Author - Industry Canada - Competition Bureau
Publication Date - 1999-11-30

REPORT ON THE SASKATCHEWAN GASOLINE INDUSTRY

I. Background on the *Competition Act* and the Competition Bureau

The *Competition Act* is a federal statute whose purpose is to maintain and encourage competition in Canada by prohibiting certain types of conduct which interfere with the competitive process and may substantially or unduly prevent or lessen competition.

The Competition Bureau (the "Bureau") has responsibility for the administration and enforcement of the Act. While the Act defines a number of practices which are either prohibited as criminal offences or are subject to a civil law review by the Competition Tribunal, the Act does not provide the Bureau with any regulatory authority to decide the law, control prices, or compel entities to adopt any particular type of conduct or policy. The Bureau's role is to examine such practices and, where appropriate, refer them to the Attorney General for prosecution for matters involving the criminal provisions of the Act, or make an application to the Competition Tribunal under the civil provisions for a remedial order

The Act does not provide the Bureau with the power to regulate prices. In fact, the federal government does not have the constitutional power to enact legislation to regulate the retail price of gasoline except in a national emergency. The constitutional power to regulate retail gasoline prices rests with the provincial governments. Only Prince Edward Island and Quebec have elected to do so in some manner, although Newfoundland has announced plans to consider legislation that would regulate gasoline prices. Other provinces have chosen to rely on market forces as the most effective means to determine an appropriate price while maintaining incentives to innovate and reduce costs.

When an application has been filed with the Tribunal, the burden of proof is on the Commissioner to satisfy the Tribunal that all of the elements of the relevant civil section of the Act are met and that an order of the Tribunal should be granted. Likewise, with respect to the criminal provisions the burden of proof is on the Attorney General on behalf of the Crown to establish the offence to the satisfaction of the courts. In other words, the Bureau cannot directly compel changes in business behaviour. In order to do so, it must take on the role of a litigant before the Tribunal. Alternatively, the Attorney General assumes this role before the criminal courts and must produce evidence and prove a breach of the Act.

II. Complaint

Specifically, the complaint submitted in the fall of 1998 asked for an investigation to determine "whether the basis exists for charges under sections 45 (conspiracy), 50 (illegal trade practices), or 61 (price maintenance) against the major integrated refiner-marketing gasoline firms in Canada, in light of the dramatic increase in concentration in Saskatchewan gasoline retailing over the last 5-6 years." It was also alleged that "vertically-integrated refiner- marketing gasoline firms are abusing their market dominance," a practice covered under section 79 of the Act.

III. General Comments

At the outset, four general comments can be made with respect to the gasoline industry in Saskatchewan.

First, the Saskatchewan gasoline market is subject to many of the same market forces as in the rest of Canada.

Second, the concerns appear in part to be predicated on a view of the market as being compartmentalized between firms which are vertically integrated and those which are not. Our examination of the supply and the distribution of gasoline in Saskatchewan indicates that there are a variety of players actively participating in these markets. These players include three national refiner-marketers (Imperial Oil, Petro-Canada, Shell), three regional refiner-marketers (Federated Coop, Husky Oil, Parkland Industries Ltd.), and nine non-integrated or "independent" marketers (Regina Cabs, Superstores- Loblaws, Domo Gasoline Corp.,Canadian Tire, 7-Eleven, Price Right, Alimentation Couche-Tard, United Farmers of Alberta, Tempo (supplied by local coops)), and two wholesalers (Harvest Fuels, Northridge Petroleum Marketing). The non-integrated marketers range from large mass merchandisers to smaller chains or single outlet operators. The attachment to this report outlines the market share of the various groups of participants in the Saskatchewan market.

Third, both the integrated and non-integrated marketers are pursuing a variety of strategies to compete. Coupons, discounts, and various forms of cross merchandising such as convenience stores and car washes are all in evidence.

Fourth, no single firm has a market share greater than 27%.

IV. Specific Allegations and Findings

The following section will report on the Bureau's findings with respect to each of the allegations contained in the complaint.

Allegation #1

For the last eight months (calculated backward from October 1998), the retail pump price of gasoline in Saskatchewan has been significantly higher than all jurisdictions with similar tax regimes.

The Bureau has collected retail regular grade gasoline pricing data on a province-by-province basis. In order to provide a proper comparison, we have excluded provincial and federal taxes because they vary from province to province. The prices net of tax removes the distortion caused by varying tax regimes and reflect the true cost of gasoline. The average ex-tax prices (in cents per litre) during the 1995-1998 period are provided below.

