

# B·U·S·I·N·E·S·S & T·H·E L·A·W

*This monthly newsletter is intended to provide timely insights into and analyses of developments in the law and other matters which affect the conduct of business in Canada.*

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## Cornerstone of Canadian Competition Laws under Siege

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A recent decision of the Nova Scotia Supreme Court Trial Division<sup>1</sup> struck down the conspiracy provisions under the *Competition Act* (Canada) as unconstitutional. This decision, which deals with a number of emerging issues under the *Charter of Rights and Freedoms* has created considerable uncertainty with respect to the enforcement of what is commonly referred to as the "cornerstone" of Canada's competition laws.

The decision of Madam Justice Roscoe dealt with three primary issues:

1. Whether the legislation in question required a sufficiently "guilty mind" for conviction;
2. Whether the legislation was void for vagueness; and
3. Whether any infringement of the Charter could be upheld as reasonable and justified under section 1 of the Charter.

The background of the case involved charges laid under s. 32 (now s. 45) of the *Competition Act*, based on allegations that pharmaceutical chemists and others in the Province of Nova Scotia had entered into collusive agreements with respect to prescription drugs and dispensing services sold or offered for sale to private pre-paid insurance plans, and for cash or credit sales to the public during a period from the mid-1970s to the middle of 1986. At a pre-trial motion, the accused sought a declaration that ss. 32(1)(c), 32(1.3) and 32(1.1) of the *Competition Act* (now ss. 45(1)(c), 45(2.2) and 45.2, respectively) were invalid and of no force and effect on the basis that they violated sections 7 (right to

life, liberty and security of the person), 11(a) (right to be informed of specific offence charged) and 11(d) (right of the presumption of innocence) of the Charter.

### Section 7 Issue

After reviewing a number of Supreme Court of Canada decisions, the Court found that the principles of fundamental justice were contravened by s. 32 contrary to s. 7 of the Charter on the basis that under s. 32 an accused person could be convicted of the conspiracy offence and be liable to imprisonment in respect of a collusive agreement even in circumstances where the accused was "morally innocent" (i.e., any anti-competitive effect may have been completely unintended and unforeseen), and even if the intention had been to increase competition. The Court held that given the stigma associated with a conviction under this section, the Act should have required that the accused intend that an anti-competitive result follow from his or her acts. Section 32 in fact only requires proof of intent to enter into the collusive agreement, and proof that the agreement

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Bridget, subject to a charge imposed upon her to pay Gidget a sum equal to the amount by which the value of the WWC shares exceeds one-half the value of the entire estate. In this way, Bridget will be entitled to exclude from her NFP the full value of the WWC shares. (And, assuming Warren's will contains the requisite statement, all of the dividend income earned from those shares will be excluded from Bridget's NFP as well.)

An interesting question arises from this alternative approach. Does not the liability to Gidget—namely, the charge imposed on Bridget by the will as a condition on the bequest of shares—constitute a deduction in calculating Bridget's NFP? If so, not only does the scheme ensure sheltered status for all the WWC shares, but it also serves to reduce Bridget's NFP to the extent that the WWC shares have a value in excess of one-half of the value of the entire estate. Using current values in the above example, Bridget would inherit all the shares of WWC worth \$500,000, subject to an obligation to pay her sister \$50,000. She would therefore see a net decrease to her NFP (as it would be calculated if her marriage were to break down at that time) of \$50,000.

On the other hand, one might well question why a spouse should be entitled to a deduction in respect of a liability that is directly attributable to excluded property. However, even if a court were to deny the deduction for that liability, this alternate approach will still succeed in sheltering all of the shares of WWC insofar as Bridget is concerned.

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## Price Discrimination Law and Innovative Marketing Practices

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### I. Introduction

The Canadian Bureau of Competition Policy has recently released a proposal to amend its enforcement policy with respect to the price discrimination provisions of the federal *Competition Act* (the "Act"). The proposals, if implemented, will permit Canadian businesses to engage in a number of marketing practices which have previously been problematic under the legislation.

### II. The Regulation of Price Discrimination

Section 50(1)(a) of the Act creates a criminal offence prohibiting any seller of articles from engaging in a

practice of knowingly discriminating, directly or indirectly, between competing purchasers by granting a purchaser any discount, rebate, allowance, price concession or other advantage which is not available at the same time to other purchasers buying like quality and quantity of the article.

Unlike similar legislation in the U.S., the Canadian statutory provisions do not expressly require that competition be lessened substantially to constitute an offence. Nor do the Canadian provisions provide an express cost justification defence where the differential in price is explainable due to differences in the cost of manufacture, sale or delivery.

