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I. **INTRODUCTION**

- The use of category management techniques and slotting allowances is increasingly prevalent in Canada, as retailers adopt more sophisticated means of analyzing and maximizing sales in particular product categories and subcategories, and suppliers seek to respond accordingly. To some extent, the adoption of these practices in Canada has been accelerated by the relatively recent arrival in this jurisdiction of large format general and niche retailers. Those retailers have brought with them the distribution and retailing strategies that have made them successful in other jurisdictions. This presentation considers, in summary form, the potential application of Canadian competition laws (and in particular, the Canadian *Competition Act*) to CM and slotting allowances.

- There are some features of the Canadian retail industry that are worth noting. As a general matter, the Canadian economy traditionally exhibits a high degree of concentration in many sectors. One commentator has suggested that the Canadian economy has an industrial structure that is essentially oligopolistic in many key sectors – as of the early 1990s, for example, four or fewer firms accounted for 60 percent or more of total sales in over 90 percent of the standard classification commodities in manufacturing. The structure of the Canadian retail sector is substantially consistent with this general observation. With respect to the grocery sector, for example, it has been suggested that the level of concentration at the retail level is at least as high as that in the United States, with the four supermarket chains accounting for approximately 75% of total Canadian food store sales. There is reason to believe that this consolidation has been accompanied by increased consolidation among suppliers in a number of retail sectors. The competition law treatment of slotting allowances and CM is, therefore, of particular significance in the Canadian retail context.

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1 Hereinafter CM.
6 The Canadian retail sector bears some similarity to its counterparts in “small” economies such as Australia and Israel: see, e.g. Michal S. Gal, *Competition Policy for Small Market Economies* (Cambridge: Harvard University Press, 2003). In Israel, for example, it has been recently noted that the grocery market is dominated by three chains and consumer goods markets by one or two manufacturers, the result being that “competition in these markets may not be as intense as in other countries.” The Israel Antitrust Authority appears to have taken a pro-active approach to the potentially anti-competitive aspects of CM, as demonstrated by the issuance of a draft code of conduct intended to govern such practices. See David A. Balto, “Ten Developments in the Antitrust Treatment of Category Management and Slotting Allowances” *Antitrust Report* (Spring, 2004) 103 at 126.
(a) **CM**

- CM has been described as “…a bizarre and controversial place in which the nation’s biggest retailers ask one supplier in a category to figure out how best to stock their shelves”. Less dramatically, CM has been defined as “a supplier-retailer process for managing entire product categories as business units and customizing them on a store-by-store basis to produce enhanced business results through a stated focus on delivering consumer value.” CM essentially permits retailers to operate a particular product category as a business, identifying the optimal product mix and merchandising in each category to meet consumer needs.

- Perhaps the most controversial aspect of CM involves the use of category captain arrangements, pursuant to which a retailer will appoint a leading manufacturer in a particular product category as category captain. The category captain will then work with the retailer in jointly collecting detailed information on the performance of all brands in the relevant category for the purpose of producing a plan for the presentation by the retailer of the entire product category. The plan can be extremely detailed – even specifying which Stock Keeping Units a retailer should carry, the suggested retail price for each SKU, layouts of Plan-o-grams (used to denote how products will be displayed on the shelves) and promotional plans. At least one study has suggested that CM may lead to higher retail prices and lower sales, though this is not a universally accepted conclusion.

- CM can present significant competition law issues. These include the possibility that a category captain could manipulate a CM model to exclude competitors (presumably, smaller ones) and/or increase its market power, facilitate co-ordination of prices or price related factors among competing manufacturers, or otherwise reduce consumer welfare.

(b) **Slotting Allowances**

- The payment of slotting allowances by suppliers to retailers is increasingly commonplace. Slotting allowances, like listing fees and “pay-to-stay” fees, are essentially payments by suppliers to retailers for shelf space. The 2003 FTC Report on...

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9 Ibid.