Retail Gasoline Prices (net of tax) in cents per litre by Province by Year (Table 1)

Year	1995	1996	1997	1998
Newfoundland	34.89	32.97	35.13	31.46
PEI	34.71	34.27	34.91	28.46
Nova Scotia	29.44	29.45	32.24	28.17
New Brunswick	32.98	31.66	34.12	28.66
Quebec	25.43	28.76	30.04	25.13
Ontario	25.62	28.73	28.87	24.71
Manitoba	30.45	32.18	32.55	28.78
Sask	29.09	30.64	31.33	27.25
Alberta	27.07	28.54	30.56	26.18
BC	34.67	35.39	35.1	27.26

Note: These figures do not include municipal taxes for BC and Quebec respectively and do not take into account any coupons or discounts.

Source: Statistics Canada

This data shows that:

- generally speaking, prices in Saskatchewan have been the fourth lowest of any provinces in Canada (Only Alberta, Quebec, and Ontario have had consistently lower prices, Nova Scotia in 1996 also had lower prices),

- when compared to certain designated provinces (Nova Scotia, British Columbia, Manitoba, Ontario), Saskatchewan has generally had the lowest prices (except for Ontario and Nova Scotia in 1996);

With regard to the eight month period preceding the October 1998 complaint, the following table outlines the pricing data for this period.

Retail Gasoline Prices (net of tax) in cents per litre per Month by Province for 1998 (Table 2)

Date	Nfld	P.E.I.	N. S.	N.B	Que.	Ont.	Man.	Sask.	Alta.	B.C.
Jan.	34.11	34.38	31.28	32.52	28.59	24.46	29.15	27.9	26.79	30.31
Feb.	33.67	34.1	30.24	31.21	27.19	25.11	26.72	26.96	25.67	29.09
Mar.	31.93	31.21	29.02	29.39	23.77	24.46	28.13	26.31	25.21	27.69
Apr.	31.07	30.74	27.72	26.26	25.52	24.09	27.47	25.56	27.36	29
May	31.07	27.19	27.63	28.26	26.49	25.21	29.25	28.46	27.17	31.06
Jun.	31.07	26.91	27.72	28.08	25.43	26.14	29.25	28.46	27.92	30.03
Jul.	31.07	27.09	27.54	27.73	25.52	24.18	29.25	28.46	26.42	29.75
Aug.	31.07	26.81	27.72	26.6	23.85	24.46	29.25	25.93	26.23	25.26
Sept.	31.07	25.41	27.8	26.52	23.77	24.83	29.34	25.09	25.95	22.27
Oct.	30.89	25.13	27.8	29.47	25	26.14	29.34	28.27	25.39	25.45
Nov.	31.07	26.25	27.72	29.73	24.73	25.3	29.43	28.36	25.67	23.39
Dec.	29.41	26.25	25.8	28.17	21.75	22.12	28.78	27.24	24.36	23.86

Source: Statistics Canada

The data in Table 2 for the eight months (February to October) reveals the following:

- in comparison with all provinces, Saskatchewan had either the third, fourth (March - April; August -September) or seventh lowest average price level (May - July; October);
- immediately following the July purchase of Mohawk Oil ("Mohawk") by Husky Oil ("Husky"), Saskatchewan prices fell from seventh lowest to fourth lowest;
- with respect to Nova Scotia, British Columbia, Manitoba, and Ontario, Saskatchewan ranked lower than Nova Scotia for four months, lower than Manitoba for all eight months, lower than B.C. for five months, but higher than Ontario for the eight month period;

Thus in respect of this allegation, Saskatchewan has generally enjoyed lower prices than most provinces. With respect to the selected provinces, it has also recorded better results. Only Ontario and Quebec have had consistently lower prices than Saskatchewan over the period

Allegation # 2

Pump prices have been hiked an additional 4 cents in Regina, perhaps coincidentally, just after the sale of western Canada's largest independent retailer, Mohawk Oil to regional refiner-marketer Husky Oil.

