DEVELOPMENTS IN THE CANADIAN LAW OF PRICE MAINTENANCE AND PREDATORY PRICING

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I. Introduction

This paper seeks to briefly summarize the recent developments in two key provisions of the Canadian *Competition Act* ("the *Act*") which control how products may be distributed, namely price maintenance and predatory pricing. In each of these areas, the relevant provisions of the *Act* are discussed, as well as some recent developments and practical implications. These rules, while not the "glamour sports" of the antitrust world, are fundamental to product distribution arrangements. Understanding these rules in Canada is central for the development of North American distribution policies.

II. Price Maintenance

A. Overview

Section 61 of the *Competition Act*, Canada's the criminal price maintenance provision, is remarkably broadly drawn. Subsection 61(1)(a) makes it a criminal offence for any person engaged in the business of producing or supplying a product to attempt, by agreement, threat, promise or "any like means", to influence upward or discourage the reduction of the price at which any other person engaged in business in Canada supplies a product.

Subsection 61(1)(b) prohibits persons from refusing to supply a product (or otherwise discriminate against) any other person engaged in business in Canada because of their low pricing policy.

Subsection 61(6) prohibits the practice of attempting to induce a supplier, by threat, promise or any like means, whether within or outside Canada, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons.

During the 1960s, 1970s and much of the 1980s this section was a hotbed of enforcement activity - some 71 reported cases. Then, during the late 1980s formal enforcement activity under this section fell off dramatically. In 1994, observing both the breadth of the statutory provision and the decline in enforcement activity, some predicted that this section was under utilized in a

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historical sense and was likely to give rise to an increase in prosecutions over the next few years.[2] This couldn't have been more wrong. Between 1994 and 2002 there were exactly two reported prosecutions under section 61.

Despite the breadth of the provision – and despite the fact that, in the words of at least one judge "… I think we would be appalled if we were to have any statistics on how many times during each business day it is probably breached by persons quite unconscious of the fact that they were breaching it…",[3] prosecutorial activity declined precipitously. Arguably this may have been an economically literate exercise of prosecutorial discretion, but it was a significant change from past practice, and posed a particular challenge for antitrust advisors. Here we had a "*per se*" offence (i.e., no effect on the relevant market or competition is required to be shown), by and large in clear, unambiguous language, which had been the subject of very aggressive enforcement activity – and yet which was going largely unenforced. And, unlike in areas of predatory pricing or price discrimination, the Competition Bureau (the "Bureau") had not released helpful enforcement guidelines suggesting, one way or another, that there was no cause for concern.

What to tell clients? The advice had typically been that the law defined a *per se* offence, it was stricter than the equivalent American provisions (stricter still, since the recent decision of the U.S. Supreme Court in *Leegin Creative Leather Products Inc. v. PSKS Inc.*[4]) and that they ought not to engage in the conduct. In addition, while the law appeared not to be being vigorously enforced by the Government, it could give rise to civil damages.[5] However, beginning in 2003 a series of developments have made the job of counsellor in this area somewhat easier. The *Stroh*, *Access Toyota*, *Re/Max*, *Toyo Tanso*, *John Deere*, *Royal Group*, *Labatt* and *Auto Body* cases (discussed below) all suggest that this is an area of at least some renewed enforcement attention.

B. The Implication of *Leegin*

In the recently decided U.S. Supreme Court case of *Leegin Creative Leather Products Inc.* v. *PSKS Inc.*, the United States Supreme Court overturned some 96 years of precedent established in the case of *Dr. Miles Medical Co.* v. *John B. Parkinsons Co*.[6] It also made life a little more complicated for firms that distribute products in both Canada and the United States.

Dr. Miles stood for the proposition that agreements between suppliers and customers that established agreed minimum resale prices were *per se* illegal. *Leegin*, which involved the distribution of belts, purses and other leather fashion accessories, determined that such agreements are not *per se* unlawful, and should be examined pursuant to the rule of reason, as are most other vertical restraints.

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2 See e.g., J.B. Musgrove, "Price Maintenance: A Slumbering Giant?", The Canadian Institute Competition Law and Competitive Business Practices Conferences (June 17, 1994) [unpublished].

3 *R.* v. *Campbell* (1979), 51 C.P.R. (2d) 284 (B.C. Co. Ct.)

4 127 S. Ct. 2705 (2007).

5 Section 36 of the Act provides a private right of action for damages where a person has suffered loss or damage as a result of conduct that contravenes the criminal provisions of the Act (including section 61) or the failure to comply with an order of the Tribunal or other court under the Act.

6 220 U.S., 373 (1911).

This decision, however logical and appropriate it may be, will provide particular challenges for firms with distribution north and south of the 49th parallel, and as a result, for their Canadian advisors. Even prior to *Leegin*, there were discrepancies between the U.S. and Canadian price maintenance laws which posed challenges for Canadian counsel attempting to adopt and/or adapt U.S. distribution strategy in Canada. In the U.S., the *Colgate*[7] doctrine provided that unilateral decisions by suppliers not to supply products to discounters were lawful, so long as such conduct was truly unilateral. Implementing and policing a "Colgate Policy" could be complex and costly, but it was lawful if implemented properly. On the other hand, pursuant to Section 61 of the *Competition Act*, a refusal to supply based on the customers low pricing policy is *per se* unlawful,[8] even if entirely unilateral.

That is, even a distribution policy based on *Colgate* offends the Canadian price maintenance law. Prior to *Leegin*, however, it was presumed that it was *per se* unlawful, both north and south of the border, to agree with the customer as to a minimum resale price. Now, in the United States not only a refusal to supply to discounters, but also agreements with resellers as to minimum resale price are not *per se* unlawful – rather both are subject to a rule of reason analysis. Both types of conduct are *per se* unlawful in Canada.

North American firms are used to thinking about Canadian antitrust law as similar to but somewhat less restrictive than U.S. antitrust law. As noted above, resale price maintenance was one area where Canadian law was slightly more restrictive than the U.S. equivalent already. Indeed, some Canadian cases[9] have held that not only is refusal to supply because, as a primary reason, a customer has a low pricing policy *per se* unlawful, refusal to supply to a customer if the low pricing policy is only one of a number of reasons for the refusal may be *per se* unlawful. That is, as a practical matter any customer who has a low pricing policy represents a danger for distributors in Canada. Any refusal to supply them – for virtually any reason – may well result in a *per se* challenge on the basis of Section 61 of the Canadian *Competition Act*. *Leegin* has made the difference between the U.S. and Canada with respect to price maintenance even more stark and significant.