### III. The Previous Enforcement Approach

In the past, the practice of the Director of Investigation and Research (the "Director") has been to challenge any price differential not based on quality or quantity differences. Canadian businesses endeavouring to comply with the letter of the legislation have been forced to constrain certain marketing practices which are not harmful or which may actually benefit competition.

Because of the high burden of proof required in criminal prosecution, enforcement actions have been rare and successful prosecutions have been even more infrequent. In fact, since the price discrimination provisions became law, only three corporate convictions have been registered, all pursuant to guilty pleas, with fines ranging from \$15,000 to \$50,000. Because of this paucity of jurisprudence, there is little judicial guidance to assist the Canadian business community in interpreting the applicability of the legislation.

### IV. The Proposed Enforcement Policy

The new policy, if implemented, will give Canadian businesses greater freedom to engage in innovative pricing strategies, provided there is no specific threat to competition, without the risk of criminal prosecution by the Director. Under the proposal, the Director would enforce the price discrimination provisions in a manner consistent with the purposes of the Act, as expressed in section 1.1, to maintain and encourage competition. Specifically, the new policy would permit pricing differentials for like quality and quantity of goods so long as the pricing advantage is available to competing purchasers.

The enforcement approach of the new policy reflects the modern assessment of economic theorists that price discrimination may either be harmful or beneficial to competition depending on the circumstances. Systematic price discrimination that eliminates or in-

juries efficient sellers or purchasers is clearly harmful, particularly where it is used in conjunction with other vertically restrictive practices. Price differences in other circumstances, however, may simply reflect different costs of serving different customers. In other cases, price discrimination may increase output and improve efficiency by eroding collusive tendencies in oligopolies or by permitting optimal production in industries where no single price would allow producers to recover their costs.

## V. Accommodation of Innovative Marketing Practices

The new policy would permit businesses to grant price concessions not based on quality and quantity differences where the price concession is made available to competing purchasers. Examples of the types of marketing practices which would be facilitated are as follows:

1. *Exclusive Dealing Discounts*: Under the policy, a supplier could offer to extend an additional discount to those distributors who agree to deal exclusively in products supplied by the manufacturer provided that the additional discount is made available to all distributors.

Where, however, the exclusive dealing arrangements have anti-competitive effects, the Director would retain the right to obtain an order from the Competition Tribunal under section 77 of the Act prohibiting the practice.

2. *Functional Rebates*: The new policy will permit a supplier to transfer some of the functions it currently performs, such as transportation, delivery, installation or maintenance, to its customers and to reward those who take on these functions with a price rebate, again provided that the opportunity is made available to all customers.

Such a plan would be prohibited only where the supplier has an intent to discriminate between purchasers. Intent would be indicated by such factors as the inability of certain customers to perform the functions required to qualify for the concessions, or the lack of correlation between the amount of the rebate and the value of the service performed.

3. *International Volume Price Concessions*: In the past, concessions given to Canadian purchasers based on aggregated purchases of the Canadian entity and its international affiliates have raised issues since, under section 50(1)(a), only the quantity purchased by the Canadian entity could be considered for the purpose of calculating the price concession.

Under the new policy, such price concessions would be permitted provided that they do not amount to anti-

competitive practices which prejudice efficient suppliers or purchasers.

4. *Buying Groups*: Under the proposed new policy, the formation of pro-competitive buying groups would be permitted; i.e., suppliers would be legally permitted to grant quantity-based price concessions to buying groups where: (i) the group is a separate legal entity; (ii) the separate entity acquires a legal interest in the articles purchased and undertakes the responsibility to pay for these goods; and (iii) the entity appears, by normal industry standards, to be capable of satisfying its obligations.

In the view of the Director, this structure would be pro-competitive since the existence of the group entity reduces the supplier's credit risk, minimizes its marketing costs and assists it in reliably forecasting volume purchases for planning purposes.

## VI. Limitations of the Proposed Policy

Where a marketing practice otherwise permitted under the new enforcement policy has anti-competitive effects or is likely to injure competition substantially, the Director would retain the authority to challenge the practice under the abuse of dominant position provisions in section 79 of the Act.

In addition, the proposed policy will not bind the Attorney General of Canada in prosecutions under the Act or prohibit persons from applying to the Director under section 9 of the Act for an inquiry into the matter if they believe that an offence has been or is about to be committed.

Finally, persons who suffer loss or damage as a result of illegal price discrimination will retain a private right of action under section 36 of the Act to sue and recover damages for any loss resulting from a breach of the price discrimination provisions.

## Environmental Issues: Urgent Considerations

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An investment in real estate is looked upon as relatively safe. But when real estate is toxic it may no longer be a secure investment. The clean-up costs of toxic real estate can be financially onerous if not crippling, sometimes equalling multiples of the original investment.

Once you take title to a piece of real property, what you own goes well beyond the landscape and building. The frightening reality is that with title you take respon-