGs")<sup>13</sup>. These guidelines set out the approach and factors considered by the Bureau in relation to a complaint or inquiry into predatory pricing, including the following:

- The Bureau's focus is on cases where the alleged predator has recouped or is likely to recoup the losses it incurred while engaging in the predatory conduct.
- Typically, an allegation of predatory pricing involves a firm with significant market power trying to maintain or increase its market power through predatory conduct. The Commissioner uses a rough proxy market share of 35% as a guideline, below which it is unlikely that an alleged predator has market power. Evaluating a firm's market power also includes an analysis of existing market conditions, including barriers to entry.
- In determining whether the prices were "unreasonably low". The PPEGs specify that:
  - a price set above the seller's average total costs is not regarded as "unreasonably low" regardless of the seller's market power;
  - a price set below average variable cost is likely to be regarded as "unreasonably low" unless there is a clear justification such as the need to sell off perishable inventory; and
  - in cases where the price is set in the "grey area" between average total cost and average variable cost, the Bureau's finding will depend on surrounding circumstances (eg. changes in demand patterns, market capacities, etc.)
  - below cost "price matching", even if implemented in response to competition, is not immune from scrutiny under the predatory pricing provisions. The Bureau thereby takes a different approach than the Court in the *Boehringer* case<sup>14</sup>.

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<sup>13</sup> Commissioner of Competition - Competition Act, Predatory Pricing Enforcement Guidelines (Ottawa: Consumer and Corporate Affairs Canada, 1992) at p. 516.

<sup>14</sup> Price matching as a "silver bullet" defence was also rejected in the recent United States case *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, U.S. District Court, Eastern District of Michigan, Southern Division, March 31, 2003, Case

- The conduct must constitute a "policy". A single sale or a temporary low price offered as a defensive reaction to a competitor's pricing is unlikely to be considered a policy. Rather, to be a policy, a pricing initiative should be a "deliberate corporate program of pricing in the market" and should be of "sufficient duration to constitute a price offering in the context of the given market."
- The conduct must "be designed to" or have the "effect or tendency of" substantially lessening competition or eliminating a competitor.

More recently, in March 2002, the Bureau released draft *Enforcement Guidelines for Illegal Trade Practices: Unreasonably Low Pricing Policies* (the "Draft Low Price Guidelines")<sup>15</sup>. These Guidelines were the subject of significant criticism from the legal and business communities, and have not (yet) been implemented. The changes in approach identified by the Draft Low Price Guidelines include the following:

- The Bureau would continue to include recoupment of losses as a factor in its considerations, but would not make it a necessary requirement. A likely substantial lessening of competition would, however, continue to be a requirement. In a predation context, these two elements may coincide;
- The Bureau would adopt the avoidable cost test instead of the average variable cost test to identify unreasonably low prices.

The Bureau's approach to predation is for the most part consistent with U.S. jurisprudence and with the economic theory underlying predation laws. That approach, however, requires a "flexible" interpretation of the words of s. 50(1)(c). On its face, the section imposes a much lower burden on the party seeking to prove predation (for example, a civil plaintiff). Section 50(1)(b) does not set out a recoupment requirement, nor does it require any anti-competitive

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No. 00-71535 wherein the Court stated (at page 19) that there is "no legal authority for a "meeting competition" defence, at least not as (a) "silver bullet".

<sup>15</sup> Available online: [www.cb-bc.gc.ca](http://www.cb-bc.gc.ca) and [www.strategis.ca](http://www.strategis.ca)

effect if it is shown that the pricing was intended to eliminate a competitor or to lessen competition substantially, or that the effect of the pricing was to eliminate a competitor (however inefficient).

To date in Canada, there have been no reported cases under the criminal predatory pricing provisions which involve airlines.

## **ABUSE OF DOMINANT POSITION**

The Bureau can also deal with predatory pricing (or other predatory conduct) under the "abuse of dominance" provisions of the Act, as an alleged "practice of anti-competitive acts" by a dominant market participant. The PPEGs indicate that where the alleged predation is carried out in conjunction with other anti-competitive acts, or where the conduct is better dealt with by the Competition Tribunal (the "Tribunal"), the Commissioner will choose to proceed under the abuse of dominance provisions, rather than by way of criminal prosecution.

