THE CANADIAN BAR ASSOCIATION
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Abuse of Dominance Enforcement Guidelines

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COMPETITION LAW SECTION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Competition Law Section, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Competition Law Section.

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Abuse of Dominance Enforcement Guidelines

I. INTRODUCTION

The Competition Law Section of the Canadian Bar Association (CBA Section) welcomes the opportunity to comment on the draft *Abuse of Dominance Enforcement Guidelines* (Guidelines) issued for consultation by the Competition Bureau on March 14, 2018. We commend the Bureau's continuing efforts to engage with stakeholders through meaningful consultations and to give meaningful guidance. Guidance is particularly important for abuse of dominance, where it may be especially difficult to distinguish aggressive but pro-competitive conduct from anti-competitive acts. The Bureau's guidance aids the business community in decision-making and ensuring continuous compliance with the *Competition Act*. In particular, the detailed discussion and examples in the Guidelines offer useful direction to businesses operating in a wide range of industries.

II. GENERAL COMMENTS

Consistency with Canadian Jurisprudence

As discussed in more detail below, the Guidelines sometimes take an inconsistent or expansive view of existing Canadian abuse of dominance jurisprudence. While it is helpful for stakeholders to understand the Bureau's perspective and position, the guidance offered should nonetheless be consistent with existing Canadian jurisprudence. Where the Bureau interprets existing jurisprudence in a specific manner, it would be helpful, at a minimum, for the Bureau to state that this perspective is the Bureau's *interpretation*. Where the Guidelines expand the application of section 79 beyond existing jurisprudence, it also creates significant uncertainty and unnecessarily increases the risk of Canadian competition law diverging from international norms. For example, the section discussing market power contains a number of references that are either vague or inconsistent with existing jurisprudence and as a result, pose a serious risk of chilling legitimate competitive conduct.

Introduction of New Concepts or Approaches in the Examples

While it is helpful to include detailed examples of the Bureau's approach to specific elements of dominance, certain examples may create more confusion than clarity.

- Some examples apply section 79 differently or more specifically than described in the Guidelines. This makes understanding the Guidelines more challenging and laborious, particularly for the lay reader. It also creates confusion as to the Bureau's position. It would be preferable if the examples were illustrative of the clear guidance in the Guidelines, rather than offering new guidance not found in the main body of the text.
- Some examples contain complex fact situations and this complexity limits the usefulness of the guidance provided. In some instances, the legal analysis is based on facts located in the Analysis section, limiting the clarity of the guidance offered by the example.

Significant Focus on Toronto Real Estate Board case (TREB)

The Guidelines frequently and extensively reference decisions of the Competition Tribunal and the Federal Court of Appeal regarding the TREB case. While these decisions are important for the development of Canadian jurisprudence, earlier cases continue to offer valid and useful guidance, particularly where they deal with more common situations or conduct not at issue in the TREB case. The Guidelines would offer broader guidance if they also reflected earlier Canadian abuse of dominance jurisprudence.

Reference to Exceptional or Novel Situations

Perhaps because of the emphasis on the TREB case, the Guidelines often focus on exceptional or novel situations. While the Bureau's intention may be to update the Guidelines to reflect the most recent jurisprudence, it would be preferable for the Guidelines to focus primarily on providing general guidance. If it is important for the Guidelines to discuss exceptional or novel situations, these discussions should be reserved for the end of a section or a footnote.

III. DOMINANCE

Paragraph 1.4 and footnote 5 – Link Between Markets

The Guidelines state that in some cases a person is dominant in a market different from the market where anti-competitive effects are alleged to arise. A footnote explains that an abuse of dominance does not occur if the two markets are "wholly unrelated" but that "where there is some link between such markets," the Bureau may conclude an abuse of dominance has

occurred. Referring merely to a "link" between the two markets (as opposed to the requirement that the dominant entity have a competitive interest – the requirement found in the TREB case) could create more confusion about the Bureau's approach and should be amended.

Paragraph 1.13 and 1.19 – Aggregating Markets

The Guidelines refer to the possibility of "aggregating" different product and geographic markets, "treating them as a single market for analytical purposes." The Guidelines further state that such aggregation may occur where competitive conditions are sufficiently similar in each market that treating them as a single market does not affect the assessment of dominance. The use of the term "aggregation" in this context may be imprecise and confusing.

