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Challenging A Competitor's Comparative Advertising

By Rick Kurnit

Many major advertisers have resorted to comparative claims of product superiority in an effort to stretch shrinking marketing budgets. In advertising, sales kits, and especially on websites of business-to-business marketers, more aggressive claims are being made. You should anticipate your marketing department coming to you (the trade regulation and competition lawyer in your legal department) with demands for immediate legal action to stop your competition from denigrating your product or service. As the lawyer familiar with your industry's codes and trade association, as well as marketing practices such as coop advertising (and, e.g., Robinson-Patman issues) – or maybe just the smartest lawyer left in your down-sized legal department – you're it. And oh yes, since the object of the exercise is to force a competitor to enter into an agreement with you to limit its competitive activities, perhaps you want to be consulted. So what should you tell them?

The Competitor's Claim

Any claim made in advertising about a product or service must be substantiated. The tricky part is that an advertiser must have substantiation for each of the meanings taken away by would-be purchasers exposed to an ambiguous claim. Thus, the competitor may have substantiation for the intended message or may be relying on an inadequate disclaimer to correct the "misunderstanding" of the claim. So, the first inquiry is: "Is it a good ad?" Your marketing people – or your CEO – who are no doubt outraged by the competitor's denigration of your beloved product or service should be counseled to consider whether forcing the competitor to fix what is wrong with its communication is the best course. Remember, they will not stop advertising; they will merely correct their advertising.

Canada Modernizes Its Resale Price Maintenance Rules

By Neil Campbell and Larry Markowitz

Following the recommendations of the 2008 Competition Policy Review Panel,[1] the March 2009 amendments to the Canadian *Competition Act* repealed the criminal offence of price maintenance.[2] In its place, a new, non-criminal price maintenance provision has been introduced which allows the Competition Tribunal to review and prohibit such a practice.[3] This brings the treatment of vertical price restrictions into line with vertical non-price restrictions[4] and modern economic thinking.[5]

The Canadian Competition Act no longer prohibits price maintenance unless it has had, is having or is likely to have, an "adverse effect on competition" in a market.

Overview of the Changes

Previously, price maintenance was a *per se* offence. The Act explicitly prohibited attempts to influence prices upwards, whether by way of agreement, promise, threat, or other similar means. It also prohibited refusals to supply or discrimination motivated by the customer's low pricing practices. The penalty was a fine in the discretion of the court (no maximum) and/or five years' imprisonment. The Act also provided for a private right of action for injured parties to recover damages.

The Act no longer prohibits price maintenance unless it has had, is having or is likely to have an "adverse effect on competition" in a market. This test already existed under the refusal to deal provision of the Act,[6] and is easier to prove than the "substantial lessening or prevention of competition" test applicable in the other civil reviewable provisions of the Act.[7] However, the

[1] Competition Policy Review Panel, "*Compete to Win,*" Final Report, June 2008, at http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h_00040.html.

[2] Formerly *Competition Act*, RSC 1985, c. C-34, s. 61. This amendment was included as part of the Federal Government's 2009 Budget Implementation Act (Bill C-10), which overhauled numerous provisions in the *Competition Act*. Among other changes, the amendments also repealed the criminal offences of predatory pricing and price discrimination. Such activities are no longer problematic unless undertaken as part of an abuse of a dominant position. For a detailed discussion of the amendments, see Campbell, N. and O'Carroll, S., "The Americanization of Canada's Competition Act," *Canadian Business Law Journal*, December 2009 (forthcoming).

[3] *Competition Act*, s. 76, as amended by Bill C-10.

[4] See the reviewable practices of Refusal to Deal, Tied Selling, Exclusive Dealing, Market Restriction and Abuse of Dominance in Part VIII of the *Competition Act*.

[5] See *e.g.* Trebilcock et al., *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002), Chapters Six and Seven. The United States Supreme Court also noted in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 127 S. Ct. 2705 (2007) that, "Though each side of the debate can find sources to support its position, it suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance […] The few recent studies documenting the competitive effects of resale price maintenance also cast doubt on the conclusion that the practice meets the criteria for a *per se* rule."

[6] *Competition Act*, para. 75 (1)(e).

[7] See *B-Filer Inc. et al. v. The Bank of Nova Scotia.,* 2006 Comp. Trib. 42, in which the Tribunal stated (at paras. 207 and 211) that in a competitive market, although a refusal to deal removes one potential supplier from the marketplace, the effects may be negligible, since one less firm selling a product may go unnoticed or may allow for a profitable opportunity for entry by a new firm. On the other hand, if remaining market

Competition Tribunal has interpreted the test as requiring the creation, maintenance or enhancement of market power in the market in which the customer refused supply was operating, not merely an elimination or impairment of the customer's ability to compete. The same approach is likely to be applied to the new price maintenance provision.