Under section 79 of the Act, it is a reviewable practice for a dominant firm (or group of firms) to engage in a "practice of anti-competitive acts" that has (or is likely to) substantially prevent or lessen competition in a market. Where the Tribunal determines, on application by the Commissioner of Competition, that a firm has abused its dominant position, it may issue orders that prohibit the offending conduct, may grant ancillary relief, and, in the case of a person operating a domestic airline service in Canada, issue an administrative monetary penalty of up to \$15 million.<sup>16</sup> In Canada, private parties may not apply to the Tribunal under section 79.

Where the Commissioner brings an Application or is investigating a complaint under section 79, she may also seek interim relief from the Tribunal, either on notice to the parties, or on an *ex parte* basis.<sup>17</sup> There is no jurisprudence regarding the type of order that could be made in a predation case, but the issues identified by the Ontario Court in *Boehringer* would be a consideration. A practical consideration for the Commissioner would also be the effect of such

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<sup>16</sup> The administrative monetary penalty set out in section 79(3.1) was added to the *Competition Act* as a result of Bill C-23, which came into force in June 2002. Administrative monetary penalties for dominant firms, other than those operating a domestic airline service, are presently not available but are under consideration by the Government.

<sup>17</sup> *Competition Act*, supra., section 103.3.

an order on the Commissioner's ability to prove her substantive case. If the conduct is quickly stopped, proving its likely effects becomes more difficult. As noted below, section 104.1 also gives the Commissioner the power to make temporary orders against dominant domestic airlines, without seeking permission from the Tribunal. The temporary order power in section 104.1 has since been struck down by the Quebec Court of Appeal as a violation of Canada's *Bill of Rights*. The Commissioner sought, and was recently granted, leave to appeal to the Supreme Court of Canada.<sup>18</sup>

Section 78 of the *Act* enumerates a non-exhaustive list of conduct which constitute anti-competitive acts, including selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.<sup>19</sup>

As a result of recent amendments (discussed below), section 78 also includes the following anti-competitive acts specifically applicable to domestic airlines:

- (a) acts or conduct of a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, that are specified under paragraph (2)(a); and
- (b) the denial by a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, of access on reasonable commercial terms to facilities or services that are essential to the operation in a market of an air service, as defined in that subsection, or refusal by such a person to supply such facilities or services on such terms.

Section 78 does not limit the types of conduct which can constitute "anti-competitive acts". The Tribunal has held the following conduct to constitute anti-competitive acts in specific cases:

- (a) long-term exclusive contracts;
- (b) acquisition of most competitors, particularly where the acquisitions are made under economic duress of threatened aggressive competition;

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<sup>18</sup> *Air Canada v. Canada (Attorney General)*, (2003) 222 D.L.R. (4<sup>th</sup>) 385 (Que. C.A.) leave to the Supreme Court of Canada granted [2003] CSCR no. 111 (S.C.C.)

<sup>19</sup> *Competition Act, supra.*, section 78(1)(i)

- (c) evergreen contracts, contracts of adhesion or meet and release clauses in certain circumstances; and
- (d) predatory pricing.

The Competition Tribunal has consistently held that an "anti-competitive purpose" is a necessary element for a finding of abuse of dominance. In *Canada (Director of Investigation and Research) v. NutraSweet*<sup>20</sup>, the first case decided by the Tribunal under the civil abuse provisions, the Tribunal held that for conduct to be considered an "anti-competitive act", whether or not it is an enumerated act in section 78, there must be an "intended negative effect on a competitor that is predatory, exclusionary or disciplinary", and evidence of this purpose is a "necessary ingredient" to any finding that an anti-competitive act has been performed<sup>21</sup>. The Tribunal went on to say that the intended negative effect need not be proved by direct evidence of subjective intent, and may be inferred from the circumstances surrounding the act<sup>22</sup>. In addition, as with the "policy of selling" required for predatory pricing, in order to constitute a practice of anti-competitive acts, there must be more than an isolated act.

In *Canada (Director of Investigation and Research) v. D & B Companies of Canada*<sup>23</sup> and *Canada (Director of Investigation and Research) v. Tele-Direct*<sup>24</sup>, the Tribunal confirmed that the existence of a legitimate business justification is a relevant factor to be considered, along with evidence of the effects of the act, and any evidence of subjective intent, in determining the overriding purpose of the act in question. Further, a business justification must be a credible efficiency or a "pro-competitive" business justification and must be weighed in light of any anti-competitive effects.<sup>25</sup>

In *NutraSweet*, the Director of Investigation and Research (as the Commissioner was called at the time) alleged that NutraSweet had committed an anti-competitive act by selling items below acquisition cost as set out in paragraph 78(1)(i) of the Act. The Tribunal held that section

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<sup>20</sup> (1990), 32 C.P.R. (3d) 1 (Comp. Trib.)