Rather than referring to aggregating these markets, it may be more appropriate to refer to dominance being present or observable across more than one market and state that in such conditions these markets may be treated as one market for ease of analysis.

While similar competitive characteristics may be useful and appropriate to rely on for analytical purposes at the paragraph 79(1)(a)/ market definition stage of the process, the Guidelines should recognize it is far less likely to be appropriate (and may not even be possible in some cases) to rely on similar competitive characteristics at the paragraph 79(1)(c) stage of the process. This is because a substantial lessening or prevention of competition must be established in each market for the Tribunal to issue an order in each market under section 79. The requirement to evaluate the dimensions of each market separately for the purposes of the analysis under paragraph 79(1)(c) was explicitly referenced by the Competition Tribunal in the TREB case (see paragraph 132 cited at note 4 of the Guidelines):

"However, an assessment must ultimately be made (at the section 79(1)(c) stage of the analysis) of the extent to which products and supply locations that have not been included in the relevant market provide or would likely provide competition to the products and locations that have been included in the market".

We recommend these paragraphs be amended clarify that "In some cases, the Bureau may consider it appropriate to analyse several different (or potentially different) product or geographic markets together for the purposes of market definition." Further, it would be helpful to add a footnote in this section or a reference in the competitive effects discussion clarifying that for the purposes of evaluating competitive effects, each market must be evaluated separately.

Paragraph 1.22 – Ability to Exclude as Indicator of Market Power

In the second sentence of paragraph 1.22, the Guidelines state "the Tribunal has stated that market power includes "the power to exclude", or the ability to restrict the output of other actual or potential market participants". The Guidelines cite paragraph 176 of the TREB decision. This statement oversimplifies the Tribunal's decision in the TREB case. More specifically, the Tribunal did not hold that the "power to exclude" was sufficient to conclude the existence of market power. The Tribunal`s decision on this point states:

"To the extent that the power to exclude comprises an ability to restrict the output of other actual or potential market participants, and thereby to profitably influence price, it falls squarely within the definition of market power articulated in Tervita. Indeed, it is often the exercise of the power to exclude that facilitates a dominant firm's ability to profitably influence the dimensions of competition referred to in Tervita." (emphasis added)

That is, the Tribunal`s discussion clearly references not just an ability to exclude but rather the ability to exclude where it encompasses the ability to restrict the output of other market participants and so the ability to profitably influence price. This distinction is important, as every property right will entail the ability to exclude third parties and competitors from the relevant property (for example physical premises or an IP right) but such exclusion would not be, on its own, sufficient to establish market power. Section 4.1 of the IPEGs on IP rights notes: "the right to exclude others from using the product or process does not necessarily grant the owner market power".

This overly broad approach (assuming that the ability or power to exclude constitutes market power) carries on through the discussion in paragraphs 140 to 142 found in the Guidelines and should be appropriately limited as well.

Paragraph 1.23 – Dominance in Other Markets

This paragraph is an example of the Guidelines focusing on an exceptional situation, rather than focusing on general principles first and then referencing more novel or exceptional approaches to abuse of dominance on a secondary basis. As most abuse of dominance cases involve an anti-competitive act in the same market where a firm is alleged to be dominant, it may create confusion to give such prominence to more exceptional situations (where a firm is dominant in a market where it does not participate) rather than focusing (at least at the outset) on more typical dominance scenarios.

Paragraph 1.25 – Likely to Obtain Market Power is Insufficient

The Bureau states it "will generally investigate allegations of abuse of dominance if it appears a firm is likely to obtain market power within a reasonable period of time where a practice of anti-competitive acts may be ongoing". This reference is both confusing and unsupported by section 10 of the Act. More specifically, under section 10, the Commissioner cannot commence an inquiry under section 79 until such time she or he has "reason to believe" that the elements of the provision have been contravened. In other words, the Commissioner must have reason to believe the defendant firm actually possesses market power at the time the investigation is undertaken, rather than simply being likely to obtain market power within a reasonable time period (i.e., "attempted monopolization" is not sufficient under Canadian law). If this discussion is retained, this limitation, which arises from the Act, should at the very least be explained in a footnote.

