

New Canadian Predatory Pricing Guidelines Embrace Aggressive Pricing

Consumers and businesses will benefit from the new guidelines on predatory pricing released on July 21, 2008 by the Competition Bureau. The guidelines recognize that low pricing policies usually have positive effects for consumers. To ensure that businesses are not deterred from pursuing aggressive pricing policies, the Bureau has provided five important signals:

- (i) The Bureau intends to use the reviewable practice of abuse of dominance instead of the criminal provisions of the *Competition Act* to deal with predatory pricing in all but the most egregious cases (e.g. where predatory pricing is used to enforce or invite participation in a cartel arrangement). Thus, the primary enforcement mechanism will be prohibition or other remedial orders, rather than fines or imprisonment.
- (ii) The assessment of whether a price is below cost or unreasonably low will be based on average avoidable cost (i.e., costs that the business could have avoided had it chosen not to sell the product in question). This approach is consistent with modern economic thinking and removes the uncertainty in prior guidelines about potential enforcement action when prices were between average variable and total cost.
- (iii) Price matching to meet competition will now be accepted as a reasonable business justification for pricing below cost. Historically, there had not been any explicit recognition of a “meeting competition” defence.
- (iv) The Bureau has accepted that the expectation of and ability to recoup losses through future price increases is a fundamental element of predatory pricing (contrary to the 2002 draft guidelines’ position that it was merely a potential factor that could be considered).
- (v) The Bureau also expects complainants to provide evidence of unprofitability during the time period of price reductions.

Overall, the guidelines are a positive development. The Bureau recognizes that aggressive pricing usually has positive effects for consumers. These guidelines signal

the Bureau's intention to be gentle on aggressive pricing, except where it is so flagrant that it could constitute criminal behaviour.

Guidance on the criminal predatory pricing provisions of the *Competition Act* was first provided by the Bureau in 1992. While they adopted a relatively restrained approach, various uncertainties remained and were intensified by draft guidelines on unreasonably low pricing policies which appeared to signal a more interventionist posture on issues such as recoupment and paralleled a high profile case against Air Canada that was eventually abandoned. The Bureau's approach in the new guidelines is a welcome return to and improvement upon the 1992 guidelines.

The Bureau has adopted a two stage test for determining whether to proceed on predation complaints that is consistent with the US Supreme Court's decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*

(i) The Bureau will examine whether the business engaging in the pricing conduct has, or is likely to obtain, market power. In the context of predation the Bureau states that the ability to recoup losses following predatory pricing is a good indicator of market power.

(ii) If the firm does possess market power, then the Bureau will conduct a cost revenue analysis to determine whether its prices are below the average avoidable cost.

The Bureau has not brought a predatory pricing prosecution since 2003 and the guidelines provide welcome assurance for businesses that are considering low pricing strategies. However, the guidelines do not bind the courts and the Bureau's restrained approach may encourage complainants to make greater use of the private right of action that is available to market participants (including competitors) who are injured when a firm charges prices that are unreasonably low with the intent or likely effect of lessening competition substantially or eliminating a competitor. Thus a low pricing policy still needs to be carefully considered in these situations.

By: Neil Campbell, Larry Markowitz, and Jonathan Hood

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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For further information, please contact one of the McMillan LLP competition lawyers listed below:

A. Neil Campbell	416.865.7025	neil.campbell@mcmillan.ca
John F. Clifford	416.865.7134	john.clifford@mcmillan.ca
Bill Hearn	416.865.7240	bill.hearn@mcmillan.ca
David W. Kent	416.865.7143	david.kent@mcmillan.ca
D. Martin Low QC	416.865.7100	martin.low@mcmillan.ca
Larry Markowitz	514.987.5052	larry.markowitz@mcmillan.ca
Mark Opashinov	416.865.7873	mark.opashinov@mcmillan.ca
J. William Rowley QC	416.865.7008	wrowley@mcmillan.ca
Éric Vallières	514.987.5068	eric.vallieres@mcmillan.ca
Marie-Christine Demers	514.987.5001	marie-christine.demers@mcmillan.ca
Jonathan Hood	416.865.7255	jonathan.hood@mcmillan.ca
Sorcha O'Carroll	416.865.7035	sorcha.ocarroll@mcmillan.ca
Lisa Parliament	416.865.7801	lisa.parliament@mcmillan.ca

www.mcmillan.ca



McMillan LLP

Toronto | t 416.865.7000 | f 416.865.7048
Montreal | t 514.987.5000 | f 514.987.1213

Barristers & Solicitors