



March 31, 2014

Via email: minister.industry@ic.gc.ca

The Honourable James Moore, P.C., M.P.
Minister of Industry
C.D. Howe Building
235 Queen Street
Ottawa, ON K1A 0H5

Dear Minister Moore:

Re: Proposed Amendments to Prohibit Unjustified Geographic Price Discrimination

I am writing on behalf of the National Competition Law Section of the Canadian Bar Association (CBA Section) to comment on the proposal in the Federal Government's budget plan released on February 11, 2014 to amend the *Competition Act* in order to prohibit "unjustified cross-border price discrimination". The CBA is a national association of over 37,500 lawyers, notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. The CBA Section comprises lawyers whose practices embrace all aspects of competition law and foreign investment review.

The CBA Section believes the proposal raises serious issues that could create significant legal uncertainty and chill cross-border trade.

While a very limited amount of information about the proposal is available, and specific proposed language is not yet available, the CBA Section's principal concerns at this stage include the following:

1. Amendments to the *Competition Act* to address geographic price discrimination have the potential to change the role of the Commissioner of Competition into that of a price regulator, which is inconsistent with the Bureau's mandate to protect and promote open and fair competition.
2. The costs and uncertainty created by new legislation are likely to outweigh any benefits achieved and may result in less competition and higher prices in Canada. The CBA Section questions whether there is, in fact, much evidence of widespread unjustified geographic price discrimination occurring in the Canadian marketplace.

3. It is difficult (if not impossible) to draft legislation to capture all of the potential factors and justifications that contribute to a country-specific pricing strategy.
4. A robust public consultation process should ensue to consider any proposed legislative amendments once tabled.

I will explain these concerns in greater detail.

1. Amendments to the Competition Act to address geographic price discrimination have the potential to change the role of the Commissioner of Competition into that of a price regulator, which is inconsistent with the Bureau's mandate to protect and promote open and fair competition.

The Federal Government's budget plan, *The Road to Balance: Creating Jobs and Opportunities*, indicates that proposed measures will focus on "when companies use their market power to charge higher prices in Canada that are not reflective of legitimate higher costs."¹ The Government intends to empower the Commissioner of Competition to enforce the new measures.

It is important to bear in mind that the Commissioner of Competition is not a price regulator. In testimony before the Senate Committee examining the Canada-U.S. price gap, representatives from the Competition Bureau stated:

While there may be a variety of potential factors contributing to a price differential between Canada and the United States for any given product, it is important to understand that the Bureau is not a price regulator. We do not determine what is or is not a fair price for any product or service. [...] High prices in and of themselves do not fall under the purview of the Act unless they are the result of anti-competitive conduct.²

The CBA Section is concerned that a new statutory provision could provide the Commissioner with broad, new powers that may constitute a form of price regulation. This would be a significant deviation from the Commissioner's current mandate, which is to investigate and, where appropriate, challenge specific anti-competitive conduct under the statute, in order to protect the operation of free and fair markets, rather than focusing on the price level of particular products.

2. The costs and uncertainty created by new legislation are likely to outweigh any benefits achieved and may result in less competition and higher prices in Canada. The CBA Section questions whether there is, in fact, much evidence of widespread unjustified geographic price discrimination occurring in the Canadian marketplace.

Given the complexity of pricing strategies in most industries, the CBA Section is concerned that, in practice, the proposal will be costly (for both private parties and the Competition Bureau) to investigate and enforce. Any analysis addressing whether a cost differential is "justified" will likely require in-depth comparisons of costs and currency rates over an extended period of time. Investigations into this type of behaviour will require significant private and government resources. In many cases, an in-depth and costly investigation will reveal that a price difference is justified given the features of the Canadian market, including its size relative to the U.S. market. In addition,

¹ Canada, Department of Finance Canada, *The Road to Balance: Creating Jobs and Opportunities* (February 2014), at p. 182 online: www.budget.gc.ca/2014/docs/plan/pdf/budget2014-eng.pdf ("Federal Budget Plan").

² Canada, Senate, *Proceedings of the Standing Senate Committee on National Finance*, 41st Parl., 1st Sess., No. 12 (February 14, 2012), at p. 41.

the role of exchange rates would need to be closely examined, as the recent evolution of the Canadian dollar vis-à-vis the U.S. dollar and other currencies might make new legislation irrelevant.

