

**DISTRIBUTION IN A GLOBAL ECONOMY
INTERNET, B2B AND TRADITIONAL ISSUES**

Section of Antitrust law

International Issues: Canada

by

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Introduction

Canada is the largest trading partner of the United States, and the countries' economies are inextricably linked. The extent and depth of economic ties between Canada and the United States, and Canada and other countries, has increased with technological developments which permit easy communication and distribution of information and goods. Technological advances also permit (and encourage) non-traditional business arrangements such as B2B market places. These trends will continue with vigour in the future.

With increased cross-border activity and growth of non-traditional business arrangements that span borders, legal restraints in foreign jurisdictions become all the more relevant. This is particularly true in the Canada-US context because, notwithstanding the closeness and similarity of the Canadian and US legal systems, there are important differences in the antitrust laws governing distribution practices. The Canadian distribution rules and notable differences between the US and Canadian laws are surveyed below, followed by a discussion of implications of the Canadian rules on e-Commerce arrangements.

The Competition Act – Overview

The *Competition Act*² is a federal statute and is Canada's principal antitrust legislation. There is no similar provincial legislation regulating competition.³

¹ The assistance of Jennifer Khurana and Courtney Weiner, students at McMillan Binch, with the preparation of this paper is gratefully acknowledged.

² R.S.O. 1985, c. C-34.

³ Provincial laws relevant to distribution practices include consumer protection and business practices legislation.

The Competition Act is administered by the Competition Bureau which is headed by the Commissioner of Competition (the “Commissioner”). The Commissioner is responsible for investigating possible breaches of the law, which may come to his attention through complaints (typically from competitors or customers) or other sources.

The Competition Act contains a mixture of criminal offences, discretionary reviewable practices and private damage actions. Criminal offences include conspiracies, bid-rigging, some misleading advertising and certain pricing practices. These offences are prosecuted by the Attorney General in criminal courts, however the Attorney General typically initiates a prosecution only on the recommendation of the Commissioner.

The so-called “reviewable practices” include matters such as mergers, abuse of dominant position, misleading advertising, refusals to deal and various vertical non-price restraints. Reviewable practices are not illegal, but may be prohibited by the Competition Tribunal in certain circumstances. The Competition Tribunal is a partially expert tribunal, whose members are both judges and others who have expertise in business or economics. The Commissioner has sole authority under the Competition Act to apply to the Competition Tribunal for an order in respect of a reviewable practice.

The Competition Act contains very limited rights of private action. Private parties cannot initiate criminal proceedings or applications to the Competition Tribunal.⁴ They can, however, sue to recover actual damages (i.e. no treble damages) suffered as the result of conduct that contravenes the criminal provisions of the Competition Act or as the result of failure by a respondent to comply with an order of the Competition Tribunal.

⁴ There is a private members bill currently before Parliament (which has the endorsement of the Commissioner) that proposes amending the Competition Act to permit private parties to initiate Competition Tribunal proceedings in respect of refusals to deal and vertical non-price restraints such as exclusive dealing. See Bill C-472, *An Act to amend the Competition Act (conspiracy agreements and right to make private applications), the Competition Tribunal Act (costs and summary dispositions) and the Criminal Code as a consequence*, 2d Sess., 36th Parl., 2000, (1st reading 6 April 2000).

Criminal Provisions: Price Restraints

The Competition Act contains four important criminal offences that are relevant to the distribution of goods in Canada: price maintenance, price discrimination, discriminatory promotional allowances and predatory pricing.⁵

Price Maintenance

(a) Overview

Section 61 of the Competition Act creates a criminal offence to attempt, by agreement, threat, promise or other like means, to *influence upwards* or *discourage the reduction of*, the price at which another person sells products or advertises products for sale.⁶ The offence applies to both horizontal and vertical arrangements.