Concerns were expressed about the pricing impact of the above merger, which closed on July 6, 1998, after being reviewed by the Bureau.[1]

The data contained in the Table 1 indicates that retail gas prices in Saskatchewan fell from 31.33 cents per litre (cpl) in 1997 to 27.25 cpl in 1998. In fact, prices were even lower in 1998 than in 1995 In response to the allegation, we have reviewed pricing data for Regina. For comparison, we have also examined Saskatoon prices. Average prices of regular grade gasoline in cents per litre (cpl) for the seven-month period are as follows:

Table 3

Regina		Saskatoon	
Month 1998	Prices ex tax	Month 1998	Prices ex tax
June	28.2	June	28.1
July	27.9	July	28.3
Aug	25.7	Aug	28.1
Sept.	25.3	Sept.	28.1
Oct.	28.2	Oct.	27.5
Nov.	28.2	Nov.	27.2
Dec.	26.9	Dec.	26.8

Source: MJ Ervin & Associates

The table above shows that in the months immediately following the July 1998 merger, average retail gas prices consistently fell in Saskatoon. In Regina, the same table shows that prices have declined in every month after the merger except October 1998 and November 1998 when prices were equal to those in June 1998. The decline returned in December 1998 with prices dropping below the level in June 1998.

Accordingly, the above data do not support the allegation that this merger has led to higher gasoline prices in Regina.

Allegation # 3

Independents' market share has fallen from 20.6% in 1992 to 8.1% in 1998, leaving the refiner-marketers with 91.9% of the market.

Upon reviewing independent market share data obtained from industry sources for the various types of oil companies in Saskatchewan between 1992 and 1998, it was confirmed that the market share of independents had fallen during that period. It was observed that the market shares of the independents had declined from 20.2% to 15.9% between 1992 and 1998 (3rd Quarter) and then to 8.9% by the end of 1998. In 1997 an independent, Supersave, was acquired by a regional refiner-marketer, Parkland Industries. However, it was also determined that this latter decline is primarily attributable to the previously mentioned 1998 merger of a large independent gasoline retailer, Mohawk, by Husky, a regional refiner- marketer. Therefore, while the market share of independents has declined over this period, much of this market share has been picked up by regional refiner-marketers who increased their market share from 17.4% to 29.1%. Over the 1992 to 1998 period, the market share of the national refiner-marketers (including their private brands) decreased in Saskatchewan from 63.0% to 61.9%.

The review of similar data for Regina outlined in Table 4 shows that between 1988 and 1997, independents have actually increased their market share from 10.9% to 12.4%. The subsequent market share decline in the third quarter of 1998 to 6.9% was again due primarily to the Husky/Mohawk merger which reversed the trend.

Market Share Data for Regina (Table 4)

	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	Oct. 1998
National Refiner- Marketers *	59.3	56.4	56.9	57.2	54.2	58.6	72.4	72.2	72.8	73.1	73.2
Regional Refiner- Marketers *	29.8	29.9	28.7	25.6	31	26.1	12.6	12.4	12.2	14.4	14.8
All Refiner- Marketers	89.1	86.3	85.6	82.8	85.2	84.7	85	84.6	85	87.5	88
Independents	10.9	13.7	14.4	17.3	14.7	15.3	14.9	15.4	15	12.4	11.9 **

- Includes private brands
- *Includes the market share of Mohawk. Actual market share would be 6.9%

Source: Kent Marketing Services Limited

Nevertheless when this situation is viewed in combination with the findings in Allegation # 2, it is evident that the decline in market share of the independents has not led to higher prices in Saskatchewan.

Furthermore, the merger of Husky and Mohawk has not led to an increase in prices Finally, the decline in the independents' market share did not result in an increase in the market share of the national refiner-marketers, but rather in an increase in the market share of Western Canadian-based regional refiner-marketers.

Allegation # 4

Independents are being charged higher prices by integrated firms than the price integrated firms are cha at the retail level.

During our investigation, there were no complaints made to the Bureau from independent gasoline retailers about this situation occurring in Saskatchewan and there was no evidence uncovered to support this allegation. Retail gasoline prices being lower than wholesale prices (which is sometimes called price inversion) can sometimes occur when there is a price war in local retail gasoline markets

This price inversion is addressed in more detail later in this report under the section dealing with the criminal predatory pricing provisions of the Act (ie. Section V (c)). In summary, during the period under review, none of the Saskatchewan independent gasoline retailers contacted complained of being a victim of predatory pricing, nor did the Bureau receive complaints to that effect.

Allegation # 5

Once independents are removed, prices at the retail level rise in that market.

In order to address this issue, the Bureau undertook an econometric analysis which studied the relationship between market concentration and retail price levels. It also analysed the relations between variations in crude oil prices and the wholesale price. The resulting study[2] discusses the impact of independents on prices in terms of their effect on the level of concentration that exists in a market. In this regard, the presence of independents does tend to lower the level of concentration, which in turn may lead to lower retail prices.

