Abuse of Dominance — Recent Case Law: *Nutrasweet* and *Laidlaw*

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Nutrasweet and *Laidlaw* are the Competition Tribunal's first two decisions applying the abuse of dominant position provisions of the *Competition Act*. The author undertakes an in depth analysis of these two decisions. His comments explore tensions in the goals pursued by competition law and call into question the approach adopted by the Tribunal in these cases. The author argues that the Tribunal underestimated the disciplining power of the market in these decisions and closes with advice to corporate counsel advising large firms on how to conduct themselves in light of *Nutrasweet* and *Laidlaw*.

Dans *Nutrasweet* et *Laidlaw*, le Tribunal de la concurrence aborda les dispositions de la *Loi sur la concurrence* en matière d'abus de position dominante. L'auteur nous livre une étude détaillée de ces deux décisions. Il examine certaines tensions qui existent dans les objectifs visés par le droit de la concurrence et remet en question l'opportunité de l'approche préconisée par le Tribunal, qui, selon l'auteur, a sous-estimé le pouvoir du marché de corriger lui-même les abus. L'auteur conclut en offrant des conseils aux avocats appelés à guider le comportement des grandes compagnies à la lumière de ces deux décisions.

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Introduction

The *Canada (Director of Investigation and Research)* v. *Nutrasweet Co.*[1] and *Canada (Director of Investigation and Research)* v. *Laidlaw Waste Systems Ltd.*[2] cases represent the first applications brought by the Director of Investigation and Research under the *Competition Act*[3] civil abuse of dominant position provisions which replaced the criminal monopolization provisions in 1986. The Director was successful in both cases, which resulted in orders prohibiting the use of certain business and marketing practices by the two firms.

For the provisions to apply, the Competition Tribunal must find that one or more persons who substantially or completely control a class of business have engaged in a practice of anti-competitive acts having, or likely to have, the effect of lessening competition substantially in a market. The *Act* contains an inclusive list of nine examples of which only one is referred to in the cases. In addition to abuse of dominance (sections 78 and 79), *Nutrasweet* also considers exclusive dealing and tied selling (section 77).

Nutrasweet is a case which deals with the aggressive defence of substantial market share; *Laidlaw* concerns the aggressive acquisition and defence of substantial market share. The decisions examine the use of alleged anti-competitive acts to create artificial entry barriers which confer unwarranted market power.

The cases establish that otherwise legitimate business practices can become an abuse of dominant position when used by a *firm or firms* with large market share. The scope and meaning given to this reviewable practice by the Tribunal is unsettling but clear. Large firms which are too successful at attacking or fending off competitors, particularly competitors which are new entrants or small firms, are liable to have their business practices prohibited as anti-competitive. The same practices may, however, be considered pro-competitive when used by new entrants or firms with small market share.

[1](1990), 32 C.P.R. (3d) 1 (Comp. Trib.) [hereinafter *Nutrasweet*].

[2](1992), 40 C.P.R. (3d) 289 (Comp. Trib.) [hereinafter *Laidlaw*].

[3]*Competition Act*, R.S.C. 1985, c. C-34, as am. by R.S.C. 1985 (1st Supp.), c. 27, ss. 187, 189, R.S.C. 1985 (2d Supp.), c. 19, Part II, R.S.C. 1985 (3d Supp.), c. 34, s. 8, R.S.C. 1985 (4th Supp.), c. 1, s. 11, R.S.C. 1985 (4th Supp.), c. 10, s. 18, S.C. 1990, c. 37, ss. 29-32, S.C. 1991, c. 45, ss. 547-550, S.C. 1991, c. 46, ss. 590-594, S.C. 1991, c. 47, ss. 714-717, S.C. 1992, c. 1, ss. 44-46, 145, S.C. 1992, c. 14, s. 1, S.C. 1993, c. 34, ss. 50-51 [hereinafter the *Act*].

I. The Case Law

Nutrasweet, based on the Tribunal's findings, could easily have been dismissed. In *Laidlaw*, an aggressive competitor was chastised for its inappropriate manners, unpleasant disposition and overbearing nature. Both decisions can be regarded as a continuation of the equity law function assumed by the Tribunal in the *Chrysler*[4] and *Xerox*[5] refusal to supply cases.

The *Nutrasweet* decision, in particular, is difficult to read and comprehend. Examination of similar issues is disjointed; factual and legal findings are at times vague and inconsistent; and, the reader must resort to secondary sources to better understand the facts pertaining to the relevant market, competitors, customers and prior European antitrust assessment of Nutrasweet's marketing practices.

In both decisions, the analysis of market power and alleged anti-competitive acts makes little reference to antitrust case law, be it Canadian, U.S., European or otherwise. The decisions severely underestimate the disciplining power of the market. In each instance, dynamic market forces would likely have addressed the inefficiencies associated with the impugned practices. As a result, the order issued by the Tribunal in each case had little or no effect on the adjudicated market.

The Tribunal gets caught in what one experienced commentator has referred to as "the antitrust paradox, a policy at war with itself."[6] The paradox stems from the unwillingness of decision makers to specify the main policy goal of competition law, to articulate the nature of the competition protected. The *Nutrasweet* and *Laidlaw* cases demonstrate the benefits to be gained by resolving this confusion. If the word "competition" were read to mean the enhancement of consumer welfare, the interests of competitors could no longer be pitted against the welfare of consumers.

This dichotomy is inherent in the purpose provisions contained in section 1.1 of the *Act* (in part, to promote the efficiency and adaptability of the economy and to provide consumers with competitive prices and product choices *versus* to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy). As the dichotomy will not likely be soon removed by legislative amendment or resolved by judicial interpretation, enterprises with large market share are well advised to make it clear that impotent competitors have fallen on their own swords. In other words, they should understand and be able to explain the rationale for the firm's marketing practices, avoid the use of agreements containing unreasonable provisions which are rarely enforced, refrain from frivolous and vexatious use of judicial and administrative processes and avoid verbal or written communication which unnecessarily threatens competitors, customers or suppliers.

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[4]*Canada (Director of Investigation and Research)* v. *Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Comp. Trib.), aff'd [1991] 2 F.C. 563, 31 C.P.R. (3d) 510 (F.C.A.).

[5]*Canada (Director of Investigation and Research)* v. *Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (Comp. Trib.).

[6]R.H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978).

A. Nutrasweet

The *Nutrasweet* case essentially involves an alleged extension of patent-conferred market power beyond the life of the patent by the use of anti-competitive acts, exclusive dealing and tied selling. The Director filed an application opposing certain business practices of Nutrasweet on June 1, 1989 and the Tribunal rendered its decision on October 4, 1990.

Nutrasweet was a U.S. company conducting branch business operations in Canada, a wholly-owned subsidiary of Monsanto Co., which had purchased Nutrasweet from G.D. Searle & Co. in 1985. Nutrasweet was the primary producer of the artificial, high-intensity sweetener aspartame, used in sugar-free or diet products such as diet soft drinks, chewing gum, low calorie foods and as a table-top sweetener.

Aspartame was discovered in 1966 and use patents were obtained in a large number of countries. Due to delays in obtaining health regulatory approvals, aspartame did not come onto the market until late in the lives of the patents. It was approved for use in Canada in 1981 and the Canadian patent expired in 1987. The European patents had also expired. In the U.S., limited health approval was obtained in 1981 but aspartame was not permitted in soft drinks (the largest source of sales) until 1983. The U.S. patent expired in December 1992.

Worldwide sales of aspartame in 1989 were approximately 7,500 tonnes (worth approximately $1.2 billion in 1991) as follows:

United States	–	75%	–	5,625
Europe	–	15%	–	1,125
Canada	–	5%	–	375
Other	–	5%	–	375
				7,500

In 1989, the diet soft drink producers (A & W, Cadbury Schweppes, Crush, Coke and Pepsi) purchased approximately eighty-five per cent of the aspartame sold in Canada. Coke and Pepsi were by far the largest individual purchasers. Nutrasweet had ninety-five per cent of all aspartame sales in Canada, one hundred per cent in the United States and eighty per cent in Europe.

Nutrasweet operated a joint venture with Ajinomoto, a Japanese company, which held process patents for one of the methods of producing aspartame. It licensed the patents and know-how to Nutrasweet in some areas of manufacturing. The two firms were joint owners in Nutrasweet AG, which marketed Nutrasweet aspartame in Europe, supplied by Ajinomoto. Most of its remaining output was supplied to Nutrasweet under long-term contract and a large percentage of Canadian supplies were derived from this source. The joint venture agreement restricted Ajinomoto from marketing directly in North America until 1996.