On the basis of *Leegin*, one may reasonably expect that U.S. suppliers of products which do not enjoy market power will consider, and may well enter into, minimum resale pricing agreements with distributors or retailers. They may seek to enter into similar agreements in Canada as part of an efficient North American distribution system. It will be for Canadian counsel to remind U.S. based firms that such agreements, at least until Canadian law is varied in some way, will be found to be *per se* unlawful north of the 49th parallel.

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7 *United States v. Colgate & Co.* 250 U.S., 300 (1919).
8 *Competition Act* R.S. 1985, C.C-34 at s. 61(1)(b).
9 See, for example *R.* v. *Royal LePage Real Estate Services Ltd.* (1993), 50 C.P.R. (3d) 161 (Alta. Q. B.).

C. Recent Canadian Cases

1. *Stroh*

In early October, 2002, The Stroh Brewery Company (Quebec) Ltd. ("Stroh") plead guilty to charges of price maintenance with respect to the sale of its products in Quebec.[10] The Bureau investigation, which commenced in 2001, concluded that between April 1999 and April 2000, Stroh engaged in price maintenance in convenience stores and other retail outlets in the Province of Quebec for the sale of bottled beer by the case. Stroh offered its retailers the option of participating in a volume-based discount program, a condition of which was that retailers were required to maintain a minimum retail price determined by Stroh for a case of six or twelve bottles. Specifically, convenience stores and retail outlets were required, via supply and distribution agreements that had been negotiated with Stroh, to maintain the price specified by Stroh for the products, thereby avoiding any discounting of the products. Stroh's sales and distribution agreements with retailers each contained the statement "At all times, the transactions negotiated and the suggested retail prices must be respected."

Upon learning of the Bureau's investigation, Stroh implemented a competition law compliance program and gave compliance sessions at certain of its locations. Stroh was fined $250,000 after having plead guilty. Stroh cooperated with the Bureau under the Bureau's Immunity Program, and the level of fine negotiated recognized that the offence in question did not arise from a general policy or conduct of Stroh, but was an isolated occurrence.

2. *Access Toyota*

In late March, 2003, the Bureau announced that it had reached a settlement with Toyota Canada Inc. ("Toyota") following the Bureau's investigation of consumer complaints alleging price maintenance and misleading advertising in relation to Toyota's Access Toyota Program.[11]

At the time of the Bureau's investigation, the Access Toyota Program allowed each participating Toyota dealer within a defined local geographic market (the Access Toyota Program was initially launched in March, 2000 in Manitoba, and was then expanded into Saskatchewan, Alberta, British Columbia and parts of Québec – each province essentially was considered a local market) to submit price "votes", by way of a discount off the manufacturer's suggested retail price, to Toyota on a monthly basis for every vehicle model sold by that dealership. The price votes submitted by the dealerships located within each local market were averaged by Toyota and these average prices, the "Access Prices", for each local market, were made available on the Toyota website. In addition, Toyota's website also provided "Drive-Away Prices" for each local market, which represented Access Prices plus all applicable fees and taxes. The Access/Drive-Away Prices were virtually always lower than any particular vehicle model's

[10] See Competition Bureau, News Release, "Competition Bureau investigation leads to a $250,000 fine in a price maintenance case" (October 10, 2002), available online at: < http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00454e.html >.

[11] The Competition Bureau's News Release, "Competition Bureau Settles Price Maintenance and Misleading Advertising Case Regarding the Access Toyota Program" (March 28, 2003) and the Prohibition Order and Agreed Statement of Facts in this case are available online at: < http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00300e.html >.

sticker or MSRP price; the discount could range from as little as $1.00 to many thousands of dollars.

The stated aim of the Access Toyota Program was to improve customer satisfaction by providing a more pleasant – no haggle – purchasing experience. The Access/Drive-Away pricing was key to customer satisfaction enhancement; it provided a mechanism whereby a price was set for each vehicle model to be sold that was said to be fair for both the dealer and the buyer because: (i) the Access/Drive-Away prices were set by the votes of participating Access Toyota Program dealerships with reference to the local market, and (ii) the "haggling" element characteristic of virtually all consumer vehicle buying transactions had been removed.

The Bureau's inquiry addressed allegations of both misleading advertising and price maintenance. With respect to price maintenance, the Bureau claimed that Toyota was prohibiting dealers affiliated with the Access Toyota Program from selling vehicles below the Access/Drive-Away Prices – that is, that the Access Toyota price was not merely a no-haggle cap, but was actually the lowest price at which area dealers would sell. At some point prior to the Bureau's investigation, Toyota became aware that, on occasion, certain Access Dealers were meeting to discuss and agree in advance on the price votes to be submitted by these Access Dealers that were then used to establish the Access Price.

The Commissioner of Competition informed Toyota that his investigation revealed that the effect of the monitoring and enforcement activities of Toyota under the Access Toyota Program caused some Access Dealers to understand that if they sold or leased Toyota vehicles below Access Prices/Drive-Away Prices, or advertised that they sold or leased at the Access/Drive-Away Price when the represented price was other than the Access Prices/Drive-Away Price established under the Access Toyota Program, the Access Dealer could be subject to substantial financial penalties.

In settling the case the parties agreed to a Consent Prohibition Order issued by the Federal Court of Canada binding on Toyota for a period of five years. The Order required Toyota to amend its Access Toyota Participation Agreement with each of its dealers who participate in the Access Toyota Program ("Access Dealers") to prohibit Access Dealers from:

- agreeing with and among each other on the prices that they are charging or will charge for Toyota vehicles, used vehicles, accessories parts or services;
- agreeing with and among each other to limit the discounts that they are applying or will apply to Toyota vehicles, used vehicles, accessories, parts or services;
- discussing or agreeing with and among themselves on the specific percentage discount to be submitted for the purposes of determining the Access Price of a vehicle; and
- making representations to the public that Toyota prohibits its unaffiliated dealers from selling below pre-determined prices (e.g., Access/Drive-Away Prices).

Toyota also agreed that for as long as it was a party to the Access Participation Agreement it would establish and implement a mechanism, satisfactory to the Commissioner, to enforce the contractual provisions identified in the points above up to and including termination of an Access Dealer's continued participation in the Access Toyota Program. The altered Access Toyota

Program was allowed to continue and Toyota was granted permission to extend it into other parts of Canada. Also as part of the settlement, Toyota made voluntary donations totalling $2.3 million to various charitable organizations across Canada.

