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I. INTRODUCTION

The provisions of the Canadian *Competition Act* ("Act"), as interpreted by relatively few cases, created clear demarcations around permissible unilateral conduct in Canada. Recent developments have, however, clouded the picture. Concurrent shifts in proposed legislation, judicial decisions, and enforcement collectively signal new and broader interpretations of the scope of the Act's unilateral conduct provisions. In turn, these developments create uncertainty for businesses operating in Canada, highlighting the need for meaningful transparency and reasoned guidance from the Competition Bureau, the courts, and the legislature. In this regard, the experiences of competition law jurisdictions that have grappled with exploitative pricing, price discrimination, and broader concepts of unilateral conduct than were previously actionable in Canada provide a natural frame of reference.

This note (II) describes the previously understood application of the Act to unilateral conduct; (III) discusses recent enforcement developments that portend unclear changes in the application of unilateral conduct rules in Canada; and (IV) considers ways that clarity could be re-established for unilateral conduct in Canada, including by reference to the experiences of the United States and the European Union.

II. UNILATERAL CONDUCT UNDER THE CANADIAN COMPETITION ACT

Sections 75 to 79 of the Act govern unilateral conduct. Notably:[2]

- Section 76 permits the Competition Tribunal to make an order where resale price maintenance results in an adverse effect on competition (among other requirements).[3]
- Section 79 permits the Competition Tribunal to make an order and impose administrative monetary penalties of up to CAD $10 million where a dominant firm engages in an "anti-competitive act" that prevents or lessens competition substantially (among other requirements). Section 78 contains a non-exhaustive list of types of conduct that can constitute an anti-competitive act under section 79.

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[2] In addition to sections 76, 78, and 79, discussed above, sections 75 and 77 permit the prohibition of refusals to deal and certain distribution practices, respectively. There have not been significant developments in respect of these sections recently.

[3] The Competition Tribunal is a specialized court that has jurisdiction over all the provisions of the Act that concern unilateral conduct.

The language of these sections of the Act is specific, which is one of the features that distinguishes the Act from the competition laws of other jurisdictions.[4] Arguably, on account of this degree of specificity the handful of cases that have considered the Act's unilateral conduct provisions have produced decisions that (i) made careful reference to the Act's text for the purposes of identifying the scope of its provisions, (ii) interpreted the language of the Act narrowly, and (iii) adopted relatively bright-line interpretations regarding the scope of permissible conduct.

The best example of such a case may be *Commissioner of Competition v. Canada Pipe,*[5] where the Federal Court of Appeal considered, among other things, the meaning of the term "anti-competitive act" in section 79. It held that:

> [w]hile clearly non-exhaustive, the illustrative list [of acts] in section 78 provides direction as to the type of conduct that is intended to be captured [as an anti-competitive act] … reasoning by analogy, a non-enumerated anti-competitive act will exhibit the shared essential characteristics of the examples listed in section 78.[6]

With reference to an earlier case, the court held that, "the purpose common to all acts [listed in section 78], save that found in paragraph 78(1)(f), is an intended negative effect on a competitor…"[7] The court further held that: "an anti-competitive act is defined by reference to its purpose" and that the inquiry is:

> focused upon the intended effects of the act **on a competitor**." As a result, some types of effects on **competition** in the market might be irrelevant [and would not constitute an anti-competitive act], if these effects do not manifest through a negative effect on a competitor. It is important to recognize that "anti‑competitive" therefore has a restricted meaning within the context of [section 79], for the Act as a whole, "competition" has many facets as enumerated in section 1.1, for the particular purposes of [section 79], "anti‑competitive" refers to an act whose purpose is a negative effect on a **competito**r."[8]

Canada Pipe therefore defined the meaning of an anti-competitive act by careful reference to the text of the Act itself. The decision interpreted the meaning of anti-competitive act narrowly, limiting the meaning of anti-competitive conduct to that which has as its overriding purpose the exclusion of competitors. In reaching this conclusion, *Canada Pipe* acknowledged that there may be gaps in the Act (since some types of conduct that affect competition would not be actionable if not manifested through a negative effect on a competitor) and virtually ignored paragraph 78(1)(f), which identifies "buying up of products to prevent the erosion of existing price levels" as an anti-competitive act.