Paragraph 1.26 and 1.44 (second bullet) – Considerable Latitude to Influence Competition and Commercial Leverage

In paragraph 1.26, the Bureau refers to a firm's "considerable latitude" to influence competition as potential evidence of a substantial degree of market power. The references to "considerable latitude to influence competition" and "commercial leverage" are both vague and unsupported by relevant jurisprudence. More specifically, it is unclear what type of action the Bureau intends to refer to here or in paragraph 1.44 (which references commercial leverage). Presumably it is not the case that any form of commercial leverage is sufficient evidence of market power. If the Bureau's position is that the ability to influence the terms on which a supplier deals with its other customers demonstrates an unusual degree of commercial leverage (and an indication of market power) - then we recommend the Bureau make this clearer, including by amending the bullet at paragraph 1.44 to refer to

the ability to influence suppliers' dealings with other customers. If the Bureau is relying on jurisprudence to support its position on this point, it should be cited.

Paragraphs 1.30, 134 and 1.35 – Lower Market Shares and Market Power

In the second sentence of paragraph 130, the Guidelines refer to the possibility that the Bureau may consider that firms with relatively low market shares possess market power where other evidence establishes its existence. This addition sows confusion, is highly implausible and is not supported by the existing abuse of dominance jurisprudence.

The reference to low market shares in paragraphs 130, 134 and 135 should be deleted. More specifically, in paragraph 135 (and footnote 30), the Guidelines refer to the Tribunal's findings of market power at market shares of 33 %. This reference to the Tribunal's findings of market power in the context of other provisions does not give helpful guidance for the application of section 79. As the Tribunal noted in the TREB case, the degree of market power required under paragraph 79(1)(a) is higher than that required under other provisions of the Act. Furthermore, the application of section 76 does not itself require a finding of market power and as such, the reference to a finding under section 76 in the Guidelines is neither helpful nor consistent with existing abuse of dominance jurisprudence.

Further, we question why the "safe harbour" threshold of market share below 35% was eliminated from the Guidelines and would urge the Bureau to re-insert this reference. The previous guidance that the Bureau will typically not examine cases where the market share is below 35% is consistent with existing abuse jurisprudence and gives important guidance to businesses.

Paragraph 1.44 and Footnote 38 – Effects of Anti-Competitive Acts as Indicators of Market Power

In the third bullet, the Guidelines state "where an allegedly dominant firm is able to lessen or prevent competition substantially in excess of the threshold necessary to qualify as substantial under paragraph 79(1)(c), this may be evidence that the firm possesses substantial market power". The reference to relying on effects to find market power is confusing, circular and risks conflating the various elements of section 79. If this is the Bureau's position, this point could perhaps be made clearer by instead stating that an ability to cause prices to be higher in the relevant market than would exist in the absence of the firm's conduct could be evidence that the firm has market power.

Paragraphs 1.47 and 1.48 – Approach to Joint Dominance

In paragraph 1.47 and footnote 39, the Guidelines state the absence of certain types of behaviours (price competition amongst competitors, frequent customer switching or leapfrog competition through innovation) could indicate these firms are not competing vigourously with one another. We disagree with the implied assertion that the absence of such indicators may alone be sufficient to constitute joint dominance. There is no jurisprudence to support this position and it is entirely inconsistent with prior guidance from the Bureau.

In prior reports and speeches by the former Commissioner of Competition, the Bureau has taken the position that something more (most likely in the form of co-ordination or communication between the parties) must occur between parties for joint dominance to be found.[1] The Guidelines should acknowledge that a perfectly competitive market could reach a price equilibrium without frequent customer switching, and that not all markets are conducive to significant innovation.

IV. ANTI-COMPETITIVE ACTS

Paragraph 2.4 – Who is a Competitor?

Paragraph 2.4 states that to determine whether an act is aimed at a competitor, a competitor is considered to be a person who competes in a relevant market and need not be a competitor of the allegedly dominant firm. However, this discussion is incomplete, since it does not explain that for a firm to engage in an anti-competitive act in a market in which it does not compete, the Tribunal specifically held that such firm must also have a plausible competitive interest in that market.[2] Paragraph 2.4 should be deleted as the point is already made in a more complete manner in paragraph 2.10.