3. *Re/Max*

On February 17, 2003, the Bureau settled a price maintenance case against Re/Max Ontario-Atlantic Canada Inc., Re/Max of Western Canada (1998) and Re/Max International Inc.[12] The parties agreed to a binding court order issued by the Federal Court of Canada, which required a change in their policies to allow Re/Max agents to advertise commission rates or fees. The court order was issued as a result of an investigation conducted by the Bureau into a policy directive issued by both Re/Max Ontario and Re/Max Western. Under the directive, Re/Max brokers and their sales associates were allegedly prohibited from advertising commission rates. Enforcement of this policy included reminders to Re/Max brokers to follow the directive, and in some cases non-compliant Re/Max sales associates were terminated. The consent order prohibited Re/Max International, Re/Max Ontario and Re/Max Western from:

- adopting policies or engaging in acts that prohibited their franchisees or sales associates in Canada from setting independent commission rates or advertising such rates;
- attempting to influence commission rates upwards by any means; and
- pressuring independent publishers to refuse advertising from any Re/Max franchisee or sales associate because of the commission rates advertised.

4. *Toyo Tanso*

In April, 2003, Toyo Tanso USA Inc. (“Toyo Tanso”) plead guilty to charges of attempting to maintain the price of isostatic graphite, used to make molds and dies for a number of industries, including auto parts and semi-conductors.[13] Between July 1993 and February 1998, Toyo Tanso sold, directly or indirectly through its independent distributor Electrodes Canada Inc. (“ECI”), approximately $200,000 of unmachined and semi-machined isostatic graphite in Canada.

Toyo Tanso was fined $200,000 by the Federal Court under the Act’s price maintenance provisions as a result of a Bureau investigation which revealed that Toyo Tanso met with ECI and attempted to raise the price of unmachined and semi-machined isostatic graphite in Canada. Toyo Tanso also agreed, under the Bureau’s Immunity Program, to cooperate fully with the Bureau’s ongoing inquiry into the carbon and graphite products industry in Canada.

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[12] See Competition Bureau, News Release, “Competition Bureau Settles Real Estate Case Involving Canadian Re/Max Franchisees” (February 17, 2003) available online at: <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00297e.html>.

[13] The Competition Bureau’s News Release, “Competition Bureau Investigation Results in Guilty Plea for Price Maintenance of Isostatic Graphite” (April 15, 2003) and the Indictment and Agreed Statement of Facts in this case are available online at: < http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00302e.html >.

5. *John Deere*

On October 19, 2004, as a result of a Bureau price maintenance inquiry, John Deere Limited ("John Deere") agreed to the terms of a Consent Prohibition Order filed with the Federal Court of Canada binding on the parties for a period of 5 years.[14]

The Bureau investigated allegations that from January to August 2003, John Deere discouraged its dealers from selling John Deere "100" series lawn-tractors below John Deere's suggested prices. While John Deere was not charged with an offence and did not admit any liability, it agreed to pay voluntary rebates to affected "100" series customers in order to address the Commissioner's concerns. The Bureau determined that approximately 8,600 consumers across Canada who bought John Deere "100" series lawn-tractors from one of John Deere's Canadian dealerships between January 1 and August 31, 2003 should receive a 5% cash rebate, at a total cost to John Deere of $1.191 million. John Deere was also required to develop a competition compliance policy and provide training in respect of the policy to all of its officers, employees and affiliates responsible for the pricing, sales and marketing of the "100" series lawn tractors in Canada by January 31 of each year for the duration of the Order, in addition to providing the cash rebates to consumers.

6. *Royal Group*

The Bureau announced on November 15, 2004 that Royal Group Technologies (Quebec) Inc. ("Royal Group") was fined $200,000 after pleading guilty in the Federal Court of Canada to "an isolated unsuccessful attempt"[15] to influence another company to maintain the price of polyvinyl chloride (PVC) window coverings such as vertical blinds and valances in 2002.

The Bureau's investigation revealed that a former employee of one of Royal Group's business units, Royal Window Coverings Canada, communicated with another company in an attempt to maintain the price at which that company would supply PVC blind slats, channel panels designed to hold vertical blind slats, and valances. Royal Group cooperated fully with the Commissioner's inquiry, and agreed to implement a compliance policy to ensure that future business practices comply with the Act.[16]

7. *Labatt Brewing Company*

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[14] The Competition Bureau's News Release, "Consumers to be Reimbursed by John Deere Limited" and the Prohibition Order issued against John Deere Limited are available online at: < http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00248e.html >.

[15] Royal Group Technologies Ltd.'s press release, "Cooperation and Compliance by Royal Group Leads to Resolution of Competition Bureau's Inquiry Into its Royal Window Coverings Canada Business Unit"(November 14, 2004)..

[16] See Competition Bureau, News Release, "Window Coverings Company Pleads Guilty in Attempting to Influence Competitor's Prices" (November 15, 2004), available online at: < http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00240e.html >.

On November 23, 2005, Labatt Brewing Company ("Labatt") pleaded guilty in the Court of Quebec to a charge of price maintenance on discount beer sold in Sherbrooke, Quebec and elsewhere in the province.

The Bureau launched an inquiry in October 2004. It determined that, between March 2004 and April 2005, Labatt, through some of its sales representatives, attempted either by agreement, threat, promise or similar means, to influence upward, or discourage the reduction of, the price at which nine independent convenience/grocery retailers supplied or offered to supply their discount beer from other breweries and Labatt.

When successful, Labatt's actions affected the price of discount beer sold by these nine retailers, including brands from Labatt competitors. Discount beer consumers in certain communities across Quebec were being offered discount beer at a higher price, while Labatt's competitors were unable to provide independent retailers and consumers with better prices.

Labatt was fined $250,000 and prohibition order was issued against the brewer. Under the order, Labatt will have to inform all of its Quebec independent convenience/grocery retailers in writing that under section 61 of the Act, the company or its representatives cannot by agreement, threat, promise or similar means, attempt to influence upward, or discourage the reduction of the price of alcoholic beverages.[17]

8. Fort McMurray Auto Body Shops

On February 16, 2007 the Competition Bureau announced that it had settled a price fixing and price maintenance case with six auto body shops in Fort McMurray, Alberta allegedly involved in fixing labour rates for repair services.[18]

The six businesses to sign the settlement were Shamrock Maintenance & Hotshot Services Ltd., Pete's Custom Coachwork, Birchwood Auto Body, Alberta Motor Products Ltd., Noral Motors and Lane's Auto Shop. They agreed to a binding Federal court order forbidding them from:

- Trading any information or communicating in any way with each other about pricing of products or services to customers or insurance companies; and
- Making any deals or arrangements relating to pricing of products or services to customers or insurance companies with any person egnaged in the sale and supply of auto body repair services in Fort McMurray.

The shops also agreed to publish a corrective notice in the local newspaper outlining the terms of the settlement, and to implement compliance programs.

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[17] See Competition Bureau, News Release, "Labatt Pleads Guilty and Pays $250,000 Fine Following a Competition Bureau Investigation" (November 23, 2005), available online at: < http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02003e.html >.

[18] See Competition Bureau, News Release, "Competition Bureau Settles Case Involving Auto Body Shops" (February 16, 2007), available online at: < http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02280e.html>.