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[4] The language of §1 or §2 of the *Sherman Act* and Articles 101 and 102 of the Treaty on the Functioning of the European Union are far more general than the detailed language of the Act.

[5] *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233.

[6] *Id.*, ¶63.

[7] *Id.*, ¶64, with reference to *Canada (Director of Investigation and Research) v. NutraSweet Co.*, (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) at 34.

[8] *Id.*, ¶68 (emphasis included in the original).

This decision resulted in the creation of a bright line for companies operating in Canada—so long as the overriding purpose of a business practice was something other than the exclusion of a competitor, the business practice could not constitute an abuse of dominance.

III. RECENT DEVELOPMENTS INTRODUCE UNCERTAINTY AND BUSINESS RISK

There have been three recent developments in Canadian competition law that cloud the question of whether the delimiters of permissible unilateral conduct under the Act are still certain. As a result, conduct that was previously considered legitimate competitive strategy may, in the current environment, raise the risk of enforcement action.

A. Visa/MasterCard—Tribunal Highlights Overreaching Interpretation of the Act

In 2010, the Commissioner applied to the Tribunal for an order prohibiting Visa and MasterCard from enforcing certain of their rules (e.g., the "honour all cards" and the "no surcharge" rule), alleging that the rules had the effect of influencing upwards or discouraging the reduction of card acceptance fees, contrary to the section 76 price maintenance provision. This represented an aggressive attempt by the Commissioner to fit the credit card companies' rules into the framework of a section the Act that made an "upward influence" on resale prices actionable in certain circumstances.

The Tribunal rejected the Commissioner's application on the basis that, among other reasons, section 76 requires a resale of a product.[9] In so doing, the Tribunal also rejected the Commissioner's "overreaching interpretation of section 76."[10]

B. Federal Government's 2014 Budget—A De Facto Price Discrimination Provision?

Despite the deep integration of their economies, prices for consumer goods sold in Canada are often higher than in the United States. This so-called "price gap" is often attributed to circumstances such as the relatively small size of the Canadian economy, the volatility of the Canadian exchange rate, the cost of compliance with Canadian product safety standards, and the cost of transportation and distribution in Canada. The price gap is occasionally the subject of political discussion.[11]

The federal government's February 2014 budget promised that it would introduce "legislation to prohibit unjustified cross-border price discrimination to reduce the gap between consumer prices in Canada and the United States."[12] The Commissioner of Competition would

[9] *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 10, at ¶ 137.

[10] *Id.*, at ¶139.

[11] For example, in February 2013 the Standing Senate Committee on National Finance published a report entitled *The Canada-USA Price Gap*; *available at*: http://www.parl.gc.ca/content/sen/committee/411/nffn/rep/rep16feb13-e.pdf.

[12] *The Road To Balance: Creating Jobs and Opportunities*, tabled in the House of Commons by the Honourable James M. Flaherty, P.C., M.P., Minister of Finance, February 11, 2014, at page 171, *available at* http://www.budget.gc.ca/2014/docs/plan/pdf/budget2014-eng.pdf.

be empowered to enforce these new laws, the details of which would only be "announced in the coming months."[13]

The government's proposal seems contrary, in principle, to Parliament's decision in the 2009 reforms of the Act that, among other things, abolished the *per se* (criminal) offense of price discrimination. The government's proposal to have the Commissioner enforce the new laws may also contradict recent statements by Bureau officials that the Bureau is:

> not a price regulator and Canadian businesses are free to set their own prices at whatever levels the market will bear, provided that these high prices are not the result of anti-competitive conduct such as price-fixing or abuse of a dominant position.[14]

Apart from a suggestion in the budget document that market power will be necessary to engage the envisaged price discrimination provision,[15] the lack of specificity in the federal government's announcement leaves many unanswered questions around the scope of a new price discrimination law. Will the proposed legislation restrict only cross-border disparities, or also intra-Canadian price discrimination? Will it effectively create an "exploitative pricing" prohibition? Must the conduct have competitive effects before it can be actionable, or are we moving back to a *per se* offense? What "justifications" for price disparities are valid? Absent clear answers, the scope for enforcement against unilateral conduct will be further clouded.