The only rival producer of aspartame in Europe and Canada was the Holland Sweetener Company ("Holland"), a joint venture between two large chemical companies, DSM of the Netherlands and Tosoh Corporation of Japan. Marketing in Europe was conducted by Holland and in Canada by Tosoh Canada Ltd., a wholly-owned subsidiary of Tosoh Corporation. Tosoh Canada began marketing efforts in Canada when the Canadian use patent expired in the summer of 1987. Due to production difficulties, Holland was not able to start production until mid-1988, several months behind schedule, and could not reach capacity until 1990. By October 1990, sales continued to lag behind output. The Director's investigation was initiated by a complaint made by Tosoh Canada, which applied for and was granted intervenor status before the Tribunal.

Annual production capacity (tonnes) in 1989 was:

Nutrasweet	–	5,400	–	U.S. (2 plants)
Ajinomoto	–	1,500	–	Japan
Holland	–	500	–	Holland

Optimum plant size was an important factor in this case. According to the expert evidence before the Tribunal, there were economies of scale for a plant with a capacity of up to more than one-third of current world output. Minimum efficient scale would therefore be approximately 2,500 tonnes per annum (⅓ of 7,500). A competitive scale plant would cost in excess of $100 million. Nutrasweet and Ajinomoto were in the process of expanding; Nutrasweet had decided to approximately double its production capacity by the time its U.S. patent expired in 1992.

Canada and Europe were the principal regions where Nutrasweet's use patent no longer applied. The Tribunal noted that "[s]ales in Europe have grown rapidly, first surpassing those in Canada in 1987 and attaining a level of growth such that the *increase* in sales between 1988 and 1989 exceeded the *total* of Canadian sales in 1989."[7] What the Tribunal didn't point out is a subject of more than passing interest. Allegations of anti-competitive acts by Nutrasweet had already proved to be fertile gronnd for Tosoh in Europe, as summarized in an article by Professor Donald Thompson, an economic expert witness for the Director in the Canadian case:

> In 1986, the European Commission received similar complaints about Nutrasweet's marketing practices from the Holland Sweetener Company and from Angus Fine Chemicals Limited, each of which wished to compete with Nutrasweet in the supply of aspartame in the European Community. The complaints alleged infringement of art. 85 of the Treaty of Rome ... The Commission challenged the exclusionary clauses in the Coke and Pepsi agreements dealing with exclusive dealing and unreasonable restraint of trade, and ruled against the exclusive dealing provisions in the two contracts, but did not consider the question of abuse of dominant position.
>
> Following prolonged negotiations, Nutrasweet agreed to amend the contracts such that world-wide exclusive contracts no longer applied to the European Community. Coke and Pepsi were required to purchase a fixed quantity of aspartame from Nutrasweet over a two-year period, with the quantity set such that newcomer firms had the opportunity to sell within the Community.
>
> In 1987, there was an additional complaint ... on the abuse of dominant position issue ... The art. 86 complaint was apparently settled following negotiations

[7]*Supra* note 1 at 7.

with the company, but with no public announcement as to the terms of the disposition.[8]

The Canadian use patent expired in July, 1987 and Tosoh Canada filed its complaint with the Director in February, 1988, only eight months later. Approximately one year after Holland commenced production the Director filed the notice of application with the Tribunal. As another commentator has observed:

> The "strategy" of HSC is clarified upon examining the earlier events that took place before the European Commission ... It is clear that, having experienced success before the Commission, HSC (through Tosoh) promptly filed a complaint with the Bureau of Competition Policy in anticipation that the recent EC precedent would influence the Tribunal and thereby enable Tosoh to avoid the arduous task of "legitimately" competing with NSC to loosen its stronghold on the aspartame market.[9]

The Director made two principal allegations against Nutrasweet; first, that its contract terms created an exclusive supply relationship between Nutrasweet and its customers and thus restricted entry or expansion of would-be or existing competitors; and second, that Nutrasweet had been selling below its acquisition cost, one of the anti-competitive acts set out in section 78. The Tribunal began by determining the relevant product and geographic markets, then considered entry barriers and then examined the abuse of dominant position, exclusive dealing and tied selling requirements. The Tribunal agreed with the parties that it is necessary to consider the degree to which aspartame was sufficiently distinct from other sweeteners. In other words, were there other sweeteners that could be used as substitutes for aspartame? The Tribunal observed that there was nothing in the past history of demand for aspartame or in the demand projections of Nutrasweet to suggest that the pivotal role played by the soft drink industry was likely to change in the foreseeable future. It thought the most likely source of competition would be from new high-intensity sweeteners such as sucralose but found it difficult to weigh the potential competitive impact of a product that had not yet been approved for any use in any jurisdiction and would undoubtedly take a number of years to be brought into commercial production after approved. The Tribunal concluded there was no evidence of direct competition between aspartame and caloric sweeteners and very weak evidence of indirect competition between diet and full-caloric products; while there was some direct competition from other currently approved high-intensity sweeteners, none by itself was a good substitute in large market segments. The relevant product market was therefore aspartame. While Nutrasweet argued that the geographic market was worldwide because entry barriers were low, the Tribunal concluded that Canada should be treated as a separate geographic market because local market conditions, including Nutrasweet's marketing practices, could produce prices in Canada which differed significantly from those in other countries.

With respect to new entry, the Tribunal concluded that there were very serious barriers. These were in the form of process patent portfolios of existing pro-

[8] D.N. Thompson, "Nutrasweet: The Evolution of Law on Abuse of Dominant Position" (1991) 18 Can. Bus. L.J. 17 at 22 note 12.

[9] P.J. Collins, "The Law and Economics of 'Abuse of Dominant Position': An Analysis of *Nutrasweet*" (1991) 49 U.T. Fac. L. Rev. 275 at 285.

ducers, significant economies of scale relative to existing world demand and large sunk costs that increased the risks of entry.

1. Abuse of Dominant Position Requirements

a. Control

As to the issue of substantial or complete control of the market, the Tribunal found that "control" should be determined by considering whether Nutrasweet exercised market power. It evaluated Nutrasweet's ability to set prices above competitive levels for a considerable period by examining all relevant indicators of market power, including market share and entry barriers. As Nutrasweet had ninety-five per cent of the product market and entry barriers were high (process patent barriers, significant sunk costs, Nutrasweet's contractual and marketing practices and delays associated with regulatory approval and consumer acceptance of any new intense sweetener), the Tribunal had little difficulty in finding that Nutrasweet possessed appreciable market power and therefore that its control was substantial.

The Tribunal rejected Nutrasweet's argument that it could not have market power because the use patent expired in 1987, evidenced by declining prices and increased output. The Tribunal agreed that its power was much less than Nutrasweet held prior to the expiration of the Canadian patent but could not conclude it lacked any power based upon the evidence of entry barriers, "particularly when it is considered along with the allegation that NSC is engaging in the anti-competitive act of pricing below its cost."[10] Nor did the Tribunal accept a submission that Coke and Pepsi, as very large buyers, were able to protect their own interests because they controlled sufficient volume to set up a rival producer and that Nutrasweet's sunk costs made it highly vulnerable to such a threatened course of action. The Tribunal found the submission failed to consider that high sunk costs, when accompanied by extensive economies of scale, also affected the position of Coke and Pepsi as would-be entrants.

b. Class or Species of Business

The Tribunal concluded that "class or species of business" is synonymous with the relevant product market.

c. Anti-competitive Acts

The parties agreed, and the Tribunal held, that other conduct not specifically mentioned in section 78 can constitute an anti-competitive act. The Tribunal declared that "[t]he purpose common to all acts, save that found in para. 78(*f*), is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary."[11]

[10]*Supra* note 1 at 29. The quoted statement is difficult to understand as the Tribunal later rejects the predatory pricing allegation.
[11]*Ibid.* at 34.

The Tribunal concluded that its interpretation of the term "practice" must be sufficiently broad to allow for a wide variety of anti-competitive acts and was of the view that a practice may exist where there is more than an isolated act or acts and that different individual anti-competitive acts, taken together, may constitute a practice. The Director, however, has the burden of establishing an anti-competitive purpose for each of the alleged acts.

The Director identified various anti-competitive acts allegedly practised by Nutrasweet:

(1) Abuse of Governmental Reporting Requirements

It was alleged that as Nutrasweet did not pay income taxes in Canada (because of accumulated losses), it obtained a competitive advantage. The same reasoning applied to its avoidance of costs by failing to accurately fill out customs declaration forms. The Tribunal rejected these allegations on the basis that there was no attempt to demonstrate an anti-competitive purpose associated with the alleged abuses.

