Price Maintenance Under the Competition Act: Issues for In-house Counsel

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Price Maintenance Under the Competition Act

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Introduction

Like other criminal pricing offences under the Competition Act, the price maintenance offence is frequently criticized for being ineffective and out-of-date with current economic thinking and for imposing unnecessarily burdensome compliance costs on Canadian businesses. Although there have been numerous proposals for reform, the price maintenance provision has remained essentially unchanged for decades. Controversy aside, possible criminal sanctions and active, [if selective], enforcement by the Competition Bureau behove businesses and their counsel to have a clear understanding of the nature and scope of this offence.

The Components of the Offence

Section 61 of the Competition Act prohibits the attempt, by “agreement, threat, promise or any like means”, to influence upward or discourage the reduction of the prices at which products are sold or advertised for sale. The offence is intended to minimize restrictions on the ability of retailers to compete on price, and thereby encourage lower prices for consumers.

A companion offence prohibits refusals to supply a product or other discriminatory behaviour taken against a person due to that person’s low pricing policies. A third and final offence under this section prohibits a firm from pressuring a supplier, by making it a condition of doing business with the supplier, to refuse to supply a third party due to that party’s low pricing policies.

Price maintenance is a per se offence. In other words, the prohibited behaviour alone is sufficient to convict the accused and the Crown need not prove any anti-competitive effects resulting from the price maintenance. The Epson case is a noteworthy illustration.

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1 Competition Act, R.S.C 1985, c. C-34, s. 61(1)(a) [hereinafter, the “Act”].

2 A more complete discussion of the economic rationale for the price maintenance offence can be found in an independent report on pricing practices commissioned by the Competition Bureau: see J.A. Van Duzer & G. Paquet, Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice (October 22, 1999) at 13ff, available online: <http://strategis.ic.gc.ca/pics/ct/vdreport.pdf> [hereinafter the “Van Duzer Report”].

3 Supra note 1 at s. 61(1)(b). This section is not to be confused with the civil, reviewable matter of “refusal to deal” found in s. 75 of the Act.

4 Ibid. at s. 61(6).

Epson was charged with price maintenance after inserting a clause into its standard dealer agreements that prohibited advertising of (but not sales at) prices below Epson’s suggested retail price. Epson argued that the policy was necessary because its products required high pre-sale service which would not be provided by full service dealers unless they were shielded from the advertising of discounted prices by other dealers. An economic expert testified about the efficiency-enhancing rationale for such a policy (e.g., avoiding free rider problems). Nevertheless, the court concluded that the offence was committed by the insertion of the clause into the dealer agreements and that possible beneficial marketplace effects were not a defence.

The Crown’s burden in establishing price maintenance is essentially twofold:

- First, the Crown must establish that the accused directly or indirectly attempted to influence upward, or discourage the reduction of, the price at which a person supplies, or offers to supply, a product. The accused need not actually affect the price of goods—a mere attempt to do so will violate the Act. Similarly, the lack of any intention to harm customers or the public is not a defence. (Although the absence of such an intention may be a mitigating factor in determining sentence.)

- Second, the Crown must establish that the accused’s attempt to influence the selling or advertised price was carried out by agreement, threat, promise or like means. The word “threat” has been interpreted as meaning “a form of intimidation, fulmination, harassment or warning which carries with it some form of penalty.” Attempts to maintain prices through “discussion, persuasion, complaints, suggestions, requests, or advice” that do not otherwise contravene section 61 are legal in Canada. Thus, for example, where a group of landlords published a newsletter exhorting other landlords to collectively raise rents, no violation of the Act was found.

Any suggestion of a re-sale price must also be made with great caution. Section 61(3) prohibits any suggestion by a product’s producer or supplier of its minimum price, unless that person makes it clear to the recipient that he is “under no obligation to accept the suggestion

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7 Although the Crown must establish that the accused intended to engage in the proscribed behaviour.
10 Shell, supra note 6 at 507 (Man. Q.B.).
11 Cartier, supra note 9 at 41.
12 See R. v. Schelew, (1984) 78 C.P.R. (2d) 102 at 106, 137 A.P.R. 142 (N.B.C.A.) (per La Forest J.A., as he then was) and at 111 (per Angers J.A.).
and would in no way suffer in his business relations with the person making the suggestion or with any other person if he failed to accept the suggestion.\textsuperscript{13}

The Competition Bureau has suggested sample language which will pass scrutiny under s. 61(3):

The dealer is under no obligation to accept these suggested resale prices and may sell at any price he chooses. If he chooses to sell at prices other than those suggested, he will not suffer in any way in his business relations with the supplier or any other person over whom the supplier has control or influence.\textsuperscript{14}

Under s. 61(4), product suppliers (other than retailers) who publish advertisements that discuss resale prices for their products are deemed to be attempting to influence upward the price of those products, unless the advertisement is clear that the product may be sold at a lower price.

