Price Maintenance in Canada— Guidance from the Competition Bureau

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In 2009, Canada's Competition Act[1] (the Act) was amended to decriminalize price maintenance and to introduce a competitive effects criterion. These amendments responded to the 2008 Competition Policy Review Panel report,[2] which noted that Canada's criminal offense for price maintenance was more restrictive than comparable U.S. law as reflected in the *Leegin* decision,[3] and that earlier studies had recommended changes to the price maintenance provision.[4] These amendments significantly expanded the scope for permissible price maintenance in Canada.

Although the general intent was to more closely harmonize Canadian and U.S. price maintenance law, the Canadian amendments are quite detailed and include express elements that may both expand and limit the law's application relative to U.S. federal antitrust law. Guidelines from the Canadian Competition Bureau (the Bureau) released in September 2014 seek to clarify the Canadian provision and identify price maintenance practices that may still be at risk of challenge.[5]

In this article, we review the price maintenance provision in the Act, discuss concerns raised by the Bureau in some recent cases, and note key aspects of the Guidelines that may point to the Bureau's future enforcement priorities. We conclude that the current climate creates a generally permissive regime for suppliers that do not possess market power, with some potential uncertainties resulting from possible expansive applications of the price maintenance provision suggested by the 2014 Guidelines.

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[1] Competition Act, R.S.C. 1985, c. C-34 (2014) (Can.).

[2] Competition Policy Review Panel, Compete to Win, Final Report 58–61 (2008), *available at* https://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/Compete_to_Win.pdf/$FILE/Compete_to_Win.pdf.

[3] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (retail price maintenance agreement subject to rule of reason), *overruling* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (retail price maintenance per se unlawful). Notably, the Competition Policy Review Panel Final Report, *supra* note 2, did not reference the different (and sometimes more restrictive) legislation in many U.S. states. *See* Michael A. Lindsay, *Repatching the Quilt: An Update on State RPM Laws*, Antitrust Source, Feb. 2014, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb14_lindsay_2_20f.authcheckdam.pdf.

[4] *See* J. Anthony Vanduzer & Gilles Paquet, Univ. of Ottawa, Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice (1999), *available at* http://www.commonlaw.uottawa.ca/index.php?option=com_docman&task=doc_download&gid=46; Can. House Of Commons, Standing Comm. on Indus., Sci. and Tech., A Plan to Modernize Canada's Competition Regime (2002), *available at* http://www.parl.gc.ca/content/hoc/Committee/371/INST/Reports/RP1032077/indurp08/indurp08-e.pdf.

[5] Competition Bureau Canada, Enforcement Guidelines, Price Maintenance (Section 76 of the Competition Act) (2014) [hereinafter Guidelines], *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-eg-price-maintenance-e.pdf/$file/cb-eg-price-maintenance-e.pdf. Comments were filed pursuant to the Bureau's public consultation on a draft of the Guidelines by The American Bar Association's Section of Antitrust Law and Section of International Law, The National Competition Law Section of the Canadian Bar Association, Food & Consumer Products of Canada, and Wal-Mart Canada Corp. Responses to the Consultation on the Price Maintenance (Section 76 of the Competition Act) Competition Bureau, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03745.html (last visited Dec. 2, 2014).

Background

The price maintenance provision in Canada's competition legislation is and has been principally directed at three types of practices:

(1) a supplier influencing a reseller's prices (including advertised prices) upward or discouraging their reduction by agreement, threat, promise, or any like means;

(2) a supplier refusing to supply or otherwise discriminating against a person because of that person's low pricing policy; and

(3) a reseller inducing a supplier to refuse to supply another person because of that other person's low pricing policy.

The 2009 Amendments limit the Tribunal's remedial powers to issuing an order that (1) prohibits the challenged price maintenance practices, or (2) where a person was refused supply because of a low pricing policy, requires the supplier to accept that person as a customer on usual trade terms.

Between 1951 and 2009, Canada had a criminal per se price maintenance offense that prohibited even unilateral minimum advertised price (MAP) policies permitted under the U.S. *Colgate* doctrine.[6] Both criminal charges and private civil actions for damages could result from conduct that violated the prior criminal offense.

The 2009 amendments to the Act replaced the criminal per se price maintenance offense with a provision (now in Section 76 of the Act) that applies only if the Competition Tribunal—a quasi-judicial body comprised of Federal Court judges and lay members—finds a likely adverse effect on competition. Either the Commissioner of Competition, the head of the Bureau, or a directly affected private party may initiate a Section 76 proceeding before the Tribunal.