(2) Contraetual Exelusion of Ajinomoto as Potential Competitor

This relationship began in the early 1970s due to Ajinomoto's expertise in certain areas of production. The Japanese company had agreed not to sell into North America until 1996 and so could otherwise have been a competitor in Canada in 1987. Although Nutrasweet had made large investments in the Ajinomoto plant in the early 1980s, the Tribunal did not perceive any efficiency-enhancing or pro-competitive elements in the relationship, apart from the licensing of Ajinomoto's technology.

However, the Tribunal declined to find that the joint venture constituted an anti-competitive act:

> A consistent pattern in the anti-competitive acts cited in s. 78 (save for that in para. (*f*)) is that the competitor of the dominant firm is a target, not a fellow actor. While the Tribunal is reluctant to conclude that all horizontal arrangements are excluded from ss. 78 and 79, we do not believe that we have been provided with adequate justification for including the ... arrangement ... as an anti-competitive act under s. 78.[12]

The Tribunal came to this conclusion even though the arrangement appeared to be anti-competitive because "the two leading producers, each with formidable, if somewhat different, strengths have in effect agreed not to compete."[13]

(3) Contract Terms Associated with Exclusivity

Three categories of terms were identified:[14]

(i) exclusive supply clauses requiring the customer to purchase all of its aspartame requirements from Nutrasweet and exclusive use clauses requiring the customer to use its aspartame as the sole or primary sweetener in some or all of the customer's products;

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[12] *Ibid.* at 37-38.
[13] *Ibid.* at 37.
[14] *Ibid.* at 38-39.

(ii) trademark or logo display allowance and cooperative marketing allowance clauses providing a substantial discount (in the order of 40%) from the gross price if the customer agreed to promote and display the Nutrasweet name and logo on packaging and in print and television advertising of the customer's product;

(iii) meet-or-release clauses, providing Nutrasweet the option to meet a lower price offered or to release the customer to purchase from another supplier, and most favoured nation clauses, ensuring that a price to a particular customer was the lowest price paid by any customer.

The branded ingredient strategy was implemented shortly after Nutrasweet began to sell aspartame for use in diet soft drinks. While use of the name and logo were never made a condition of supply, Nutrasweet could arrange its prices so that customers had little effective choice as long as Nutrasweet was, through its patent monopoly, the sole supplier of aspartame. The Tribunal held that the strategy became exclusionary when the use patent expired, and, as

> the strategy was introduced when the use patent was in force and customers did not have a choice of suppliers and marketing approaches, the tribunal is 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.[15]

The logo display and promotion allowances, after patent expiry, were held to be essentially inducements to exclusivity because they

> create an "all-or-nothing" choice for customers. In the event that customers decide that they would prefer not to use the logo for a particular product line or not to commit themselves to use it on all of that line, they are forced to purchase all of their supply from another supplier because it is too expensive to buy from NSC without the logo and advertising discounts. This means that new suppliers must become sufficiently established so that potential customers are willing to entrust all of their needs for a product line to the new supplier.[16]

In the Tribunal's view, the meet-or-release and (by implication) the most favoured nation clauses were in the agreements at the behest of the largest customers, Coke and Pepsi, as a way of mitigating the effects of being locked in by an exclusive contract: "If exclusive supply is objectionable in the instant case, so is a meet-or-release clause: by making exclusivity more acceptable to customers it serves as an inducement for customers to enter into exclusive arrangements."[17] The Tribunal was not persuaded that the clause mitigated the entry-barring effects created by exclusivity and held that competitors would be discouraged from submitting bids since they would know that Nutrasweet would be given the opportunity of meeting any submitted price. The most favoured nation clause was found to be an inducement to exclusive dealing because it assured customers that they would not be treated worse than their competitors. In the Tribunal's view, it was doubtful that either of these clauses

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[15]*Ibid.* at 40.
[16]*Ibid.* at 41.
[17]*Ibid.* at 42.

would exist in the absence of an explicit or implicit exclusive supply agreement. The Tribunal found that the agreements requiring exclusive supply, and all the contract terms related to it, had an exclusionary purpose.

(4) Selling Below Cost

It was alleged that Nutrasweet engaged in the anti-competitive act, contained in paragraph 78(*i*), of selling articles at a price less than acquisition cost, and separately, that it engaged in predatory pricing generally. The Tribunal agreed with Nutrasweet's submission that acquisition cost does not easily lend itself to manufacturing situations. On product supplied by Ajinomoto, there was a purchase and resale but Nutrasweet's prices exceeded its acquisition costs by a comfortable margin. On product supplied from the U.S., there was no transaction and the Tribunal held there was no reason to apply paragraph 78(*i*) to manufacturing situations where there is no purchase and resale.

As to predatory pricing generally, the Tribunal was satisfied that the term "anti-competitive act" was broad enough to cover other predatory pricing. However, the Tribunal found that the evidence was less than compelling as to whether Nutrasweet priced below cost.

(5) Use of U.S. Patent to Foreclose Competition

The Director alleged that Nutrasweet used its U.S. patent in three different ways to gain a competitive advantage in Canada. First, the patent was instrumental in causing Coke and Pepsi to agree to exclusive supply contracts outside of the United States; the Tribunal held that the evidence did not support a finding that it constituted or was part of a separate anti-competitive act. Second, the patent was used to finance low cost pricing in Canada by providing Nutrasweet with a deep pocket; the Tribunal had already found that Nutrasweet had not engaged in below cost predatory pricing.

The third way involved U.F.L. Foods Inc. ("U.F.L."), a Canadian co-packer for Nutri/System, which supplied low calorie food dishes marketed by Nutri/System. U.F.L. had a supply agreement with Tosoh Canada for the purchase of aspartame used in these products. Nutrasweet persuaded Nutri/System to require U.F.L. to purchase its aspartame from Nutrasweet by offering Nutri/System a rebate on all other products containing Nutrasweet aspartame imported by Nutri/System from co-packers in the United States. The rebate was equal to the difference between Nutrasweet's U.S. and Canadian prices times the amount of aspartame contained in the imports. The Tribunal took a dim view of this practice in accepting the Director's argument that the use of a monopoly position (created by the U.S. patent) in one market to obtain a competitive advantage for a dominant firm in another market is an anti-competitive act:

> There are several aspects to this rebate which lead to the conclusion that the United States patent is being used to exclude competition, and in a most heavy-handed fashion. It is virtually impossible for HSC or any other competitor to meet NSC's offer, short of providing customers with a blank cheque. Competitors cannot know how much the rebates on a customer's United States imports will amount to. The large difference between the price in the United States and Canada and the effect that rebating this amount has on the net/net price is evidence

> that NSC is willing to price without regard to its cost in order to prevent the expansion of HSC. NSC would not have any way of knowing how costly its offer might be.
> This is a form of dumping in that NSC can in effect export its product at a price below that charged in the United States, without any risk to its domestic price which is protected by its exclusive patent rights.[18]

d. Lessening of Competition

The Director argued that the Nutrasweet supply contracts, and their terms, tied up a very large percentage of the market and prevented small scale or toe-hold entry, the proof of which lay in the very limited inroads into Nutrasweet's market share made by Holland and would-be entrants. Nutrasweet argued that the supply terms were not particularly restrictive, that Holland's failure to make rapid progress was due to growing pains which were being overcome, that Nutrasweet's large market share was due to superior economic performance and that the presence of large buyers able to create supply options for themselves guaranteed that they would not accept supply contracts that injure their (and their consumers') interests. The Tribunal accepted the Director's position:

> The tribunal is convinced that the exclusivity in NSC's contracts, which includes both the clauses reflecting agreement to deal only or primarily in Nutrasweet brand aspartame and the financial inducements to do so, impedes "toe-hold entry" into the market and inhibits the expansion of other firms in the market. Since exclusive use and supply clauses appear in virtually all of NSC's 1989 contracts, and thus cover over 90% of the Canadian market for aspartame, it is clear that during the currency of those contracts there is little room for entry by a new supplier.[19]

The Tribunal held that all of the section 79 requirements were satisfied, stating:

> NSC substantially controls through its market power ... the sale of aspartame in Canada. ... NSC has engaged, and is engaging, in a practice of anti-competitive acts ... and they have been frequently repeated. They include the use ... of exclusive supply and use clauses, logo display allowances, co-operative marketing allowances, meet-or-release clauses, and most-favoured-nation clauses. They also include the use of its United States patent to foreclose competition by a system of rebates on exports from the United States to induce Canadian importers to have only NCS aspartame used in products purchased by them in Canada. ... [T]hese practices have had and are having the effect of preventing or lessening competition substantially.[20]