D. Statutory Reform

Unlike proposals with respect to predatory pricing – and as well price discrimination – neither the Canadian Government's 2003 Discussion Paper with respect to possible changes to the *Competition Act*, nor Bill C-19,[19] made proposals to change section 61 of the Act. This, despite the recommendations of the *Van Duzer Report*[20] that decriminalization was appropriate, and indeed despite the recommendation of the Parliamentary committee which studied this matter[21] which reached the same conclusion.

The case for decriminalization would appear to have been strongly articulated, both by the Parliamentary committee and by the *Van Duzer Report*. As well, the desire for international harmonization, given the *Leegin* decision, may act as a further catalyst in this direction. It is difficult if not impossible to understand why, in principle, one form of vertical control over distribution – vertical price control – should be subject to a *per se* criminal prohibition, when other forms – market restriction, exclusive dealing and the like (which are economically at least, often substitutes for vertical price controls) are treated as reviewable rule-of-reason conduct.

The situation is complicated further in that the Competition Bureau has recently proposed amendments to section 45, the conspiracy provision. Section 45 makes agreements which prevent or lessen, unduly, competition illegal. The proposals would make certain specified horizontal agreements *per se* unlawful – without the need for an undueness test – and would decriminalize other horizontal conduct. Nevertheless, under section 61 of the *Competition Act*, Canada already has a *per se* prohibition on horizontal and vertical pricing agreements. If there is to be reform to section 45 to focus on certain "bad" hard core activity as *per se* unlawful, and decriminalization of other horizontal conduct, in our submission there can be no justification for leaving section 61 unaltered. The horizontal pricing provisions in section 61 must be subsumed in the revised section 45. Once that is done, we submit it will be painfully obvious that a remaining vertical *per se* pricing prohibition is an anomaly in the Act.

E. Some Tentative Conclusions

For many years, government enforcement of the Canadian price maintenance laws was vigorous. Then, it fell into a precipitous decline. Over the past few years, price maintenance enforcement in Canada has been stepped up, particularly in relatively high profile industries. A policy of requiring a minimum price of one's distributor is likely to attract criminal or quasi-criminal sanction. As well, price maintenance is being used as a supplement to enforcement of the conspiracy provisions, as the *Toyo Tanso* and *Fort McMurray Shops* cases suggest. With the

[19] Bill C-19, *An Act to amend the Competition Act and to make consequential amendments to other Acts* (November 2, 2004, 38th Parliament, 1st Session). For a copy of Bill C-19, visit the Library of Parliament website at: <http://www.parl.gc.ca/legisinfo/index.asp?Language=E&Session=13&query=4295&List=toc> (date accessed: 18 December 2007).

[20] See J. A. Van Duzer and G. Paquet, "Anticompetitive Pricing Practices and the *Competition Act*: Theory, Law and Practice" available online at: < http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01770e.html >.

[21] See Interim Report on the *Competition Act*: Report of the Standing Committee on Industry published in June, 2000 available online at: <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=160&Lang=1&SourceId=36486>.

Leegin decision, pressure for harmonization with U.S. law is also on the rise. While observers were largely disappointed that Bill C-19 did not include predatory pricing reforms, the recent decision to split the section 45 reform from other possible reforms to the Act may allow a window for section 61 reform at the same time. If section 45 is recast with certain *per se* offences, and if most of the other pricing provisions are decriminalized and made reviewable, then there will be a strong argument for a full review of section 61 along with section 45.

In the meantime, if businesses thought they could ignore the risk of price maintenance enforcement they have been reminded they are wrong. Price maintenance remains very much a live concern.

III. Predatory Pricing

A. Overview

Predatory pricing in Canada is addressed under two separate statutory regimes: the civil abuse of dominance provisions of the *Competition Act* (Sections 78 & 79), as well as the criminal predation law, found in section 50 of the *Competition Act.*

The number of decided predatory pricing cases in Canada can be listed on the fingers of two hands.[22] The few decided cases were thought not to provide sufficient guidance, so in March 1992 the Bureau released its *Predatory Pricing Enforcement Guidelines* ("1992 Guidelines").[23] The 1992 Guidelines helped to clarify the Bureau's enforcement perspective and, at least in the view of many commentators, they signalled the Bureau's lack of enforcement interest in this area, except in extraordinary cases.

That was the state of play throughout the 1990s and into the new century. However, more recent developments suggest this is an area to watch. The developments which we examine include the Bureau's Draft *Enforcement Guidelines for Illegal Trade Practices: Unreasonably Low Pricing Policies (Under Paragraphs 50(1)(b) and 50(1)(c) of the Competition Act* (the "2002 Draft Guidelines"), which were never implemented; the abuse of dominance case – based almost exclusively on a theory of predatory pricing – against Air Canada; the case of *Culhane* v. *ATP Aero Training Products Inc. et al.*[24]; proposed reform of the predatory pricing provisions in the statutory amendments proposed in the Bureau 's 2003 discussion paper *Options for Amending*

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22 These cases include: *R.* v. *Producer's Dairy* (1966), 50 C.P.R. (2d) 265 (Ont C.A.), *R.* v. *Hoffman-LaRoche Ltd*. (Nos 1 and 2) (1981), 28 O.R. (2d) 164 (H.C.J.), aff'd (1981) 33 O.R. (2d) (C.A.), *R.* v. *Consumers Glass Co. Ltd*. (1981), 33 O.R. (2d) 228 (H.C.J.), *947101 Ontario Ltd*. (c.o.b. Throop Drug Mart) v. *Barrhaven Town Centre* (1995), 121 D.L.R. (4th) 748 (Ont. Gen. Div.), *Upper Lakes Group Inc.* v. *Canada (National Transportation Agency)* (1995), 62 C.P.R. (3d) 167 (F.C.A.), *Canada (Director of Investigation and Research)* v. *The NutraSweet Company* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.), *Boehringer Ingelheim (Canada) Inc.* v. *Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 (Ont. Ct. Gen. Div.), *Commissioner of Competition v. Air Canada* (2003), 26 CPR (4th) 476 (Comp. Trib.) and *Culhane* v. *ATP Aero Training Products Inc.*, (2004), 31 C.P.R. (4th) 113 (Fed. Ct.).

23 The *Predatory Pricing Enforcement Guidelines* are available online at: < http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01746e.html>.

24 (2004), 31 C.P.R. (4th) 113 (Fed. Ct.)

the Competition Act: Fostering a Competitive Marketplace[25] (the "Discussion Paper") –as reflected in Bill C-19[26]; and finally, the release of the Bureau's revised *Draft Predatory Pricing Enforcement Guidelines, 2007* (the "2007 Draft Guidelines")[27] in October, 2007.