It is not possible to conclude that the removal of independents from the market will automatically result in a price increase at the retail level. This conclusion is supported by the findings regarding the Husky-Mohawk merger summarized in Allegation # 2 which shows that prices did not rise in Saskatchewan following the merger. In this particular instance, prices actually declined immediately afterward.

Allegation # 6

Integrated firms control the supply of gasoline to independents and are engaged in price maintenance, i.e. " running out of product" before scheduled deliveries to the independents if their retail price is too low.

This allegation, if substantiated by evidence, could represent an offence under section 61(1)(b) of the *Competition Act*, the price maintenance provisions However, despite significant efforts, we were not able to substantiate this allegation. The persons who allegedly made these statements would not confirm them and without such confirmation, we cannot inquire further into this matter Our efforts to substantiate the allegations of price maintenance are discussed later in this report (ie Section V (d))

Allegation # 7

National ("major") refiner-marketers overwhelmingly control the supply of gasoline to independent gasoline retailers.

The concept of market "control" is a key element of, and has a very specific meaning under, the abuse of dominant provisions of section 79 of the Act. As previously indicated, no single firm accounts for greater than 27% of retail gasoline sales in Saskatchewan. The complaint referred to the joint control threshold of 65%. This market share level was set out in the Bureau's *Merger Enforcement Guidelines* as indicative of proposed mergers which should be investigated further to determine whether or not they pose a significant competition issue. This is a guideline and is not determinative without additional analysis. In Saskatchewan, the joint market share of the national refiner-marketers is 62% which is close enough to the threshold to prompt fur examination.

Market share is not the sole criterion for establishing control. The Competition Tribunal has clearly defined control as market power in the case law.[3] Market power is the ability to unilaterally raise prices above competitive levels for a considerable period of time. To prove that a joint abuse of dominance has or is underway in the market, it is necessary to establish that there is co-ordinated activity between the group members to afford them this joint market power. During its investigation of the Saskatchewan gasoline industry, the Bureau found no evidence of this co-ordination between the refiner-marketers. The allegation of abuse of market dominance is discussed in greater detail in Section VI of this report.

Allegation # 8

IRGMA data make it reasonable to conclude that the long term viability of independents in a market is essential to the long term stability of lower retail prices.

While it would appear reasonable that independents would have a stabilizing effect on retail prices, the economic analysis conducted by the Bureau indicates that the presence of independents does tend to lower the level of concentration which, in turn, may lead to lower retail prices.

In the past, independents did provide a low-cost alternative to integrated marketers. Over a period of several years, however, the integrated marketers have responded to this competition and rationalized their operations. A 1999 independent study commissioned by the Bureau found that in twelve major cities between 1988 and 1997, there was a reduction of 944 stations owned by "integrated companies" and a net increase of sixty-one stations owned by "independents." The same study states that "average throughput, an important indicator of productivity at the retail level, shows that the integrated companies have for the most part outperformed [the independents] over the decade under review."[4]

Furthermore, despite a decline in the market share of independents in Saskatchewan, it is not possible to conclude that this will automatically result in a price increase at the retail level Rather prices fell in the period immediately following the merger. Therefore, this conclusion is not supported by our findings in the Saskatchewan gasoline industry.

V. Analysis Under the Criminal Provisions of the Act

a) Conspiracy - Section 45

Section 45, the conspiracy provision of the Act, makes it an offence for anyone to agree or arrange with another person to prevent, or lessen unduly, competition in the sale or supply of a product. Such agreements or arrangements could include, for example, price fixing or market allocation schemes (dividing markets or customers among competitors). Proof by direct or inferential evidence of an agreement or arrangement among competitors is an essential element to establish an offence under this section. In addition, the Crown is required to prove, beyond a reasonable doubt, that the agreement or arrangement would unduly lessen competition. Penalties under this section include a fine of up to $10 million and imprisonment for up to five years, or both.

The existence of similar or identical prices or the fact that competitors match each other's price movements, are not sufficient, by themselves, to establish the existence of an agreement. In gasoline retail markets, the visibility of posted prices and consumer perception that different brands of gasoline are essentially the same product produce similar or identical prices without an agreement. Gasoline retailers cannot sell at higher prices than nearby competitors without quickly losing significant business, thus there is a tendency for prices to be identical or similar in gasoline markets. Some further indication of an agreement among gasoline suppliers to fix prices or allocate markets (or customers) is needed before the Commissioner would have reason to believe that an offence had occurred under the conspiracy provision and enable the Commissioner to commence an inquiry under the Act.