2. Exclusive Dealing

The Tribunal agreed with Nutrasweet that its sales were not conditioned on the customer dealing exclusively with Nutrasweet:

> there is no evidence on the record that customers were refused or threatened with a refusal of aspartame supply if they did not enter into exclusive contracts with NSC. Several customers explicitly denied any coercion and admitted that the

[18] *Ibid.* at 46.
[19] *Ibid.* at 48-49.
[20] *Ibid.* at 52.

request for exclusivity originated with them. The tribunal therefore accepts that there is no exclusive dealing in this case in the sense set out in para. 77(1)(*a*).[21]

However, the Tribunal did accept the Director's argument that the fidelity rebates were clear financial inducements to deal only in Nutrasweet's aspartame and to refrain from using another's within the meaning of paragraph 77(1)(*b*):

the customers clearly agreed to deal only or primarily in the products of NSC and in return received various rebates whose existence depends on exclusive use of Nutrasweet brand aspartame ... NSC has induced exclusive dealing ... through its financial incentives or fidelity rebates, and its exclusivity clauses.[22]

For the reasons earlier stated in respect to abuse of dominance, the Tribunal held that the remaining requirements of section 77 were satisfied.

It is interesting to note, as the Tribunal observed in passing, that "the practice of exclusive dealing is widespread in Canada since *virtually all customers buy pursuant to requirements contracts from either NSC or Tosoh.*" [emphasis added][23]

3. Tied Selling

The Director alleged that Nutrasweet's trademark constituted a tying product and that as a condition of supplying the trademark, the customer was required to purchase Nutrasweet aspartame and refrain from using the aspartame of any other in conjunction with the trademark. The Tribunal agreed that a trademark might be the subject of a tying arrangement but was not persuaded by the facts before it in this case, in part because the Director's argument had been inconsistent on the point.

B. **Laidlaw**

This case essentially involved the simple reluctance of competitors, customers and local governments to enforce their basic (non-antitrust) legal rights which allowed an aggressive firm to acquire and hold substantial market share. The Director filed an application opposing certain business practices of Laidlaw in March, 1991 and the Tribunal rendered its decision on January 20, 1992 and its order on February 11, 1992.

Laidlaw is a major supplier in the waste collection and disposal service industry; it is the largest in Canada and third largest in North America.

The parties agreed that the relevant product market was lift-on-board service, commonly referred to in the industry as front-end service. It involves the use of vehicles which lift a collection bin over the front end of the truck by a hydraulic hoist, emptying the waste material into the truck where it is compacted. The service is required by commercial customers which generate a significant quantity of solid waste such as restaurants, office buildings and campgrounds. The bins, which may be as small as 2 cubic yards or as large as 12

[21]*Ibid.* at 53-54.
[22]*Ibid.* at 54, 57.
[23]*Ibid.* at 55.

cubic yards, are left at the premises of the customer and emptied at regular intervals.

The Tribunal held that the relevant geographic markets were four areas on the eastern side of Vancouver Island with approximate populations as follows:

Cowichan Valley (Duncan)	29,100
Nanaimo	66,900
Courtney-Comox-Cumberland	20,800
Campbell River	20,000

Laidlaw's competitors in these areas were generally small and medium-sized local businesses. Laidlaw's market share was in excess of eighty-seven per cent in these areas.

The Director alleged that through a series of acquisitions in the mid-1980s, and the use of exclusionary service agreements, Laidlaw obtained unwarranted market power. It was able to maintain its dominant position by the use of such contracts, aided by questionable litigation practices, which created artificial entry barriers.

1. Laidlaw's Conduct

a. Acquisitions and Related Activity

Laidlaw acquired most, and in some cases all, of its competitors (and subsequent new entrants) by merger through numerous transactions. In the Nanaimo area, for example, it purchased all three competitors in the same year. In the Campbell River area it purchased both of its competitors on the same day. Laidlaw was very aggressive in persuading competitors to sell their businesses to it and repeatedly harassed the principal owners with taunts regarding the future of their operations or with threats to put them out of business. The acquisition agreements contained non-compete covenants which obligated the shareholders and principal employees of the acquired business not to compete with Laidlaw in decreasing area and time alternatives which the Tribunal found were overly broad.

The purchase agreements provided for Laidlaw to assume existing customer obligations, including municipal contracts. In one instance, the municipal council annually approved the prices to be charged to those using lift-on-board service. The council accepted Laidlaw as the successor under the contract which was to be re-tendered in the fall of that year. Before this occurred, Laidlaw managed to have many of the customers sigu individual contracts even though it was currently serving those customers pursuant to its contract with the council. The council asked Laidlaw to cease the practice but Laidlaw did not comply. When the tender was called, Laidlaw was the highest bidder. Laidlaw then questioned the authority of the council to award the contract since it had individual contracts with many of the customers and threatened the council with a lawsuit. The council cancelled the tendering process and did not award a contract because "it did not want the expense and political embarrassment of being involved in a lawsuit with Laidlaw."[24]

b. Laidlaw's Contracting Practices

Immediately after acquiring another business, Laidlaw approached its customers to have them sign service agreements. Laidlaw would at times seek the renewal of agreements long before their expiry date. The Tribunal found that the signatures on many of these contracts were obtained by misrepresenting the nature of the documents customers were being asked to sign.

The service agreements were generally for a three-year term and would automatically renew unless notice to terminate was given sixty days before expiry of the term. If Laidlaw wished to terminate because a customer refused to accept a proposed price increase, it could do so on thirty days' notice, or ten days' notice in later versions of the agreement. Many of the agreements obligated the customer, even if the contract had been terminated, to use Laidlaw if Laidlaw was willing to meet a competitor's terms and conditions (right of first refusal/right to compete clauses). The Tribunal found these clauses to be anticompetitive because:

> Requiring a customer to provide information about bids from other companies allowed Laidlaw to know who was competing with it and on what terms ... Laidlaw therefore did not have to respond to competition by lowering prices generally. It could target price reductions only on the customer that a competitor was seeking to acquire, thereby reducing the costs of using predatory or disciplinary pricing to discourage price competition. In addition, these kinds of clauses prevent secret price-cutting which is widely recognized to be an important means of maintaining competitive markets.[25]

The agreements also purported to bind the customer to employ Laidlaw for all its waste disposal requirements. Another term involved automatic price increase clauses in which customers were deemed to consent unless they notified Laidlaw that they objected to the price increase within a specified time period. A later version of this clause dispensed with consent and provided for automatic price increases for dumping fees, taxes, duties, levies, fuel costs, certain administrative fees and other costs of doing business. Sometimes prices would be raised proportionately more than the corresponding cost increase. Finally, if a customer desired to terminate before the end of the three-year term, another clause provided for the payment of liquidated damages in an amount which substantially exceeded the actual damage incurred by Laidlaw. The Tribunal found that Laidlaw's contracts contained many elements which were also found in the standard form contracts used by the other two major international waste collection firms, Waste Management Inc. and Browning-Ferris Industries.

c. Enforcement of Contracts

When customers attempted to terminate their agreements to accept service from a competitor, Laidlaw would have a lawyer write a letter, threatening legal

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[24]*Supra* note 2 at 297.
[25]*Ibid.* at 307.

action, to the customer and the competitor, alleging breach of contract and tortious interference with its contract, respectively. These letters would often misrepresent that Laidlaw had previously pursued many such actions against its customers and had not been unsuccessful to date. The Tribunal found, however, that as a practical matter, Laidlaw's practice in the Vancouver Island markets seemed to have been one of not pursuing litigation against customers; only the threat of litigation was used.

2. Geographic Market

Some conceptual elements of the Tribunal's decision are of interest. The Director's position was that market determination should be based on a review of the past and present conduct of the customers and competitors. Laidlaw argued that the conceptual test in the Director's *Merger Enforcement Guidelines*[26] should be used. Can a firm impose a significant non-transitory price increase without causing buyers to purchase the service from suppliers located in other regions? Can a five per cent price increase be sustained for a two-year period? The Tribunal held:

> Indeed, as counsel for the Director argues, it is not obvious that a significant non-transitory price increase test for determining market boundaries is useful in an abuse of dominant position case. In an abuse of dominant position case it is not the *potential* dominant position or the increase in dominance of a firm which is at issue. The respondent firm is alleged already *to have* a dominant position in the relevant market. The market definition issue relates to an existing situation rather than a prospective one.
> The tribunal wishes to emphasize that the above discussion of the respondent's expert evidence should not be taken as an acceptance that the 5% price rise criterion is necessarily a useful one even in a merger case. While the test of a non-transitory significant price increase may be conceptually useful, what percentage will be significant and what period of time will satisfy the test of non-transitoriness can only be determined by reference to the facts of a particular case.[27]

The Tribunal emphasized that evidence respecting past and present firms in the market must also be considered with some care. It found, however, that evidence of historical and present conduct in this case was buttressed by other evidence in the form of a previous written submission to the Bureau by Laidlaw in respect of another transaction. The Tribunal accepted this evidence.