B. 2002 Draft Guidelines

On March 8, 2002, in an attempt to modernize its approach to the offence of predatory pricing, the Bureau released the 2002 Draft Guidelines. It was anticipated that the 2002 Draft Guidelines would replace the 1992 Guidelines previously issued by the Bureau. The 2002 Draft Guidelines, like the 1992 Guidelines, address paragraphs 50(1)(b) and 50(1)(c) of the Act, which set out criminal offences respecting geographic price discrimination and the sale of products at unreasonably low prices.[28]

The Bureau sought the public's views on the 2002 Draft Guidelines during a three month comment period which ended in mid-June, 2002. Only nine submissions on the 2002 Draft Guidelines were received by the Bureau; the document attracted far less public interest than did the 1992 Guidelines, despite the fact that, among other things, it eliminated the need for recoupment to show predation, and introduced the concept of "avoidable cost" as the benchmark against which prices would be measured. The 2002 Draft Guidelines were never implemented.

C. 2007 Draft Guidelines

In October 2007, the Bureau released an updated Draft Guidelines, the "*Draft Predatory Pricing Enforcement Guidelines, 2007*" ("2007 Draft Guidelines"). Public comments were sought on these revised Guidelines and the consultation process ended in January, 2008.

The 2007 Draft Guidelines contain three fundamental departures from the 1992 Guidelines: (1) the institutional framework has been modified - complaints regarding predatory conduct will now initially be examined primarily under the *Competition Act's* abuse of dominance provisions, not the criminal law provision; (2) the Bureau will assess unreasonably low prices using the concept of average avoidable costs rather than average variable costs and average total costs; and (3) "price matching" has been added as a reasonable business justification for pricing below

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25 The discussion paper is available online at: <http://strategis.ic.gc.ca/pics/ct/ct02584e.pdf> (date accessed: 18 December 2007).

26 *Supra*, Note 19.

27 The *Draft Predatory Pricing Enforcement Guidelines, 2007* are available online at: < http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02469e.html> ("2007 Draft Guidelines").

28 Sections 50(1)(b) and 50(1)(c) read as follows:

50(1) Everyone engaged in a business who

> (b) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in that part of Canada, or designed to have that effect, or
>
> (c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

average avoidable costs. There is, as well, a fourth change, being a more subtle shift in the approach to recoupment and market power necessary for predation.

1. Institutional Framework – Abuse of Dominance Provisions

For those complaints where there is a potential issue under the *Act*, the Bureau has determined that initial investigations will be undertaken pursuant to the Abuse of Dominance provisions in the *Act*. The Bureau notes that since inquiries into predatory pricing involve considerations of market structure and conduct, they are best suited to the non-criminal provisions of the *Act*.

As such, rather than be treated as a criminal matter under Section 50(1)(c), all complaints regarding predatory conduct will, at the outset, now be examined under the civil provisions at sections 78 and 79 of the *Act*, following the procedure detailed in Part 4.3 of the Bureau's *Enforcement Guidelines on the Abuse of Dominance Provisions*.[29]

The non-criminal Abuse of Dominance provisions require that, for a challenge to succeed, the conduct be likely to lead to a substantial lessening or prevention of competition. By contrast, the criminal predatory pricing provision, can give rise to liability when the conduct substantially lessens competition, or eliminates a competitor, or if it is designed to do either of those things.[30]

While the primary approach to enforcement by the Competition Bureau will now be non-criminal, civil plaintiffs may still bring damages claims for alleged breach of the criminal provisions. As well, the 2007 Draft Guidelines provide that at any stage of the process, the Bureau may determine that the conduct in question is particularly egregious and should be examined under the criminal predatory pricing provisions. The guidelines note that factors which suggest egregious conduct will include the use of predation to enforce or invite participation in a cartel, or breaking a pre-existing order of the Competition Tribunal.

2. Average Avoidable Costs

A key issue in predatory pricing is the need to determine whether the alleged predator is pricing below some appropriate measure of cost. The 2007 Draft Guidelines replace the 1992 relevant cost concept of "average variable costs" with that of "average avoidable costs".

The concept of "avoidable cost" was introduced with the 2002 Draft Guidelines; however, the 2007 Draft Guidelines provide more detailed guidance on what this cost concept entails. The 2007 Draft Guidelines provide that 'avoidable costs' generally include:

> i) labour, materials, energy, use-related plant depreciation, promotional allowances and other variable costs;
>
> ii) the non-sunk portion of product-specific fixed costs, otherwise known as quasi-fixed costs; and

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[29] Available online at: < http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01251e.html>. The process includes establishing dominance sufficient to satisfy that market power exists and therefore recoupment is possible; considering the extent to which the act of predation will deter entry through establishing a reputation for predation; and considering whether the dominant firm is pricing below some measure of its costs.

[30] *Competition Act*, *supra* note 8 at s. 50(1).

iii) incremental fixed and sunk costs associated with sales generated by the firm during the period the low pricing policy is in place.

The *Air Canada*[31] case, described below, employed the concept of "avoidable costs" since that measure is required by the *Competition Act*, but only in respect of the specific provisions related to dominant air carriers. The 2007 Draft Guidelines suggest that 'avoidable costs' may include a broader range of costs than does the concept of 'variable costs.' These include, as noted, "quasi-fixed costs", "incremental fixed costs" and opportunity costs. It remains to be seen at what point the cost of producing a product can be said to be avoidable, nor is it clear how far the court or Tribunal can or should go in "second guessing" business decisions, and thereby finding costs to be avoidable, or attributing opportunity costs.

Part, at least, of the problem associated with the concept of "avoidable cost," and the attribution of opportunity costs to the alleged predator, is that the inquiry into opportunity costs invites the trier of fact to determine what the alleged predator "should" have done in re-deploying assets to more appropriate uses. This, in effect, presumes that courts, tribunals, judges, juries and economists know best how to run railroads, or airlines, or cigarette companies. We submit that this may not, always, be the case.

Further, we wonder whether this change to the guidelines is practical. Unlike labour, materials and other variable costs, the amount of quasi-fixed cost – whatever that is – attributable to any given product is unlikely to be a readily accessible value for most businesses, given the changing environment in which they operate. We are concerned that a business which does not have accurate or current numbers on hand, for fear of pricing a product too low and violating the *Act*, may price their products at a higher-than-necessary level, to account for unknown quasi-fixed costs. Rather than encouraging low prices in the market, this would, in fact, have the effect of passing along higher prices to consumers.

In an area where serious, even criminal, sanctions may result from pricing policies, and pricing decisions must be made quickly, it is important to have predictability in terms of how the offence will be interpreted. The concept of avoidable costs does not, in our view, much advance the debate.