A companion offence prohibits refusals to supply a product or engaging in other discriminatory behaviour because of a buyer's low pricing policy.⁷ In addition, section 61(6) creates an offence for any person who, by threat, promise or any like means, attempts to induce a supplier, whether within or outside Canada, as a condition of its doing business with a supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons.⁸

Not all attempts to influence another person's prices are unlawful since an offence occurs only if the attempt is made "by agreement, threat, promise or any like means."⁹ Indeed, attempts to maintain prices through "discussion, persuasion, complaints, suggestions, requests or advice" that do not otherwise contravene section 61 have been found to be permissible.¹⁰ Thus, it is not illegal

⁵ The Competition Act also contains criminal offences relating to misleading advertising and specific marketing practices such as double-ticketing, multi-level marketing plans and pyramid selling. Discussion of those offences is beyond the scope of this paper.

⁶ *Supra* note 2 at s. 61(1)(a).

⁷ *Ibid.* at s. 61(1)(b).

⁸ *Ibid.* at s. 61(6).

⁹ The word "threat" has been defined as "a form of intimidation, fulmination, harassment or warning which carries with it some form of penalty". See *R. v. Schelew*, 78 C.P.R. (2d) 102 at 109-10 (per LaForest J.A.) and at 111 (per Angers J.A.) (N.B.C.A.).

¹⁰ *R. v. Les Must de Cartier Canada Inc.*, 27 C.P.R. (3d) 37 at 41 (Ont. Dist. Ct.).

to provide customers with information concerning market performance and make suggestions regarding pricing strategies; nor is it illegal to request a retailer or other person to increase its prices.

However, due to the breadth of the offence any suggestion of a resale price must be made with caution. While suggestions of maximum price are permissible, any suggestion of a minimum resale price could be construed as an attempt to discourage a price reduction, and so must be accompanied by a clear statement that the person to whom the suggestion is made is under no obligation to accept the suggestion.¹¹ Publication by a supplier (other than a retailer) of an advertisement that mentions a resale price for the product is also problematic unless the price is expressed so as to make clear that the product may be sold at a lower price.¹²

Defences are provided with respect to refusals to supply to certain customers because of their low pricing policies where the customer has made a practice of using products supplied as loss-leaders, engaged in misleading advertising or failed to provide an adequate level of service.¹³ However, it is important to note that these defences only apply to an actual refusal to supply, and not an attempt to influence price which is not accompanied by a refusal. The Act also contains a general exception where the relevant dealings are between affiliated entities.¹⁴

(b) e-Commerce Implications

The price maintenance offence is broad and will cover any attempt to influence prices charged by Canadian re-sellers. In the e-Commerce arena, particularly in B2B arrangements, care must be taken to ensure that commercial arrangements do not offend the price maintenance provision, and that marketplace participants do not unknowingly commit an offence in Canada. That said, the commission of an offence by sellers located outside of Canada might be difficult to enforce by Canadian antitrust authorities who find that the offenders are physically beyond the reach of Canadian law.

¹¹ *Supra* note 2 at s. 61(3).

¹² *Ibid.* at s. 61(4).

¹³ *Ibid.* at s. 61(10).

¹⁴ *Ibid.* at s. 61(2).

Price Discrimination

(a) Overview

A price discrimination offence is committed by a supplier that makes a *practice* of knowingly granting “discounts, rebates, allowances, price concessions or other advantages” to one customer that are not equally “made available” on sales of goods of like quality and quantity to other customers who are competitors of the favoured customer.¹⁵

The price discrimination provision is quite complex. But, facts which on a literal reading of the Competition Act seem problematic might not result in enforcement action in all cases because the Competition Bureau has a fairly liberal interpretation of the price discrimination offence.¹⁶ That view and the Competition Bureau’s enforcement policies are described in the lengthy Price Discrimination Enforcement Guidelines (“PDEG”), which were released in 1992.¹⁷

For an offence to be committed, the seller must have knowledge (which includes wilful blindness) of the discrimination, but proof of anti-competitive effects in the marketplace are not necessary for a conviction. Other important elements of the offence include:

- There must be a sale. This means that licensing, leasing, agency and consignment transactions are not covered by the provision.¹⁸ It is interesting to note that unlike the Robinson-Patman Act¹⁹ which requires two sales in order to support a prosecution on the basis that one discriminates against another, the PDEGs state that one sale at a more favourable price than is available to others may be sufficient for the purposes of section 50(1)(a).

