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January 16, 2008

## By Email and Courier

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File No.: 111833.0011

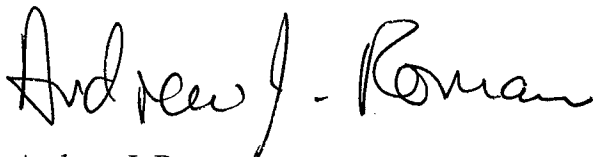
Dear Ms. Lavallée:

## Re: Comments on Draft Predatory Pricing Enforcement Guidelines

Please find enclosed the submissions of our client, Groupe Pétrolier Norcan Ltd., in response to the Bureau's invitation for public comments on the draft Predatory Pricing Enforcement Guidelines released on October 9, 2007. These submissions address several issues regarding the regulation of predatory conduct which Norcan is concerned are not adequately covered in the Guidelines.

If possible, Norcan would appreciate the opportunity to discuss its concerns with members of the Bureau. When you have had an opportunity to review these submissions, please contact me at your convenience to arrange a time to discuss these issues.

Yours truly,



Andrew J. Roman

AJR/emb/Enclosures

cc. Garry Garcin, Norcan

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January 16, 2008

**By Email and Courier**

Competition Policy Review Panel  
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Ottawa, Ontario  
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Dear Sirs/Mesdames:

**Re: Comments on Draft Predatory Pricing Enforcement Guidelines**

Please find enclosed the submissions of our client, Groupe Petrolier Norcan Ltd., in response to the Competition Bureau's invitation for public comments on the draft Predatory Pricing Enforcement Guidelines released on October 9, 2007. These submissions address several issues regarding the regulation of predatory conduct which Norcan is concerned are not adequately covered in the Guidelines. We submit them to you in the hopes that they may benefit your study of competition law in Canada.

If you would like to discuss any issues arising from these submissions, we would be glad to meet with any of your staff to provide any assistance we can in developing appropriate policy under the *Competition Act*.

Yours truly,



Andrew J. Roman

AJR/emb/Enclosures

*cc. Garry Garcin, Norcan*

**SUBMISSION TO THE COMMISSIONER OF COMPETITION**

**COMMENTS ON THE COMPETITION BUREAU'S DRAFT  
PREDATORY PRICING GUIDELINES**

**BY**

**GROUPE PÉTROLIER NORCAN INC.**

**JANUARY 15, 2008**

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## COMMENTS ON THE COMPETITION BUREAU'S DRAFT PREDATORY PRICING ENFORCEMENT GUIDELINES

### Introduction

This is the submission of Groupe Pétrolier Norcan Inc. ("Norcan"), which responds to the Competition Bureau's (the "Bureau") invitation for comments on the proposed revisions to the *Predatory Pricing Enforcement Guidelines* (the "Guidelines") released on October 9, 2007. Norcan is an independent importer and wholesaler of petroleum products in Quebec, and constitutes the second largest supplier of competitively priced petroleum products to independent gasoline retailers in Quebec.

Predatory conduct, which is normally carried on by a dominant firm, is harmful to consumers because it reduces competition, usually significantly. Therefore, the *Competition Act* (the "Act") should, to the extent possible, be interpreted and applied so as to preclude or limit such conduct. Predation is the genus, of which predatory pricing is but one species.

The Act deals with predatory conduct in two places, and in two different ways. Under the criminal law provisions there is a specific offence, section 50(1)(c), which is not specifically labelled "predatory pricing", but pricing "unreasonably low". We will have more to say about the significance of this labelling below. Second, again without using the label "predatory pricing", the civil law provisions dealing with abuse of dominance in section 79 can be used to deal with predatory conduct, whether predatory pricing or other predatory conduct.

Norcan is concerned that the proposed new Guidelines are focused only on predatory pricing on the criminal law side, and therefore, are under-inclusive. In most cases, they will not provide sufficient protection against predatory practices by dominant firms.