The Bureau's examination disclosed that there was a general reluctance among gasoline retailers in local markets in Saskatchewan to use price cutting as a means to compete. Most of the gasoline retailers interviewed preferred to use rebates, coupons, and loyalty programs as the primary means of competition. Such programs are less likely than price cutting to lead to price wars, during the course of which prices can approach or even go below costs. Nevertheless, the use of rebates, coupons, and loyalty programs represents a form of price discounting, and some independent and branded dealers of refiner-marketers in cities like Regina and Saskatoon do, on occasion, offer prices slightly below the market price.

One of the allegations was that Saskatchewan had "the highest average retail prices," even allowing for different provincial tax regimes. However, according to the data in Table 1, Saskatchewan retail gasoline prices on an ex-tax basis were among the lowest in the country from 1995 to 1998, with only Ontario, Quebec, and Alberta having consistently lower prices.

Another complaint that we received from independent gasoline suppliers, and that we considered in our examination, was that the refiners' wholesale prices (referred to as "rack" prices) were similar or identical most of the time. The wholesale gasoline market operates essentially like a commodity market, with customers switching suppliers over small price differences. Wholesale suppliers often match each others' posted rack prices so as not to lose customers. However, the examination disclosed that independent gasoline retailers receive a discount off the posted wholesale prices, even when they do not meet the minimum published purchase requirements and receive additional discounts for significant volume purchases, with the effect that greater wholesale price differences exist between suppliers than are suggested by posted wholesale prices. Such price discounting is not consistent with the existence of a price fixing agreement.

In addition, an analysis of the relationship of crude oil prices to wholesale gasoline prices in Regina found that a 1 cent per litre change in crude oil prices resulted in a 1 cent per litre change in wholesale gasoline prices within a two month period. The fact that, whatever the initial reaction of gasoline wholesalers to a crude oil price increase, wholesale gasoline price increases are restricted to the level of actual cost increases within sixty days also suggests that the wholesale gasoline market is responsive to crude oil prices.

In sum, there is no evidence that would lead the Bureau to conclude that an agreement or arrangement existed among gasoline suppliers to prevent or lessen competition unduly in the Saskatchewan gasoline markets. Over the past few years, Saskatchewan has consistently had some of the lowest retail gasoline prices in Canada, on an ex-tax basis. In light of evidence of price discounting off of wholesale prices, low retail gasoline prices, ex-tax, and competition for retail customers in the form of rebates, coupons, and loyalty programs, it cannot be concluded that retail gasoline prices are established as the result of a conspiracy in Saskatchewan. It is our conclusion that retail gasoline prices in Saskatchewan are determined by local supply and demand conditions.

b) Price Discrimination - Section 50 (1)(a)

Section 50(1)(a) of the Act prohibits a supplier of an article from engaging in a practice of discriminating between competing purchasers who buy an article in similar quantities and of similar qualities. The Bureau's examination found that at the wholesale level, price discounts could vary among purchasers, but were commonly based on annual volumes purchased. Section 50(1)(a) does not prohibit volume discounts as they can play a significant role in encouraging price competition. Thus, the Bureau's investigation found no violation.

c) Predatory Pricing - Section 50(1)(b) and 50(1)(c)

Section 50(1)(b) of the Act, which concerns regional predatory pricing, prohibits businesses from engaging in the policy of selling products in any area of Canada at prices lower than those charged elsewhere in Canada, if the sale's effect, tendency or design is to substantially lessen competition or eliminate a competitor. This provision of the Act is similar to the more general predatory pricing provisions of the Act, in which a key concern for the Bureau is whether the conduct resulted, or would be likely to result, in a substantial lessening of competition. The general predatory pricing provision, section 50(1)(c), prohibits businesses from engaging in a policy of selling products at prices unreasonably low, if the sale has the effect or tendency of substantially lessening competition or eliminating a competitor, or is designed to have that effect

We have not received any complaints from gasoline retailers in Saskatchewan alleging predatory pricing or price inversion (which is a situation when wholesale prices are greater than retail prices). Nonetheless, as part of our examination of this issue, we obtained and reviewed historical data for the Regina gasoline market which showed that retail gasoline prices approached or went below cost in Regina from December 1996 to March 1997. In more recent years, retail margins have firmed. All the retailers interviewed in Saskatchewan confirmed that there had been few price wars in the last few years.