The CBA Section is also concerned that businesses will have difficulty analyzing whether their conduct is potentially subject to challenge under the new provision. As compliance may require ongoing monitoring, the proposal is likely to increase the cost of doing business in Canada for a variety of cross-border businesses, not just those targeted by Competition Bureau investigations.

Other potential unintended consequences could include a reduced willingness to sell into Canada (e.g., for fear of investigation or because of compliance costs). It would be perverse if the proposed amendments had the effect of lessening or preventing competition that might otherwise have existed in Canada, thereby negatively impacting Canadian consumers and the economy. Indeed, by chilling participation in Canadian markets, it is possible that the proposal could result in the very harm the *Competition Act* seeks to avoid, namely that competition will be reduced.

The CBA Section questions whether these negative consequences may outweigh the intended benefits, particularly since it is not evident that there is widespread, unjustified geographic pricing discrimination between the U.S. and Canada.

A number of studies – including the Report of the Senate Committee on National Finance, *The Canada-USA Price Gap* – have identified myriad reasons for different prices in the U.S. and Canada. These include import tariffs, safety and other regulatory standards, underlying cost differences and different demand conditions. In fact, much of the Competition Bureau’s analytical work in investigating the impact of anti-competitive practices on Canadian consumers is premised on the notion that, in many industries, the market (or markets) in Canada operate differently than the market (or markets) for identical goods in the U.S. or elsewhere. However, the proposal appears to assume that there is one North America-wide geographic market, and the same distribution costs, for products sold on both sides of the Canada-U.S. border.

While “country pricing strategies” are also mentioned in the Senate Report and the Federal Budget Plan, there appears to be limited evidence to suggest that these strategies are a primary cause for different prices, rather than perhaps simply the result of the underlying cost, regulatory environment and other conditions related to doing business in Canada. In other words, in our view, there is little, if any, evidence of companies using market power to engage in unjustified country-specific pricing strategies.

The *Competition Act* already contains numerous provisions designed to prohibit anti-competitive practices by companies with market power, such as those dealing with abuse of dominant position or resale price maintenance. The *Competition Act* used to prohibit price discrimination, geographic or otherwise, at former section 50(1). These provisions were repealed in 2009 in an effort to modernize the legislation, following a recommendation in the Final Report of the Competition Policy Review Panel. The reintroduction of a provision dealing with unjustified geographic price discrimination would reverse the implementation of this recommendation.

3. It is difficult (if not impossible) to draft legislation to capture all of the potential factors and justifications that contribute to a country-specific pricing strategy.

The Federal Budget Plan notes that only instances of “unjustified” country-specific pricing will be of concern but it does not describe the criteria to assess when country-specific pricing will be considered unjustified.

Any amendment to the *Competition Act* designed to address geographic price discrimination would need to account for the myriad reasons for which a price difference could be justified. This could

present significant challenges because the reasons for justified cost differences are so varied, and likely differ depending on the nature of the industry in question. For example, in one industry, differences in transportation costs may be the important factor, while in another one, differences in regulatory requirements or exchange rate volatility may drive pricing decisions.

4. A robust public consultation process should be undertaken to consider any proposed legislative amendments once they have been tabled.

Aside from a few statements in the Federal Budget Plan and the Throne Speech, there is very little public information on the amendment proposal. Even the most basic aspects of the proposal are not yet known. For example:

- Will the proposed amendments apply to final (consumer facing) products only or also to intermediate products?
- Will the proposed amendments apply only to physical goods or to physical goods and services?
- Will geographic price discrimination compare prices only between Canada and the U.S., or also between Canada and other countries?
- How will products priced differently in local communities or geographic regions within Canada or within the U.S. be assessed?
- Will there be a private right of action associated with the proposed legislative amendments?

The answers to these and numerous other questions will undoubtedly impact the range of stakeholders interested in and affected by the proposal. As such, we believe it is important that a broad public consultation process be undertaken so that a wide range of perspectives may be taken into account before any proposal is implemented.

Minister, we urge you to carefully consider the issues arising from this proposal before introducing specific amending legislation. Representatives from the CBA Section would be pleased to discuss our concerns with you and with others involved in the legislative process.

Yours truly,

(original signed by Tamra Thomson for Denis Gascon)

Denis Gascon
Chair, Competition Law Section