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Recent Developments in Canadian Price Discrimination Law

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Introduction

The *Competition Act*'s price discrimination offence (section 50(1)(a)) prohibits a supplier from engaging in a practice of granting price concessions or other monetary advantages to one purchaser, which are not available to competing purchasers, in respect of a sale of goods of like quality and quantity.[1]

This criminal prohibition against price discrimination has been part of Canadian competition law in one form or another since the mid-1930s. Despite its longevity, the price discrimination provision is rarely the subject of judicial consideration, whether in the context of criminal enforcement proceedings or civil actions initiated by private plaintiffs.[2]

That is why the recent Alberta Court of Queen's Bench decision in *Polar Ice Inc. v. Arctic Glacier Inc.* is noteworthy.[3] Following a trial on the merits, the Court held in favour of the plaintiff's allegations of price discrimination against the defendant. However, the Court's analysis and conclusions are questionable as a matter of law. Indeed, if this decision were to be followed, it would significantly alter the generally accepted interpretation of the price discrimination provisions in the *Competition Act* and severely limit the pricing flexibility of many suppliers in Canada by requiring them to proactively offer lower prices to competing purchasers whenever they extend a discount to a particular customer.

A more detailed discussion of the decision and its implications follows.

Summary of Decision

Polar Ice Inc. ("Polar") operates an ice-making plant in Edmonton. Arctic Glacier Inc. ("Arctic") is the largest supplier of ice in Manitoba, Saskatchewan and Alberta. Indeed, the evidence before the Court was that Arctic had a virtual monopoly in Alberta for the supply of ice to grocery stores, liquor stores, service stations, small confectionary stores and concrete supply companies.

In its claim against Arctic, Polar alleged that Arctic had engaged in a deliberate campaign to interfere with Polar's contractual relations and commercial interests. Among other things, Polar alleged that Artic had:

- refused to honour a contract to supply a customer that had also ordered ice from Polar unless that customer agreed to purchase exclusively from Arctic;
- offered improper payments to certain of the foregoing customer's employees in order to obtain an exclusive supply agreement; and
- violated the Competition Act's price discrimination provision by offering targeted lower pricing to certain of its customers that were also current or prospective customers of Polar without offering the same pricing to competitors of these customers.

Mr. Justice R. P. Marceau of the Court of Queen's Bench of Alberta granted Polar's claim following a trial on the

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1 *Competition Act*, R.S.C. 1985, c. C-34, §50(1)(a).

2 Criminal offences under the *Competition Act* are investigated by the Competition Bureau and prosecuted by the federal Public Prosecution Service of Canada. Section 36 of the *Competition Act* gives private parties the right to sue for damages incurred as a result of conduct that is contrary to the *Competition Act*'s criminal offence provisions.

3 2007 ABQB 717, December 12, 2007.

merits. With respect to the price discrimination issue specifically, Mr. Justice Marceau interpreted section 50(1)(a) as making it illegal for suppliers to "target a specific competitor". He then concluded as follows:

> I am satisfied that in each case in Edmonton where Polar had secured or was on the point of securing a contract to supply ice to Sobeys grocery stores and to liquor stores which previously had obtained their ice from Arctic, Arctic either matched the price offered by Polar or undercut that price. More importantly, Arctic did not lower the price it charged to other grocery stores in the area who were in competition with the Sobeys stores which had been approached by Polar. Similarly, it did not offer the same lower price it gave Athlone, Liquor Depot and Spirits Liquor to liquor outlets in competition with those stores. I find that it selectively offered the lower prices specifically because of Polar's competition and that Arctic's action in lowering its price in these circumstances was specifically directed to meeting that competition. In some cases (i.e. the 10 Sobeys corporate stores), Arctic's actions resulted in Polar losing a contract. In other cases (the six Sobeys franchise stores), Arctic was unsuccessful in achieving that end…
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> The offers made by Arctic to match or even undercut Polar's price to the liquor outlets and Sobeys were direct and deliberate attempts to induce those businesses to breach their contracts with Polar… Arctic offered its "competitive pricing" only to Polar's current or prospective customers. The price it offered to competitors of these customers remained the same. This was a direct contravention of s. 50(1)(a) of the Competition Act.

Although he granted Polar's claim under section 50(1)(a), Mr. Justice Marceau ruled that Polar had failed to prove specific loss or damage suffered as a result of Arctic's conduct in relation to Sobeys and the liquor outlets. Accordingly, he did not award any damages for violation of the *Competition Act*. However, he did award Polar $50,000 in damages at large suffered as a result of Arctic's overall conduct.

Analysis

Section 50(1)(a) of the *Competition Act* makes it a criminal offence for "every one engaged in business" to be a party or privy to or assist in,

> any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity…

There are several problems with the Court's analysis of this provision in the Polar case.

Purpose of Provision

First, the Court misconstrues the purpose of section 50(1)(a) by concluding that it is designed to prevent suppliers from targeting competitors. In fact, the objective of the provision is to create a level playing field among competing purchasers that buy articles of similar quality and quantity from a supplier.[4] In other words, the focus of section 50(1)(a) is on competition between purchasers and not suppliers.