Importantly, the Ontario Court of Appeal has held that the Crown must still establish that this attempt to influence prices upward was made by “agreement, threat, promise or like means.”\textsuperscript{15} According to Goodman J.A., “no offence is created” by s. 61(4).\textsuperscript{16} He rejected the Crown’s argument that the existence of a separate, stand-alone provision in s. 61(4) suggested that any form of advertising which violated the provision constituted the “like means” referred to in s. 61(1)(a).

Furthermore, neither ss. 61(3) or (4) prevent suppliers from affixing suggested prices to the packaging or container of a product.\textsuperscript{17}

**Defences**\textsuperscript{18}

There are several exceptions and defences to the price maintenance offence. Section 61(2) provides that the price maintenance rules do not apply to attempts to influence prices that are made between affiliated entities. As noted above, the prohibitions\textsuperscript{19} against

\textsuperscript{13} *Supra* note 1 at s. 61(3).

\textsuperscript{14} Bureau of Competition Policy, *Background Papers - Stage I Competition Policy* (Ottawa, 1976) at 56, cited in C.J.M. Flavell & C.J. Kent, *The Canadian Competition Law Handbook* (Toronto: Carswell, 1997) at 180. The authors also offer an alternate, more concise, clause: “Suggested retail prices are not obligatory. Non-acceptance will not prejudice business relations with (name of supplier) or with any other person it controls or influences”.

\textsuperscript{15} *Philips*, *supra* note 9 at 134. (In that case, the court was interpreting the identical provisions of the predecessor *Combines Investigation Act*, R.S.C. 1970, c. C-23, s. 38(4).)

\textsuperscript{16} *Ibid.* at 133.

\textsuperscript{17} *Supra* note 1 at s. 61(5)

\textsuperscript{18} In addition to the existing defences under the Act, the Van Duzer Report has recommended the adoption of an efficiencies defence for vertical price maintenance cases: see *supra* note 2 at 77-78 and 84.

\textsuperscript{19} *Supra* note 1 at ss. 61(3) and (4) respectively.
suppliers suggesting minimum resale prices or advertising resale prices are subject to the exception in section 61(5) for prices affixed to product packaging. Section 61(10) provides a series of defences for persons charged with the refusal to supply offence in s. 61(1)(b), where the accused had reasonable grounds to believe that:

- the other person made a practice of using the products supplied by the accused as loss-leaders (i.e. for the purpose of advertising and not for making a profit);
- the other person made a practice of selling the products supplied by the accused at below-profit prices in order to attract customers to his or her store, to sell them other goods;
- the other party made a practice of engaging in misleading advertising with respect to the products supplied by the accused; or
- the other party made a practice of not providing a reasonable level of service with respect to the products supplied by the accused.

Penalties and Enforcement

The Competition Bureau investigates alleged violations although ultimate discretion in and responsibility for initiating criminal proceedings rests with the Director of Public Prosecutions. The Bureau has a full arsenal of investigative tools at its disposal, including search and seizure, examinations under oath and production of records or other physical evidence.

Persons found guilty of price maintenance may be punished on conviction by a fine in the discretion of the court, or imprisonment for a term of up to five years, or both. In addition, courts may issue orders under section 34 of the Act to prohibit the continuation or repetition of an offence or anything else directed towards the continuation or repetition of an offence. Failure to abide by the terms of such an order can lead to punishment by fine (the amount of which is in the court’s discretion) or imprisonment for a period of up to two years.

The Act also provides a civil cause of action that may be initiated by private parties for loss or damage resulting from violation of the Act’s criminal offences, including price maintenance. Although recovery is limited to actual loss plus costs, costs may include those of any investigation of the conduct in question, as well as the costs of the proceeding.