The amendments make two other changes which also reduce the situations in which the price maintenance provision will apply. The Act now provides that the person must actually have engaged in the conduct; mere attempts to influence prices upward are no longer problematic. In addition, the new provision only applies to supplier-customer situations (*i.e.* "resale price maintenance"), whereas the prior criminal offence also covered horizontal interactions (*e.g.* one competitor pressuring another to raise its prices).

The new provisions also allow a private party to seek leave from the Competition Tribunal to start a private action.[8] In practice, we expect that the Commissioner of Competition will only initiate proceedings where a broad market impact is observable and that most proceedings will be brought by customers who have been terminated. This has been the experience under the Refusal to Supply provision since a private right of action was introduced in 2002. If the Tribunal determines the respondent has engaged in price maintenance, it may order the respondent to stop engaging in the practice and/or continue to supply the customer on usual trade terms. However, the Tribunal has no authority to impose fines or award damages.

Suggested Resale Prices

The new civil regime continues to make available a defence for a supplier that suggests a resale price or minimum resale price for its product. The defence will be available if the supplier makes it clear that the reseller is under no obligation to accept the suggestion and that their business relations would in no way suffer if the suggestion is not followed.

Implications for Business

The amendments to Canada's price maintenance rules provide suppliers with substantial new flexibility in their pricing decisions. Manufacturers will be able to impose actual or minimum prices on their wholesalers,[9] retailers and other resellers unless and until prohibited on the basis of demonstrated adverse effects on competition. When combined with the recent removal of rigid price discrimination / promotional allowance offences, it is timely for firms to take a fresh look at

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participants are placed in a position of created, enhanced or preserved market power, then the effect may be considered "adverse", even if not "substantial." Thus, the difference between an adverse effect on competition and a substantial effect is the degree of the effect. This approach was confirmed and elaborated in *Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited v. Groupe Westco Inc. and Groupe Dynaco, Coopérative Agroalimentaire and Volailles Acadia S.E.C. and Volailles Acadia Inc./Acadia Poultry Inc.*, 2008 Comp. Trib. 7. For a brief commentary on this decision, see McMillan Competition Group, "Tribunal decision affirms market power required in order to succeed in 'refusal to deal' case," September 2009. Available online at: <http://www.mcmillan.ca/Upload/Publication/Tribunal_Decision_Affirms_Market_Power_0909.pdf>.

[8] *Competition Act*, s. 103.1. The other reviewable practices in the *Competition Act* for which a private right of action is available with leave are Refusal to Deal, Exclusive Dealing, Tied Selling and Market Restriction.

[9] Maximum prices have historically been and will continue to be lawful under Canadian competition law.

their Canadian pricing strategies. While firms with a substantial market share should still note that there are large fines for violations of the abuse of dominance provision of the Act,[10] that provision requires evidence of a predatory, exclusionary or disciplinary "practice of anti-competitive acts,"[11] and price maintenance (or price discrimination) will rarely have such effects.

North American Pricing Strategies

The conversion of price maintenance from "*per se*" to "rule of reason" conduct by the United States Supreme Court in the *Leegin case*[12] provided suppliers with considerably more scope to set resale prices in the US (subject to various continuing state law restrictions). This resulted in a different standard between Canada and the United States that required firms selling into Canada and their Canadian subsidiaries to operate continental distribution chains carefully because of the stricter laws in force in Canada.

The recent amendments to Canada's *Competition Act* more closely align U.S. and Canadian standards by removing price maintenance practices from the criminal law and placing them in a context where such practices are dealt with by the Tribunal only in the rare cases where anti-competitive effects result. This allows for greater flexibility in crafting pricing programs on a North American basis. For example, unilateral minimum advertised pricing policies (MAPPs) may now be used in Canada, unless and until prohibited by the Competition Tribunal on the basis of adverse effects on competition. Such policies have long been used in the United States, but would have been caught under the previous Canadian price maintenance rules.

A. Neil Campbell (Toronto) and Larry Markowitz (Montréal) are Partners at McMillan LLP.

[10] *Competition Act*, s. 79.

[11] *Canada (Commissioner of Competition) v. Canada Pipe Co*., 2006 FCA 233, [2007] 2 F.C.R. 3 at para. 77.

[12] In *Leegin, supra* note 5, the United States Supreme Court overturned a nearly century-old ban on setting minimum resale prices. The Court stated that a manufacturer's agreement with a retailer to sell products of the manufacturer at or above a specified minimum price is no longer *per se* illegal. Instead, minimum resale price agreements are to be evaluated on a case-by-case basis under the "rule of reason," which allows potential benefits to competition to be weighed against potential anti-competitive effects.