The 2009 Amendments limit the Tribunal's remedial powers to issuing an order that (1) prohibits the challenged price maintenance practices, or (2) where a person was refused supply because of a low pricing policy, requires the supplier to accept that person as a customer on usual trade terms.[7] Conduct within the scope of Section 76 would not appear to provide grounds for a private action for damages on the basis of common law tort liability for an unlawful act.[8]

Section 76 includes some qualified exemptions for (1) conduct involving principals and their agents, or conduct between affiliates,[9] (2) suggested retail prices in which the absence of adverse consequences for failing to follow the suggestion is made clear,[10] (3) advertising that expressly indicates that dealers may sell for less,[11] and (4) refusals to supply because of a reseller's practice of using the relevant products as loss leaders, below cost selling, misleading advertising, or failing to provide adequate levels of servicing.[12]

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[6] United States v. Colgate & Co., 250 U.S. 300 (1919) (holding that in the absence of an agreement between a manufacturer and a distributor, the manufacturer may unilaterally identify its wishes concerning resale prices and decline further dealings with distributors who fail to observe them).

[7] Competition Act, R.S.C. 1985, c. C-34, § 76(2) (Can.).

[8] *See* Novus Entm't Inc. v. Shaw Cablesystems Ltd., 2010 BCSC 1030 (Can.) (striking a claim that conduct alleged to be an abuse of dominant position under Section 79 of the Act was an unlawful interference with the plaintiff's business interests, where the Tribunal had not issued any order in respect of the alleged conduct). Section 36 of the Act establishes a private right of action for violations of certain offenses under the Act, but not in respect of civil reviewable matters such as Section 76. A breach of a Tribunal order under Section 76, however, would be an offense under Section 66 and grounds for a damages claim in a private action pursuant to Section 36 of the Act.

[9] Competition Act, R.S.C. 1985, c. C-34, § 76(4) (Can.).

[10] *Id.* § 76(5).

[11] *Id.* § 76(6).

[12] *Id.* § 76(9).

Enforcement Action Under the 2009 Provision

No private party has yet commenced a Tribunal proceeding under Section 76. A government enforcement action and an investigation, however, provide some insight into its application.

First, the Commissioner made an application to the Tribunal under the 2009 price maintenance provision challenging the imposition by the Visa and MasterCard credit card networks of rules that prevented participating retailers from (i) surcharging for credit card payments, (ii) not accepting all the network's cards or (iii) discriminating in their treatment of cards from different networks (the Merchant Rules). Some retailers argued that the surcharges or selective acceptance of credit cards were necessary in light of increasing fees Visa and MasterCard indirectly charged to retailers for sales transactions involving a credit card.[13] The Commissioner argued that the Merchant Rules constrained retailers from encouraging customers to use lower cost methods of payment, which in turn limited the ability of retailers to negotiate lower fees with credit card companies. More specifically, these fees, known as card acceptance fees, are paid by retailers to entities known as Acquirers. Acquirers provide services to retailers that allow retailers to accept credit card payments.[14] Because both Visa and MasterCard establish their respective Merchant Rules in their agreements with Acquirers, the Commissioner argued that the imposition of these rules had the effect of "influencing upward or discouraging the reduction of" card acceptance fees in violation of Section 76.[15]

Although Section 76 expressly applies to persons engaged in a business relating to credit cards[16] and the Tribunal found that the challenged restrictions led to higher prices for credit card services and had an adverse effect on competition, the Tribunal held that the price maintenance provision did not apply to the challenged policies because the credit card services supplied by Visa and MasterCard were not "resold" to the affected merchants because the services supplied by Visa and MasterCard to Acquirers are different than the services supplied by Acquirers to retailers.[17] In other words, a "resale" of the respondent's product is required for the price maintenance provisions to apply.[18]

After the Visa/MasterCard decision, some major consumer product suppliers in Canada, particularly in the grocery and pharmacy sectors, reportedly began to impose new limits on the ability of retailers to advertise or sell certain products below specified retail prices.[19]

The second significant government development started with the Bureau's review under the Act's merger provisions of a proposed acquisition by Loblaw, a major Canadian grocery chain, of Shoppers Drug Mart, a major pharmacy chain. In the course of its review, the Bureau considered,

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[13] Comm'r of Competition v. Visa Canada Corp. and MasterCard Int'l Inc., 2013 Comp. Trib. 10, ¶ 56 (Can.) [hereinafter Visa/MasterCard].

[14] *Id.* ¶ 142.

[15] *Id.* ¶ 159.

[16] Competition Act, R.S.C. 1985, c. C-34, § 76(3)(b) (Can.).

[17] Visa/MasterCard, *supra* note 13, ¶¶ 391–392.

[18] *Id.* ¶ 134. Similarly, the Act also expressly provides that Section 76 applies to persons that have exclusive rights and privileges conferred by a patent, trademark, copyright, registered industrial design or registered integrated circuit topography. However, on the basis of Visa/MasterCard, Section 76 may not apply to minimum resale prices imposed on a licensee if the licensee is not re-selling the licensed patent, trademark or other intellectual property.