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20 Supra note 3.
22 The magnitude of the accused’s earnings may be taken into account by a court in determining the appropriate fine amount: see Shell case, supra note 6.
23 Supra note 1 at s. 34(6).
To enhance deterrence, the Bureau is beginning to seek higher fines for price maintenance. Corporate fines in significant price maintenance cases have recently been in the $100,000-$250,000 range. Moreover, while it has been the Bureau’s practice to charge individual executives in cartel cases, the authorities have now done so in one price maintenance case as well. In a real estate industry case involving “horizontal” price maintenance (full service brokers refusing to deal with discount brokers), two executives were fined a total of $30,000. The Bureau has also made it clear that individuals may apply for immunity in connection with an investigation into a corporate defendant. More recently, the Bureau has negotiated large monetary settlements and consent prohibition orders in lieu of guilty pleas in several high profile cases. Recent settlements have involved $1 million-plus restitution payments to affected customers and donations to charitable organisations.

Cross-Border Risks: Minimum Advertised Price Programs

Minimum advertised price (“MAP”) programs are being used by many businesses in the US to counter the power of increasingly large and sophisticated resellers. Canadian subsidiaries are often invited and sometimes directed to implement parallel programs in Canada. A note of caution is in order: the adoption in Canada of a US MAP may amount to price maintenance in Canada. In addition, reliance on a MAP to terminate a reseller may violate the “refusal to supply” branch of the offence.

A typical MAP program has three fundamental elements that are designed to accommodate the vertical price-fixing (resale price maintenance) rules under US antitrust laws:


25 See, for example, D. MacKenzie, “The Bureau's Immunity Program: Fine Tuning or Overhaul”, Paper Prepared for the Canadian Bar Association Annual Conference (September 28-29, 2006): “While cartel enforcement is the primary focus of the Bureau's Immunity Program, unlike other jurisdictions, the Program is available to applicants for all criminal offences under the Competition Act. Applicants and their counsel should be aware that immunity is available to applicants for “single-party” offences such as price maintenance, false or misleading representations and deceptive marketing practices. The inclusion of the sole beneficiary criterion in the Immunity Program Bulletin in 2000 recognised the unique issues that may arise in this context. Corporations are typically excluded from the Program for “single-party” offences based on the sole-beneficiary criterion. Indeed, their cooperation following a receipt of immunity would have no value with no other party left to investigate or prosecute. However, an individual that has engaged in price maintenance or false or misleading representations and deceptive marketing practices on the suggestion of its corporate employer may apply for and qualify for immunity in return for cooperating in the investigation and prosecution of the corporation.”

The manufacturer refuses to sell products covered by the MAP to resellers that advertise the product for sale at less than the minimum advertised price established by the manufacturer.

The reseller remains free to establish its own selling prices, which may be above or below the manufacturer’s minimum advertised price.

The manufacturer refuses to negotiate or discuss the MAP (or any violations of it) with resellers but may terminate a reseller which prices below the minimum level. A common variation is to link the MAP to various benefits which the reseller does not receive if it prices below the MAP.

If a MAP program is indeed administered unilaterally — and is not incorporated by reference as a term of a manufacturer’s contracts with its resellers (i.e., through a general clause requiring the reseller to comply with standard terms and conditions established by the manufacturer) — then there may not be any “agreement” between the manufacturer and reseller. However, the Competition Bureau and courts would almost certainly take the position that a MAP program entails a threat and/or a promise. The threat is that the reseller will immediately be cut off if it reduces advertised prices below the manufacturer’s minimum specified price. The implicit promise is that the reseller will continue to be supplied by the manufacturer if advertised prices remain at or above the specified level.27

The “refusal to supply” branch of the price maintenance offence applies where a current or potential customer is refused supply (or otherwise discriminated against) because of its “low pricing policy.” The adoption of a MAP program arguably does not involve any discrimination if the program applies equally to all resellers of the manufacturer’s products. However, any termination of a reseller (or other discriminatory action short of termination, such as denying cooperative advertising reimbursements) for violation of a MAP would be illegal unless it was based on something other than the “low pricing policy” of the reseller. Terminations of business relationships may, of course, be initiated for valid commercial reasons; however, such commercial reasons cannot be used as a pretext for terminations that are in fact motivated by concerns about a reseller’s low pricing.