C. Toronto Real Estate Board—Is Abuse of Dominance Expanding in Canada?

In 2011, the Commissioner applied for an order against the Toronto Real Estate Board ("TREB"), a trade association of realtors. The Commissioner alleged TREB's rules restricted the ability of realtors to pursue innovative internet-based business models, which constituted an abuse of dominance. The Commissioner admitted that the TREB did not compete with realtors, such that its conduct did not constitute direct action against a competitor (per the standard in *Canada Pipe*).

The Commissioner asked that the Tribunal revisit the decision in *Canada Pipe* on the basis that (i) the list of anti-competitive acts in section 78 is not exhaustive, and (ii) paragraph 78(1)(f) (discussed above, which concerns buying up of product) does not require that a competitor be harmed. The Tribunal rejected this request, instead finding that section 78 "is a powerful indicator that the Canada Pipe Rule is the correct approach."[16] The Commissioner's application therefore failed.

In concluding *obiter* remarks, the Tribunal noted that "[t]he Tribunal observes that, although section 79 does not apply, section 90.1 of the Act might give the Commissioner a means

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[13] *Id.*, ¶182.

[14] *See, The Canada-USA Price Gap*, *supra* note 11, at 56. More recently, however, the Commissioner of Competition has made comments that suggest his approval of the government's "action to protect consumers and end price disparity." *See* Remarks by John Pecman, Commissioner of Competition, delivered November 14, 2013 in Toronto; *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03629.html.

[15] *The Road To Balance*, *supra* note 12 at 182, provides that the legislation will be applicable to situations where "companies use their market power to charge higher prices in Canada that are not reflective of legitimate higher costs… Higher prices brought on by excessive market power hurt Canadian consumers."

[16] *Commissioner of Competition v. The Toronto Real Estate Board*, 2013 Comp. Trib. 9, ¶15.

to apply to the Tribunal."[17] Section 90.1 is a civil provision that prohibits anti-competitive agreements among persons, two or more of whom are competitors. The Tribunal's remarks once again suggest that the Commissioner was attempting to bridge perceived gaps between different sections of the Act and advocate for an arguably overreaching interpretation of one of the unilateral conduct provisions in the Act.

The Commissioner appealed. In brief reasons, the Federal Court of Appeal reversed the decision of the Tribunal, holding that:

> I do not interpret *Canada Pipe* to mean that as a matter of law, a person who does not compete in a particular market can never be found to have committed an anti-competitive act against competitors in that market, or that a subsection 79(1) order can never be made against a person who controls a market otherwise than as a competitor.[18]

The Federal Court of Appeal then conducted further statutory interpretation, but seemingly reached the opposite conclusion as it did in *Canada Pipe*. Instead of ignoring paragraph 78(1)(f), which is unusual as a matter of antitrust and has never been tested in Canadian courts, it held that:

> paragraph 78(1)(f) is an indication that Parliament did not intend the scope of subsection 79(1) to be limited in such a way that it cannot possibly apply to the Board in this case. If the Court in Canada Pipe intended to narrow the scope of subsection 79(1) as the Tribunal held, then I would be compelled to find that aspect of Canada Pipe to be manifestly wrong because it is based on flawed reasoning (specifically, the unexplained inconsistency in the reasons).[19]

The Federal Court of Appeal sent the case back to the Tribunal for consideration on the merits.

The Federal Court of Appeal's decision does not contain any discussion as to how the concept of an anti-competitive act might be limited post-*Canada Pipe*, or how general antitrust principles might support or otherwise relate to the outcome of its decision. Given the open-ended definition of an anti-competitive act in *TREB*, there are questions as to whether exploitative pricing by dominant firms could potentially now be subject to section 79 of the Act.

IV. TRANSPARENCY AND BRIGHT LINES NEEDED IN CANADA

These recent developments, considered collectively, suggest a tension in interpretation that clouds the previously bright line between permissible and impermissible unilateral conduct. This leaves unanswerable questions about the legality of aggressive commercial conduct for companies operating in Canada, and raises real risks for business.

If companies operating in Canada are to continue to compete aggressively, then more transparency and new bright lines are needed. The experiences of the United States and the European Union, which have long grappled with price discrimination and broader concepts of abuse of dominance than were previously actionable in Canada (including exploitative abuse), provide relevant direction in developing a Canadian road map.