3. Control

The Tribunal accepted and followed the analysis in the *Nutrasweet* case, but stated:

> A *prima facie* determination as to whether a firm is likely to have market power can be made by considering the share of the relevant market held by that firm. If that share is very large the firm will very likely have market power ... But other considerations must also be taken into account including: how many competitors

[26]Director of Investigation and Research – *Competition Act, Merger Enforcement Guidelines* (Ottawa: Supply and Services Canada, 1991) [hereinafter *Guidelines*].
[27]*Laidlaw*, *supra* note 2 at 320.

> there are in the market and their respective market shares; how much excess capacity the firms in the market have, and how easily a new firm can establish itself as a competitor.[28]

The Tribunal found that Laidlaw's market shares were generally in excess of eighty-seven per cent; while there was some evidence of competitor excess capacity it was tempered by the extent to which customers were bound by long term contracts and by the "apparent unwillingness of Laidlaw's competitors to use price as an inducement to attract customers."[29] Laidlaw's ability to successfully utilize the automatic price increase clauses, while anecdotal evidence, was more consistent with a firm exercising market power than the reverse; and, although general entry barriers were very low, acquiring a sufficient customer base was a significant barrier to entry as a result of Laidlaw's contracting practices. For these reasons the Tribunal had little difficulty in concluding Laidlaw substantially controlled the relevant markets, stating:

> In general, in this industry barriers to entry are very low ... The amount of equipment required is limited: a truck and some containers. The capital to purchase these can easily be obtained: the equipment itself will serve as security for a loan. There is no requirement for extensive technical training or expertise although experience as a mechanic is useful. There are limited administrative and overhead expenses. Many of the providers of service have operated and still operate out of their homes ... The most significant barrier to entry is acquiring a sufficient customer base within a reasonable period of time to allow the business to become profitable.
>
> While barriers to entry in the industry are low, much higher barriers exist in the markets under discussion as a result of the contracting practices of Laidlaw. It is these contracting practices, along with other allegedly anti-competitive acts, which it is argued lead [*sic*] to both Laidlaw's dominant position and a substantial lessening of competition in the markets in question.[30]

4. Anti-competitive Acts — Lessening of Competition

a. Acquisitions

The Tribunal acknowledged that acquisitions can be a legitimate method of entering and growing in a market but was of the view that Laidlaw's practice of acquiring firms was clearly for the purpose of initially acquiring a monopolistic position and then eliminating competitors from the relevant market areas. Its conclusion was based on the frequency, timing and result of the acquisitions which at times gave Laidlaw one hundred per cent of the market; various expressions of subjective intent to the effect that Laidlaw would take whatever action was appropriate to put existing and potential competitors out of business; the lack of a persuasive business explanation for the acquisitions; and, the overly restrictive covenants in the acquisition agreements which demonstrated an intent to monopolize: "Covenants preventing a vendor from operating within a 300-mile radius with respect to the purchase of a business which operated generally within an area having less than a 30-mile radius, are clearly unreasonable."[31]

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[28] *Ibid.* at 325.
[29] *Ibid.* at 327.
[30] *Ibid.* at 331.
[31] *Ibid.* at 335.

b. Mergers and Abuse of Dominance

The Tribunal examined whether the merger and abuse of dominance provisions of the *Act* are mutually exclusive and concluded that they are not:

> In the *Nutrasweet* decision, the tribunal refused to classify a voluntary agreement between competitors as an anti-competitive act ... Reference was made in this regard to the fact that a feature of the enumerated acts listed in s. 78 (except for that in para. (*f*)) is that the competitor of the dominant firm is a target, not a fellow actor. At the same time, the tribunal left open the question as to whether or not such horizontal arrangements might be classified as anti-competitive acts. It commented that it was reluctant to conclude that all horizontal arrangements were excluded from ss. 78 and 79 and that, in any event, it was sufficient for the purposes of the *Nutrasweet* decision to state that the Tribunal had not been provided with adequate justification ... It is not seriously in dispute ... that the enumeration in s. 78 is not controlling with respect to the scope of s. 79. The tribunal in this case has no difficulty classifying the acquisitions as acts constituting an anti-competitive practice.[32]

Laidlaw argued that acquisitions and mergers do not fall under the abuse of dominant position provisions because they are dealt with elsewhere in the *Act*, citing the maxim *expressio unius* (explicit mention of one case involves implicit exclusion of the others). The Tribunal rejected this argument because section 78 is explicitly non-exhaustive; while section 91 is concerned with mergers, it does not necessarily follow that acquisition of a competitor falls exclusively under the merger provisions; and, subsection 79(7) clearly contemplates the possibility of competitor mergers being the subject of either a section 92 or section 79 application.

c. Contracting Practices

The Tribunal considered that automatic renewal clauses might lower transaction costs, that liquidated damages clauses can avoid litigation costs, and that automatic price rise clauses could eliminate uunecessary negotiation or litigation and apportion the risk related to future events. It also considered that long-term exclusive contracts might serve to allocate future business risks. However, it accepted expert evidence on behalf of the Director that the relation-specific investments that would normally be associated with such clauses did not exist in this type of business and therefore the clauses did not have any identifiable efficiency rationale. As customers apparently derived no benefit from the clauses, and as there was no credible business explanation for the provisions, other than to create barriers to entry, the Tribunal concluded that such tying of customers to Laidlaw operated to exclude other competitors from the market.

Laidlaw also argued that the clauses were not anti-competitive because they were not specifically drafted for the markets in issue, that they were designed to meet competition from its two main competitors on a broader stage where such contracts were standard in the industry. This submission was rejected because

> [t]here is nothing before the tribunal with respect to how these contracts operate in larger markets. Nevertheless, in so far as the markets in issue are concerned,

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[32] *Ibid.* at 336-37.

> there is no doubt that they have anti-competitive effects. It is no answer to say that they were designed for a different market and therefore not intended to have anti-competitive effects in the smaller market. As has been noted, actions will be presumed to have been intended to have the effects which actually occur in the absence of convincing evidence to the contrary.[33]

d. Questionable Litigation Practices

The Tribunal expressed a sense of outrage at Laidlaw's use of litigation and threats of litigation, employing its vastly larger size and economic resources in an oppressive use of the legal system to prevent customers from switching to competitors: "It commenced spurious litigation and threatened litigation against its competitors to drive or attempt to drive them out of business by raising their costs of doing business. This is certainly predatory behaviour."[34]

e. Lessening of Competition

The Tribunal noted that while the markets were clearly small (and would not likely support more than two competitors in the Cowichan Valley area, two in the Campbell River area and three in the Nanaimo area), this did not mean that there had not been a substantial lessening of competition in those markets. The Tribunal held that Laidlaw's acquisition practices increased concentration in the markets, at times to monopoly levels:

> Laidlaw bought all the firms in the market so that at times it held a 100% market share. This by itself constitutes at least a *prima facie* lessening of competition which is substantial. The tribunal does not purport to determine whether those practices alone, in the absence of the Laidlaw contracts, could have resulted in a substantial lessening of competition. It is sufficient to say that the acquisitions form part of the anti-competitive practices in that regard.[35]

The acquisitions alone likely would have been insufficient because, as noted above, entry barriers were extremely low. Laidlaw's aggressive contracting practices clearly persuaded the Tribunal that competition was substantially lessened notwithstanding Laidlaw's submission that there was no evidence of the state of competition in the markets before Laidlaw entered compared to what presently existed:

> It is not just the number of competitors and comparative market shares which are relevant in considering whether a substantial lessening of competition has occurred. In this case the linchpin of Laidlaw's maintenance of its dominant position is the standard form contracts of adhesion which it uses to lock in a customer base. In this regard, the substantial lessening which is to be assessed need not necessarily be proved by weighing the competitiveness of the market in the past with its competitiveness at present. Substantial lessening can also be assessed by reference to the competitiveness of the market in the presence of the anti-competitive acts and its likely competitiveness in their absence.[36]

As a result, the Tribunal concluded that the requirements of section 79 had been met, stating:

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[33] *Ibid.* at 343.
[34] *Ibid.* at 344.
[35] *Ibid.* at 345.
[36] *Ibid.* at 345-46.