¹⁵ *Supra* note 2 at s. 50(1)(a).

¹⁶ For example, the Price Discrimination Enforcement Guidelines indicate that conditional discounts such as volume-based discounts, growth bonuses, functional discounts and exclusive dealing discounts are permissible in certain circumstances, even though they might be prohibited on a narrow reading of section 50(1)(a).

¹⁷ Industry Canada, Competition Bureau, (Ottawa: Consumer and Corporate Affairs Canada, 1992), available at <http://strategis.ic.gc.ca/SSG/ct01140e.html>.

¹⁸ *Ibid.* at s. 2.3.1.

¹⁹ 15 U.S.C. § 13(a).

- The sale must involve articles. The price discrimination rules do not cover services.²⁰
- Section 50 applies only to persons “engaged in a business” which is defined under section 2(1) of the Competition Act as manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles.
- The offence applies to anyone who “is a party or privy to, or assists in” the sale. Although a seller’s agents and employees are included, buyers are not exposed to liability by bargaining for preferred pricing.²¹
- The seller must grant a “discount, rebate, allowance, price concession or other advantage”. These phrases, including “other advantage”, typically refer to monetary arrangements. Therefore, the seller can provide technical assistance, equipment and related services on an unequal basis without violating the price discrimination rules.²²
- The discrimination must arise with respect to sales of “like quality and quantity”.²³
- There must be a practice of discrimination. Short-term price reductions, occasional discounts for promotional events, and generous terms to attract new accounts normally are not problematic. However, it is important to note that meeting competition is not a defence in Canada (although a one time price reduction might not constitute a “practice” under the section).

Provided they are technically *available* (i.e. accessible or obtainable, not necessarily “offered”), price concessions granted to one purchaser need not automatically be granted to competing purchasers. The PDEG’s suggest that to meet the availability requirement, a seller should disclose its unilateral

²⁰ *Supra* note 17 at s. 2.4.

²¹ *Ibid.* at s. 2.2.

²² *Ibid.* at s. 2.5.1.

²³ *Ibid.* at s. 2.5.8.

concessions to competing purchasers in full and in a timely manner. By contrast, where the purchaser initiates negotiations and agrees to provide a service in exchange for the price concessions, the seller need not announce the concession as long as the seller is prepared to grant a comparable concession in exchange for comparable services at the competing purchaser's request.²⁴

Buying groups can create issues for a seller that is trying to identify the true "purchaser" of its goods in order to avoid a price discrimination offence. If a buying group is merely an association of independent purchasers seeking to aggregate their purchase volumes, the individual members of the group likely are the true purchasers (and thus discounts should be awarded on an individual basis, without regard to the volume of the group). In the Commissioner's view, three essential characteristics must be present in order for a buying group to be a true purchaser:²⁵

- The group should be a legal entity capable of acquiring property,
- The group should in fact acquire title in the articles (although it need not take possession), and
- The group should be liable and assume responsibility for payment of the goods purchased.

(b) e-Commerce Implications

The price discrimination offence has proven difficult to apply, and often out of step with economic realities, in traditional business models. e-Commerce arrangements create additional complexity and uncertainty. For example:

- It will be very difficult for sellers to determine whether purchasers compete with each other.
- Typically, price concessions (e.g. credit terms and cash discounts) must be made available to competing purchasers who purchase goods at the same time. The volume, velocity and geographic

²⁴ J. Clifford & S. Walker, "Canada" in J. von Kalinowski, P. Sullivan & M. McGuirl eds., *Antitrust Laws and Trade Regulation* (New York: Matthew Bender & Co. Inc., 1999) Vol. 9 at 200-58.