<sup>21</sup> *NutraSweet, supra.* at 34.

<sup>22</sup> *NutraSweet, supra.* at 35-36.

<sup>23</sup> (1995), 64 C.P.R. (3d) 216 (Comp. Trib.)

<sup>24</sup> (1997), 73 C.P.R. (3d) 1 (Comp. Trib.)

<sup>25</sup> *Tele-Direct, supra.* at 180.

78(1)(i) was intended to apply to distributors due to its use of acquisition cost as the standard, but went on to say that predatory pricing by a manufacturer could also constitute an anti-competitive act under section 78. The Tribunal described the cost standard required for predatory pricing to constitute an anti-competitive act, holding that average variable cost, as a proxy for marginal costs, was the appropriate standard for a firm operating at less than full capacity, and that average total cost was the appropriate standard for a firm operating at full capacity. On the facts of the *NutraSweet* case, however, the Tribunal did not find that predatory pricing had occurred because it found that it was highly unlikely that NutraSweet would have been able to recoup its foregone profits from Canadian consumers, and because the Director had only alleged below acquisition cost pricing (which was inapplicable to a manufacturer).

### Guidelines on Abuse of Dominance

In July, 2001, the Bureau issued its *Enforcement Guidelines on the Abuse of Dominance Provisions*. The Guidelines indicate that an individual firm with less than a 35% market share, or a group of firms who jointly account for less than a 60% market share, will generally not give rise to concerns of market power or dominance. In addition, the Bureau views an action as anti-competitive if it falls into one or more of the following categories: (i) acts that raise rivals' costs (or reduce rivals' revenues) or that foreclose existing or potential rivals from key inputs or facilities; (ii) predatory conduct (such as predatory pricing); and (iii) acts intended to facilitate coordinated behaviour among firms (facilitating practices).<sup>26</sup> The Guidelines also consider anti-competitive purpose, adopting the Tribunal's finding in *NutraSweet* that a predatory, exclusionary or disciplinary purpose is a necessary requirement in an abuse case.

## **AIRLINE-SPECIFIC LEGISLATION AND REGULATIONS**

Until 1999, there were two significant network airlines in Canada - Air Canada and Canadian Airlines. In late 1999, Canada's airline industry underwent a major restructuring due to the financial difficulties of Canadian Airlines, resulting in the acquisition of Canadian by Air Canada. Following the acquisition, Air Canada became the overwhelmingly dominant domestic

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<sup>26</sup> Competition Bureau, "Enforcement Guidelines on the Abuse of Dominance Provisions", July 2001, available online: [www.strategis.ca](http://www.strategis.ca).

airline in Canada with more than 80% of domestic passenger traffic and close to 90% of domestic passenger revenues. Given Air Canada's market dominance, the Government passed Bill C-26 which made certain airline specific amendments to the *Competition Act* in an attempt to protect the competitive process. In addition to securing undertakings from Air Canada through the merger approval process, Bill C-26 amended the Act to provide authority for the Governor in Council to specify, by regulation, specific anti-competitive acts or conduct on the part of a dominant domestic airline.

In 2000, the *Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service*<sup>27</sup> (the "Airline Regulations") were implemented. They added the following acts to the list of potential anti-competitive acts in section 78, but only with respect to the operation of a dominant domestic airline:

- (a) operating capacity on a route or routes at fares that do not cover the avoidable cost of providing the service; and
- (b) increasing capacity on a route or routes at fares that do not cover the avoidable cost of providing the service.

The "avoidable cost" test for predation set out in the Airline Regulations diverges from the variable cost test set out in the Bureau's 1992 PPEG's but is the same as the test espoused in the Draft Low Pricing Guidelines. The Air Canada case (discussed below), is the first case in Canada to interpret and apply the avoidable cost test. It is likely to have wider application to predation cases in Canada generally.