Both the present and the proposed Guidelines interpret the law so as to make it excessively difficult to establish and restrain predatory conduct, including pricing. Norcan recommends that, where possible, the legislation should be interpreted so as to allow the Bureau greater scope to identify and restrain predatory conduct

Norcan would note that in its recent submission to the Competition Policy Review Panel, the Bureau has recommended<sup>1</sup> that the Panel should support the recommendations of the 2002 House of Commons Industry Committee Report and the Organization for Economic Co-operation and Development (OECD) recommendations regarding amendments to the Act so that the criminal provisions on predatory pricing would be repealed, and this conduct would be treated as a reviewable practice. Norcan supports these recommendations. Nevertheless, until the Act is amended, there is still considerable improvement possible in these Guidelines.

Specifically, Norcan makes the following recommendations which it believes will enhance the effectiveness of the Bureau's enforcement policies:

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<sup>1</sup> Submission to the Competition Review Panel, January 11, 2008, at page ii of the Executive Summary, and page 3 of the text.

1. The concept of “predation” should not be limited to pricing, and the Guidelines should recognize all forms of predatory conduct, including non-price predation
2. In the narrow and specific subset of predation known as predatory pricing, the Guidelines should cover any pricing pattern (whether below, at or above costs, as the case may be) being used to discipline or eliminate competitors;

Both of these recommendations will be discussed in turn.

In practice, neither predatory pricing nor other forms of predatory conduct (with the exception of the airline industry) have been regularly submitted to the Tribunal under section 79. Prosecutions under the criminal provisions of the Act have also been extremely rare, for fear that they would be unsuccessful. In the majority of cases under section 50(1)(c), firms have either been acquitted,<sup>2</sup> or had claims dismissed where they were brought by civil litigants under section 36(1).<sup>3</sup> Norcan is aware of only two cases in which criminal sanctions have been imposed for predatory pricing.<sup>4</sup> Accordingly, in practice, this section of the law is virtually unenforceable and cries out for a different and more effective approach.

## 1. The Concept of Predation

Norcan’s first and greatest concern is with the limited concept of “predation” adopted by the proposed Guidelines.

A broader concept is justified by the fundamental purpose of the *Competition Act*, which is consumer protection through the preservation of markets. This purpose was emphasized by the Competition Tribunal (the “Tribunal”) in the recent case of *Canada (Commissioner of Competition) v. Air Canada*,<sup>5</sup> in which the Tribunal quoted from section 1.1 of the Act and highlighted the following words:

... The purpose of the Act is set out in section 1.1 of the Act as follows:

### 1.1 Purpose of Act

The purpose of this Act is to *maintain and encourage competition* in Canada in order to *promote the efficiency* and adaptability of the Canadian economy ... in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and *in order to provide consumers with competitive prices and product choices*.<sup>6</sup>

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<sup>2</sup> *R. v. Producers Dairy Ltd.* (1966), 50 C.P.R. (2d) 265 (Ont. H.C.J.); *R. v. Carnation Co.* (1969), 58 C.P.R. (2d) 112 (Alta. C.A.); *R. v. Consumers Glass Co.* (1981), 33 O.R. (2d) 288 (H.C.J.) [*Consumer’s Glass*].

<sup>3</sup> *Boehringer Ingelheim (Canada) Inc. v. Bristol-Meyers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 (Ont. Gen. Div.); *947101 Ontario Ltd. (Throop Drug Mart) v. Barrhaven Town Centre Inc.* (1995), 121 D.L.R. (4<sup>th</sup>) 748 (Ont. Gen. Div.); *Culhane v. ATP Aero Training Products Inc.* (2004), 238 D.L.R. (4<sup>th</sup>) 112 (F.C.), aff’d (2005) 252 D.L.R. (4<sup>th</sup>) 340 (F.C.A.); *Provincial Partitions Inc. v. Ashcor Inplant Structures Ltd.* (1993), 50 C.P.R. (3d) 497 (Ont. Gen. Div.).

<sup>4</sup> *R. v. Hoffman La Roche Ltd.* (1980), 28 O.R. (2d) 164 (H.C.J.), aff’d (1981) 33 O.R. (2d) 694 (C.A.); *R. v. Perreault*, [1996] R.J.Q. 2565 (C.S.).

<sup>5</sup> (2003), 26 C.P.R. (4<sup>th</sup>) 476 (Comp. Trib.) [*Air Canada*].

<sup>6</sup> *Ibid.* at para. 32.