> There is no reason to doubt that based solely on the economics of lift-on-board service these should be highly competitive markets. The evidence shows, however, that the effect of the contracts is to make entry sufficiently difficult so that it no longer polices the market. The evidence demonstrates that a new firm can acquire a certain number of customers but that it cannot establish a customer base with sufficient rapidity to make entry attractive. In the markets in question there is no doubt that [the] acquisition practices of Laidlaw buttressed by the creation of artificial barriers to entry through the contracts have resulted in a substantial lessening of competition.[37]

II. Some Analysis and Observations

A. Nutrasweet

1. Contract Terms

Based on the evidence accepted by the Tribunal, and on its findings, it is clear that the exclusivity, meet-or-release and most favoured nation clauses were imposed or requested by customers and not by Nutrasweet:

> In the view of the tribunal the meet-or-release clause is there at the behest of the largest customers, Coke and Pepsi, who had entered into long-term exclusive contracts ... It is doubtful whether the meet-or-release and most-favoured-nation clauses would exist in the absence of an explicit or implicit exclusive supply agreement ... The tribunal agrees that there is no evidence on the record that customers were refused ... supply if they did not enter into exclusive contracts with NSC. Several customers explicitly denied any coercion and admitted that the request for exclusivity originated with them.[38]

The desire for exclusivity arose coincident with the expiry of Nutrasweet's Canadian patent.[39] Customers might well have reasoned that patent expiry would cause prices to fall and demand to increase (by other soft drink manufacturers not currently producing a diet drink or by other food processors) and be concerned that current capacity (of Holland and Nutrasweet) would be insufficient to supply their requirements. Nutrasweet's capacity expansion would not be completed until 1992.

Whatever reason customers had for requesting exclusivity, it would not have been for the purpose of excluding Nutrasweet's competitors from the market. Although Nutrasweet engaged in the practice, it could not have done so for an exclusionary purpose if its action was dictated by customers. These contract clauses could therefore not have been anti-competitive because they lacked the requisite purpose: "an anti-competitive act must be performed for a purpose, and evidence of this purpose is a necessary ingredient. The purpose common to all acts, save that found in para. 78(*f*), is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary."[40]

If the request for exclusivity originated with customers for security of supply or other reasons, rather than as a result of the logo fidelity rebate induce-

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[37]*Ibid.* at 347-48.
[38]*Supra* note 1 at 42, 43, 53-54.
[39]*Ibid.* at 47.
[40]*Ibid.* at 34.

ments, then the Tribunal's conclusion that Nutrasweet induced exclusivity contrary to the exclusive dealing provisions of paragraph 77(1)(*b*) also falls.

Moreover, if the fidelity rebates, after patent expiry, were for the purpose of effecting a price reduction[41] and stimulating post-patent demand for Nutrasweet aspartame, they could be considered pro-competitive rather than anti-competitive in the absence of any other tainted contractual practices.

2. Minimum Efficient Scale

One of the striking features of this case, based on expert evidence accepted by the Tribunal, is that the production capacity of Nutrasweet's sole competitor was *only 1/5 of minimum efficient scale*: "there are economies of scale for a plant with a capacity of up to more than one-third of current world output."[42] This implies that Holland was not capable of being a vigorous and effective competitor to Nutrasweet. It also explains why Nutrasweet was able to offer logo fidelity rebates after its Canadian patent expired. If Holland was unable to compete on price, directly or indirectly, with Nutrasweet, its exclusion from the market was the result of competition and not any anti-competitive acts of Nutrasweet.

Suppose there are five tire manufacturers with similar costs and one of them finds a new production process (which cannot be ascertained by examination of the final product) which reduces the production cost by fifty per cent. If the manufacturer lowers its price by an amount equivalent to the cost saving and thereby attains a monopoly because the others exit the market, is this an exercise of market power? Is it unwarranted market power? Is it an anti-competitive act? Is it a substantial lessening of competition? Does this business practice increase or decrease consumer welfare? Are the other four competitors unfairly excluded from the market? Should we be concerned with the survival of the inefficient competitors? Suppose the efficient manufacturer, instead of a straight price reduction, offers its customers the total cost reduction saving in the form of an exclusive dealing agreement with large rebates if the retail purchaser agrees to prominently display the manufacturer's logo in point of sale advertising. Is this different? The four inefficient manufacturers will exit the market in any event.

Because Nutrasweet's costs were lower, it could match Holland's price and still offer customers a logo fidelity rebate equal to the difference between its and Holland's production costs: "A recent increase in the amount of this allowance was explained by Mr. Rosa, Group Vice-President and General Manager of the Sweetener Group of NSC, as being NSC's preferred form of price reduction."[43] Whether or not the logo and advertising allowances created an "all-or-nothing" choice for customers is irrelevant in these circumstances. All Holland had to do was to lower its price in an amount equal to the amount of Nutrasweet's allowances.

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[41]*Ibid.* at 41.
[42]*Ibid.* at 27.
[43]*Ibid.* at 41.

But the Tribunal found that minimum efficient scale entry was not feasible because

> a firm that hopes to achieve cost parity with NSC must achieve a large market share. Such large scale entry entails significant risks since ... much of the investment in a dedicated aspartame plant is sunk: its value is much less in alternative uses. Another difficulty ... is the existence of a marked learning curve ... Even a large, fully utilized plant may not provide costs comparable to those of NSC's present costs until the entrant has accumulated production experience ... Pierrel, like other firms that left the industry, faced formidable difficulties because the volume of sales possible outside of the areas covered by NSC's use patent was very small.[44]

Worse still was Nutrasweet's decision to corner the market by doubling production capacity:

> This decision has been taken in order to safeguard its market share once its United States use patent expires at the end of 1992. In weighing the risks posed by other sweeteners the decision was clearly taken to confront potential competition from other producers of aspartame by developing a highly efficient production capacity capable of meeting much of the future demand.[45]

The following observations can be made respecting the Tribunal's findings in the foregoing paragraphs. First, Holland should not have been able to advance a complaint based on its own inefficient scale. Second, the companies comprising the Holland joint venture are world class chemical companies able to assess and assume significant risks. Third, Holland entered the market near the end of the patent protection period (not at the beginning or the middle of the period when no market would be available) because it anticipated that on expiry of the patents, demand for aspartame, like most other products coming off patent, would substantially increase as the price began to fall (average price of aspartame in the U.S. was more than fifty per cent higher than it was in Canada). Fourth, Nutrasweet was not expanding capacity to foreclose future competition; like Holland, Nutrasweet clearly anticipated substantial increased demand on expiry of its patents. Fifth, if entry barriers were so high and Nutrasweet had so effectively neutralized Holland by its anti-competitive acts, why did Nutrasweet allow its Canadian prices to fall after expiry of its patent? Sixth, as Holland was not cost competitive, the concern expressed by the Tribunal on these matters was immaterial.

3. Patents

The Tribunal appears to have taken a dim view of the relationship between Nutrasweet's patents and its market share:

> The branded ingredient strategy becomes a matter of exclusivity wherever the use patent expires and customers have at least the legal opportunity of buying from other suppliers ... [T]he strategy was introduced when the use patent was in force ... The tribunal is 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 ... Past exclusivity has contributed to the

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[44] *Ibid.* at 27, 26.
[45] *Ibid.* at 19.

> present importance of the logo ... The tribunal does not accept that NSC is entitled to any more protection against competition than it was able to obtain through patent grants that provided it with a considerable head start on potential competitors.[46]

Nutrasweet's Canadian patent expired in July, 1987; Tosoh Canada filed its complaint with the Director in February, 1988; and application was made to the Tribunal in June, 1989. Nutrasweet's ninety-five per cent market share was an important factor in determining its control (possession of market power), whether its actions were anti-competitive and whether there was a substantial lessening of competition. The contractual practices, except for the display and advertising allowances, were imposed at the request of customers. As the Tribunal notes, the display and advertising allowances were introduced when the patent was in force and if they were an anti-competitive extension of the patent rights, the practice would surely have been challenged under U.S. antitrust law. However, as soon as the patent expires the display and advertising allowances became an anti-competitive act. But if Holland had been cost competitive, it could have matched these allowances with a straight price reduction. Any market power Nutrasweet possessed after expiry of its patent was due to the absence of an efficient competitor. It was not reasonable in these circumstances to expect substantial Canadian market share to gravitate to Holland so soon after expiry of the patent. Consideration might have been given to whether an immediate challenge to post-patent market share is contrary to subsection 79(5), which provides that an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Patent Act* or *Trade-marks Act* is not an anti-competitive act. Society benefits twice from the patent, once when the product is introduced (by definition its price must be lower than the technology replaced), and again when the patent expires (competition causes the price to fall to production cost).

