



# **Protecting Brand-Specific Investments in Canadian Distribution**

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# Overview of the Canadian Market

- World's 13<sup>th</sup>-largest economy
- Voted “best country for business in the G-20” (2012) and “best country in the world to do business” (Oct 2011) by *Forbes Magazine*
- Banking sector voted world's soundest 5 consecutive years by *World Economic Forum*
- 9<sup>th</sup>-highest per capita income in the world

# Overview of the Canadian Market

- Luxury goods sales in Canada have returned to, and exceeded, pre-2009 levels (unlike USA and EC) – *American Express Canada Report (2012)*
- Strong consumer spending and increased ties to and immigration from China and other Asian markets buoying luxury spending in Canada
- Strong IP protections and liberal distribution rules for brand owners

# Canada's Liberal Distribution Regime

- In March of 2009, Canada implemented legislative reforms to liberalize its treatment of pricing and distribution practices under the *Competition Act*
- New regime is more permissive than its US and EC counterparts
  - No fines or damages for RPM, price discrimination, refusal to deal or excessive pricing
  - No exposure to class actions for these practices
  - Worst-case outcome is a behavioural order from Competition Tribunal

# Canada's Liberal Distribution Regime

- Vertical pricing and distribution conduct all treated as “reviewable practices” by the *Competition Act* – it is presumptively legal unless/until challenged and shown to harm competition
- Transparency provided by a single, comprehensive federal regime – no differing state laws as in USA
- Thus, significant scope exists for brand owners to leverage these greater market freedoms in Canada

# Resale Price Maintenance (RPM)

- Defined in Canadian law as “any attempt [...] to influence upward [...] or discourage the reduction of [...] the price” at which a customer or other person sells or advertises a product
- Also includes any “refusal to supply a product” or “otherwise discriminate against” a person because of his low pricing policy
- Until 2009, treated as a *per se* illegal criminal offence in Canada (although inconsistently enforced), backed up by fines and/or jail sentences

# Resale Price Maintenance (RPM)

- Since 2009, RPM has been recast as a “reviewable practice” – presumptively legal unless the Competition Tribunal finds the conduct had an “adverse effect on competition”
- Even where RPM is found to adversely affect competition, remedies are limited to a behavioural order to cease engaging in the conduct
  - No fines, no private damages awards
- Enforceable by Competition Bureau (CCB; antitrust regulator) or private litigants in certain circumstances

# Resale Price Maintenance (RPM)

- **CCB** has shown little interest in enforcing the RPM provision post-2009
  - Has also publicly indicated that it would contact a firm suspected to be practicing RPM and attempt to resolve concerns before initiating litigation
- **Private** RPM cases are also rare
  - None since 2009 under new regime
  - Litigants must first obtain leave from Competition Tribunal – must show they are “directly and substantially affected” and show some basis for an adverse effect on competition

# Resale Price Maintenance (RPM)

- Several statutory defences exist, if the CCB or a private litigant brings a case, where the reseller made a “practice”:
  - of using the products as loss leaders
  - of using the products not for selling at profit, but for attracting customers to sell them other products
  - of engaging in misleading advertising, or
  - of not providing the level of servicing that purchasers of the products might reasonably expect

# Price Discrimination - Repealed

- Was defined in Canadian law as the offering of different prices, or promotional allowances, to customers buying substantially the same **quality** and **quantity** of product
- Until 2009, treated as a *per se* illegal criminal offence in Canada (although rarely enforced), backed by fines and/or jail sentences
- Provision abolished in 2009
- Now can only be addressed under abuse of dominance provision, assuming all elements of abuse have been proven (see below)

# Predatory Pricing - Repealed

- Was defined in Canadian law as selling at “unreasonably low” prices (*i.e.*, below cost) with the intention or effect of eliminating a competitor or substantially lessening competition (SLC)
- Until 2009, treated as a criminal offence in Canada (although rarely enforced), backed by fines and/or jail sentences
- Provision abolished in 2009
- Now can only be addressed under abuse of dominance provision, assuming all elements of abuse have been proven (see below)

# Abuse of Dominance

- Canadian abuse provision midway between US *Sherman Act* section 2 (monopolization) and EC Article 102
- Key elements are:
  - Dominance – undefined, but guidelines and caselaw indicate a minimum 50% market share, in a market with entry barriers
  - A “practice” of anti-competitive acts targeting competitors with a predatory, exclusionary or disciplinary intent
  - Conduct must substantially lessen competition
- Abuse is only enforced by CCB – no private litigation
- CCB has been active – 3 abuse cases brought since 2010

# Abuse of Dominance

- Application of abuse provision to luxury goods companies is questionable
  - CCB must define relevant antitrust product and geographic markets to prove SLC
  - Brand-specific markets for luxury goods are unlikely
  - Thus need to prove >50% market share in all handbags, all watches, all sunglasses, *etc.*
- However, the legislation does contemplate **joint abuse of dominance**, where two or more companies have a combined high market share and engage in coordinated abusive conduct

# Abuse of Dominance

- Most examples of “abusive” conduct in statute relate to foreclosing rivals’ access to inputs or customers
  - Focused on **exclusionary** and not exploitative abuse
  - Closer to US than EC law – no concept of **excessive pricing** (*United Brands*; Art. 102(a)) under Canadian abuse of dominance law
  - Luxury goods suppliers may set prices as they choose
- **Penalties** formerly limited to corrective orders; since 2009 include AMPs up to C\$10MM – none yet imposed but CCB seeking in current case

# Dealing With Distributors

- “Refusal to deal” (RTD) also a reviewable practice under the *Competition Act*
- CCB or private litigant can obtain a supply order where:
  - a person is “substantially affected in his business” or “precluded from carrying on business” due to the refusal to supply
  - the person is unable to obtain adequate supplies of the product because of “insufficient competition among suppliers” of the product
  - the person is willing and able to meet the usual trade terms
  - the product is in ample supply, and
  - the refusal will have an “adverse effect on competition” in a market

# Dealing With Distributors

- As with other reviewable practices, private litigants must first obtain leave from the Competition Tribunal to bring an RTD action
- Interim supply orders may be obtained after leave is granted
- No fines or damages available in RTD actions – the best a litigant can achieve is an order to supply on usual trade terms
  - Downside to terminating a distributor/dealer is low under the *Competition Act*
  - However, the common law still requires reasonable notice (or \$\$ in lieu) be given when terminating

## Questions? - Anytime

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