3. Business Justification Defence

The final significant change from the 1992 Guidelines to appear in the 2007 Draft version is the addition of a number of legitimate business justification defences for pricing below avoidable costs. Pricing below cost in order to sell off excess, obsolete or perishable goods or to induce customers to try a new products has been established in the jurisprudence as business objectives which the Bureau must consider as valid rationale for below cost pricing.

The 2007 Draft Guidelines go further, and include the practice of "price matching" as a possible defence, as had been recognized in the case law.[32] This enables a firm to reduce its price in order

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[31] *Commissioner of Competition v. Air Canada* (2003), 26 CPR (4th) 476 (Comp. Trib.)

[32] See *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.*, (1998) 83 C.P.R. (3d) 51 (Ont. Gen. Div.).

to meet a competitor's price in the short run, even if it means pricing below average avoidable cost and a loss for the business.

However, the 2007 Draft Guidelines indicate that use of price matching will be evaluated on a case by case basis to determine whether its use is justified or is being used to mask anti-competitive conduct such as undercutting. The 2007 Draft Guidelines clarify that price matching where one product is superior in terms of service or quality will not be permitted. Similarly, including "giveaway" or "bonus" products, in addition to price matching, could be deemed as undercutting. Citing abuse of dominance jurisprudence, the Bureau concludes that "to support a defence of a valid business justification, there must be a credible efficiency or pro-competitive explanation."

4. Recoupment and Market Power

As with the 1992 Guidelines, the 2007 Draft Guidelines highlight the importance of market power in assessing alleged predatory conduct. Two of the factors which indicate market power are the market share held by any firm, and the ability of a business to recoup losses following a period of predatory pricing. Both of these concepts were present in the original 1992 Guidelines; the 2007 Draft Guidelines, however, indicate a slight shift in the Bureau's approach to recoupment.

The 2007 Draft Guidelines state that "[g]enerally, the Bureau does not consider a firm with a market share of less than 35 percent to be capable of exercising market power," although a footnote indicates that such a firm might have market power if it has "a unique cost advantage or the ability to use strategic behaviour to build and entrench market power."[33] This is broadly similar to the approach in the 1992 Guidelines.

With respect to recoupment, the 2007 Draft Guidelines indicate that the Bureau will interpret the ability of a firm to recoup its losses as an indication of market power. The fact that recoupment is relevant to the Bureau's approach to predatory pricing, outlined in the 2007 Draft Guidelines, is not a change from the 1992 Guidelines, but it is a change from the 2002 Draft Guidelines, which did not provide for recoupment as a necessary element. There has, however, been a shift in the approach to recoupment.

Whereas the 1992 Guidelines required the power to recoup as a necessary element in predation,[34] the 2007 Draft Guidelines use the ability to recoup as an indicator of market power, which itself is the necessary element. They also broaden the theory as to how recoupment might be achieved. They provide:

> [r]ecoupment usually takes place when the firm that initiated the predatory campaign increases prices in the relevant market following the elimination or

[33] See 2007 Draft Guidelines, Section 3.3

[34] See 1992 Guidelines, Sections 2.1 and 2.2.1.2, which state "The analysis emphasizes the presence of, or potential for, market power. The analysis seeks to determine if, after a period of low pricing, the alleged predator would be able to raise prices and recoup losses (or forgone profits), unconstrained by competition in the future…In the context of a predatory pricing complaint, it is necessary to determine whether or not the alleged predator appears to have the power to recoup its initial losses by raising prices to above-normal levels once its target/rival has been driven from the market."

> disciplining of its competitors. Disciplining may result in a rival increasing its prices, or becoming less aggressive or otherwise restraining its competitive activities. Other forms of recoupment are also possible. In addition to "in-market" recoupment, a firm can recoup losses incurred in one market by exercising market power in another product or geographic market(s). Raising barriers to entry, for example, by acquiring a "reputation for predation" can make it easier for a firm to recoup losses following a period of predation such that actual or potential new entrants perceive a higher risk that entry will be unprofitable. As well, predation may be a rational strategy in order to preserve the long-term stability of an existing market structure, coerce participation in an illegal conspiracy or to establish an industry standard to exclude others or maintain market control.[35]

D. Recent Canadian Cases

1. *Air Canada*

The *Air Canada* case[36] began with the filing of an application by the Commissioner before the Competition Tribunal (the "Tribunal") on April 5, 2001, and concluded[37] with the Tribunal's decision on July 22, 2003. This hearing itself only represented an input to the larger question, which was to be addressed in phase two of the case[38] – as to whether Air Canada engaged in abuse of dominant position under the newly enacted *Regulations Respecting Anti-Competitive Acts of Persons Operating A Domestic Service* (the "Airline Regulations").[39] The decision in phase one turned on whether Air Canada had engaged in pricing below "avoidable cost". As the time period during which Air Canada was alleged to have engaged in such acts straddled the coming into force of the regulations, the Tribunal proceeded on the basis that activity prior to the coming into force of the airline regulations would be evaluated using the previous provisions of sections 78 and 79 of the Act (the abuse of dominance provisions).

The application was brought in respect of seven different routes which Air Canada flew in Eastern Canada, and which were experiencing competition from either WestJet or CanJet. Two such routes (Toronto/Hamilton – Moncton; Montreal – Halifax) were selected as test routes for phase one. Rather than deal with the entire question of abuse of dominance on consent, the first phase of the hearing dealt only with the question of whether Air Canada had been operating below avoidable cost in respect of flights on the two routes.

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[35] See 2007 Draft Guidelines, Section 5.1

[36] *Commissioner of Competition* v. *Air Canada* (2003), 26 C.P.R. (4th) 476 (Comp. Trib.)

[37] Subject to a self-imposed stay, pending Air Canada's anticipated emergence from creditor protection.

[38] On October 29, 2004 the Bureau announced that it had resolved its litigation with Air Canada. In the Bureau's News Release, the Commissioner cited the passage of time and significant changes in the airline industry as determinative factors in the Bureau's conclusion that pursuit of phase two of this case would not be in the public interest. See Competition Bureau, News Release, "Competition Bureau Settles Case with Air Canada" (October 29, 2004), available online at: < http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00246e.html>. The Notice of Discontinuance is available on the Competition Tribunal's website at: <http://www.ct-tc.gc.ca/english/CaseDetails.asp?x=68&CaseID=187#249>.

[39] SOR/2000-324.

The four questions agreed by the parties to be addressed by the Tribunal in the first phase of the hearing were, with respect to the two routes in question and for the period between April 1, 2000 and March 5, 2001:

1. What was the appropriate unit or units of capacity to examine?
2. What categories of costs are avoidable and when do they become avoidable?
3. What is the appropriate time period or periods to examine?
4. What, if any, recognition should be given to "beyond contribution"?