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1 See: Report on the Saskatchewan Gasoline Industry (November 30, 1999), online (https://bit.ly/2jWXJG4) and Sheridan Scott, Abuse of Dominance Under the Competition Act, (Speaking Notes, delivered to FTC/DOJ Hearings on Single Firm Conduct—September 12, 2006) at p. 14, online (https://bit.ly/2ImmypL)

2 See TREB at para. 279 – 282.

Paragraphs 2.7 and 2.9 – Achieving Efficiency/Procompetitive Benefits by Other Means

The second sentence of paragraph 2.7 states that the Bureau will consider whether the "efficiency or procompetitive benefits could have been achieved by alternate means that did not impact competitors". Similarly, the second last sentence of paragraph 2.9 states that circumstances may arise where the "Bureau finds that a practice satisfies 79(1)(b) even when it may make economic sense without an anti-competitive effect on a competitor". The Bureau gives the example of "where the economic benefits resulting from exclusion are sufficiently large compared to the other profits derived from the practice, such evidence may establish that the overall purpose was an anti-competitive effect on a competitor". These statements are overly broad and contradict the existing jurisprudence on this point.

More specifically, these statements suggest that a dominant firm could be restricted from pursuing conduct that would benefit the firm because of the impact on competitors, even if it would be economically rational for the firm to pursue the conduct absent any exclusionary impact on competitors. In other words, this statement suggests the Bureau is seeking to impose an obligation on dominant firms to pursue business activities that have the least exclusionary impact on competitors. We are unaware of any support for this position in the Canadian jurisprudence, and it places firms in the impossible position of trying to evaluate the impact of various actions on other firms.

It may well be the case that circumstances arise where the benefit of certain conduct to the dominant firm is very small, but the exclusionary impact is very large, so that it could be reasonable to infer that the predominant purpose of the conduct was to exclude or harm competitors. However, the Guidelines try to extend this concept even further to imposing a requirement on dominant firms to pursue the least restrictive form of achieving legitimate objectives. This standard is inherently uncertain, would be highly impractical for firms to follow and seriously risks chilling pro-competitive conduct.

Further, it is unclear what type of benefits would be categorized as "economic benefits resulting from exclusion", as virtually every activity is designed to win business for a firm (to the exclusion of a competitor or competitors).

As the Tribunal recognized in TeleDirect, "targeting cannot be distinguished as an anti-competitive act merely by the fact that there is a differentiated response. Targeting, in the sense

of a differentiated response to competitors, is a decidedly normal competitive reaction. An incumbent can be expected to behave differently where it faces entry than where it does not."

Similarly, in TREB, the Tribunal recognized that in "assessing the balancing test under paragraph 79(1)(b), the Tribunal must determine whether sufficiently clear, convincing and cogent evidence exists to demonstrate that the overriding purpose of the impugned practice was anti-competitive. If it is not satisfied that this evidence has been adduced, the Tribunal will conclude that this element has not been demonstrated by the Commissioner. The Tribunal considers this to be particularly important in section 79 cases, to avoid chilling unilateral conduct that is primarily motivated by legitimate business justifications, but may also be objectively expected to have some adverse impact on competition."

The Guidelines should be amended to reflect the requirement that clear, convincing and cogent evidence exist to demonstrate that the overriding purpose of the impugned practice is anti-competitive. Without this clear guidance, the Guidelines risk chilling legitimate business conduct.

Paragraph 2.10 – Competitive Interest

The discussion should be expanded to reflect the additional guidance on what constitutes an anti-competitive act offered by the Competition Tribunal in the TREB case at paragraphs 279 – 282. For example, the Competition Tribunal noted its expectation that garden variety refusals to deal should not be caught under section 79. It would be helpful for the Guidelines to reflect this additional guidance.

Paragraphs 2.12 and 2.13 - Predatory Conduct

The expectation of successful recoupment is a fundamental aspect of demonstrating the existence of predation. Absent an expectation of recoupment, predation simply provides a wealth transfer from producers to consumers (i.e., consumers benefit), and does not result in any competitive harm. While the notion of recoupment is referenced in paragraph 2.12 and footnote 54 refers to the notion of recoupment being analysed as part of paragraph 79(1)(c), an expectation of recoupment should be discussed in greater detail in this section as well. The Guidelines should clarify that the measure of cost the Bureau will use for assessing predation is that of the dominant firm (and not the cost base of another, likely less efficient, competitor).

Another way of making this point is for the Guidelines to expressly state that the Bureau will apply the "as efficient competitor" test when calculating average avoidable cost.

Paragraph 2.18 – Examples of Disciplinary Conduct

The discussion of "discipline" in this context (facilitating, maintaining or inducing coordination among firms) could be relevant for the identification of whether collective dominance exists, but not whether an act is anti-competitive. The concepts discussed in this paragraph would be more usefully deployed in paragraphs 1.47 and 1.48, discussed above.