²⁵ *Supra* note 17 at s. 2.5.4.2.

scope of online transactions might make it difficult to determine the point in time at which a sale is concluded.

- B2B arrangements may be set up as a buying group, which might not meet the technical requirements of the PDEGs.
- Many online transactions involve services (e.g. stock trades or loans), and thus would not be subject to the price discrimination offence.
- Creation of products specifically for online sales gives rise to issues about whether products sold through online distribution channels are of like “quality” to comparable products distributed through traditional channels.

Discriminatory Promotional Allowances

(a) Overview

A criminal offence is committed if a supplier offers promotional allowances to one customer and fails to offer competing customers similar allowances on proportionate terms.²⁶ While many of the elements of the offence are similar to those for price discrimination, it is important to note one major difference: allowances must be *offered*, as opposed to merely being *made available*, to all competing purchasers so that each will receive a monetary value approximately in the same ratio to its purchases.²⁷ The use of the word “offer” implies a duty on the part of the seller to inform all customers of the availability of the promotional allowance.

Under section 51(1) of the Competition Act, “promotional allowances” are defined to be discounts, rebates, price concessions or other advantages²⁸ that are offered or granted for advertising or display purposes and

²⁶ *Supra* note 2 at s. 51(2).

²⁷ W.D. Chritchley, Deputy Director of Investigation & Research (Resources and Manufacturing), Consumer and Corporate Affairs Canada, Notes for an Address to the Law Society of Upper Canada Program on the Competition Act, *The Pricing Practices Provisions of the Competition Act* (Toronto, May 16, 1989).

²⁸ i.e., monetary arrangements by which the seller confers upon the purchaser a lower net price per unit of articles sold. *Supra* note 17 at s. 2.5.1.

are collateral to a sale or sales of products, but are not applied directly to the selling price. The proportionality requirement will be met if:

- The allowance offered to a purchaser is in approximately the same proportion to the value of sales to it as the allowance offered to each competing purchaser is to the total value of sales to that competing purchaser,
- In any case where advertising or other expenditures or services are exacted in return for the allowance, the cost thereof required to be incurred by a purchaser is in approximately the same proportion to the value of sales to it as the cost of the advertising or other expenditures or services required to be incurred by each competing purchaser is to the total value of sales to that competing purchaser, and
- In any case where services are exacted in return for the allowance, the requirements have regard to the kinds of service that competing purchasers at the same or different levels of distribution are ordinarily able to perform or cause to be performed.²⁹

The discriminatory promotional allowance offence is *per se*. Since there is no requirement that the violation form part of a “practice”, a single occurrence may violate the Competition Act.

(b) e-Commerce Implications

The implications to e-Commerce businesses are similar to those relating to price discrimination. In particular, in the online world it will be difficult for sellers to determine not only the identity of purchasers but also whether those purchasers compete with one another. However, unlike price discrimination, the discriminatory promotional allowance provision applies to both products and services, so its application to e-Commerce transactions will likely be of greater relevance.

Predatory Pricing

(a) Overview

²⁹ *Supra* note 2 at s. 51(3).

While often referred to as one provision, the Competition Act actually contains two distinct price predation provisions. The first offence, geographic predatory pricing, involves a policy of selling products anywhere in Canada at prices lower than those charged elsewhere in Canada.³⁰ The second offence, known as predatory pricing, occurs when products are sold at “unreasonably low” prices.³¹ Both provisions require that there be a policy of predatory pricing with the effect or purpose of substantially lessening competition or eliminating a competitor.

The geographic predatory pricing provision is rarely enforced and the predatory pricing provision has caused much confusion in Canadian competition law. To provide some clarification and insight into the key questions of when prices will be considered predatory, the Commissioner issued the Predatory Pricing Enforcement Guidelines³² (the “PPEG’s”) in May 1992 which set forth his enforcement approach.³³

The PPEGs indicate that the Competition Bureau takes a two-stage approach to investigating predatory pricing allegations and determining whether the alleged predator’s prices are “unreasonably low”. In the first stage, the Bureau focuses on market power and market conditions to assess whether effective predation is possible. Only then does the investigation move to the second stage, in which the more controversial issues of prices and costs are examined to determine whether predation has actually occurred.