The answers were:

1. The unit of capacity is the schedule flight.
2. The categories of costs that are avoidable are those discussed [in the reasons] beginning at paragraph 197; the avoidable costs so found are avoidable from the outset by virtue of shedding, redeployment or disposal.
3. One month is an appropriate period of time to examine.
4. No recognition should be given to "beyond contribution".

Phase two of the hearing was to deal with whether anticompetitive acts (that is, pricing below avoidable cost) occurred on the other five routes in question, and would have addressed, for all seven routes, the question of control of a relevant market under section 79(1)(a); the question of whether there was a practice of anticompetitive acts; the question of whether the acts were entered into with the necessary purpose under the Act (with an eye to legitimate business justifications in that regard); and finally, the question of whether the practice of anticompetitive acts, if indeed engaged in with the appropriate purpose, had or was likely to result in a substantial prevention or lessening of competition.

The Tribunal found that most of Air Canada's costs were avoidable over a relatively short period of time. That, of course, will militate in favour of finding predation. The more costs are found to be avoidable, the easier it is to conclude that revenues are below avoidable costs. This impact was amplified by including in "costs" revenue from other routes which Air Canada could have earned had it chosen to fly those routes rather than the routes subject to the challenge (forgone opportunity). This impact was still further amplified by the Tribunal's refusal to include in revenue the earnings from routes which the routes in question fed passengers into "beyond contribution."

The Tribunal found that reasonable business justifications for conduct were not relevant or to be taken into account in determining whether Air Canada priced below avoidable cost. It also found that the time period over which it should examine was whatever period of time the Commissioner chose in his or her application. Thus, an anticompetitive act will be found to have occurred regardless of the reasonable business justification, if any, for the conduct, and over any period of time what the Commissioner chooses to define. This seems to us to be inappropriate.

Given the Tribunal's approach to the Airline Regulations, Air Canada would have been liable to have been found to be engaging in an anticompetitive act on every route it operated against a new entrant. Assuming that prior to the entry of the new competitor it was making money on the flight or route, as soon as there is entry by a low cost competitor Air Canada must reduce its prices if it wants anyone to fly with it. If it does, it is quite likely that it is going to be operating below avoidable cost. If it doesn't reduce price, it is going to be flying with empty planes, and once again, operating below avoidable cost. It would seem that to avoid an anticompetitive act, Air Canada's only option would be to immediately withdraw from the flight or route. That is neither a realistic assumption, nor a reasonable antitrust outcome. It is one thing to argue that Air Canada ought not to be able to expand output on such routes in a below cost way, or even ought not to be able to significantly undercut a new entrant, but to argue that simply deciding to stay on the route and effectively match (or even not quite match) the new entrant's fares constitutes an anticompetitive act, seems problematic.

In hindsight, it is easy to speculate that almost any change in scheduled flights that Air Canada made in the period prior to its reorganization might have trouble standing up to the scrutiny of the avoidable cost test set out by the Tribunal – even flights which did not involve any change might have done so. After all, Air Canada was on its way into bankruptcy. This seems a peculiar basis upon which to reach a conclusion of price predation. Given the Tribunal's decision in the *Air Canada* case, predatory pricing allegations, at least involving airlines, are likely to have a high chance of success.

A contrast to the Tribunal's decision in the *Air Canada* case is the U.S. Tenth Circuit Court of Appeals' decision in the price predation case involving American Airlines ("AMR").[40] The *AMR* case involved a predation claim against AMR based upon its response to entry of low cost carriers operating from its hub at Dallas/Ft. Worth, centered around the hub-and-spoke system of American Airlines.

The Court of Appeals found that AMR responded to competition from low cost carriers ("LCC") with changes in: (1) pricing (matching LCC prices); (2) capacity; and (3) yield management, on four of its routes. The Government did not present evidence of its own creation as to the costs AMR experienced in adding capacity. Rather it drew various costs analysis from AMR's internal tracking systems. In doing so, it presented four different analyses of what it asserted to be the incremental costs experienced by AMR in adding capacity on the routes in question.

In examining the construction of these cost tests, the court concluded that they were not good proxies for marginal or incremental costs. It concluded that two of the tests used by the Government included both incremental and fixed costs. The other two tests treated as costs aspects of profit which the airline chose to forego in order to add the capacity (as did the Tribunal in *Air Canada*). Since none of the cost comparisons offered by the Government were an acceptable proxy for marginal costs, the Government's case was rejected by the Court of Appeals.

More interesting than the specific reasoning on the costs tests in issue was the attitude the Court applied to the Government's allegations. The case was dealt with on summary judgment motion by AMR, so all of the factual assumptions favoured the Government. Nevertheless, the Court rejected the Government's case on the basis of the cost test. While the excruciating detail as to

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[40] *U.S.* v. *AMR Corp.*, 335 F. 3d 1109 (10th Cir., 2003)

the costs examined, which is provided by the Tribunal in the Air Canada case, is not available in the *AMR* case, it appears the U.S. Court was less inclined to view AMR's costs as incremental than the Tribunal appears to have been to view many of Air Canada's costs as avoidable. There was also, as noted, the differential treatment of forgone revenue as a "cost".

As a general rule, we think it would be fair to say that the *AMR* case proceeded on the basis of fundamental scepticism respecting the Government's allegations of predation, recognizing that a false positive finding of predation discourages low prices; whereas the case before the Tribunal appears to have proceeded on the basis of fairly robust scepticism by the Tribunal of Air Canada's position as to the avoidability of its costs. The difference in approach seems to have resulted in the difference in outcome – and one which will logically have the effect of discouraging dominant airlines – and perhaps dominant firms in other markets – from lowering their prices and fighting to retain business in the face of aggressive new competitors.

2. *Culhane*

The *Culhane v. ATP Aero Training Products Inc. et al.* case is one of the few reported predatory pricing cases in Canada.[41] The plaintiff in this case was an author who published practice exam guides used to prepare for pilot's aviation examinations. The defendants were ATP Aero Training Products Inc. and its sole principal, publishers of certain on-line pilot exam preparation guides. Until May 1999, the defendants purchased the plaintiff's publications and resold or distributed them to others; however, the plaintiff also independently wrote and published his own aviation exam guides. In 1997, the defendant began offering free on-line exam guides over the Internet. The plaintiff alleged that the defendant's practice of making these examination guides available free of charge over the Internet reduced sales of his competing publications.

The plaintiff brought a private action claim for damages under section 36 of the Act in relation to alleged predatory pricing contrary to section 50(1)(c) of the Act. The plaintiff also claimed damages for unlawful interference with economic interest.