V. COMPETITIVE EFFECTS

One notable absence from the Guidelines is any discussion of subsection 79(4) in the discussion on competitive effects arising from the practice of anti-competitive acts in issue. The Guidelines effectively ignore subsection 79(4) of the Act which provides that "In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance." This provision is important in ensuring that a dominant firm is not penalized simply for having a better product or service. The Bureau should address its approach to the application of this provision in the Guidelines.

On a more general level, when analyzing the effects of a practice, we encourage the Bureau to utilize economic tools, where possible, to quantify and balance anti-competitive effects against pro-competitive effects arising out of the conduct in question. Doing so would not only clarify the applicable economic standard and accordingly, provide a measure of predictability and consistency to businesses but also encourage a dialogue that is likely more conducive to resolving disputes through settlement or mediation and avoid the need for protracted litigation.

VI. REMEDIES

Another notable absence from the Guidelines is any meaningful discussion of subsections 79(3.1), (3.2) and (3.3) on Administrative Monetary Penalties (AMPs). The Guidelines merely summarize the statutory scheme and note "the decision by the Commissioner to seek an AMP

and its amount is very fact-oriented and will invariably depend on the specific circumstances of each case."

Guidance on AMPs is of significant practical importance to stakeholders. Uncertainty about the circumstances where the Bureau will seek an AMP (and its amount) creates a real risk of chilling legitimate competitive behaviour. That is because many businesses will refrain from engaging in aggressive, but legitimate, activities where the dividing line between abuse of dominance and vigorous competition on the merits is unclear (as is often the case) and where enforcement policy is opaque.

We recognize that the specific circumstances of each case will be important. However, there have been numerous cases since AMPs were introduced into the *Competition Act* in 2009. The Bureau has sought and obtained AMPs in some cases (such as the $5 million AMP in the Reliance Home Comfort case) and not others (such as the TREB and Vancouver Airport Authority cases). The Bureau therefore has experience in assessing whether or not to seek AMPs and the quantum of the AMPs it will seek. It would be helpful if the Bureau would share more of its internal analysis regarding AMPs in order to ensure that its silence does not curb economically desirable vigorous competition on the merits.

VII. EXAMPLES

The CBA Section commends the Bureau for including a variety of fact patterns in the Guidelines. Fact patterns and practical examples are extremely helpful to illustrate the Bureau's approach and analysis and give important supplementary guidance to stakeholders. However, in some instances, the fact patterns should be clearer to be more helpful.

Example 2

The facts and analysis are unclear in several respects.

- The nature of DUTY's allegedly anti-competitive conduct (about which SMASH has complained) is not specified in paras. 5.4 to 5.6. In particular, it is unclear if the conduct complained of is the "hyper duty" marketing and why the geographic element of the fact pattern (i.e., Eastern and Western Canada) is relevant. More specifically, the reader is left with the suggestion that marketing claims (which appear to be true) could be considered an anti-competitive act under paragraph 79(1)(b). We recommend that another type of conduct might be more helpful and relevant to include in this example.
- It is unclear what information is being conveyed in the second sentence of paragraph 5.5. For example, is the "share of eastern Canadian drills" a reference

to the share enjoyed by each supplier in Eastern Canada (or one particular supplier), or something else? It is also unclear how price fluctuations between Eastern and Western Canada would be relevant to the share of suppliers in each region (since the suppliers might be the exact same).

- It is also unclear why in paragraph 5.9, the market is defined as sales to retailers rather than consumers. This could be because, for example, DUTY and SMASH only sell on a wholesale basis, and not, by contrast, over the internet to consumers or directly to industrial customers. If this is the case, these facts should be stated at the outset.

Example 3

- The CBA Section has concerns about including this example. First, the nature of the anti-competitive acts SUBSTANTIAL has allegedly engaged in is unclear and confusing. At paragraph 5.16, the example states that the Bureau will "consider the extent to which SUBSTANTIAL has commercial leverage over its retail channels" as part of its assessment of whether SUBSTANTIAL has market power. For the reasons noted above, the reference to commercial leverage is overly broad and confusing. More specifically, this discussion fails to recognize that the ability to negotiate better terms could simply reflect superior service or products (as recognized by paragraph 79(4)).