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[17] *Id.*, at ¶26.

[18] *Commissioner of Competition v. Toronto Real Estate Board*, 2014 FCA 29, at ¶14.

[19] *Id.*, at ¶20.

- If the Commissioner is of the view that section 79 is broad enough to capture conduct by a dominant firm other than that which is manifested through a negative effect on a competitor, as was previously the common understanding in Canada, then clear guidance as to the reach of section 79 is critical. The European Commission, which administers a broadly scoped abuse of dominance provision, has attempted to provide such guidance in significant detail through an articulation of its enforcement priorities and the application of its abuse of dominance provision in those areas of priority.[20] In the United States, there are calls in many quarters for the Federal Trade Commission to publish clear guidance surrounding how it intends to enforce §5 of the *Federal Trade Act*, which is also broadly scoped (indeed, proposed guidelines have already been published).[21] Either of these approaches, if adopted in Canada, could create the transparency businesses require.
- If exploitative pricing and price discrimination are to be actionable under competition laws, new legislation may be in order. This approach is far preferable—from a democratic, legal, and economic perspective—to stretching the existing, narrowly drafted unilateral conduct provisions. The government has taken the first step in this regard by promising new legislation concerning price discrimination; for its part, the Bureau has recently issued draft guidelines for public comment concerning the enforcement of section 76 (the price maintenance provision).[22]
- Where new legislation is required, widely accepted economic principles should be its basis, and the experiences of other leading competition law jurisdictions considered. For example:
    - Any new legislation should only be capable of applying to conduct that harms competition; that is, any new legislation should apply a *rule of reason*, rather than a *per se*, standard. This approach has the advantage of being consistent with the scheme of the Act, which the Supreme Court of Canada has described as economic regulation designed to address conduct that reduces competition,[23] and precluding the consideration of non-economic factors. It would also be consistent with the degree of caution and objectivity that courts have adopted for price discrimination and exploitative pricing cases in other jurisdictions. For example, in the United States price discrimination can only be established if it results in an injury to competition.[24] By further example, in the European Union courts have found that proving exploitative pricing requires more than simply proving the existence of a large profit margin—in addition, the unfairness of the

[20] *See*, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, OJ C 45 (February 24, 2009).

[21] *See*, for example, William Kovacic & Marc Winnerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J, 929 (2010; *infra)*, note 26.

[22] *See*, Competition Bureau, *Price Maintenance (Section 76 of the Competition Act) Enforcement Guidelines*, draft for public consultation (March 20, 2014), *available at*: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03687.html.

[23] *See, General Motors v. City National Leasing*, [1989] 1 S.C.R. 641 at 676.

[24] *See* the discussion of injury to competition in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC Inc.*, 546 U.S. 164 (2006).

impugned price relative to the price of other products must also be established (thereby importing a concern with competition generally into the analysis).[25]

- Any new legislation should shield conduct that results in some cognizable efficiencies (which approach is being advocated for in the United States)[26] or otherwise permit the harm from the impugned conduct to be measured against the efficiencies that it also creates, such that no order could be made unless the conduct results in deadweight loss.[27]
- Any new legislation should adopt bright lines and well-recognized exceptions and defenses, so that companies operating in Canada can have certainty as to when their business practices will be free from scrutiny. For example, new legislation should only apply to firms with a dominant position;[28] this would be consistent with the limited scenarios in which exploitative pricing can be pursued by the European Commission. By further example, new price discrimination legislation should not apply where customers do not receive products of like quality or quantity (i.e., volume discounts should be permitted), and there should be an exception for meeting competitors' prices; these exceptions are available in the United States and in the European Union.

[25] *See* Case 27/76, *United Brands Company v. Commission,* [1978] ECR 207.

[26] This standard, which certain people are advocating for in respect of §5 of the *Federal Trade Act*, recognizes the inherent risk associated with prohibiting conduct that results in efficiencies to the economy. *See* the Statement of Federal Trade Commissioner Joshua D. Wright, *Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, published June 19, 2013, at section III, *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-joshua-d.wright/130619umcpolicystatement.pdf.

[27] The examination of the efficiencies created by impugned conduct is required by other sections of the Act (*see*, in particular, subsection 90.1(4) and section 93).

[28] *See*, *supra,* note 15.