[19] *See* Marina Strauss, *Canadian Grocery Suppliers Strike Back Against Heavy Discounting*, Globe And Mail (Mar. 8, 2014), http://www.theglobeandmail.com/report-on-business/canadian-grocery-suppliers-strike-back-against-heavy-discounting/article17360748/; *see also* Wal-Mart Can. Corp., Comments on Draft Competition Bureau Enforcement Guidelines for Price Maintenance (Section 76 of the *Competition Act*) 5 (2014), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Wal-Mart-Canada-Price-Maintenance.pdf/$file/Wal-Mart-Canada-Price-Maintenance.pdf.

among other things, restrictions imposed by Loblaw on its suppliers to compensate Loblaw for discounts that Loblaw provided on the suppliers' products to match other grocery stores' lower advertised prices.[20] The Bureau was concerned that these policies created incentives for Loblaw's suppliers to impose price maintenance restrictions on Loblaw's competitors, thereby preventing those competing retailers from offering lower prices.[21] The Bureau ultimately obtained commitments from Loblaw directed at these policies.[22] In a public statement on its clearance of the merger, the Bureau stated that, while a consent agreement with Loblaw addressed merger-specific issues, the Bureau would continue to investigate Loblaw's policies, agreements and conduct related to pricing strategies and programs that reference rivals' prices.[23]

Key Points from the 2014 Enforcement Guidelines

[S]ome aspects of the Guidelines suggest the Bureau takes a relatively more activist approach to the price maintenance provision than had previously been evident under the 2009 amendments.

The credit cards case and the Loblaw investigation are somewhat atypical examples of conduct that could raise issues under the price maintenance provisions of the Act. For more typical resale price maintenance policies, such as MAPs, the September 2014 Guidelines represent the most significant guidance to date from the Bureau on the 2009 price maintenance legislation.

The Guidelines provide several key takeaways. Also, as noted below, some aspects of the Guidelines suggest the Bureau takes a relatively more activist approach to the price maintenance provision than had previously been evident under the 2009 amendments.

Price maintenance is often procompetitive. The Guidelines recognize that price maintenance is common in many markets, and, depending on the nature of the product, can be procompetitive in many circumstances, such as by enhancing service and inventory levels among competing retailers of the same brand of product and addressing free-riding among retailers. Price maintenance may also facilitate entry by encouraging retailers to stock and promote a supplier's products or engage in marketing efforts to promote a particular product.[24]

Multi-supplier challenges. The Guidelines state that the Bureau may consider enforcement action against more than one supplier in an industry or sector to address an adverse competitive effect in a market resulting from price maintenance practices.[25] However, the Guidelines do not amplify how or whether the Bureau would frame such an application to the Tribunal in instances where (i) the various suppliers had each independently and unilaterally adopted a price maintenance policy and (ii) no one of them alone has market power sufficient to have an adverse effect

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[20] Competition Bureau Position Statement, Competition Bureau Review of the Proposed Acquisition of Shoppers Drug Mart Corp. by Loblaw Cos. Ltd. (Mar. 21, 2014), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03703.html [hereinafter Position Statement].

[21] *Id.*

[22] Consent Agreement, Comm'r of Competition and Loblaw Cos. Ltd., Mar. 21, 2014, *available at* http://www.ct-tc.gc.ca/CMFiles/CT-2014-003_Registered%20Consent%20Agreement_1_38_3-21-2014_1159.pdf. Under paragraph 53 of the agreement, Loblaw cannot enter into any "Threshold Deals" with any suppliers of specified categories of products for five years. A "Threshold Deal" is an agreement between Loblaw and a supplier that requires the supplier to compensate Loblaw to ensure that Loblaw achieves a stated margin when Loblaw lowers its price to match an advertised price of another retailer.

[23] Position Statement, *supra* note 20. In November 2014, pursuant to its continued investigation into Loblaw's policies, agreements and conduct, the Bureau applied for court orders compelling 12 major grocery suppliers to produce records and information relevant to the Bureau's continuing investigation of Loblaw's pricing policies. *See* Jeff Gray & Marina Strauss, *Watchdog Probes Alleged 'Restrictive Trade Practices' at Loblaw*, GLOBE AND MAIL (Nov. 17, 2014), http://www.theglobeandmail.com/report-on-business/loblaw-faces-competition-bureau-probe-over-pricing-strategies/article21613053/, and e.g., Application Record, Comm'r of Competition v. S.C. Johnson and Son, Ltd., No. T-2342-14 (Can. Ont. Fed. Ct., Nov. 12, 2014).