Bill C-26 also enacted amendments in relation to access to and supply of essential services and facilities, as well as granting the power to the Commissioner to issue temporary cease and desist orders against a dominant airline (discussed above).<sup>28</sup>

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<sup>27</sup> SOR 2000-324

<sup>28</sup> The temporary order power in section 104.1 has since been struck down by the Quebec Court of Appeal as a violation of Canada's *Bill of Rights* and leave to appeal to the Supreme Court has been granted to the Commissioner. See *Air Canada v. Canada (Attorney General)*, (2003) 222 D.L.R. (4<sup>th</sup>) 385 (Que. C.A.) leave to the Supreme Court of Canada granted [2003] CSCR no. 111 (S.C.C.)

In 2002, the Government made an additional airline specific amendment to the Act, which gives the Tribunal the power to order an administrative monetary penalty of up to \$15 million against a dominant domestic airline which is found to have abused its position of dominance.<sup>29</sup>

### **THE AIR CANADA CASE**

In March 2001, the Commissioner brought his first case under the Airline Regulations. The case dealt with Air Canada's response to the entry of discount carriers WestJet and CanJet on routes in eastern Canada. Air Canada had responded to their entry by lowering fares and adding capacity on the routes where WestJet and CanJet began operations. The Commissioner alleged in his Application to the Tribunal that Air Canada had abused its dominant position by operating capacity on the WestJet and CanJet routes at fares that did not cover its avoidable costs. WestJet intervened in the case in support of the Commissioner. CanJet had exited the market shortly after the Commissioner's case was filed. Air Canada disputed the Commissioner's allegations.

On consent of the parties, the hearing of the application was split into two phases. In *Canada (Commissioner of Competition) v. Air Canada*<sup>30</sup> ("Air Canada"), the decision with respect to Phase I of the application, the Tribunal held that Air Canada had committed anti-competitive acts by operating flights on two sample routes in eastern Canada at revenues that did not cover its avoidable costs, contrary to paragraph 78(1)(j) of the Act and the Airline Regulations.

It is important to note that the Air Canada decision, unlike the previous abuse of dominant position decisions reviewed above, did not include a complete abuse of dominance analysis. Phase I was designed to clarify the operation of the avoidable cost test set out in the Airline Regulations, and to apply that test to two sample routes in Air Canada's domestic operations. The determination of whether Air Canada was dominant, and whether it had implemented a "practice of anti-competitive acts" that substantially prevented or lessened competition remains to be determined in a subsequent hearing (Phase II).

In its Phase I decision, the Tribunal defined avoidable costs as those which can be avoided by not producing the good or service in question. It determined that the appropriate unit of capacity is

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<sup>29</sup> Bill C-23, which made other significant amendments to the *Competition Act* in addition to the airline specific administrative monetary penalty, came into force in June 2002.

<sup>30</sup> (2003), 26 C.P.R. (4<sup>th</sup>)476, [2003] C.C.T.D. No. 9 (Comp. Trib.)

the "scheduled flight" (a numbered departure scheduled at approximately the same time of day on a regular basis). Avoidable costs were found to include: costs that are not incurred if the flight does not operate (such as fuel); costs that can be redeployed to another productive use (such as where the costs of an unprofitable flight could have been applied for another more profitable flight, i.e. the plane and staff could have been used for another flight); and costs that can be eliminated through disposal (such as selling a plane, or cancelling a lease for the plane). Air Canada's avoidable costs were determined to include most of its non-overhead costs and, more specifically, all variable costs and all product-specific fixed costs that were not sunk.

Redeployment was an important issue in Phase I. Air Canada argued that its aircraft ownership costs, for example, were fixed costs which it could not "avoid" by ceasing to operate a particular flight or route. The Commissioner argued that planes are mobile assets which can be redeployed from below cost flights to more profitable ones. The Tribunal concluded that aircraft should be treated as avoidable costs where it is shown, generally, that redeployment opportunities were available.

In regard to the revenues to be attributed to a scheduled flight for purposes of the avoidable cost test, the Tribunal rejected Air Canada's argument that "beyond revenues" should be included in the test. Air Canada argued that for a network carrier, the actual revenues collected for any flight are not fully demonstrative of the actual value of the flight within the network. It sought, therefore, to add so-called "beyond revenues" to the cost/revenue calculation. The Tribunal did not reject the concept of beyond revenues, but did reject Air Canada's method of assessment. Beyond revenues were therefore excluded from the avoidable cost test.