Usually, no enforcement action is taken unless the alleged predator possesses the market power needed to impose and sustain a price increase profitably.³⁴ In the absence of market power the low pricing in question could not be predatory since it would not be rational for a seller to attempt to drive a rival out of the market through low prices if it could not subsequently recoup the losses sustained during the period of low pricing by increasing prices after the exit of the

³⁰ *Supra* note 2 at s. 50(1)(b).

³¹ *Ibid.* at s. 50(1)(c).

³² Industry Canada, Competition Bureau, (Ottawa: Consumer and Corporate Affairs Canada, 1992), available at <http://strategis.ic.gc.ca/SSG/ct01139e.html>.

³³ The Commission announced recently that revised PPEGs likely will be issued in the near future. Address of Konrad von Finkenstein given at Canadian Bar Association Competition Law Section Annual Meeting in Ottawa, Ontario on September 21, 2000.

³⁴ The Bureau has indicated that an alleged predator must control more than 35% market share to possess market power. *Supra* note 32 at s. 2.2.1.1.

targeted rival. However, if the Bureau concludes that predation is a potentially viable strategy (in that the alleged predator is a dominant firm in a market having significant entry barriers), it will conduct a detailed analysis of the alleged predator's pricing policy and cost structure to determine whether the predator's prices are "unreasonably low". Under the PPEGs, pricing above average total costs normally is not predatory. Pricing below average variable cost is presumed to be predatory in the absence of some other reasonable explanation (e.g., perishable inventory). The grey zone between these two requires a detailed assessment of the alleged predator's intentions and the surrounding circumstances.

(b) e-Commerce Implications

e-Commerce applications generally enhance entry and expansion, making recoupment theories in the predatory pricing context less plausible than under traditional models. In addition, calculating an appropriate measure of cost in order to determine whether prices are in fact predatory may be even more complicated in cases involving online commerce, rendering the provision of even less relevance than in the context of traditional business models.

Reviewable Matters: Non-Price Vertical Restraints

Exclusive dealing, tied selling, market restrictions and refusals to deal are the principal non-price vertical restraints in Canadian law.³⁵ Each is a practice which is subject to review and corrective action by the Competition Tribunal.³⁶

(a) Exclusive Dealing

Exclusive dealing occurs when a supplier requires or induces someone to deal exclusively or primarily in products that it supplies or has designated, or to refrain from dealing in a class or kind of product except as

³⁵ The Competition Act also contains provision for review by the Competition Tribunal of certain delivered pricing (i.e. refusing to deliver product to a willing buyer at the same terms offered to other buyers), foreign suppliers refusal to supply (by reason of exertion of buying power outside of Canada by another buyer) and consignment selling arrangements. Each is measured against an anti-competitive threshold test. In certain circumstances, the reviewable practices of misleading advertising and abuse of dominant position might also be relevant to a distributor.

³⁶ As noted above, amendments to the Competition Act have been proposed which, if enacted, will give private parties the right to initiate Competition Tribunal proceedings in respect of these reviewable matters.

supplied or designated by the supplier.³⁷ Where, on application by the Commissioner, the Competition Tribunal finds that exclusive dealing, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to:

- impede entry or expansion of a firm in the market,
- impede introduction of a product into or expansion of sales of a product in a market, or
- have any other exclusionary effect in the market,

with the result that competition is or is likely to be lessened substantially,³⁸ the Tribunal may make an order prohibiting a supplier from engaging in the practice and containing any other requirement the Tribunal deems necessary to overcome the effects of the exclusive dealing or to restore or stimulate competition in the market.³⁹ To be actionable, the exclusive dealing must be part of a practice employed by the supplier. Consequently, an isolated incident of exclusive dealing is not problematic.