[24] Guidelines, supra note 5, § 1.

[25] *Id.* § 2.1.1.

on competition. As the FCPC Comments on the Draft Guidelines pointed out, Section 76 lacks express statutory language to permit an application on this basis.[26] In contrast, some of the Act's other provisions clearly permit the Tribunal to, for example, issue an order directed to all or any suppliers engaged in exclusive dealing that is "widespread in the market" if the practice is likely to lessen competition substantially.

Indirect influence on resale price. Section 76 applies to agreements or other specified types of conduct that influence prices upward either directly or indirectly. While minimum resale price or MAP policies, for example, may constitute a direct upward influence on price, it is less clear what might constitute an "indirect" upward influence on price. The Guidelines state that even though an increase by a supplier of the wholesale price of a product may lead to an increase in the retailer's price, such a price increase is insufficient, in and of itself, to warrant enforcement action under Section 76.[27] The Tribunal made a similar but broader observation in *Visa/MasterCard*:

> We agree with the Respondents that the "influencing-upward" condition must mean something other than the consequences that flow from a company's exercise of market power which results in adverse effects on competition in the form of an increase in prices in the downstream market. If not, Section 76 would turn into an open-ended provision. There is no support, in the legislative history, other decisions, or commentary, for such an interpretation.[28]

The Guidelines then assert that the Tribunal considers that a supplier's influence on a retailer's selling or advertised prices could represent something more than the mere exercise of market power (and presumably constitute indirect price maintenance) where, for example, the supplier's conduct results in a retailer setting the price of its product at a level higher than it would otherwise sell the product.[29] This, however, goes beyond the cited portion of the *Visa/MasterCard* decision, where the Tribunal stated more generally that "Under some circumstances . . . resale price maintenance can reduce both intra-brand and inter-brand competition and is demand-restricting as a consequence. In this case there would be both an upward influence on price and an adverse effect on competition."[30] By citing this passage, the Bureau may be suggesting that a policy which reduces inter-brand competition by encouraging higher prices of other manufacturers' products has a distinct indirect upward influence on resale prices that the Bureau may investigate under Section 76.

The Guidelines further suggest that the Bureau may consider a supplier's terms and conditions of sale to indirectly influence upward a reseller's prices if they "may reduce or eliminate downstream competitive forces that would otherwise discipline the supplier's upstream pricing, such that the supplier's price for the product supplied, and by extension the price of the retailer's product, is higher than would be the case absent the price maintenance conduct."[31] Here, the Bureau cites the Tribunal's *Visa/MasterCard* decision to the effect that the card networks' no-surcharge rules effectively required merchants to pass on the cost of higher card acceptance fees to all cus-

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[26] Food & Consumer Products of Can. FCPC Submission on the Draft Price Maintenance Guidelines 2 (2014), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Food-Consumer-Products-Canada-Price-Maintenance.pdf/$file/Food-Consumer-Products-Canada-Price-Maintenance.pdf.

[27] Guidelines, *supra* note 5, § 2.1.3.

[28] Visa/MasterCard, *supra* note 13, ¶ 162.

[29] Guidelines, *supra* note 5, § 2.1.3 (citing Visa/MasterCard, *supra* note 13, ¶¶ 162 and 269).

[30] Visa/MasterCard, *supra* note 13, ¶ 269.

[31] Guidelines, *supra* note 5, § 2.1.3 (citing Visa/MasterCard, *supra* note 13, ¶¶ 321–322).

tomers, regardless of their method of payment. In contrast, surcharging by merchants for use of cards with higher merchant fees would provide a competitive constraint on those acceptance fees, resulting in lower fees for merchants to access credit card network services.

The CBA Comments on the Draft Guidelines argued that this interpretation is inconsistent with *Visa/MasterCard* because it conflates the "influence upward" and the "adverse effect on competition" elements in Section 76.[32] In other words, in accordance with the decision of the Canadian Federal Court of Appeal in *Canada Pipe*, each element of Section 76 should have a distinct and non-overlapping meaning.[33] The CBA Comments also asserted that, in a price maintenance case, terms and conditions that may influence a *supplier's* pricing (rather than a reseller's) should not be relevant.

In any event, if Section 76 prohibited supplier policies merely because they indirectly cause prices to be higher than they otherwise would, that would seem to capture a supplier policy of requiring retailers to provide minimum levels of service or minimum standards of store quality, which would not traditionally have been considered to constitute challengeable price maintenance under the Act. Indeed, it would be difficult to understand why such a policy could be prohibited simply because it causes prices to be higher than they otherwise would, while a supplier's direct price increase to its resellers would not.