The Commissioner argued that proof of the operation of a flight below avoidable costs led to the inference that Air Canada had committed an anti-competitive act, which could be rebutted by evidence of a legitimate business justification. The Tribunal went further, holding that proof of operating below avoidable costs establishes an anti-competitive act, which cannot be rebutted by evidence of a business justification. In doing so, the Tribunal stated as follows:

...Indeed, the anti-competitive acts stated in section 78 of the Act, (with the exception of paragraph 78(1)(f) and the definition of domestic service as defined in subsection 55(1) of the *Canada Transportation Act* namely paragraphs 78(1)(j) and 78(1)(k)) require an "object", "design" or "intent" to engage in an exclusionary conduct that is having the effect of augmenting, entrenching or extending market power. The presence

of such wording made relevant the concept of legitimate business justification in past Tribunal correspondence. However, the Tribunal observes that no such intention has been expressly stated in paragraph 78(1)(j) of the Act. In the Tribunal's view, the wording of paragraph 78(1)(j) is clear: once a party fails the avoidable cost test, its conduct constitutes an anti-competitive act.

In the Tribunal's view, evidence of a legitimate business justification accepted in past tribunal jurisprudence could be considered in this case for the period...prior to the coming into effect of the Airline Regulations...The Tribunal may, however, consider legitimate business justification, among other elements, when determining whether a "practice" of anti-competitive acts has occurred pursuant to section 79 of the Act.<sup>31</sup>

Based on the Tribunal's reasons in *Air Canada*, the anti-competitive acts enumerated in the Airline Regulations do not require as a "necessary ingredient" to a finding under section 78, evidence of an "intended negative effect on a competitor that is predatory, exclusionary or disciplinary" as first enunciated in the *NutraSweet* decision.

However, the Tribunal made it clear that the *Air Canada* decision does not foreclose consideration of a legitimate business justification, "among other elements", when determining whether a "practice" of anti-competitive acts has occurred. In particular, the Tribunal left the door open to consider anti-competitive purpose and the impact of beyond revenues (as a legitimate business justification) as an element in a section 79 analysis.

In the *Air Canada* case, the Competition Tribunal concluded that Air Canada had operated capacity at fares below its avoidable costs on two subject routes. Still to be determined in Phase II are the following issues:

1. Air Canada's dominance;
2. Whether Air Canada's conduct amounted to a "practice" of anti-competitive acts;
3. Whether Air Canada's conduct resulted in a substantial prevention or lessening of competition in the relevant market; and
4. The appropriate remedy.

In April 2003, the Ontario Superior Court made an order granting creditor protection to Air Canada under the Canadian Companies' Creditors Arrangement Act ("CCAA"). The Tribunal stayed the execution of its findings in Phase I until Air Canada emerges from CCAA protection.

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<sup>31</sup> *Air Canada, supra.* at paragraph 54.

Once this occurs, Phase II can proceed. There could also be an appeal of the Tribunal's Phase I decision to the Federal Court of Appeal.

Before the Commissioner filed his application in the Air Canada case, the Bureau released draft *Enforcement Guidelines on the Abuse of Dominance in the Airline Industry* (the "Airline Guidelines")<sup>32</sup>. As with the Draft Low Pricing Guidelines, the Airline Guidelines have not yet been finalized. However, the Airline Guidelines closely follow the position taken by the Commissioner, and the application of the avoidable cost test by the Tribunal in the Air Canada case.

### **PROPOSED REFORM OF THE PREDATORY PRICING PROVISIONS**

In June 2003, the Government of Canada released a discussion paper outlining proposed legislative changes to the Act<sup>33</sup>. Among other changes, the discussion paper proposes the repeal of the criminal predatory pricing provisions, with a corresponding amendment to subject predatory pricing to review solely under the abuse of dominance provisions. The discussion paper also proposes broadening the power of the Tribunal to impose administrative monetary penalties for all reviewable conduct and in all industries, not just airlines. In addition, the civil cause of action for individuals harmed by criminal conduct under the Act would be broadened to include conduct for which the Tribunal has issued an order under the abuse of dominance provisions.

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<sup>32</sup> Available online at [www.cb-bc.gc.ca](http://www.cb-bc.gc.ca) or [www.strategis.ca](http://www.strategis.ca)

<sup>33</sup> Government of Canada, "Options for Amending the *Competition Act*: Fostering a Competitive Marketplace", June 2003. Available online at [www.cb-bc.gc.ca](http://www.cb-bc.gc.ca) and [www.strategis.ca](http://www.strategis.ca)