



February 17, 2015

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: Bill C-49 – Price Transparency Act

Further to our letter of March 31, 2014, I am writing on behalf of the National Competition Law Section of the Canadian Bar Association (CBA Section) with respect to Bill C-49, the *Price Transparency Act*.

Bill C-49 would amend the *Competition Act* (the Act):

- By authorizing the Commissioner of Competition to conduct inquiries to determine the reasons why a product or class of products has a higher selling price in Canada than in the US, and require the Commissioner to make public reports on completed inquiries (Unjustified Price Discrimination Provisions); and
- By amending (and expanding) the definition of “affiliate” under the Act (Affiliate Amendments).

The CBA Section welcomes the proposed Affiliate Amendments, which have practical implications for the application of the Act to a variety of conduct. We provide below a few technical comments on these proposed amendments.

The CBA Section also commends the government on the fact that the proposed Unjustified Price Discrimination Provisions would not prohibit “unjustified cross-border price discrimination” or allow the Commissioner to seek administrative monetary penalties in respect thereof, as had been proposed. That said, we remain concerned that Bill C-49 is fundamentally inconsistent with Canada’s competition legislation, and that it would confer on the Commissioner an extremely vague mandate the exercise of which would impose unreasonable compliance costs on businesses operating in Canada.

The proposed language in section 3 of Bill C-49 (which would amend section 10 of the Act), if enacted, would benefit from a minor wording change (set out below) to make it clear that the cross-border selling price difference to be examined by the Commissioner must be a selling price difference within a corporate group (e.g., a US company and its Canadian subsidiary), which we understand to be the intent of the legislation. As currently worded, the proposed amendment to

section 10 of the Act could be interpreted to allow the Commissioner to commence a broad inquiry in any circumstances where the selling price of a product or class of products – even by unrelated sellers – is higher in Canada than in the US. It would be troubling if the proposed amendment were interpreted to confer this power on the Commissioner, particularly in view of the proposed amendments to section 11 of the Act, which would allow the Commissioner to compel the production of documents in connection with a Section 10 inquiry.

UNJUSTIFIED PRICE DISCRIMINATION PROVISIONS

The CBA Section has three principal concerns with these provisions.

1. The Unjustified Price Discrimination Provisions are fundamentally inconsistent with the Competition Act

For more than a century, a fundamental tenet of antitrust or competition laws in Canada and the US has been that charging “high” prices – absent some other prohibited conduct – is not and should not be actionable or justify enforcement action. Judicially, this view has been confirmed by the US Supreme Court.¹ It is also reflected in statements of both the US and Canadian enforcement agencies. In Canada, Competition Bureau officials have publicly stated that the Bureau “is not a price regulator”, that it does not “determine what is or is not a fair price for any product or service,” and that “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

Enacting the Unjustified Price Discrimination Provisions would be fundamentally inconsistent with both the objectives of and principles underlying the Act and with the mandate of the Commissioner under the Act.

Having repealed in 2009 the provisions of the Act that previously prohibited geographic price discrimination (former subsection 50(1)), enacting the Unjustified Price Discrimination Provisions would represent a retrograde step for Canada’s competition policy.

2. The Unjustified Price Discrimination Provisions will create a vague enforcement mandate, which will undermine “compliance”

We understand the government position is that enacting Bill C-49 will influence business behaviour – creating an immediate downward pressure on prices – just by the fact that the Commissioner will have the new powers in the bill.³ If that is the case, the CBA Section believes the Unjustified Price Discrimination Provisions are too vague, with the result that it will be difficult, if not impossible, for the Commissioner to exercise the new mandate in a way that will influence businesses as envisaged, or for businesses to determine whether they are within the scope of the law (and, if so, what actions they should be taking).

Questions left unanswered by Bill C-49 include:

- What product sales are to be investigated? Is the intent of Bill C-49 that the Commissioner would focus inquiries on consumer products/retail sales, manufacturing inputs/wholesale sales, or both?
- How are “the facts” to be determined by the Commissioner? How are costs to be measured? How will exchange rates be taken into account?
- How will the Commissioner select the products/suppliers to investigate?