While the Guidelines are not entirely clear on this point, a possible reading is that a price increase or other policy that simply raises a reseller's costs without restricting the reseller's pricing strategy or impairing inter-brand competition would not be sufficient to invoke Section 76 whereas a restraint related to the reseller's pricing policies, although not expressly setting a minimum resale price, could be an indirect upward influence on price challengeable under Section 76, if the other elements of Section 76 are met.

In *Visa/MasterCard*, the Tribunal found that the respondents' no-surcharge rules indirectly influenced upward the price at which Acquirers sold credit card network services to merchants.[34] However, the Tribunal did not find sufficient evidence to support the Commissioner's allegation that rules requiring merchants to honor all cards or prohibiting discrimination among a network's cards had influenced prices upward.[35] In any event, the Tribunal's comments in this regard were obiter dicta given that the Tribunal's principal finding was that Section 76 did not apply because of the absence of a resale.

Parity agreements. In discussing Section 76's application to "indirect" influences on reseller prices, the Guidelines also cite the example of price parity agreements.[36] Those agreements involve commitments by retailers to the supplier to charge the same resale price as other retailers charge for the supplier's products, or to charge the same resale price as that retailer charges for products sourced from the supplier's competitors. In recent years, parity agreements have

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[32] Can. Bar Ass'n, Competition Bureau's Draft Price Maintenance Guidelines 4–5 (June 2014) [hereinafter CBA Comments], http://www.cba.org/CBA/submissions/pdf/14-36-eng.pdf; *see also* Visa/MasterCard, *supra* note 13, ¶ 163.

[33] Comm'r of Competition v. Canada Pipe Co., 2006 FCA 233 (Can.).

[34] Visa/MasterCard, *supra* note 13, ¶ 322.

[35] *Id.* ¶¶ 333, 339.

[36] Guidelines, *supra* note 5, § 2.1.3.

come under increased scrutiny by other competition agencies because of concerns that they may reduce price competition between retailers or suppliers.[37]

"Any like means." As noted above, Section 76 applies to attempts by a supplier to influence prices upwards by agreement, threat, promise "or any like means." The Guidelines comment that any conduct that implicitly or explicitly purports to confer a benefit or impose a penalty on a reseller could be subject to Section 76, but do not expand on this point or comment further on the concept of "like means."[38] An example of "like means" from the case law under the prior price maintenance offense is deliberately filling orders with wrong and unordered goods.[39]

"Resale." As noted above, in its *Visa/MasterCard* decision, the Tribunal found that a resale of a product is required for Section 76 to apply. The Tribunal stated that the resold product need not be identical, although in many instances it would be identical or "substantially similar on the important aspects of the product."[40] The Guidelines suggest that a product that is repackaged, reapportioned, processed or transformed from the product supplied, or is bundled with other products, could be considered "substantially similar."[41] The Tribunal noted, but did not find it necessary to rule on, the respondents' position that the resold product should be in the same antitrust product market as the product supplied.[42]

Scope of exemptions. While a supplier may refuse to supply a reseller that engages in a practice of loss leader selling, false advertising, bait and switch, or inadequate servicing, the Guidelines state that the Bureau may, in that case, still establish that the supplier's minimum resale pricing or MAP pricing practices have in fact influenced a retailer's pricing upwards.[43] However, it is not clear how or in what circumstances that scenario could arise when the reseller has been refused supply, or whether the Tribunal would sustain a challenge on that basis.

Constructive refusals to supply. According to the Guidelines, constructive refusals to supply involving price or non-price conduct can provide grounds for a challenge under Section 76. For example, the Guidelines state that a wholesale price for a product that is patently in excess of any price that could reasonably be expected to be obtained for the product in a downstream market could constitute a constructive refusal to supply.[44] Case law under the prior price maintenance offense provides some qualified support for this proposition. In the *Sunoco* case, the Crown unsuccessfully argued that Sunoco had effectively or indirectly refused to supply one of its deal-

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[37] For example, the Competition and Markets Authority (UK) has proposed changes to the private motor insurance (PMI) market to increase competition and reduce the cost of premiums for motorists, including a ban on price parity agreements between price comparison websites (PCWs) and insurers which prohibit insurers from making their products available to consumers elsewhere at lower rates. The Competition and Markets Authority found that some price parity clauses in contracts between PCWs and insurers had the effect of suppressing competition on price and were likely to lead to higher PMI prices overall. *See* Press Release, Competition and Markets Authority, CMA Sets Out Changes for Private Motor Insurance (June 12, 2014), https://www.gov.uk/government/news/cma-sets-out-changes-for-private-motor-insurance.

[38] Guidelines, *supra* note 5, § 2.1.2; CBA Comments, *supra* note 32, at 3–4.

[39] R. v. Levi Strauss of Canada Inc. (1979), 45 C.P.R. (2d) 215 (Can. Ont. Co. Ct.).

