

December, 2014

**Competition Act Amendments:**

**Price Transparency Act**

On December 9, 2014 the federal government introduced legislation to amend the *Competition Act*, the *Price Transparency Act* (“*PTA*”). The *PTA* would give the Competition Bureau new powers to conduct inquiries into complaints about price discrimination in Canada, where prices would be compared to U.S. prices for similar products. In conducting these inquiries, the Bureau would be able to obtain court orders requiring companies to produce documents, including confidential business documents, and to compel witnesses to appear and respond to questions under oath. Upon completing an investigation, the Bureau would be required to prepare and issue public reports describing the cross-border price discrimination and identifying the causes of the price discrepancies.

**Concerns About the Proposed Legislation**

It is my view and the view of many commentators that while the *PTA* is designed for political purposes to show that the government is “putting Canadian consumers first”,<sup>1</sup> it will be difficult to implement for at least three reasons. First, the focus on consumer prices does not fit well with the overall purpose of the *Competition Act*. The Act’s purpose is multifaceted, among other things to “maintain and encourage competition in Canada ... [and] promote the efficiency and adaptability of the Canadian economy ... in order to provide consumers with competitive prices and product choices.”<sup>2</sup> The *PTA*’s focus on one specific outcome of competition, that Canadian consumer prices should be equivalent to U.S. consumer prices for similar products, is likely to come into conflict with other purposes and provisions of the Act. It is notable that the former criminal price

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<sup>1</sup> See the government’s press release with this title at <http://news.gc.ca/web/article-en.do?nid=913079> and a backgrounder on the *PTA*, Bill C-49, at <http://news.gc.ca/web/article-en.do?nid=913059>. The legislation is posted at: <http://www.parl.gc.ca/LEGISInfo/BillDetails.aspx?Language=E&Mode=1&billId=6822185>.

<sup>2</sup> The purpose section of the *Competition Act* is s. 1.1.

discrimination provision had not been enforced by the Competition Bureau for many years and was repealed in 2009, as a part of the recent modernization of the Act.

Second, the Bureau does not currently have the expertise or resources to act as a regulator of prices for consumer products. In submissions made by Competition Bureau staff to the 2012 Senate Committee studying the alleged Canada - U.S. price gap, the Bureau noted that there are many factors considered by businesses in establishing prices. High prices do not necessarily mean that a particular market is uncompetitive, so long as the prices are not the result of anti-competitive conduct, such as price fixing, bid-rigging or abusing a dominant position. With respect to resources, the government has made it clear that no new funding or staff will be available to support the *PTA* but that the Bureau will be expected to carry out its investigations, which have the potential to be extensive and wide-ranging, within its existing budget.

Finally, there are many practical problems to anticipate. Given that complaints should be expected to be filed by consumer groups and competitors in numerous industry sectors, one wonders how the Bureau will establish priorities among complaints, and within a particular inquiry, how it will determine which products are similar, how it will select companies to participate in the inquiries and the specific types of information to be provided. Further, the process of undertaking an investigation is likely to give rise to complex legal issues, such as whether the companies have been treated fairly and given adequate notice of the case they are expected to meet and whether sufficient protection is provided for confidential business information. The *PTA* will undoubtedly create significant regulatory burdens for the companies that become subjects of the inquiries, whether or not they are found to have engaged in unjustified price discrimination.

Since the Conservative government has a majority in the House of Commons and an election is to be held in 2015, it is advisable to consider that the *PTA* will become law.

Please address any questions about the *PTA* or the *Competition Act* generally, to Carol Anne O'Brien at [caob@caobrienlaw.com](mailto:caob@caobrienlaw.com), or (416) 640-7270.

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