Example 4

- It would be helpful if this example were revised to explain why the Bureau would examine this example as a joint dominance case at all. More specifically, given that PAL has a market share of 55%, it would be more helpful if the Bureau could give its perspective on whether it would first examine if PAL could exercise unilateral dominance on its own. In addition, it would be helpful for the Bureau to explain why Buddy could or should be viewed as jointly dominant solely on the basis that it has unilaterally adopted some of the same practices as PAL.

Example 5

- In paragraph 5.31, the Guidelines should note that while DOMAINE's costs may be a useful proxy for use at an early investigatory stage, a conclusion about alleged below cost selling requires an assessment of CHATEAU's actual costs. In other words, the costs of a less efficient competitor should not be capable of identifying allegedly "below cost" pricing. See the discussion at paragraph 2.13, above.
- In paragraph 5.40, in addition to a new entrant, the Bureau should assess the possibility of re-entry by the target of the predation.

Example 6

- Paragraph 5.46 states that "exclusive dealing also takes the form of a firm requiring or inducing its own suppliers to deal only with the firm itself and not that firm's competitors". Footnote 86 at the end of this paragraph states that exclusive dealing can also be pursued under section 77 of the Act. Section 77 of the Act, however, does not apply to a firm requiring or inducing its own suppliers to deal only with the firm itself. Rather, in section 77, exclusive dealing is defined to mean a practice where a supplier of a product requires its customers to deal

only with products supplied by or designated by that supplier, or refrain from dealing with another supplier. This confusion could be eliminated by changing the first sentence in footnote 86 to "exclusive dealing by a supplier can also be pursued under section 77 of the Act".

Example 7

- Paragraph 5.60 references a number of potentially anti-competitive practices that may confuse the reader. For simplicity and clarity, the discussion should focus merely on the change to GORDIAN's warranty terms and its competitive effects (as suggested in paragraph 5.70). Reference to the rebate program and potentially higher pricing in the non-hitch market for rope and the restrictions on arbitrage may confuse the point the Guidelines are attempting to illustrate. The complexity of this paragraph is contrasted with the straightforward way anti-competitive effects are assessed in paragraphs 5.69 and 5.70. The details of paragraph. 5.60 could be removed if, for example, the facts were changed so that rope was sold exclusively for hitches (and for no other applications).

Example 8

- The description of SUNNY's complaint in paragraph 5.77 may create confusion. Since SOL has no regulatory authority and cannot prevent SUNNY (or any other operator) from selling over the internet, SOL is not preventing SUNNY from beginning operation in SOL's province. Instead, SUNNY may have complained because it requested that SOL certify its products but SOL refused because SOL will not certify internet sellers. This point (which arises because SOL has no regulatory authority at all) should be clarified.
- Paragraph 5.82 suggests that because SOL is a trade association that acts in the interests of its members, the Bureau may conclude that it has a competitive interest in affecting competition among its members. This statement is too broad. Consistent with the Competition Tribunal's approach in the TREB case, simply acting in the interests of its members should not be sufficient to constitute competitive interest. More specifically, in TREB CT, the Tribunal stated that the analysis of whether a trade association has a competitive interest "may be as straightforward as demonstrating that it has a plausible interest in protecting some or all of its members from new entrants or from smaller disruptive competitors in the market."
- In paragraph 5.83, the Guidelines state that the Bureau will "evaluate the purpose of the rules adopted by SOL". It can be difficult to evaluate the purpose of a trade association with many different members (who may have disparate views). It would be useful for the Guidelines to acknowledge that a trade association may include many different views, such that the subjective intent of a few members should not be attributed to the association as a whole.

Example 9

- Including this example creates significant potential uncertainty and risks chilling legitimate competitive behaviour. More specifically, we submit that to be consistent with existing Canadian jurisprudence, any attempt by a firm to meet competition while pricing above its applicable measure of cost should be treated as presumptively legal. Further, the CBA Section questions what remedy the Bureau could or would propose to seek from STATIC to prevent the allegedly

anti-competitive acts from occurring again in the future. The anticipated difficulty in crafting an order illustrates the difficulty in giving guidance to STATIC on the type of discounts that would be acceptable. In light of these inherent difficulties, we recommend that the Bureau revise this example.

- Paragraph 5.87 contains a typo. The penultimate sentence should refer to DYNAMIC's customer acquisition program, not STATIC's program.

VIII. CONCLUSION

The CBA Section appreciates the opportunity to comment on the draft *Abuse of Dominance Enforcement Guidelines*. We would be pleased to discuss our comments in more detail.