[40] Visa/MasterCard, *supra* note 13, ¶ 115.

[41] Guidelines, *supra* note 5, § 2.1.4.

[42] Visa/MasterCard, *supra* note 13, ¶ 134.

[43] *See* COMPETITION LAW OF CANADA 25TH ED. § 4.06[4] (Calvin S. Goldman & John D. Bodrug eds., 2013) (discussion of other aspects of these exemptions).

[44] Guidelines, *supra* note 5, § 3.1.1.

ers by "freezing" that dealer's pricing support at an uncompetitive level.[45] The court commented that it accepted the Crown's position that "in some circumstances the refusal to sell at a price which allows the dealer to make a profit might amount to indirect refusal to supply," but in that case there was no restriction on the amount of gas that the dealer's station could obtain and other financial incentives were available to the dealer with increased purchases.[46]

The Guidelines add that non-price constructive refusals to supply could include, for example, delays in filling orders or shipping incomplete orders. However, these examples might also be viewed as actual refusals to supply and perhaps illustrate better a position that a partial refusal to supply because of a person's low pricing policy could provide grounds for an order under Section 76.[47]

Single incident. The Guidelines state that a single incidence of a refusal to supply or discrimination is sufficient to engage the price maintenance provision if the other elements are present.[48] It may, however, be difficult to establish that a single occurrence has the anticompetitive effect required for the Tribunal to issue an order.

Prospective customers. The Guidelines state that the refusal to supply branch of the price maintenance provision can apply with respect to a prospective reseller even if that person is not an existing or previous customer of the supplier.[49] Accordingly, refusing to supply a new customer because of its low pricing policy could provide grounds for an order under Section 76.

"Because of a low pricing policy." Consistent with some case law under the prior price maintenance offense, Section 3.1.3 of the Guidelines states that the Bureau considers that a refusal to supply, or discrimination in the supply of, a product will have occurred "because of the low pricing policy" of a person where the low pricing policy is the "proximate cause" of the supplier's refusal or discrimination.[50] The Guidelines go further in stating that, in the Bureau's view, a person's low pricing policy need not be the only or even the primary reason for the refusal or discrimination, but it is sufficient that it be "a factor informing the supplier's decision."[51] However, hypothetical example 2 in Section 7.2 of the Guidelines seems to imply that the "low pricing policy" must have made a difference in the determination not to supply, e.g., if poor service would have led to refused supply regardless of the reseller's pricing policy or good service would have restored supply regardless of the pricing policy, the refusal is not "because of" the low pricing policy. Thus, in contrast to the discussion in Section 3.1.1 of the Guidelines, the example suggests that it is not sufficient for the reseller's low pricing policy to simply be one non-determinative factor in the supplier's decision making.

Safe Harbor: Assurance of pricing freedom. The Guidelines state that the price maintenance provision will not apply where a person (e.g., retailer "A") induces a supplier to refuse supply to

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[45] R. v. Sunoco (1986), 11 C.P.R. (3d) 557 (Can. Ont. Dist. Ct.).

[46] *Id.* at 568.

[47] One court has held that a refusal to supply a person with a specific brand of an item because of that person's low pricing policy violated the prior price maintenance offense. *See* R. v. Grange (1979), 40 C.P.R. (2d) 214 (Can. B.C. Co. Ct.).

[48] Guidelines, *supra* note 5, § 3.1.1.

[49] *Id.* § 3.1.3.

[50] *Id.*; *see* Reasons for Judgment, R. v. 41813 Alberta Ltd., No. 9201-1336c6 (Can. Alta. Q.B. (Judicial Dist. of Calgary), Feb. 4, 1993); Sentencing, R. v. 41813 Alberta Ltd., No. 9201-1336-C6 (Can. Alta. Q.B. (Judicial Dist. of Calgary), Mar. 24, 1993); Reasons for Judgment, R. v. Royal Lepage Real Estate Servs. Ltd., No. 8201-14125 ¶¶ 95–106 (Can. Alta. Q.B. (Judicial Dist. of Calgary), Oct. 28, 1994); Sentencing, R. v. Royal Lepage Real Estate Servs. Ltd., No. 8201-14125 (Can. Alta. Q.B. (Judicial Dist. of Calgary), Dec. 20, 1994).

[51] Guidelines, *supra* note 5, § 3.1.3.

another person (e.g., competing retailer "B") if retailer "A" would have done business with the supplier regardless of the success of the inducement.[52] Accordingly, a retailer who wishes to discuss product prices with a supplier could reduce its risk under the price maintenance provision by making it clear to its supplier that it will continue to purchase from the supplier on the same terms whether or not the supplier continues to sell to other retailers. Similarly, the Act expressly provides that a suggestion by a supplier of a resale or minimum resale price to a reseller is deemed to influence the reseller unless the supplier made clear that the reseller is under no obligation to accept the suggestion and would in no way suffer in its business relations if it refuses to accept the suggestion.[53] (Of course, even if a suggestion is made and resale prices are influenced upwards, the other elements of the provisions, including an adverse effect on competition, must also be established before the Tribunal can issue an order under Section 76.)

