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Overview of the Competition Act's Pricing Provisions

Businesses in Canada enjoy increased flexibility with respect to their pricing practices, following the 2009 amendments to the *Competition Act*. However, depending on the circumstances, certain provisions of the *Competition Act* may still need to be considered as a business makes decisions and plans that relate to their prices.

Price Maintenance, Limited Scope of New Civil Provision, s. 76

The repeal of the former criminal price maintenance provision (s. 61) was one of the changes made to the *Competition Act* in 2009. After having been criticized as creating a chilling effect on competition, and no longer supported by economic analysis as being pro-competitive, the provision had not been relied upon by the Competition Bureau in its enforcement of the Act for some time. It was replaced with a new civil price maintenance provision, s. 76[1], which has a much more limited scope.

The most important change is that price maintenance is no longer a *per se* criminal offence. The new provision describes "reviewable conduct" that is subject to a "rule of reason" analysis. The Competition Tribunal may only issue a prohibition order with respect to price maintenance if it finds that the practice has had, or is likely to have, an "adverse effect on competition" in a market. This is a lower threshold than the "substantial lessening of competition" that is required under other reviewable conduct provisions, such as s. 79, discussed below.

As reviewable conduct, price maintenance may result only in a Competition Tribunal order prohibiting the conduct in the future. There is no possibility of imprisonment, criminal fines, or even administrative monetary penalties ("AMPs"). Further, third party

[1] For the full text of the *Competition Act*, see the federal Department of Justice web site at: http://laws.justice.gc.ca/eng/acts/C-34/index.html.

damages are no longer available via the "private right of action" provision, s. 36 of the Act. Another change is that, whereas the criminal provision could have applied to both horizontal and vertical price maintenance, the civil provision applies only to resale (vertical) price maintenance. (As noted below, the s. 45 conspiracy offence applies to horizontal price fixing agreements between competitors.) Finally, mere attempts at price maintenance will not be subject to review. Before it can issue a prohibition order under s. 76, the Competition Tribunal must find that the business did influence upward, or discouraged the reduction of the applicable price, and that the necessary "adverse effect" on competition resulted, or is likely to be the result.

To succeed in a price maintenance proceeding either the Commissioner or a private party who has been granted leave[2] must prove to the Competition Tribunal that: (a) the responding party has directly or indirectly influenced upward, or discouraged the reduction of, the price at which its customer or another reseller supplies, or offers to supply, a product – OR has refused to supply a product to or has otherwise discriminated against a person or class of persons engaged in business because of its/their low pricing policy; (b) its actions were carried out by "agreement, threat, promise or like means"; and (c) the conduct has had, is having, or is likely to have an "adverse effect on competition". As noted, this is a lower threshold than a "substantial lessening". However, the economic effect will generally be required in the market as a whole, and not just on the business of the complaining party.

Repeal of Other Criminal Pricing Provisions

Three other criminal pricing provisions were repealed in 2009: (a) geographic price discrimination; (b) predatory pricing, which pertained to the use of "unreasonably low" prices, offered for the purpose of eliminating a competitor; and (c) a provision that required "promotional allowances" to be offered to customers on a proportionate basis, reflecting volumes purchased. As with the criminal price maintenance provision, these provisions had been under-enforced by the Competition Bureau. In contrast to price maintenance, however, none of these provisions has been replaced. In each case, the pricing activity is subject to review by the Competition Tribunal if it can be characterized as an "anti-competitive practice" and if the other elements of s. 79 exist.

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[2] A private party must meet the requirements of s. 103.1 of the Act, and as required by s. 103.1(7.1), must show that it is "directly affected" by the conduct.

Pricing in Connection with an Abuse of a Dominant Position, s. 79

While space does not permit a full discussion of "abuse of a dominant position" in this article, it must be noted as one of the civil, reviewable conduct provisions that should be considered when pricing decisions are being made. Specifically, an "abuse of dominant position" may be found to exist – and could result in a Competition Tribunal prohibition order, and AMPs of up to $10 million[3] – where a business (or a two or more businesses, acting jointly) has: (a) "substantial or complete control of a market"; (b) is engaging in a "practice of anti-competitive acts"; and (c) where the practice has had, or is likely to have, the "effect of lessening competition substantially in a market".

With respect to the second element and as identified in the non-exclusive list of "anti-competitive acts" set out in s. 78, these acts may relate to pricing. Examples include: the use of "fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor" (s. 78(1)(d)); buying up products "to prevent the erosion of existing price levels" (s. 78(1)(f)); and "selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor" (s. 78(1)(i)). In these circumstances the use of a "low price" or even an "unreasonably low price" is not sufficient to trigger the application of s. 79. The anti-competitive purpose must exist. Case law indicates that the Tribunal's focus will be on whether the practice is exclusive, disciplinary or predatory.