As the Tribunal emphasized, the maintenance of healthy competition and the protection of consumers are paramount. The Act should therefore be interpreted and applied in the Guidelines so as to require the Bureau to seek to restrain any conduct by dominant firms that would reduce competition at the expense of consumers<sup>7</sup>. Norcan's recommendations are made with this fundamental purpose in mind.

The Guidelines define predation exclusively in terms of *pricing* policies by a dominant firm. While this would be appropriate, given the limitations of subsection 50(1)(c), which specifically refers to a "policy of selling products at prices unreasonably low", Norcan would note, again, that the Bureau has recommended to the Competition Policy Review Panel that the offence should be repealed, and that predatory conduct should be dealt with on the civil side, as a reviewable practice before the Tribunal. That can be done already. There is nothing in subsection 50(1)(c) which precludes the Bureau from treating section 79 as another tool, and dealing with it within this same set of Guidelines. Indeed, since the Bureau has obtained only two convictions for predatory pricing in over 30 years, perhaps the time has come to recognize that it is so difficult to prove the offence beyond a reasonable doubt that section 79 should be seen as the only really useful tool currently available to the Bureau.

Parliament has already legislated, and the Government of Canada has already created regulations intended to restrain non-price predation in the Canadian airline industry. Norcan agrees with the Bureau's submission to the Competition Policy Review Panel that it is inconsistent with general competition policy to single out a particular industry for inclusion in the Competition Act, which should be a law of general application regardless of industry.<sup>8</sup> Nevertheless, the precedent of the airline industry provides an appropriate model for a comprehensive definition of predation that could be applied generally, in the Competition Act.

In the Bureau's *Draft Enforcement Guidelines on Abuse of Dominance in the Airline Industry* (the "Airline Guidelines"), released in 2001, the Bureau recognized that predation may occur through non-price factors, such as an increase in capacity. While it is true that this conduct is specifically mentioned in Regulations related to the airline industry,<sup>9</sup> and that the Bureau's proposed approach was based on these regulations, it is suggested that this approach can be applied in principle to any industry, as it constitutes another manifestation of predatory conduct

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<sup>7</sup> Theoretically, this should exclude a natural monopoly situation, under which an increase in the number of competitors may actually be to the disadvantage of consumers.

<sup>8</sup> Submissions to Competition Review Panel, *supra* note 1, at page ii of the Executive Summary, and page 4 of the text.

<sup>9</sup> Section 78(1)(j) of the Act provides that an anti-competitive act can include acts specified by regulation in the context of the domestic service industry, as defined under the *Canada Transportation Act*, S.C. 1996, c.10. *Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service*, SOR/2000-324, s. 1, provides that the following constitute anti-competitive acts by a domestic service:

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

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

(c) using a low-cost second-brand carrier in a manner that is described in paragraph (a) or (b).

that harms competition and ultimately consumers. The Airline Guidelines describe non-price predation in the airline industry in the following terms:

For the airline industry, the regulations state that operating or increasing capacity on a route or routes, at fares that do not cover the avoidable costs of providing the service constitutes an anti-competitive act.

The pricing and capacity decisions of a dominant carrier will have an anti-competitive effect if they result in higher prices and reduced output due to the elimination or disciplining of a rival, or the exclusion of a potential rival. For example, a dominant firm may offer a large number of seats at low fares on a route on which it faces competition. As a result of this conduct, one or more of the airline's competitors may be driven from the market. Such conduct may also deter remaining airlines from engaging in aggressive fare competition, or deter other airlines from entering routes on which the incumbent airline operates. As another example, a dominant airline may increase capacity on a route in such a way as to attract passengers from a rival carrier, while not attracting a sufficient number of passengers to cover its avoidable costs.

...

The practice of operating capacity at fares that do not cover the avoidable cost of providing the service does not require that the fares charged by the dominant airline be lower than the fares set by the competitor in order to be considered anti-competitive. ... The Bureau does not consider that matching dollar price of a competitor for travel on a specific flight is the same as charging the same real price for the same quality and quantity.<sup>10</sup>

The underlying point is that price, capacity and quality are all interrelated aspects of a given product or service offered for sale. Price reduction is not the only means by which a dominant firm may make its products or services temporarily more desirable to consumers than a rival's products or services, and may do so for a predatory purpose. A dominant firm can predate by adjusting any of these components to make its product or service temporarily more desirable within the market, in a predatory manner rather than in a competitive manner, for the purpose of eliminating or disciplining a competitor. As the Bureau noted in the Airline Guidelines, a dominant firm may "match" the dollar price offered by a rival while in fact undercutting the rival in terms of the real price offered for quantity and quality.