[T]he Tribunal cannot issue an order under the Act's price maintenance provision unless the challenged practice has an "adverse effect" on competition. This is a lower threshold than the "substantial lessening or prevention of competition" test that applies in many other provisions of the Act . . .

Adverse effect on competition. As noted above, the Tribunal cannot issue an order under the Act's price maintenance provision unless the challenged practice has an "adverse effect" on competition. This is a lower threshold than the "substantial lessening or prevention of competition" test that applies in many other provisions of the Act, such as the provisions with respect to mergers and abuse of dominance. The Tribunal has said that "without market power there can be no adverse effect in a market."[54] As a result, the Bureau will be concerned with price maintenance conduct only where it is likely to create, preserve or enhance market power—namely, the ability to behave relatively independently of the market.

A market share of less than 35 percent typically will not prompt further Bureau examination of whether a firm possesses market power. However, the Guidelines point out that, consistent with the Tribunal's findings in *Visa/MasterCard*, a firm with a market share of less than 35 percent could have a degree of unilateral market power in some instances, depending on the relevant market's characteristics.[55] In that case, the Tribunal found the market to consist of the supply of certain credit card network services provided by only two suppliers. While Visa had two-thirds of the market and MasterCard accounted for the balance, given the highly concentrated market, MasterCard's pricing discretion, its margins, and the very high barriers to entry, the Tribunal found that both Visa and MasterCard had market power.

The Guidelines identify the following circumstances in which price maintenance may be demand-restricting, thereby adversely affecting competition in a market and serving to create, preserve or enhance market power:

- ***Inhibiting competition between suppliers:*** Price maintenance may be used by suppliers to facilitate less vigorous price competition among them, or to help police a price-fixing arrangement among them. (Of course, in the latter case, it may be expected that the Bureau would pursue a criminal cartel charge, rather than an order under Section 76.)[56]
- ***Inhibiting competition between retailers:*** One or more retailers may compel a supplier to adopt price maintenance to facilitate less vigorous price competition among the retailers, or to help police a price-fixing arrangement among the retailers.[57]

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[52] *Id.* § 4.1.1.

[53] Competition Act, R.S.C. 1985, c. C-34, § 76(5) (2014) (Can.).

[54] Nadeau Poultry Farm Ltd. v. Groupe Westco Inc., 2009 Comp. Trib. 6, ¶ 369 (Can.).

[55] Guidelines, *supra* note 5, § 5.2.

[56] Competition Act, R.S.C. 1985, c. C-34, § 45 (2014) (Can.).

[57] Guidelines, *supra* note 5, § 5.3.

- *Supplier exclusion:* An incumbent supplier may use price maintenance to guarantee margins for retailers to cause them to be unwilling to carry the products of existing or new entrant competitors of the supplier. To the extent that such a policy results in the foreclosure of downstream distribution channels to competing suppliers, it may limit or reduce the ability of such suppliers to discipline the incumbent's wholesale pricing, enabling the incumbent to charge a price that is higher than it could sustain absent such conduct. (However, the abuse of dominance provisions in Section 79 of the Act may provide a clearer basis for challenging such exclusionary conduct if it is likely to prevent or lessen competition substantially.)[58]
- *Retailer exclusion:* A retailer may compel a supplier to engage in price maintenance with a view to excluding competition to the retailer from discount or more efficient retailers.[59]

After-the-fact analysis. The Guidelines include an example of the application of Section 76 to co-operative advertising agreements that appears to focus on an after-the-fact analysis of whether a MAP policy in fact had the effect of increasing prices.[60] As a practical matter, however, a supplier must make a determination of whether a proposed policy complies with the price maintenance provisions before it proceeds to implement the policy. Nevertheless, to minimize risks of Bureau investigations, suppliers may wish to attempt to monitor the impact on market prices of any price maintenance policies they may adopt from time to time.