The low gasoline prices in the period from December 1996 to March 1997 were sporadic reactions to market circumstances by different competitors in the market and could not be characterized as indicating a "policy" of unreasonably low prices on any single competitor's part. To constitute a contravention of section 50(1)(c) of the Act a firm's pricing, even if it might be described as being unreasonably low from time to time, must constitute a policy of unreasonably low pricing. No independent gasoline retailer complained of predatory pricing during the December 1996 to March 1997 period, nor did the Bureau receive complaints to that effect from any other retailers in the Regina market in that period.

More importantly, there were no predatory effects resulting from the low prices in the Regina gasoline market in the period from December 1996 to March 1997. As indicated previously, the market share of independents in Regina in the period 1988-1997 increased from 10.9% to 12.4%. The decline in the third quarter of 1998 is the result of the Mohawk - Husky merger.

In Saskatchewan as a whole, the market share of independent gasoline retailers did in fact decrease from 20.2% in 1992 to around 9% in 1998, after the merger of Mohawk and Husky. However, this decrease in market share was due to that merger and there was no evidence that it occurred as a result of independents having been victimized by predatory pricing. It should also be noted that the decline in the independents' market share in Saskatchewan did not result in an increase in the market shares of the national refiner-marketers but, rather, principally in an increase in the market share of Husky, a Western Canadian based regional refiner-marketer.

d) Price Maintenance - Section 61 (b)

Section 61, the price maintenance provisions, makes it a criminal offence for a supplier to "refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person."

The complaint alleged that refiner-marketers "run out" of product if an independent's retail prices are too low. This situation, if proven, could constitute an offence under subsection 61(b) of the Act. However, the person identified as the source of this allegation has since denied making this statement, and when we contacted a second source provided, he also would not confirm making the statement in question. A witness present at the meeting where the comment was allegedly made could not corroborate that such a statement had ever been made and we have not been able to find any other evidence to support this allegation, despite careful investigation.

Another allegation of price maintenance was made during the course of the Bureau's examination by a national refiner-marketer's branded retail dealer in Regina. The individual claimed to have been involved in a price war in 1996 in Regina and alleged to have been approached by a representative of the supplier and discouraged from continuing to cut prices. The Bureau's attempt to substantiate the dealer's allegations established that the dealer's gasoline station was not in operation in 1996. No other information was disclosed during the examination which would otherwise establish the veracity of the allegation.

The Bureau views incidents of price maintenance activity in the gasoline industry as serious matters and has successfully prosecuted a number of gasoline marketers for breaches of this section. We made a serious effort to substantiate both the initial allegation and the allegation revealed in the co[illegible]e of our examination. In neither case, is there evidence to support the allegations.

V[illegible]. Analysis Under the Civil Provisions of the Act

Abuse of Dominant Position - Section 79

The allegation that suggested that the vertically-integrated petroleum firms "control" the market was dealt with as a complaint in the context of a potential abuse of dominant position. Below is an assessment of the complaint under section 79 of the Act.

Section 79 is designed to remedy situations where one or more firms have been abusing their position of dominance so as to substantially lessen or prevent competition. Before a remedial order may be obtained from the Competition Tribunal under this section, the Commissioner must satisfy the following three elements:

(a) that one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;

(b) that the dominant firm or firms have engaged in or are engaging in a practice of anti-competitive acts; and

(c) that the practice of anti-competitive acts, has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market.

Element (a) - control of a class or species of business

Interpretation

"Class or species of business" has been held by the Tribunal to be synonymous with the relevant product market. This market along with the relevant geographic market, are the two initial determinations the Tribunal has made in its analysis of previous section 79 cases. In defining the relevant product market the Tribunal has cited factors such as direct and indirect evidence of substitutability, functional interchangeability, trade views and switching costs. In determining the relevant geographic market, the Tribunal has considered the boundaries within which competitors must be based if they are to provide effective competition and where prices tend toward uniformity.

"Control" has been equated with market power or the ability to set prices above a competitive level for a considerable period of time. While the measures for determining market power will vary from case to case, a high market share[5] together with significant barriers to entry are necessary to support such a finding.