Section 50(1)(a) can be contrasted in this regard with section 50(1)(c) of the *Competition Act*, which is indeed designed to prevent suppliers from disciplining or harming their competitors. Thus, this provision makes it illegal for a supplier to sell the same product in different regions of Canada at different prices where this has "the

[4] *See e.g.*, the Competition Bureau's *Price Discrimination Enforcement Guidelines* (1993), at §1.3, http://www.competitionbureau.ca.

effect or tendency of substantially lessening competition or eliminating a competitor … or [is] designed to have such effect".

Like Quality and Quantity

Second, as noted above, section 50(1)(a) contains a series of discrete elements, all of which must be satisfied in order for there to be an offence. Of key importance is that the offence applies only to discriminatory pricing "in respect of a sale of articles of like quality and quantity". This means that it is not unlawful for a supplier to distinguish in its pricing between competing customers that buy different amounts of product. In other words, if competing customers A and B purchase 5,000 and 15,000 units, respectively, of the same product, the supplier is entitled to grant B more favourable pricing than A based on its larger volume of purchases. Furthermore, this discount need not be supported by reference to any cost justification.

The Court makes no reference in *Polar* to the question of "like quality and quantity". There is only a finding that Arctic offered to match or even undercut Polar's prices to specific customers (Sobeys and the liquor outlets), which the Court held was sufficient to contravene section 50(1)(a). However, section 50(1)(a) would apply only if, among other things, it were proved that the competing customers also purchased at least the same quantity of ice as the "preferred" customers in this instance. The Court does not address this point and it is not clear whether it was part of the evidence offered and simply omitted from the decision, or was erroneously ignored.

Available/Offer

The final difficulty with the Court's decision is its apparent assumption that section 50(1)(a) is violated if a supplier that provides special pricing to one customer (or a select group of customers) does not then "offer an across-the-board lower price" to all competitors of that customer (or customers).

Section 50(1)(a) does not require a supplier to "offer" price concessions to competing customers. The only requirement is that the same prices must be made "available" to competing purchasers (all else being equal). This is in contrast to section 51 of the Competition Act, which requires that certain allowances provided by suppliers for promotional purposes be "offered" to competing customers on proportionate terms.[5]

While the meaning of the term "available" in this context has not been definitively determined and is the subject of some debate, the generally accepted interpretation is that a supplier has no obligation to pro-actively disclose and offer specific price concessions granted to one customer to all other competing customers. The only obligation is that the price concession be made "available" to these competing customers in like circumstances, i.e., they would be entitled to the concession if they meet the relevant criteria and request it.

The Competition Bureau takes a somewhat different view in its *Price Discrimination Enforcement Guidelines* (the "Guidelines").[6] Although the Bureau acknowledges that there is a difference between the obligation to make a price concession "available" to customers and the obligation to "offer" it to customers, the Guidelines attenuate this distinction by expanding the circumstances in which the Bureau expects suppliers to take pro-active steps to offer a price concession to all of its customers who purchase the same or greater quantities of similar products.

For example, the Guidelines state that if a supplier unilaterally decides to offer a price concession to a customer, it should disclose the price concession to all other competing purchasers of articles of like quality and quantity. Similarly, if a supplier negotiates a price concession with a customer, the Guidelines state that disclosure should be made to other competing customers unless the negotiations were initiated by the first customer and it agreed to provide a service in exchange

5 *Competition Act, supra,* §51.

6 *Supra*, at §2.5.3.

for the concession. In those latter circumstances, the supplier's sole obligation is to respond to initiatives of competing customers who ask for a similar deal on similar terms. Otherwise, it appears that the Bureau would expect suppliers to offer broad disclosure of even negotiated price concessions.

The Bureau's Guidelines do not have the force of law. Nor have they been judicially considered or endorsed. The Guidelines are simply an articulation of the Bureau's views on section 50(1)(a) for enforcement purposes. In respect of the "available" issue specifically, the Bureau's position introduces distinctions and qualifications that go beyond the plain meaning of the statutory language.

Taken at face value, the *Polar* case might offer support to the Bureau's view that unilateral price concessions must be pro-actively communicated to all competing customers, at least in some circumstances. However, it is difficult to credit any precedential value to the decision, given that the Court does not address the distinction between the concepts of "offer" and "make available", nor even acknowledge that such a distinction exists.

Conclusion

Polar's allegations against Arctic might have fit more comfortably under the *Competition Act*'s abuse of dominance provision than under section 50(1)(a).[7] However, there is no right of private action under the *Competition Act* for conduct constituting an abuse of dominance.[8] Therefore, Polar could not have brought a claim for damages on that basis.

It is perhaps understandable in the circumstances why the Court would sympathize with Polar's price discrimination claim against Arctic. Nonetheless, the Court's conclusions are based on a faulty interpretation of section 50(1)(a) and the decision raises more questions for future cases under Canadian price discrimination law than it resolves.[9]

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7 *Competition Act, supra,* §§78-79.

8 Unlike price discrimination, abuse of dominance is classified as a civil "reviewable practice" under the Competition Act. There is currently no right of civil action for damages arising from conduct constituting a "reviewable practice" under the *Competition Act.*

9 There is a fairly broad consensus in Canadian competition circles that the price discrimination offence ought to be eliminated. Most recently, a federally appointed review panel recommended that price discrimination, along with predatory pricing and discriminatory promotional allowances, be dealt with under the *Competition Act*'s civil abuse of dominance provision and that the criminal offences for these matters be repealed. Canada's Conservative party, which is set to form a minority government as a result of the recent federal election on October 14, 2008, has endorsed this position.