11 Hereinafter SKUs.

12 Supra note 10.


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Slotting Allowances in the Retail Grocery Industry provides an example of how slotting allowances and similar payments arise in dealings between manufacturers and retailers:

Every year, suppliers propose thousands of new grocery products, each competing for retail grocery store shelf space. To decide whether to stock a new product, retailers engage in complex and multi-faceted discussions and negotiations with suppliers. Generally, the supplier presents the new product to the retailer’s buyer or category manager, attempting to convince the retailer that the product is likely to be successful. The retailer and supplier also typically discuss funds – slotting, promotional, co-op advertising, or other introductory allowances or discounts – some of which would lower the retailer’s per unit purchase cost for an initial period of time. The retailer then decides whether to carry the new product in its stores. Slotting allowances are one component of this decision process.  

- It has been suggested that slotting allowances permit retailers to reduce their risk in giving shelf space to new products by apportioning part of that risk to the supplier or otherwise allowing them to allocate shelf space to the most desirable new products. This view is not uniformly accepted by suppliers, who express concern over the possibility that the practice may inhibit entry of small suppliers that cannot afford to pay such fees, or otherwise favour the large suppliers able to bear the requested payments.

- Slotting allowances have generated some degree of public concern in Canada, particularly among small retailers, who were supportive of a 2000 legislative initiative (Bill C-402, which subsequently died on the order paper) to amend the abuse of dominance provisions of the Act to include slotting allowances in the definition of an “anti-competitive act” (i.e. conduct which would constitute an abuse of dominance).

II. **The Competition Act – An Overview**

- The Act is federal legislation of general application. The legislation is the primary source of Canadian competition law. The Act establishes the Commissioner of Competition as the sole independent authority responsible for the administration and enforcement of the legislation. The Commissioner is the head of the Competition Bureau, the federal agency that assists her in the administration and enforcement of the Act.

- The Act contains both criminal provisions, which are enforced in the courts like other criminal matters, and civil provisions, which are subject to review by the Competition

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17 Hereinafter the *Commissioner*. Ms. Sheridan Scott currently holds this position.

18 Hereinafter the *Bureau.*
Tribunal\textsuperscript{19}, a specialized administrative tribunal composed of judges and lay persons. The criminal provisions include conspiracy, bid-rigging, price maintenance, price discrimination, predatory pricing, misleading advertising, and deceptive telemarketing.\textsuperscript{20} Reviewable provisions include abuse of dominance, tied selling, exclusive dealing, market restriction, and refusals to deal. In addition, mergers which result, or are likely to result, in a substantial lessening or prevention of competition are potentially reviewable, as are certain deceptive marketing practices.

- Conduct that violates the criminal provisions is punishable by fine and/or imprisonment. Conduct that falls within the scope of the reviewable practices provisions is not illegal unless performed in the face of an order from the Tribunal or an existing court order.

- Section 36 of the Act contains a limited right of action for private litigants.\textsuperscript{21} The section 36 right of action is restricted to single (not treble) damages for conduct contrary to the criminal provisions of the Act or for a failure to comply with a judicial order under the Act. Section 36 does not contemplate a private right of action for injury suffered as a result of a reviewable practice, though other provisions in the Act permit private parties to seek leave to bring an application to the Tribunal for a remedial order as a result of an alleged breach of the reviewable refusal to deal or exclusive dealing/tied selling/market restriction provisions.\textsuperscript{22}

- In addition to the above, there are some general features of the Canadian competition law regime which are relevant:
  
  - The provisions of the Act relating to conspiracy and abuse of dominance, and a number of other provisions of the Act, require that impugned conduct result or be likely to result in an undue lessening or prevention of competition (in the case of the conspiracy provisions)/substantial lessening of competition (in the case of

\textsuperscript{19} Hereinafter the \textit{Tribunal}.

\textsuperscript{20} Bill C-19, \textit{An Act to amend the Competition Act and to make consequential amendments to other Acts}, 1\textsuperscript{st} Sess., 38\textsuperscript{th} Parl., 2004, available online: <http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-19/C-19_cover-E.html>. Bill C-19 was given first reading in the Canadian House of Commons on November 2, 2004. The Bill proposes to decriminalize most pricing practices, including price discrimination, geographic price discrimination, predatory pricing, and promotional allowances. Conduct that would presently be examined under these provisions would likely be examined under the civil abuse of dominance provisions, provided that the other requisite elements of the abuse of dominance provisions are met. Should Bill C-19 be enacted into law, the result will be that conduct previously subject to the affected pricing provisions but pursued under the abuse of dominance provisions will generally attract enforcement only from the Commissioner, as individuals are not permitted to bring claims to the Tribunal for alleged violations of the abuse of dominance provisions of the Act.