A firm presumably has some right to defend its post-patent market share. *R.* v. *Hoffmann-La Roche Ltd.*,[47] a criminal case, provides some guidance to firms in this position:

> [I]f an accused acts largely in self-defence, this is a factor to be considered in deciding whether the prices were unreasonably low in the circumstances and whether the intent of the accused was to substantially lessen competition. ... [O]ne need not wait for the competitor to attack first — if one has information that an assault from a competitor is being planned, one may strike pre-emptively. In *R.* v. *Allied Chemical et al.* ... Mr. Justice Ruttan stated: "One is not required to wait until competitors get well established and then seek to meet them and their demands." Consequently, whereas a price reduction of 50% by itself might appear unreasonable in certain circumstances, it might not be if a competitor had reduced its price by 40% just prior to that time or if he had indicated that he would do so in the near future. Competition is a battle after all, and competitors must be allowed to engage in that battle, as long as they do so within reason. ... There was virtually no competition in diazepam before Horner's launch, because Roche had the patent which gave them a monopoly on sales of diazepam. By temporarily subduing Horner's efforts in the hospital arena, its competition and that of the other

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[46]*Ibid.* at 39-40, 50, 52.

[47](1980), 48 C.P.R. (2d) 145, 109 D.L.R. (3d) 5 (Ont. H.C.J.) [hereinafter *Hoffmann-La Roche No. 1* cited to C.P.R.].

> potential competitors was lessened to a degree, but it may not have been *substantially* lessened. ... Although "one cannot and ought not to measure with precision attacks and counterattacks in a truly competitive market," one cannot use any and every method to protect one's market. One cannot use improper tactics. Just as in self-defence from physical attacks, a person can use only reasonable force, so too, in defending one's market, a person must use reasonable methods. If someone slaps you, you cannot shoot him. Similarly, if your competitor cuts prices, you may decrease yours too, but you cannot reduce them to zero for six months and expect a Court to find that your intention is other than to eliminate competitors or substantially lessen competition. ... Another factor must be considered. Even though Roche was not much larger than Horner in over-all sales volume, and even though both companies had strong international links, Roche was a giant in diazepam compared to Horner, which was just trying to get a toehold in the market. One can expect substantial price cuts from a seller who is trying to enter a new market. One can also expect a competitor, who is already in the market, to match or even to best those cuts in order to thwart the attack. But when the price reductions of the defender are so out of line with those of the attacker as these were, their purpose must be suspect. Here, Roche's response was so outlandish that it demonstrates to me that it was not competing with a competitor, but that it was seeking to eliminate its competitors and to substantially lessen competition. ... On all the evidence here, I find that what was done by Roche was not a mere defence of its market. When one's product is attacked in the market, certainly one can take steps to defend that product. One can meet a competitor's price reduction and even reduce one's price below that of his competitor. That is, after all, what competition is all about. But when a competitor comes along with a 25% to 40% reduction on a new product in an effort to enter the market and the accused commences to give away its similar product for free, for an entire year, I can come to no other conclusion ... [I]f this conduct were not prohibited in these circumstances, it is hard to know when an offence under this section could be committed.[48]

The *Hoffmann-La Roche No. 1* case also highlights a practical consequence of the intent requirements of the abuse of dominance provisions. Mr. Justice Linden discounted but still relied upon colourful language regarding competitors contained in documents seized from Roche as evidence of the requisite intent to substantially lessen competition.

4. Substantial or Complete Control

High market share is not necessarily a valid proxy for market power. The Tribunal interprets substantial or complete control as requiring *prima facie* evidence of market power and the conclusion reached at this stage tends to heavily influence the analysis of the remaining requirements.

A better approach might be to interpret this requirement to mean simple possession of high market share for a substantial period of time, which then puts into play a consideration of the competitive validity of the impugned practice. Whether or not a firm has unwarranted market power would be better considered during evaluation of the purpose of the challenged business practice and its impact on competition.

5. Product Market

Hindsight is perfect but subsequent events suggest that the Tribunal was too conservative in its findings on substitutes and spectrum of aspartame use:

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[48]*Ibid.* at 179, 184-85, 189, 191, 194-95, 196-97.

> The most serious competitive threat appears to be sucralose which, like aspartame, is considered to be similar to sugar in taste but is more stable than aspartame. A number of ... applications are being sought for this product in petitions filed in mid-1987 with the FDA in the United States. The second product, alitame, appears to be considered less of a potential competitive threat ... To date, no country has granted approval to either ingredient for any application.[49]

Sucralose received Canadian approval in September 1991 and drinks flavoured with sucralose were on the market the following year. Nutrasweet recently received Canadian approval to market a new form of aspartame that for the first time can be used in baked goods.

The Tribunal narrowed definition of the product market to aspartame, with major emphasis on its primary use, because it had no hard evidence to the contrary notwithstanding evidence of substantial current research and a number of applications having been filed with health regulatory authorities. While proximate development of new products and aspartame uses may not have been established beyond a reasonable doubt, it was shown to be probable. Uncertainty on this issue should have been resolved in favour of Nutrasweet. Further, the Tribunal's conclusion that Nutrasweet's planned doubling of capacity indicated that generic aspartame was the most significant substitute product is weak and ignores fundamental patent economics, particularly when the price of the patented product was more than fifty per cent higher than the post-patent product.

6. No Respect for Tosoh Canada

In response to overtures from Holland/Tosoh Canada, Coke and Pepsi asked for bids for all of their 1989 requirements. Holland refused on the ground that it did not have sufficient free capacity to meet all the needs of both companies and wanted to deal with both in the same way. It submitted a bid covering a substantial volume but much less than that requested. Nutrasweet submitted that in so doing, Holland was the author of its lack of success in obtaining any volume from Coke or Pepsi. The Tribunal held: "We agree with Tosoh's view that it was being used by Coke and Pepsi to obtain a better price from NSC and that there was little chance that either of them was seriously considering giving all its Canadian business to Tosoh."[50] If this situation was as obvious to Nutrasweet as it was to the Tribunal, one might reasonably question Nutrasweet's business judgment in allowing its price to fall significantly in Canada, as noted by the Tribunal on at least five separate occasions.[51] A credible competitive threat had to be emanating from some source. Finally, these facts also demonstrate that Coke and Pepsi, for whatever reasons, clearly wanted to deal exclusively with one supplier and Tosoh Canada couldn't deliver.

7. U.S. Patent Leverage and Dumping

It is difficult to understand the characterization of the U.F.L. factual situation as an anti-competitive act ("a form of dumping"). The Tribunal had deter-

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[49] *Supra* note 1 at 14.
[50] *Ibid.* at 48.
[51] See *e.g. ibid.* at 16, 17, 19, 29, 51.

mined that Nutrasweet did not engage in predatory pricing. What Nutrasweet did was to enable a greater number of (possibly more efficient) suppliers to compete in the Canadian market (the U.S. patent was a non-tariff barrier to U.S. food processors).

The purpose and effect of dumping laws is universally acknowledged to be protection of producers at the expense of consumers. Nutrasweet's action in this instance enhanced rather than diminished consumer welfare. The negative competitive impact on Tosoh Canada was caused by the U.S. patent laws, not Nutrasweet.

B. Laidlaw

1. Market Power or Market Share

If the contracting practices of Laidlaw can be characterized as an ineffective scarecrow (something frightening but not dangerous), the basis of the Tribunal's decision dissolves because entry barriers were otherwise extremely low.

It is significant that Laidlaw did not offer customers a lower price for signing a long-term contract nor refuse to provide service if a customer refused to sign a service agreement.[52] The customers were commercial businesses, not consumers. They could have avoided all of the one-sided clauses by the simple expedient of reading and refusing to sign the service agreement. When agreements are obtained by misrepresentation, liquidated damages clauses operate as a penalty, termination provisions are unreasonable or agreements are breached by poor service or improper flow-through of cost increases, lower and small claims courts cheerfully decline enforcement.[53] When lawyers intentionally misrepresent the existence and result of prior litigation in cease and desist letters, they are subject to law society discipline proceedings and possibly prosecution pursuant to the misleading advertising provisions of the *Act*. Finally, markets tend to efficiently circulate non-covert information of sharp business practice. It is not surprising that the Tribunal concluded: "In fact, Laidlaw's practice in the Vancouver Island markets seems to have been one of not pursuing litigation against customers. No evidence was adduced of any action against a *customer* having been commenced to enforce the contracts. Only the threat of litigation was used."[54]

2. Standard Industry Agreement

The Tribunal's analysis of this issue is disappointing. If the impugned clauses were commonly used by firms in other North American markets and were as effective as the Tribunal concluded they were in this case, one would expect to find a wealth of U.S. antitrust case law on these industry contracting practices. None was cited.