In 2003, the Bureau applied to the Tribunal under section 79 to restrain precisely this form of non-price predation in the Canadian domestic airline industry.<sup>11</sup> The Tribunal considered whether increases in the operational capacity of Air Canada on certain domestic routes constituted an anti-competitive act designed to discipline or eliminate certain low-cost carriers that had entered the market to challenge what was previously a monopoly held by Air Canada. It concluded that Air Canada had increased its capacity on certain routes while failing to cover its own avoidable costs.<sup>12</sup> Although the case was adjourned prior to a final decision, and was limited to a determination that Air Canada was not covering its avoidable costs, the Tribunal's analysis approached non-price predation in a way that should be applied to predatory conduct generally, regardless of industry.

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<sup>10</sup> Airline Guidelines, at 11-12.

<sup>11</sup> *Air Canada*, *supra* note 5.

<sup>12</sup> *Ibid.* at paras. 338-339.

As the experience of City Express, driven out of business by the dumping of excess capacity on its routes by Air Canada, well illustrates, non-price predation is potentially just as damaging to competition as price predation. The legislative and administrative components of the competition regime will not be able to perform their function fully unless they have the tools to capture all forms of predatory conduct by dominant firms. It is also appropriate to recommend increasing the scope for private parties to bring predation to the attention of the Tribunal or the Court.

Section 78(1)(a) recognizes that a vertically integrated firm may commit an anti-competitive act by "squeezing" the margin available to an un-integrated customer, for the purpose of preventing the customer's entry into, or expansion in, a market. This form of anti-competitive conduct is well-recognized when it takes the form of a vertically-integrated firm charging artificially high prices at the supply level to an un-integrated customer so as to squeeze that customer's margins at the retail level. However, vertically-integrated firms may also predate by selling products to their own retailers at an artificially low price, so as to allow the retailer to undercut un-integrated competitors without pricing below costs.

This issue may arise where a supplier has a near-monopoly over local supply, forcing un-integrated retailers either to purchase from the dominant supplier or look to import from other national or international markets. A rational, profit-maximizing supplier holding strong market power in local supply would be expected to price at or just below the cost of importing the goods (factoring in transportation costs, import duties, etc.). Such a price would represent the dominant firm's opportunity cost, as it is the maximum price chargeable by the firm that would still allow it to out-compete its international rivals. A vertically-integrated firm, however, may predate by supplying products to its own retailers at a price below its own opportunity cost, so as to increase the margins of its own retailers. This, in turn, would allow its retailers to keep prices low without necessarily pricing below their own cost. At the same time, the dominant firm could refuse to supply rival retail firms in the market. An un-integrated rival would thus be forced to purchase its supplies from international suppliers at a higher price, thus increasing its own costs. It would therefore be forced to sell its products at a very low margin or be driven out of business.

This is, in effect, a form of cross-market subsidization, wherein a dominant firm uses its competitive advantage in one market to subsidize affiliates in other markets. In this scenario, the upstream firm subsidizes the downstream firm by foregoing the profit it would normally make in supplying its downstream affiliates, so as to permit them to lower their costs and thereby undercut competitors in the downstream market.

This form of predation is not clearly caught by any of the specific provisions in section 78(1) or 50(1)(c). It would not be caught by section 78(1)(a), which deals with squeezing by a vertically-integrated supplier, because the rival firm is not a customer of the supplier. It would not likely be caught by section 78(1)(e), which provides that it is anti-competitive to pre-empt scarce resources, as these resources are still available to retailers in the market at a higher cost. It would also not likely constitute an offence under section 78(1)(h), which deals with requiring or inducing a supplier to sell only to certain customers, as this section appears to capture only the situation in which one firm requires or induces *another* supplier not to sell to a particular customer.