There are a number of defences available to the reviewable practice of exclusive dealing. For example, exclusive dealing may be undertaken for a reasonable period of time in order to facilitate entry of a new supplier or product into the market.⁴⁰ There also is a defence available where the participants are affiliated.⁴¹

³⁷ *Supra* note 2 at s. 77(1)(a).

³⁸ In *Canada (Director of Investigation & Research) v. NutraSweet Co.*, 32 C.P.R. (3d) 1 [hereinafter *NutraSweet*], the Competition Tribunal held that the test to determine whether there had been a substantial lessening of competition is essentially the same for section 77 as it is for section 79 (the abuse of dominant position provision in the Competition Act). Section 79 jurisprudence (including the *NutraSweet* case itself) makes clear that there will be a substantial lessening of competition if the alleged anticompetitive acts will preserve or enhance an entity's market power. In that context, market power is defined as "the ability to behave independently of the market". Although there are no clear quantitative thresholds for identifying market power, a market share in excess of 35% may be sufficient to attract scrutiny of the Commissioner with respect to exclusive dealing.

³⁹ *Supra* note 2 at s. 77(2).

⁴⁰ *Supra* note 2 at s. 77(4)(a).

⁴¹ *Ibid.* at s. 77(5).

There has been only one decision in which the Tribunal has ordered a firm to cease engaging in exclusive dealing.⁴² In *NutraSweet*, the Commissioner challenged NutraSweet Co.'s use of exclusivity clauses in its contracts which required customers to use NutraSweet brand aspartame as the sole or primary sweetening ingredient in their products and obtain all of their NutraSweet brand aspartame from NutraSweet. Although the Tribunal agreed that the result of these clauses was that the purchaser would agree to use only NutraSweet brand aspartame, it held that these clauses alone were not enough to be considered exclusive dealing within the meaning of section 77(1)(a) of the Competition Act. However, NutraSweet's use of fidelity rebates (which provided a substantial discount from the gross price of the aspartame to customers displaying the NutraSweet name and "swirl" logo) and co-operative marketing discounts to customers for promotions of products containing only NutraSweet brand aspartame were held to be exclusive dealing under s.77(1)(b) of the Competition Act. These practices were part of a broader range of behaviour found to be an abuse of dominant position by the Tribunal.⁴³ Ultimately, NutraSweet was ordered to discontinue the fidelity rebates and other contracting practices.⁴⁴

(b) Tied Selling

The reviewable practice of tied selling occurs when a supplier engages in a practice of making the supply of its products (the "tying" product) conditional on a customer's agreement either to purchase another product (the "tied" product) from the supplier or its nominee, or to refrain from using or distributing another product not manufactured or designated by the supplier in conjunction with the first product.⁴⁵ Section 77 of the Competition Act extends the concept to include situations where the supplier, as part of a practice, induces a customer to engage in tied selling by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet that condition. Tied selling may be subject to a corrective order of the Competition Tribunal if it is engaged in by a major supplier of a product in a market or it is wide-spread in a market and, in either case, is likely to:

- impede entry into or expansion of a firm in the market,

⁴² *Supra* note 38.

⁴³ *Ibid.* at 52-56.

⁴⁴ *Ibid.* at 58.

⁴⁵ *Supra* note 2 at s. 77(1).

- impede introduction of a product into or expansion of sales of a product in the market, or
- have any other exclusionary effect in the market,

with the result that competition is or is likely to be lessened substantially.