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[52] *Supra* note 2 at 340.

[53] See *Tilden Rent-a-Car Co.* v. *Clendenning* (1978), 83 D.L.R. (3d) 400 (Ont. C.A.), respecting adhesion contracts.

[54] *Supra* note 2 at 311.

3. Acquisitions as Abuse of Dominance

While horizontal acquisitions might be evidence in support of an act being anti-competitive, Parliament did not intend such action to be a stand-alone anti-competitive act.

The listed anti-competitive practices are not in and of themselves unlawful. The requisite intent or motive contained in each practice coupled with the effect of lessening competition substantially must also be present for the provisions to apply. Each of the listed practices requires proof of an anti-competitive purpose and, in general, the practices appear to be concerned with conduct of competitors directed at other competitors. Accordingly, section 78 lends itself to the application of the *ejusdem generis* rule, preventing its application to circumstances of non-exclusionary collusion or conduct that lacks an anti-competitive exclusionary motive. An experienced and highly respected Canadian competition law practitioner has stated:

> Several questions arise from this manner of legislating. First, does the *ejusdem generis* principle apply despite the provision stating that the generality of the term "anti-competitive act" is not restricted by the illustrations? ... Each of the anti-competitive acts listed ... contains as part of its description, explicitly or implicitly, reference to an exclusionary purpose, object or design. Does this refer to some subjective intent, or instead to a balancing of legitimate business objectives against any exclusionary effects that may be assumed to have been anticipated? ... The guide published by the government when Bill C-91 was introduced clearly contemplates an *ejusdem generis* principle ... It states as follows regarding the description of the anti-competitive acts: "The list is non-exhaustive so that acts of like character can be held to be anti-competitive by the Tribunal. All of the listed acts include consideration of the purpose, object, or design of the dominant firm to ensure that the censured conduct is not, in fact, reasonable competitive behaviour."[55]

4. Small Markets

Laidlaw, as a large international business, may possibly have had higher overhead costs than did its smaller, home operator, competitors. The only solution to this problem is to increase and maintain high volume. The small markets in this case would support two or three small or medium-sized competitors but could not likely support them and Laidlaw too.

It is significant in this regard that there was no evidence of predatory pricing.

5. Tribunal Use of Authority

The Tribunal cites a lengthy quotation from R.H. Bork, *The Antitrust Paradox*, in support of its conclusion that Laidlaw's questionable litigation practices were "certainly predatory behaviour."[56] Although the quote, as reproduced

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[55]B.C. McDonald, "Abuse of Dominant Position: A New Monopoly Law for Canada" (1987) 32 Antitrust Bull. 795 at 807, 812.

[56]*Supra* note 2 at 344.

in the decision, appears to be three self-contained paragraphs, the beginning of the first paragraph and the end of the third paragraph were omitted.

This section of Bork's book deals with predation through abuse of governmental processes and is concerned with oppositions to market entry before administrative and judicial institutions such as public utility boards, licensing authorities, planning boards, health departments and the many other bodies and officials which control and qualify the would-be competitor's access to the marketplace. The Tribunal's quote, in context, does not support the proposition for which it is cited.

Conclusion

An analysis of the abuse of dominance sections, their legislative history and these two decisions shows that these provisions are based principally upon predation theory. However, predation theory was discredited, perhaps fatally, in 1986 by the United States Supreme Court in *Matsushita* v. *Zenith*.[57] The abuse provisions attempt to breathe life back into the theory by emphasizing non-price predation. But as the theory depends upon the creation of sustainable artificial entry barriers (which usually only exist when supported by government regulation of some sort), circumstances in which alleged abuse of dominance actions are likely to be anti-competitive will or should be rare. In *Nutrasweet*, the Tribunal was blinded by the theory and overlooked the basic economic facts as found and summarized in its own decision. In *Laidlaw*, while the company may have been a commercial bully, abuse of dominance competition law is not an appropriate vehicle to address such behaviour.

Competition inevitably produces victims and the abuse of dominance provisions invite these victims to take their grievances to the Director. A major problem which confronts the Director and the Tribunal is the difficulty in distinguishing between hard-nosed competition and conduct which is proscribed by the *Act*. It is therefore important to find ways to reduce the attractiveness of antitrust as a means by which one competitor chills the pro-competitive conduct of another. Perhaps the most important is to recognize that consumer welfare is paramount to competitor welfare.[58]

The statutory statement of purpose (in section 1.1 of the *Act*) provides one primary goal which has four subsidiary objectives. The statement is of some significance as it has no counterpart in the former legislation. The courts have generally understood that competition legislation is designed to achieve the primary goal (to maintain and encourage competition). A cursory review of the case law discloses that the major purpose of competition policy has usually been expressed in such terms as "the protection of the public interest in free competition." Behind this goal lies a policy decision to rely mainly on market forces to guide economic activity, stimulate innovation, minimize resource waste and, generally, to satisfy consumer demands at minimum cost.

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[57][1986-1] Trade Cases 67,004.

[58]For a discussion of why consumer welfare is paramount, see Bork, *supra* note 6 at 58-61. See also F.H. Easterbrook, "The Limits of Antitrust" (1984) 63 Texas L. Rev. 1.

Implicit in the goal of maintaining and encouraging competition is the economic consequence that every successful competitive practice has victims. This consequence creates a conflict between two of the subsidiary statutory objectives: ensuring that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy while at the same time providing consumers with competitive prices and product choices. Presumably the statute is not intended to require that small competitors be protected at the expense of consumers; sheltering any producer usually results in higher prices to the consumer (and yet, the offences of price discrimination and discriminatory promotional allowances are continued under the *Act* notwithstanding that their primary effect is to protect small business). The goal of protecting small business cannot be attained under a law designed to generally maintain and encourage competition, if to do so means that inefficiency is to be rewarded and consumers penalized. Aside from the question of whether it is socially desirable to promote small business at the expense of the consumer,

> such a policy would be unworkable because it would require comprehensive and continuing supervision of the prices of large firms. There are no effective short-cuts. For example, if mergers between large firms are forbidden because of concern that they will enable the firms to take advantage of economies of scale and thereby underprice smaller firms operating at less efficient scale, one (or more) of the larger firms will simply expand until it has achieved the most efficient scale of operation.[59]

The policy to rely mainly on market forces to guide business activity bears directly on the efficacy of the *Act*. Absent government protection or intervention, all anti-competitive conduct is transitory because resources will ultimately gravitate to their highest valued use. Market restrictions which result in supra-competitive profits are by their nature unstable and self-destructive. It is only a matter of time before one or more members cheat on the other members of a cartel, another competitor enters the market or someone innovates around the restriction. As time may be significant (it took approximately seven years before the OPEC cartel began to show signs of weakness), competition law seeks to hasten the demise of restrictions. But where the effects of such restrictions are transitory in the short term, one might reasonably ask whether resources should be expended on their prevention at all instead of allowing the market to more efficiently dispense the necessary economic justice.

In summary, there is nothing unlawful or inherently wrong in occupying a dominant position in a market. What may be objectionable is the abuse of such dominance. Abuse of dominance, as demonstrated in the *Nutrasweet* and *Laidlaw* decisions, can mean many things. To avoid costly and time consuming litigation in this area, executives of large firms should be mindful of the following considerations:

(a) understand and be able to explain the rationale for the firm's marketing practices and contractual terms in agreements (better customer service, customer requirements, lower costs/prices);

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[59] R.A. Posner, *Antitrust Law: An Economic Perspective* (Chicago: University of Chicago Press, 1976) at 96-97.

(b) avoid use of one-sided sales, franchise or service agreements containing unreasonable provisions which are rarely enforced in any event;

(c) educate sales and marketing personnel to avoid the use of verbal and written language which unnecessarily threatens competitors, customers or suppliers;

(d) avoid frivolous and vexatious use of judicial and administrative processes; and

(e) give due consideration to any substantive complaint of anti-competitive conduct; consider whether the particular practice really furthers the firm's legitimate business interests.