Arguably this conduct could be caught by the literal meaning of the words in subsection 50(1)(c), because the language refers to a policy of "selling products at prices unreasonably low, having

the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect.” However, 50(1)(c) requires that the predator be a “competitor” with the firm that it seeks to eliminate or discipline. Thus, they must compete within the same relevant market. This makes it difficult to restrain the kind of predation described above, as the predator could arguably occupies a different market (the wholesale, or supply market) while the victim of the conduct occupies the retail or distribution market. As they may not be “competitors” within the meaning of section 50(1)(c), the cross-market subsidization form of predatory conduct is likely to escapes sanction under 50(1)(c).

Although this form of predation does not fit neatly within the established Canadian criminal law of predatory pricing, it does represent a form of anti-competitive conduct undertaken with the intention of creating, increasing or entrenching market power. It has no rational business justification other than to discipline or eliminate an un-integrated rival. As in the U.S., it is open to the Bureau to recognize this as a form of predation and seek sanctions or restraint where appropriate, under section 79.

Norcan recommends to the Bureau that it make greater use, in the proposed new Guidelines of the civil remedies, through section 79. The provisions in section 79 are broad enough to cover any form of predation that may occur, and can be enforced more effectively due to the lower standard of proof that applies.

It may be true that the list of anti-competitive acts in section 78, as interpreted by the Courts and the Competition Tribunal,<sup>13</sup> may not contain a specific, broad prohibition against predatory pricing or other predatory conduct. However, it must be remembered that the section 78 list is *non-exhaustive*. This is made explicit in section 78(1), which states that the list does not restrict the generality of the term “anti-competitive act,” and has been affirmed by the Courts.<sup>14</sup> Both the Tribunal and the Bureau have noted that that the common features of the enumerated examples of anti-competitive acts in section 78 are that they are all predatory, exclusionary or disciplinary.<sup>15</sup> Predatory pricing clearly falls within this broad categorization, as does non-price predation and predation that relies on advantages particular to vertically-integrated firms. Indeed, the Tribunal has explicitly stated – and the Bureau has acknowledged – that the term “anti-competitive act” in section 78 is broad enough to include forms of predation that are not explicitly mentioned in section 78.<sup>16</sup> Norcan suggests therefore that section 79 be used more often when the Bureau suspects that predation – in whatever form – is occurring within a market, but also that section 78 be amended to include an explicit mention of predatory conduct.

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<sup>13</sup> *Canada (Director of Investigation & Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) [*NutraSweet*], for example, considered the meaning of section 78(1)(i): “selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.” It held however that this refers only to articles purchased for resale, and does not cover articles manufactured for sale: para. 122.

<sup>14</sup> *Ibid.* at para. 90.

<sup>15</sup> *Ibid.* at para. 90; Competition Bureau, *Enforcement Guidelines on the Abuse of Dominance Provisions* (released July 2001) [AOD Guidelines] at 23.

<sup>16</sup> *NutraSweet*, *supra* note 13 at para. 124; see AOD Guidelines, *ibid.* at 23.

## 2. Predatory Pricing Means Selling at a Price That is “Unreasonably Low”

The Guidelines set out the Bureau’s interpretation of predatory pricing:

The Bureau considers predatory pricing to be a firm deliberately setting prices to incur losses for a sufficiently long period of time to eliminate a competitor, or otherwise inhibit competition in the expectation that the firm will subsequently be able to recoup its losses by charging prices above competitive levels or achieving another anti-competitive objective.<sup>17</sup>

The Bureau’s interpretation appears to be that only *below-cost* pricing by a dominant firm can constitute predation. It has incorporated into its definition of “predatory pricing” the element of incurring losses – that is, the firm must be pricing below its costs in order to achieve its anti-competitive objective. By implication, the Guidelines suggest that pricing above some appropriate measure of costs is *per se* legal.<sup>18</sup> Accordingly, the Bureau will not pursue any investigation of possible predatory pricing once it has determined that the firm in question is likely to be pricing above its own avoidable costs.

Norcan has two concerns about this. First, it ignores above-cost predation which can occur in a market and which would harm competition to the detriment of consumers. Second, the whole process of cost estimation involves making a number of assumptions, engaging in complex, protracted methodological debates and a high level of variability. This makes it very difficult to draw any bright line between above-cost and below-cost pricing.