A threshold issue which must be considered in every tied selling case is whether there are one or two products. The Competition Tribunal stated in *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* that:⁴⁶

[a] fundamental requirement of tying is the existence of two products, the tied product and the tying product. It is implicit in the determination of whether there are one or two products that efficiency considerations must be taken into account. We consider demand for separate products and efficiency of the bundling are the two “flip-sides” of the question of separate products. Assume demand for separate products, if efficiency is proven to be the reason for the bundling there is one product. If not, there are two products.⁴⁷

In determining whether there were two separate products, the Tribunal adopted the 1984 decision of the U.S. Supreme Court in *Jefferson Parish Hospital District No. 2 v. Hyde*⁴⁸ in which the court concluded that no tying arrangement can exist unless there is sufficient demand for the purchase of the tied product separate from the tying product, such that it is efficient to offer them as separate products. Once it is determined that more than one product or service exists, the Tribunal will then determine whether or not the ability to purchase one product is in fact conditional on purchasing another, and the tying of the two products leads to a substantial lessening of competition.

It should be noted that in addition to the general affiliate defence available under section 77(5), there are two defences which are unique to the

⁴⁶ 73 C.P.R. (3d) 1 (Comp. Trib.) [hereinafter *Tele-Direct*].

⁴⁷ *Ibid.* at 115.

⁴⁸ 466 U.S. 2 (1984).

reviewable practice of tied selling. One defence concerns persons engaged in the business of lending. Lenders may engage in tied selling, regardless of the competitive effects, as long as it is reasonably necessary to achieve “the purpose of better securing loans”.⁴⁹ This defence appears to be quite narrow and specialized. A broader defence is available which permits tied selling that is “reasonable having regard to the technological relationship between or among the products to which it applies”.⁵⁰

(c) Market Restriction

The Competition Act defines a market restriction to be any practice whereby a supplier, as a condition of supplying a product to a customer, requires that customer to supply the product only in a defined market, or exacts a penalty of any kind from the customer if it supplies the product outside of a defined market.⁵¹ The reference to a defined market covers territories established on a geographic basis. One could, and probably should, also assume that the reference includes restrictions based on classes of customers.⁵²

As with other reviewable practices in the Competition Act, only the Commissioner may apply to the Competition Tribunal for an order with respect to a market restriction. If the Tribunal determines that the restriction is likely to substantially lessen competition in relation to a product because it is imposed by a major supplier or because it is widespread in the market, the Tribunal may prohibit continuance of the practice and make an order containing such other requirements necessary to restore or stimulate competition in relation to the product.⁵³

There is a new entry defence applicable to market restriction arrangements which allows market restriction to be engaged in for a reasonable period of time in order to facilitate entry of a new supplier of a product or of a new product into a market.⁵⁴ There is also a general affiliate defence available under section 77(5) of the Competition Act, however the market restriction

⁴⁹ *Supra* note 2 at s. 77(4)(c).

⁵⁰ *Ibid.* at s. 77(4)(b).

⁵¹ *Ibid.* at s. 77(1).

⁵² *Supra* note 24 at 200-48.

⁵³ B. Dunlop, D. McQueen & M. Trebilcock, *Canadian Competition Policy: A Legal and Economic Analysis* 227 (Toronto: Canada Law Book, 1987).

⁵⁴ *Supra* note 2 at s. 77(4)(a).

provision employs an expanded definition of affiliate. For the purposes of market restriction, two firms are affiliated where one supplies ingredients to the other, who further processes those ingredients into food or drink, then sells in association with the first firm's trademark.⁵⁵

To date, no market restriction proceedings have been brought before the Tribunal. Additionally no cases have been reported where the Commissioner has accepted undertakings to cease and desist from such conduct.

(d) Refusal to Deal

Unlike legislation of other jurisdictions in which refusals to deal can be challenged only under more general laws, Canada's competition laws include a stand-alone refusal to supply provision.⁵⁶ The refusal to deal provision represents a potential limitation on the right of suppliers to exercise independent discretion in selecting the person with whom they will transact business.

Section 75 of the Competition Act permits the Competition Tribunal to order one or more suppliers in a market to supply a customer with product within a specified time and on usual trade terms if it determines that.⁵⁷

- a person is substantially affected in its business or precluded from carrying on its business due to its inability to obtain an adequate supply of a product anywhere in the market on usual trade terms as a result of insufficient competition among suppliers,
- the product is in ample supply, and
- the customer is willing and able to meet usual trade terms.