¹ See: *Pacific Bell Telephone Co. dba AT&T v. linkLine Communications, Inc.*, (No. 07-512) 503 F. 3d 876 (2009).

² Canada, Senate, Proceedings of the Standing Senate Committee on National Finance, 41st Parl., 1st Sess., No. 12 (February 14, 2102), at p. 41.

³ CTV News: *Ottawa unveils new legislation to narrow Canada-U.S. price gap* (December 9, 2014)

Absent a clear legislative mandate, the new powers to be conferred on the Commissioner will represent little more than a legislative threat of the possible investigation of unspecified conduct. While the proposed legislation will raise issues with which businesses and their legal advisers must come to terms, we doubt whether it will have any measurable impact on product prices in Canada.

3. The Unjustified Price Discrimination Provisions would impose unreasonable “compliance costs” on Canadian businesses

Regardless of its impact (or lack thereof) on product pricing in Canada, Bill C-49 will give rise to significant costs for businesses that are the subject of an inquiry. These will include significant information production costs incurred in responding to section 11 orders obtained by the Commissioner, legal and accounting costs, and the cost of lost management time, in addition to the negative publicity that invariably will accompany inquiries once they become known to the public.

The costs of responding to inquiries by the Commissioner will extend to the US affiliates of Canadian “targets” by virtue of the proposed amendments to section 11 of the Act to allow collection of information relevant to an inquiry by the Commissioner from affiliates located outside of Canada. If the validity of this provision is upheld, it will expand the scope of the Commissioner’s inquiries and the associated business costs.

Finally, the Unjustified Price Discrimination Provisions in Bill C-49 fail to address certain issues that may result in other, intangible costs for Canadian businesses. These include:

- The extent to which confidential information will be protected in the required public report by the Commissioner;
- Whether businesses that are the subject of an inquiry by the Commissioner will have an opportunity to respond to the conclusions before the publication of the report; and
- Whether information collected by the Commissioner during an inquiry could be used in unrelated enforcement proceedings.

In the view of the CBA Section, requiring any Canadian business to incur these costs is unreasonable in circumstances in which the pricing practices being examined are not, at the end of the day, proscribed by the Act.

4. Technical Comment

Our technical suggestion on the Unjustified Price Discrimination Provisions – designed to ensure that they only apply to pricing differentials within corporate groups – is to amend section 3 of Bill C-49 as follows:

(1.1) If the Commissioner has reason to believe that the selling price of a product or class of products by a person is or was higher in Canada than the selling price of that product or class of products — or of a similar product or class of similar products — by that person or an affiliate of that person in the United States, the Commissioner may make an inquiry into the matter with a view to determining the facts, including the extent of the difference between the selling prices, and the reasons for that difference.

AFFILIATE AMENDMENTS

The CBA Section has technical comments on the proposed Affiliate Amendments.

Proposed changes regarding Trusts

Section 2(1) of Bill C-49 would include in the definition of the term “entity” a “trust or other incorporated organization capable of conducting business”.

While the reference to an unincorporated organization is appropriate, we are unclear on the inclusion of a “trust” in that phrase, given that a trust is not an “organization” but, rather, describes a fiduciary relationship. While certain business arrangements are structured as trusts for a variety of reasons, we suggest that the provision be clarified to make it clear whether the term “trust” refers to the trustees of the trust and the trust assets they hold, or whether it extends to include the beneficiaries of the trust.

Proposed changes to subsection 77(4)

We suggest that the word “and” be added after subsection 77(4)(c) so that it reads “and no order made under this section”. This would clarify that the language on the lack of any order applies to the entirety of subsection 77(4) and not simply 77(4)(c).

Proposed changes to subsection 110(4)

The proposed amendments to subsection 110(4) would extend that application of the amalgamation provision to “entities” rather than just corporations. It is unclear why this amendment is necessary, given that the concept of amalgamation applies only to corporations in Canada.

We appreciate the opportunity to provide you with these comments and would be pleased to discuss them with you at your convenience.

Yours truly,

(original letter signed by Tamra L. Thomson for R. Jay Holsten)

R. Jay Holsten
Chair,
CBA Competition Law Section