Aaron S. Edlin, Professor of Economics and Law at the University of California, has identified five different marketplace scenarios in which predatory pricing can occur.<sup>19</sup> The form will vary with the circumstances. The five scenarios are as follows:

1. *Limit pricing (aggressive)*. In this scenario, a low-cost monopoly<sup>20</sup> prices low in order to limit entry. High-cost rivals will decide not to enter and low-cost rivals will enter.<sup>21</sup>
2. *Wal-Mart (aggressive)*. A national chain like Wal-Mart opens a store in a new locality and charges prices much lower than those that previously prevailed. These prices drive the pre-existing stores out of business.<sup>22</sup>
3. *Low-Cost Monopoly, or Monopoly with Other Advantages (defensive)*. A monopoly charges high prices. Another firm, despite having higher costs or other disadvantages such as a less desirable product, nonetheless can earn substantial profits by undercutting

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<sup>17</sup> Competition Bureau, *Draft Predatory Pricing Enforcement Guidelines* (released Oct 9, 2007) [Guidelines] at ii.

<sup>18</sup> *Ibid.* at 4.

<sup>19</sup> Aaron S. Edlin, “Stopping Above-Cost Predatory Pricing” (2002) 111 Yale L.J. 941.

<sup>20</sup> Professor Edlin uses the word “monopoly”, perhaps somewhat inappropriately, as true monopolies are rare. He should be interpreted as meaning “a high degree of market power”, which will in most cases fall short of a complete monopoly.

<sup>21</sup> *Ibid.* at 960.

<sup>22</sup> *Ibid.*

these high prices, so it enters the market. After entry, the incumbent cuts prices below its rival's cost and drives the rival out of the market.<sup>23</sup>

4. *Same-Cost Monopoly without Advantage.* A monopoly faces a challenge from an entrant that can produce a comparable product at similar or lower cost. The monopoly attempts to drive it from the market with below-cost prices. The entrant reduces its production to limit losses, while the incumbent must produce high quantities to keep prices low, and so suffers large losses. Eventually, either the rival exits or the incumbent relents and accommodates the entrant by reducing output and letting price rise above cost.<sup>24</sup>
5. *Oligopoly Discipline (defensive).* Prices are relatively high and all firms are comfortable. One gets greedy and tries to capture more of the market with low prices or some innovation. Another firm, or the rest of the firms in concert, cuts prices in an effort to discipline its rival.<sup>25</sup>

Below-cost predatory pricing is a response to Scenario 4, in which the dominant firm's costs are *greater than or equal to* the costs of the new entrant. In such a marketplace, the dominant firm can only undercut its competitor by pricing below its own costs, as the competitor can sustain itself in the face of at-cost or above-cost pricing by the dominant firm. Most of the attention given to predatory pricing is – at least implicitly – focused on this scenario.

However, as Edlin points out, a definition of predatory pricing that encompasses only Scenario 4 (or *below-cost* predatory pricing) overlooks the forms of predatory pricing that occur in response to the other scenarios, and in particular Scenario 3. Scenario 3 addresses what can happen where a dominant firm enjoys *lower* costs than its rivals. A dominant firm with a high level of market power and with lower costs can engage in predatory pricing by lowering its prices below those of its rivals, but above its own costs. Once the rival has been driven from the market, the dominant firm can raise prices to supra-competitive levels to recoup its losses. Importantly, the prospect of such predatory pricing also deters new entry, thus allowing the dominant firm to maintain high prices.<sup>26</sup> This results in loss of welfare to consumers, as rivals are prevented from disciplining the dominant firm.

Scenario 3 – which deals with above-cost predatory pricing – is important because it reflects a market situation that is at least as common as Scenario 4. Dominant firms will frequently hold cost and other advantages over smaller rivals and new entrants. This may include cost advantages that result from greater production experience, better access to supplies, economies of scale, and the like.<sup>27</sup> The dominant firm will have already incurred its sunk costs. The

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<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.* at 960-61.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.* at 963. Edlin writes, "... a firm rarely achieves monopoly without one or more advantages. Any such firm probably has gone down the cost learning curve and produces more efficiently than a newcomer. The industry may enjoy increasing returns to scale or scope. The firm may simply have a first mover advantage and be able to hide behind entry barriers from start-up costs."