The refusal to deal provision is similar to a *per se* offence, in that it does not contain the substantial lessening of competition test against which virtually all other reviewable matters are measured. Because of its *per se* character, section 75 is traditionally applied more as a protection for small distributors against unfair business practices than as a mechanism to ensure

⁵⁵ *Supra* note 2 at s. 77(6).

⁵⁶ Refusals to deal may also fall under the Act's conspiracy provision and, in certain situations, sections on price maintenance, tied selling, exclusive dealing, or abuse of dominance.

⁵⁷ *Supra* note 2 at s. 75.

competition. For example, in the *Chrysler* and *Xerox*⁵⁸ cases, the Tribunal used the provision to prevent companies that supplied unique replacement parts to small exclusive distributors from terminating a long-standing relationship. However, given the reference to a person's preclusion from carrying on business, a supplier might well be ordered to begin selling to someone not previously a customer if the product in question is necessary to conduct business.⁵⁹

It is important to note that an order under section 75 may only be made against a supplier in the market. As with other provisions of the Competition Act, the term market ought to be taken to mean a relevant product or geographic market. The implication of this is that a person could not be ordered to either supply a product that it does not currently supply, or to supply one of its products in a geographic market in which it does not currently carry on business. Further, in *Warner Music*⁶⁰ which involved the licensing of rights to recorded music, the Competition Tribunal held that the Competition Act's refusal to deal provision cannot be used to compel a copyright holder to grant a license. The Tribunal found that the legal rights that constituted the copyright which Warner Music was refusing to license were not "products" for the purposes of the refusal to deal provision in the Competition Act. This decision stands in direct contrast to the US *Kodak*⁶¹ decision which significantly restricted the use of intellectual property-related defences in refusal to deal cases.

(e) e-Commerce Implications

In an e-Commerce world, defining relevant geographic and product markets and assessing whether market power exists is likely to be more complex. In those circumstances, it might be more difficult for antitrust agencies to establish the substantial lessening of competition necessary for the Competition Tribunal to make an order in respect of most reviewable matters.

Online commerce arrangements typically are open to all interested purchasers, so refusal to deal might be of little relevance outside of closed arrangements such as some B2B marketplaces. However, if grounds exist for an

⁵⁸ *Canada (Director of Investigation & Research) v. Chrysler Canada Ltd.*, 27 C.P.R. (3d) 1 (Comp. Trib.), aff'd, 38 C.P.R. (3d) 25 (Fed. C.A.), aff'd (1992), 138 N.R. 319 (note) (S.C.C.) [hereinafter, *Chrysler*]; *Canada (Director of Investigation & Research) v. Xerox Canada Inc.*, 33 C.P.R. (3d) 83 (Comp. Trib.) [hereinafter *Xerox*].

⁵⁹ *Supra* note 24 at 200-49.

⁶⁰ *Canada (Director of Investigation & Research) v. Warner Music*, 78 C.P.R. (3d) 321 (Comp. Trib.).

⁶¹ *Image Technical Servs. Inc. v. Eastman Kodak Co.*, 125 F. 3d 1195 (9th Circ. 1997).

order to be made in respect of a refusal to deal or any other reviewable matter, Canadian antitrust authorities may have difficulty enforcing that order against suppliers that have no physical presence in Canada.

Conclusion

The explosive growth of e-Commerce distribution and other business arrangements has competition law enforcement implications, which are primarily procedural. Traditional economic principles and concerns are as relevant in the information economy as in the old economy, but they become more challenging to apply and enforce in a world where state borders have little relevance to the business arrangement. As e-Commerce permits businesses to become increasingly global, this should be expected to be followed by increased globalization of antitrust enforcement and enhanced cooperation amongst enforcement agencies as a means to enable regulators to reach offenders who have a physical presence or assets beyond their borders.

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