Case resolutions. The Guidelines state that, before commencing formal proceedings with the Tribunal under the price maintenance provision of the Act, the Commissioner will generally afford parties an opportunity to respond to the Bureau's concerns and to propose an appropriate resolution to address them. The Guidelines note that possible resolutions could range from discontinuance of an inquiry to a consent agreement registered with the Tribunal.[61]

Other considerations. Notably, the Guidelines do not discuss any factors that might cause the Commissioner to exercise his discretion not to pursue a case that satisfies the elements of the Act's price maintenance provision. In *Visa/MasterCard*, the Tribunal observed that its power to issue an order under this provision is discretionary and, having regard to the complexity of the credit card market and likely "technical hitches, unforeseen consequences [and] a need for ongoing adjustment and stakeholder consultation," the Tribunal would not have issued an order in that case even if the Commissioner had established all of the elements of the price maintenance provision.[62] Presumably, the Commissioner is entitled to, and will, exercise discretion in deciding which price maintenance cases he will pursue.

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[58] The abuse of dominance provisions in Section 79 of the Act provide that where "(a) one or more persons substantially or completely control, throughout Canada or any [part of Canada], a class or species of business, (b) that person or persons have engaged in or are engaging in a practice of anti-competitive acts, and (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market," the anticompetitive practice may be prohibited or subjected to a remedial order or monetary penalty. The Bureau's Abuse of Dominance Enforcement Guidelines assert that a group of unaffiliated firms may collectively or jointly hold market power if the firms do not compete with one another to a sufficient degree. See Competition Bureau Canada, Enforcement Guidelines, The Abuse of Dominance Provisions, Sections 78 and 79 of the Competition Act § 2.4 (2012), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-abuse-of-dominance-provisions-e.pdf/$FILE/cb-abuse-of-dominance-provisions-e.pdf. While the Bureau states that similar or parallel conduct by firms is insufficient, on its own, for the Bureau to consider two or more firms to hold a jointly dominant position, it remains to be seen whether the Tribunal would hold that independent firms could jointly "control" a market in the absence of an agreement or understanding between them. *See* John D. Bodrug, *Joint Dominance*, 21 Can. Competition Rec. 104 (2003).

[59] Guidelines, *supra* note 5, § 5.3.

[60] *Id.* § 7.1.

[61] *Id.* § 6.

[62] Visa/MasterCard, *supra* note 13, ¶ 395.

In designing a Canadian pricing and distribution policy, companies should keep in mind that even a unilateral policy that complies with the price maintenance provision might still raise issues under other provisions of the Act. Notably, a recent Federal Court of Appeal decision in respect of proceedings against the Toronto Real Estate Board under the abuse of dominance provisions of the Act held that Section 79 can apply to a firm that is dominant in one market but whose conduct has exclusionary effects in another market.[63] For example, the Bureau might challenge a refusal to supply by a dominant supplier under the Act's abuse of dominance provisions (which allow the Tribunal to impose significant monetary penalties) if the Bureau concludes that the conduct excludes downstream distributors or retailers from a market and substantially prevents or lessens competition in that market.

Policies directed at resale policies of only the supplier's own products (or some of them), ought to carry relatively less risk of challenge than a policy purporting to restrict prices of competing products, given that the latter appear to have attracted Bureau scrutiny.

Similarly, even if a reseller's termination does not provide grounds for challenge under the price maintenance provisions, consideration should also be given to separate refusal to deal provisions in Section 75 of the Act. In some circumstances, Section 75 allows the Tribunal to order supply on usual trade terms to a person who is substantially affected in his business, or is precluded from carrying on business, due to his inability to obtain adequate supplies of the product anywhere in a market on usual trade terms. For such an order to be made, the customer or prospective customer must show that (1) its inability to obtain adequate supplies of the product is because of insufficient competition among suppliers for a product that is in ample supply, and (2) the refusal is having or is likely to have an adverse effect on competition in a market.

Implications

Undoubtedly, by adding a competitive effects element and de-criminalizing the provision, the 2009 amendments to the Competition Act provided significantly greater scope for suppliers to engage in price maintenance practices in Canada. A supplier that clearly lacks market power has the greatest flexibility, subject only to potential concerns if price maintenance is engaged in by some of its competitors and has a cumulative anticompetitive effect.

Suppliers that may be found to possess market power will need to assess the potential competitive effects of a proposed price maintenance practice in Canada, and should document any efficiency enhancing rationales for adopting a price maintenance policy. Policies directed at resale policies of only the supplier's own products (or some of them), ought to carry relatively less risk of challenge than a policy purporting to restrict prices of competing products, given that the latter appear to have attracted Bureau scrutiny. Having said that, it remains to be seen what types of non-traditional price maintenance practices the Bureau will challenge, and in what circumstances the Tribunal will be prepared to issue a remedial order. In particular, an aggressive approach to what constitutes an "indirect" upward influence on price, constructive refusals to supply, or low pricing as a "proximate cause" for a refusal to supply, could create new trip wires for companies that distribute their products in Canada. ●

[63] Comm'r of Competition v. Toronto Real Estate Bd., [2014] F.C.A. 29 (Can. Ont. Fed. Ct.).