dominant firm may also enjoy demand side advantages, such as brand loyalty and demand-side network externalities.<sup>28</sup>

Where a dominant firm enjoys such cost advantages, it can undercut new rivals while still pricing above its own marginal or avoidable costs. Thus, a dominant firm can maintain supra-competitive prices because its ability to undercut indefinitely will cause potential entrants to decline to risk the sunk costs associated with entry. They are deterred by the knowledge that the dominant firm can always undercut their prices, to any level it wishes, without fear of restraint from competition law. Thus, consumers pay higher prices than would be enjoyed if the rival were able to establish itself and thereby constrain prices in the market.

Norcan believes that the Bureau's enforcement policies, and therefore the Guidelines, should explicitly recognize the existence of above-cost predation by dominant firms. Where a dominant firm has clearly chosen to forfeit a reasonable profit or rate of return – with no reasonable business justification other than to drive out a competitor – it should be the practice of the Bureau to refer such a case to the Competition Tribunal.

This conclusion is buttressed by the fact that both Courts and the Tribunal have noted the difficulties associated with determining what precisely is meant by “avoidable costs” in any given situation.<sup>29</sup> “Costs”, to say the least, is a moving target – a concept that can be manipulated by the parties involved, and about which two equally reasonable economists may disagree in any particular case. Thus, a Court and the Tribunal should not become overly concerned with determining as a threshold issue whether a particular pricing strategy is above or below some highly debatable estimate of costs. The emphasis should simply be on whether the company has foregone a reasonable rate of return or profit with no business justification.

Nothing in either the criminal provision in subsection 50(1)(c) or the abuse of dominance provisions in subsection 79 (1) preclude a finding of above-cost predatory pricing. Subsection 50(1)(c) refers only to a policy of selling products at prices “unreasonably low”. It is not limited to a below-cost fact situation. While one Canadian Court has suggested, on the facts of a particular case, that above-cost pricing is reasonable,<sup>30</sup> Norcan believes that the Court should be given the opportunity to revisit the issue in light of the different facts of another case, as well as the new economic theories that have developed in the 25 years since this decision.

Likewise, a finding that above-cost predatory pricing constitutes an anti-competitive act is entirely consistent with the abuse of dominance provisions in section 79(1). While certain of the examples of “anti-competitive” acts in section 78(1) appear to be limited to below-cost pricing in certain circumstances, these examples are not exhaustive but merely illustrative. As stated by the Bureau, the essential feature common to the anti-competitive acts in these sections is that they involve conduct engaged in for the purpose of maintaining, entrenching or enhancing market power.<sup>31</sup> This definition is just as amenable to above-cost predation as to below-cost predation.

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<sup>28</sup> *Ibid.*

<sup>29</sup> See for example the difficulties faced by the Competition Tribunal in *Air Canada*, *supra* note 1, in determining the appropriate measure of Air Canada's avoidable costs on various routes throughout Canada.

<sup>30</sup> *Consumers Glass*, *supra* note 2..

<sup>31</sup> AOD Guidelines, *supra* note 15 at 1.

#### **4. Conclusion**

Predatory conduct is a single, comprehensive idea, even though the conduct may manifest itself in different ways. Predatory conduct should, therefore, be dealt with in a unified, comprehensive Guideline that incorporates both the criminal and the civil law processes currently found in the Act. (If and when the Act is amended to de-criminalize the subset of predatory conduct that is predatory pricing, the need for further amendment to the Guidelines can be addressed at that time.)

All of the often subtle and ingenious forms of predation constitute a drain on the economic health of the markets in which they occur, which in turn ultimately limits consumer choices and raises consumer prices. Consistent with the stated purpose of the Act, Norcan believes that the Bureau's Guidelines should seek to restrain any and all forms of predatory conduct, so as to help ensure that markets are not undermined by predation.

Norcan recommends that the test for predation should encompass all of the forms of predation outlined above. It suggests that where a firm has through any means clearly foregone a reasonable rate of return or profit on a product for which no business justification can be determined other than to eliminate or discipline a competitor, it should be open to the Bureau to treat this conduct as predatory and to refer the matter to the Competition Tribunal so that the conduct can be evaluated and, if necessary, restrained or sanctioned.