Pricing as an Element of Criminal Conspiracy, s. 45

The criminal conspiracy provision of the Act, s. 45, applies to horizontal pricing agreements between competitors or potential competitors. Specifically, any agreement or arrangement between competitors or potential competitors "to fix, maintain, increase or control the price for the supply" of a product or service may be subject to prosecution as a *per se* criminal offence, subject to a term of imprisonment of up to 14 years or a fine of up to $25 million[4]. As a result of the 2009-10 amendments, there is no longer a requirement for an "undue" lessening of competition. It is also important to note that, as

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[3] This AMP is the maximum for a first order against a person or entity under s. 79. AMPs of up to $15 million are available for subsequent orders.

[4] Subsection 45(1)(a) applies to price-fixing agreements, but the criminal provision also applies to other kinds of agreements: s. 45(1)(b) to agreements "to allocate sales, territories, customers or markets for the production or supply" of a product or service, and s. 45(1)(c) to agreements "to fix, maintain, control, prevent, lessen or eliminate the production or supply" of product or service.

with the previous version of s. 45, there is no requirement for direct evidence that the parties entered into an agreement. The court "may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it".[5]

Pricing in Other Competitor Agreements, s. 90.1

When s. 45 was amended to remove the requirement for an "undue" lessening of competition, s. 90.1 was added to provide that arrangements or agreements among competitors which prevent or lessen competition "substantially" are subject to review. While s. 45 which will apply to cartels, this new provision applies more generally to agreements between competitors. Agreements with competitors or potential competitors that pertain to price should be considered from the perspective of both s. 45 and s. 90.1.

The new competitor collaboration provision may apply to a proposed agreement or arrangement, as well as to an agreement or arrangement that has been made. Where it would affect a significant share of the relevant market, an agreement may be of concern. However evidence of concentration or market share alone is not sufficient.[6] In examining an arrangement or agreement under this provision, the Tribunal may have regard to a number of specified factors,[7] including: the extent to which acceptable substitutes for the products supplied by the parties are or likely to be available; any barriers to entry faced by their competitors; and the extent to which effective competition remains or would remain. The competitor collaboration provision also includes an efficiency exception.[8]

There is no possibility of imprisonment or fines or even for AMPs under this provision. However, after finding that the elements have been made out, the Competition Tribunal may issue orders, either prohibiting the parties from doing anything under the agreement or arrangement, or requiring one or more of them to take some specified action.

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[5] Subsection 45(3), which also states that "for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt".

[6] Subsection 90.1(3).

[7] Subsection 90.1(2).

[8] Subsections 90.1(4) and (6).

Misleading Representations Relating to Price, ss. 51 or 74.01

A misleading representation relating to price may be subject to the *Competition Act* as a criminal offence or as reviewable conduct. In both cases, it is unnecessary to prove that any person was deceived or misled and it is the "general impression" conveyed by the representation, as well as its literal meaning, that will be taken into account in determining whether or not it is misleading in a material respect. A representation will be found to be "material" if it will influence a consumer's buying decision.

The criminal offence will exist where a "false or misleading representation" relating to price is made "knowingly and recklessly". On indictment, the conduct is punishable by a fine in the discretion of the court and/or a term of imprisonment of up to 14 years. On summary conviction, it is punishable by a fine of up to $200,000 and/or imprisonment of up to one year.

Except in cases of fraud, the Competition Bureau will generally proceed against price-related misleading representations as reviewable conduct, under s. 74.01. Where a sale price is advertised as compared to an "ordinary selling price" the Act sets out specific tests, to establish the appropriate "ordinary" price. The test can be complied with by reference to the supplier's own prices or the prices of suppliers generally. In each case, the ordinary price must be one at which either a substantial volume of product has been sold, within a reasonable period of time before or after the representation is made, or at which the product has been offered for a substantial period of time recently before or immediately after the representation is made.[9]

Please address any questions about the pricing provisions of the *Competition Act*, or any related matters, to Carol Anne O'Brien at caob@caobrienlaw.com, or (416) 640-7270.

Carol Anne O'Brien's law practice is focused on regulatory matters including communications law (broadcasting and telecommunications), competition law, advertising and marketing, Internet domain names and privacy.

[9] The volume and time tests are set out in s. 74.01(2)(a) and (b) for suppliers generally, and s. 74.01(3)(a) and (b) for the supplier.