Since the allegation was to the effect that one or more vertically integrated gasoline firms control a market, this raises the issue of joint dominance under section 79. In the case of joint dominance, it is a group of firms together which may be exercising the control or market power. While high joint market share is indicative of market power, it alone is insufficient. Evidence of co-ordinated activity between the group members to facilitate this market power is also required. Furthermore, it must be established that barriers to entry are such that no one will challenge this market power within a reasonable period of time.

While the Tribunal has not considered this specific issue in any contested case, the leading case law under the predecessor monopoly provision of the *Combines Investigation Act* stated that the joint control of a class or species of business "foresees a combination of circumstances whereby one or more persons, inclusive of independent corporations, through the coordination of their activities work together as a unit." Based on a review of related Canadian decisions regarding abuse of dominance and jurisprudence from other antitrust jurisdictions, a Tribunal finding that one or more parties jointly control a market would likely require evidence of some communication between the parties as well as some coordinated conduct beyond conscious parallelism resulting in a lack of competition between the parties. Conscious parallelism is defined as firms in an industry acting in a similar but independent fashion.

Analysis

Gasoline, as a fuel for passenger motor vehicles is the most efficient and lowest-cost fuel now available. As other potential fuels like propane, diesel, or natural gas are not functionally interchangeable without major modifications and switching costs, there are no economically viable substitutes to gasoline. While there are a variety of gasoline brands, the product itself is homogenous and consumers are highly price sensitive. For the purposes of this analysis, the relevant class or species of business and product market is gasoline for motor vehicles.

With respect to the relevant geographic market at the wholesale level, the province of Saskatchewan is part of a larger western Canadian market. This conclusion has been reached largely on the basis of product movement between refiner-marketers. While there is only one refinery in Saskatchewan, Federated Coop in Regina, a substantial amount of gasoline is supplied from Alberta and is transported via a cost-effective pipeline system. Likewise, according to Saskatchewan Government statistics, only 25% of the crude oil produced in Saskatchewan is for provincial use, 20% is shipped to other provinces, and the remainder is exported to the United States.

At the retail level, it is apparent that the entire province of Saskatchewan does not constitute one geographic market. Given the limited distance that drivers will travel to refuel, it is concluded that Regina and Saskatoon each constitute separate markets, while the rural area can be subdivided into individual towns or villages and the environs. Pricing data also supports this localized market definition. There are price differences between the two major cities and fairly uniform prices within each city. Price increases or decreases in one sector of each of these cities tend to be rapidly matched in other city sectors.

With respect to control[6] in the retail sale of gasoline, there is a variety of types of sellers of gasoline: national refiner marketers, regional refiner marketers, and a range of non-integrated marketers or independents. Based upon all data acquired during our investigation, it is evident that there is no dominant firm supplying gasoline to the retail level within the respective relevant geographic markets.[7] At retail, besides the outlets of the national refiner marketers and regional refiner marketers such as Parkland Industries and Federated Coop, independents such as Domo Gasoline Corp. and 7-Eleven, and mass marketers such as Canadian Tire and Superstores (Loblaws) are all operating in Saskatchewan. Barriers to enter into the retail gasoline market appear not to be insurmountable.

Although the wholesale level is more concentrated than retail, there exist a variety of players at the refinery level in the Western Canada region including the national refiner marketers (Petro-Canada, Imperial Oil, Shell) and regional refiner-marketers (Federated Coop, Husky Oil, Parkland Industries). In addition, gas brokers exist which can supply gasoline to the non-integrated marketers at prices that are better than the independents could obtain dealing directly with the integrated suppliers. This is because of the volume discounts which the brokers can obtain and can pass on, at least in part, to the independents.

The tests of control or market power are market share and barriers to entry. In the geographical retail markets, no single firm meets the 35% threshold of control. While collectively, the three largest integrated gasoline companies (Imperial Oil, Petro-Canada, and Shell) have market shares at the retail levels greater than 50%, this is not in itself sufficient to conclude that they jointly "control" a market. Nevertheless since the market shares of the three largest integrated gasoline companies approached the threshold set out in the Merger Enforcement Guidelines (see footnote #7), which threshold is also used for the purpose of enforcing section 79, the Bureau decided to investigate the market further.