The defendant claimed not to be 'selling products', as its exam guides were made available at no cost to consumers; however, the Court found that the defendant was engaged in a policy of selling, as it historically sold the exam guides for a price and updated the guides online to maintain their currency. The Court also concluded that the defendant was selling the guides at unreasonably low prices, taking into consideration such factors as the difference between the defendant's production cost and the actual sale price charged; the indefinite length of time the defendant intended to make the publications available at no charge; the "offensive" [Note: this is the rather peculiar language of the decision] nature of the price reduction (the defendant's price cutting was not done in reaction to any price decrease implemented by the plaintiff or anyone else in the market place); and the absence of evidence of any external economic benefit (there was no evidence that the free examination guides had increased or would increase sales of the defendant's other products) accruing to the defendant from reducing prices below cost.

Despite these findings, however, the Court did not make a finding of predatory pricing. It noted that predatory pricing typically requires prices set to drive others out of a market or deter entry

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[41] *Culhane v. ATP Aero Training Products Inc. et al.* (2004), 31 C.P.R. (4th) 113 (Fed. Ct.)

into it; following which the predator firm then raises its prices to recoup the losses. The plaintiff must show the effect or the object of the conduct. Here, the Court was not satisfied that the defendant's conduct had the effect or tendency of substantially lessening competition, that the defendant intended such an effect or that it intended to eliminate the plaintiff as a competitor. The Court found that there was no causal evidence of an actual reduction in competition. The intention of the defendant in giving away the guides online was, the Court found, to use the giveaway as a marketing tool, and not a scheme to reduce competition. (*Quaere*, then, its conclusion, noted above, that this was not an external economic benefit.) The Court acknowledged that the plaintiff's sales had decreased; however, there were multiple plausible explanations for this, none of which could be traced to the defendant's unreasonably low pricing policy. In the absence of these essential elements of the offence, the Court rejected the plaintiff's claims and his action against the defendants was dismissed.

A notice of appeal was filed by the plaintiff on June 28, 2004 with the Federal Court of Appeal. On April 11, 2005, the Federal Court of Appeal dismissed Mr. Culhane's claim for damages against ATP.[42] On October 6, 2005, the Supreme Court of Canada (without reasons) also dismissed Mr. Culhane's application for leave to appeal, with costs.[43]

E. Statutory Reform

The House of Commons Standing Committee on Industry, Science and Technology in its April, 2002 final report entitled *A Plan to Modernize Canada's Competition Regime*[44] (the "Industry Committee Report") recommended that the predatory pricing provisions be repealed and that predatory pricing behaviour be made a reviewable matter under the existing abuse of dominance provision. The Committee recognized that anticompetitive pricing behaviours are probably not appropriately dealt with under criminal provisions, being better suited to a civil provision with a competition test.

On the heels of the Industry Committee Report, the Bureau's June, 2003 Discussion Paper recommended repealing the existing predatory pricing provisions of the Act, and including predatory pricing as an anticompetitive act under the abuse of dominance provisions. A new anti-competitive act – selling products at a price below avoidable cost – was recommended to be added to the existing list of anti-competitive acts in section 78 of the Act. As a result of such an amendment, the Bureau noted that the Competition Tribunal could order administrative monetary penalties in respect of such conduct.

On November 2, 2004, the Minister of Industry introduced Bill C-19[45] into the House of Commons. The amendments tabled in Bill C-19 were somewhat more circumscribed than those originally proposed by the Bureau in its June, 2003 discussion paper; however, the proposed amendments were nonetheless significant. That Bill died on the Parliamentary Order paper.

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[42] *Culhane* v. *ATP Aero Training Products Inc.* 39 C.P.R. (4th) 20 (C.A.)
[43] *Culhane* v. *ATP Aero Training Products Inc*., [2005] S.C.C.A. No. 279
[44] The House of Commons Standing Committee on Industry, Science and Technology's final report is available online at: <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=221&Lang=1&SourceId=37149>.

[45] *Supra*, note 19.

In their January 2008 submissions to Canada's Competition Bureau Review Panel, both the Canadian Bar Association and the Competition Bureau recommended that the criminal predatory pricing provisions, as well as the price discrimination provisions, be removed from the *Competition Act*. Repeal of the provisions dealing with price discrimination, predatory pricing, discriminatory promotional allowances and geographic price discrimination, if such proposed changes are enacted, would result in such matters being subject to challenge under the Abuse of Dominance provisions, but not under the criminal law.

F. Some Tentative Conclusions

The state of play in predatory pricing law in Canada is a bit hard to ascertain right now. Insofar as the 2007 Draft Guidelines and the *Air Canada* case represent guidance, they suggest that while, for years, predatory pricing was largely a theoretical but not a practical issue, the risk of predatory pricing complaints is likely higher now than it has been in more than a decade, although it is likely to be a civil, rather than a criminal challenge. The substitution of the avoidable cost for the variable cost test – particularly if avoidable cost is defined, as it was in *Air Canada*, as including forgone opportunities – suggests a relatively easier test for plaintiffs. As well, insofar as the 2007 Draft Guidelines suggest that recoupment is an indicator of market power, but no longer a necessity element for predation, the chances of successful allegations of predation appear to be increased. These developments all argue in favour of increased risk of predatory pricing enforcement.

On the other hand, the *Culhane* case suggests, despite some odd language (e.g., "offensive" price reductions) that while private predatory pricing cases are not dead, the courts are still reluctant to make predatory pricing findings, recognizing that low prices are on balance very good for consumers. As well, the ambiguity of the status of the draft Guidelines suggests that the Bureau may be reconsidering its position in that regard.

All in all, this is an area in considerable flux, and businesses cannot take the same comfort they might have taken a few years ago that aggressive pricing was unlikely to be challenged. Then, as long as their prices were above variable cost, predatory pricing challenges were almost a guaranteed non-starter. Now, the issue is not quite so clear. Further, with the settlement of the *Canada Pipe* abuse of dominance case[46] the Canadian law of predation in relation to bundled discounts is, as is the case elsewhere in the world, far from clear.[47]

[46] *Canada (Commissioner of Competition) v. Canada Pipe Company Ltd.*, 40 C.P.R. (4th) 453 (Comp. Trib.); reversed by 49 C.P.R. (4th) 241 (F.C.A); leave for appeal dismissed [2006] S.C.C.A. No. 366. Registered Consent Agreement issued December 19, 2007 (CT-2002-06).

[47] For a discussion of the Canada Pipe case please see J. Musgrove and S. Szentesi ,"Loyalty Programs and Abuse of Dominance: Canada Pipe", CLE BC Conference (December 1, 2006) [unpublished] and J. Musgrove, "Loyalty Programs", Speaking Notes for ABA Teleconference, (November 21, 2006) available in *Buying Loyalty Revisited: Loyalty Programs in the U.S., EU, and Canada*, ABA Section of Antitrust Law (November 2006).