A recent case highlights the risks of adopting a US MAP program, even inadvertently, in Canada. R. v. John Deere evolved from an agreement in the US between Deere & Company and US-based retailer Home Depot to sell a new line of garden tractors.28 The agreement contained a MAP provision but the program was not intended to apply in Canada. Several of John Deere’s Canadian retailers had the impression that they were not allowed to advertise below the minimum suggested price. The Competition Bureau commenced an investigation based on complaints that John Deere’s Canadian affiliate, John Deere Limited, was

27 Section 61(3) of the Act contains a reverse onus provision regarding manufacturer communications to resellers about their pricing. In MAP programs, the manufacturer is typically doing more than making a “suggestion” — a reseller would clearly “suffer in his business relations” by not accepting the minimum advertised price.

discouraging the reduction of advertised prices. Once made aware of the concern, John Deere Limited took steps to make it clear that the MAP program did not apply in Canada. It avoided a criminal charge by settling the case without admitting liability.  

**Horizontal Price Maintenance and Enforcement Trends**

While price maintenance prosecutions traditionally have focussed on vertical relationships, there have been several successful prosecutions and settlements of cases of horizontal price maintenance. In 2004 Royal Group Technologies was fined $200,000 after pleading guilty to attempting to influence a competitor to maintain the price of PVC window coverings. More recently, the Bureau announced that it settled a combined price fixing and price maintenance case involving six auto body repair shops in Fort McMurray, Alberta. The accused in each of these cases were accused and/or convicted of attempting to influence competitors’ prices, rather than those charged by customers. These cases make it clear that enforcers may have a “back-door” option of charging suspected offenders under the *per se* section 61 offence, rather than under the Act’s section 45 conspiracy offence, which requires the Crown to establish an undue lessening of competition.

**Conclusions**

The future for price maintenance is uncertain. In 2002, the House of Common’s Industry Committee recommended decriminalization and making price maintenance subject to review under the *Competition Act*’s civil abuse of dominance provision. The Bureau is on record as opposing such a move, only, according to the Committee, because the Bureau has a higher success rate when prosecuting under a *per se* offence. Disregarding the Committee report, the previous Liberal Government proposed but did not implement an amendments package that would have repealed the Act’s other criminal pricing provisions but left price maintenance as-is.

The provision is likely to come under scrutiny again in the near future because the Government has announced plans to task an expert independent panel to undertake a

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29 The terms of the settlement included: a “restitution” payment amounting to 5% of sales to each dealer – totalling $1.191 million; a five-year consent prohibition order requiring implementation of a competition law compliance program; and changes to its administrative and sales practices in Canada.


comprehensive review of Canada’s competition policies and report, before Budget 2008, to the Minister of Industry on options for future legislative amendments. Although the Government has said little more at this stage, price maintenance is an obvious subject for review.

Pending any potential legislative change it is important for businesses and their counsel to have a clear understanding of the nature and scope of the Act’s price maintenance offence. While appropriately advised businesses will generally be able to structure their pricing arrangements as they wish, breach of the Act’s criminal pricing provisions may have consequences that can be financially, reputationally and personally severe.
About the author

Omar Wakil is a partner in the Competition and Foreign Investment Groups of McMillan Binch Mendelsohn. He advises domestic and international clients on all aspects of competition law, including merger transactions, cartel and abuse of dominance investigations, and other pricing and distribution matters. As part of his practice he also co-ordinates worldwide antitrust and foreign investment clearances on multi-jurisdictional transactions.

Omar is the vice-chair of the Mergers Committee of the Competition Law Section of the Canadian Bar Association and a private sector advisor to the International Competition Network, a multi-jurisdictional governmental antitrust organisation.

Qualified as a solicitor in England and a member of the Brussels Bar, Omar spent part of his career at a leading international law firm in Brussels where he advised clients on competition law issues arising under European law.

Omar speaks frequently on antitrust issues at professional conferences and universities in Canada and Europe. He has also written extensively in the area and is also co-ordinating editor of the loose-leaf service *International Mergers: The Antitrust Process* (3rd edition: Sweet & Maxwell, London). He holds a LLB from University of Toronto, an LLM from Stockholm University, and a postgraduate diploma from King’s College, London.