In the case of joint dominance, it must be established that a group of firms of significant size to control the market are engaged in some form of co- ordinated activity which facilitates the exercise of market power. There is no evidence that these companies are engaging in this type of coordinated conduct or joint behaviour. There does not seem to be any impediments to rivalry among these firms. Consumers can exercise countervailing power since they can easily purchase gasoline from another firm. Gasoline is homogeneous and consumers are price sensitive so switching between firms is easy and rapid. Likewise, there is no evidence of communication, agreement or other coordinated activity beyond conscious parallelism which could lead to a finding of control within the meaning of section 79. As a result, it is not possible to conclude that the national refiner- marketers either individually or collectively, control the defined markets as contemplated by section 79 of the Act. There is no joint control over these markets. Thus, as the first element, "control" has not been established, there are no grounds to proceed with an application to the Tribunal under section 79.

VII. Conclusions

A detailed review of the allegations has determined that the allegations have generally been unfounded or the conclusions drawn from them are not supported. Rather, there are other explanations for the observed situations. Pricing data shows that Saskatchewan does not have the highest prices in relation to other provinces. The merger of Mohawk and Husky, did not lead to an increase in prices but rather there was a decline in prices immediately afterward. This merger also primarily accounted for the decline in market share by independents.

The Bureau's examination of the Saskatchewan gasoline market did not provide grounds to believe that criminal offences under the conspiracy, price discrimination, predatory pricing, or price maintenance provisions have occurred.

With respect to a potential violation of the Act's civil provision of abuse of dominant position, the Bureau's assessment has disclosed that the first required threshold element has not been met. The national refiner marketers, either individually or collectively, do not "control" a relevant market as required by section 79.

Competition Bureau

November 15, 1999

ATTACHMENT

Retail Gasoline Shares in Saskatchewan *(volume of litres)

Category	**Approximate Share (%)**
National Refiner-Marketers (national brands, including private brands)	**62**
Imperial Oil	
Petro-Canada	
Shell	
Regional Refiner-Marketers (including private brands)	**29**
Federated Co-op	
Husky Oil	
Parkland Industries	
Unintegrated (Independent) Marketers	**9**
Regina Cabs	
Superstores (Loblaws)	
Domo Gasoline Corp.	
Canadian Tire	
7- Eleven	
Price Right	
United Farmers of Alberta	
Alimentation Couche-Tard	
Tempo (supplied by local coops)	
Total	**100**

* for 3rd Quarter 1998

Source: Kent Marketing Services Limited (data for urban centres) as provided by industry sources.

NB. In addition to the integrated refiners, there are two brokers selling at wholesale: **Northridge Petroleum Marketing** and **Harvest Fuels**.

Footnotes

1

[1] The Bureau concluded that the merger would not substantially lessen or prevent competition in the relevant markets. Prior to the merger, Mohawk had approximately 6.5 percent of the Saskatchewan retail gasoline sales while Husky's share was approximately 4.5 percent.

[2] Dr. Anindya Sen, Wholesale and Retail Competition in the Canadian Petroleum Industry: An Econometric Analysis., Hull, Quebec, March 1, 1999

[3] Canada v. NutraSweet, (1990), 32 C.P.R. (2d) 1 (C.T.); Canada v. Laidlaw Waste Systems, (1992), 40 C.P.R. (3d) 289 (C.T.); Canada v. D and B Companies, (1995), 64 C.P.R. (3d) 216 (C.T.); Canada v. Tele-Direct (Publications) Inc. et al., (1997), 73 C.P.R. (3d) 1 (C.T.)

[4] Loretta Mahoney, Retail Gasoline Market Shares - An Analysis of the Experience of Integrated Companies and Independents over the Decade in Selected Canadian Cities, Ottawa, Ontario, March, 1999, pages 38 and 3

[5] The Tribunal has stated that if a firm has a market share greater than 50%, there would be a *prima facie* finding of market power, while a market share below 50% would not

[6] In the allegation, reference was made to the fact that "the Bureau considers an industry concentration in excess of 65% to be anti-competitive ...." While the Bureau's Merger Enforcement Guidelines (page ii) indicates that the Bureau is more likely to challenge a *merger* if the post-merger market share of the four largest firms exceeds 65%, the guidelines go on to state on the same page that:

> "These thresholds merely serve to distinguish mergers that are unlikely to have anti-competitive consequences from mergers that require further analysis, of various qualitative assessment criteria such as those highlighted in section 93. No inferences regarding the likely effects of a merger on competition are drawn from evidence that relates solely to market share or concentration. In all cases, an assessment of market shares and concentration is only the starting point of the analysis."

[7] For the purposes of enforcing section 79, the Bureau generally considers that a firm with a market share below 35% is not dominant. In Saskatchewan, no single firm has a market share greater than 27%.