\textsuperscript{22} \textit{Supra} note 2 at section 103.1.
abuse of dominance and other provisions). Horizontal restraints are, therefore, analyzed in Canada on a basis that has been described as “partial rule of reason”;  

- Contested proceedings instituted by the Commissioner are relatively uncommon in most matters subject to the Act. Because of this, counsel and business people must rely upon the enforcement policy of the Commissioner in interpreting the relevant provisions of the Act, including guidelines and information bulletins issued in this regard;

- Private enforcement of Canadian competition laws is even rarer. Few cases have proceeded to trial under section 36. In 2002, the Act was amended to permit private parties to bring applications for relief (but not for damages) to the Competition Tribunal with leave, but only under the refusal to deal, tied selling, exclusive dealing and market restriction provisions. There are a few (but not many) applications which have been brought by private parties in this manner. Enforcement of Canadian competition law, therefore, is primarily in the hands of the Commissioner.

III. **APPLICATION OF THE COMPETITION ACT TO CM AND SLOTTING ALLOWANCES**

- The Canadian competition law treatment of CM and slotting allowances acknowledges that in many cases, such practices may be competitively neutral or even pro-competitive.

- CM raises two broad competition issues: first, that practices such as the use of category captains enable the selected captain to either exclude rivals or raise their costs and second, that such practices may also facilitate collusion, either among competing manufacturers or competing retailers. CM models that contemplate suggested retail prices may also raise price maintenance concerns.

- The very nature of category captain relationships can lead to behaviour which may raise exclusivity or access issues. All category captains face a potential conflict of interest in performing their role – they are retained to advise retailers as to which products to carry and how those products should be displayed, while, at the same time, they are responsible for the success of their company’s own products. This conflict must be carefully managed, particularly by category captains who possess market power. While category captains can enhance competition by providing input which facilitates costs savings and other benefits, they must ensure that they do not exert their influence over retailers in

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23 *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 650 per Gonthier J. Because of this, in Canada, the issue of characterization of a distribution practice as constituting a vertical or horizontal restraint does not have the same implications as under U.S law.
24 *Supra* note 21.
25 *Supra* note 2 at section 103.1.
26 See e.g., *Quinlan’s of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 15 and *Allan Morgan & Sons Limited v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4.
27 *Supra* note 8 at 201.
such a way as to give preferential treatment to their own products, while excluding those of their competitors.  

- While slotting allowances can be beneficial in facilitating the introduction of new products, there is some concern that such schemes could have an exclusionary effect on competitors. Specifically, slotting allowances could, in some circumstances, restrain competition among retailers or reinforce the market power of retailers at the expense of suppliers unable to afford slotting fees and of consumers who face reduced choice as a result. From a competition law perspective, concerns could arise if, for example, a dominant firm pays a slotting allowance to, in effect, acquire exclusivity or tie up shelf space, thus pre-empting competitors’ access not only to retailers’ shelves but, if done on a widespread basis, precluding those competitors from even entering the market.

- The provisions of the Act that are of most relevance to CM and slotting allowances are the reviewable abuse of dominance and exclusive dealing provisions, as well as the criminal conspiracy and price maintenance provisions. None of these provisions of the Act, save price maintenance, are \textit{per se} in nature.

\textit{(a) Abuse of Dominance}

- The abuse of dominance provisions of the Act are roughly analogous in scope to section 2 of the Sherman Act \footnote{\textit{Sherman Antitrust Act}, 15 USC §§ 1-7 [hereinafter the \textit{Sherman Act}].}. Subsection 79(1) of the Act provides that the Commissioner may make an application to the Tribunal for a remedial order where one (or more) firms substantially or completely control a market (i.e. dominance or joint dominance) and has engaged in an anti-competitive act, as defined in the Act, which results or is likely to result in a substantial lessening or prevention of competition in a market. \footnote{The Bureau has issued Guidelines setting out its enforcement approach. While the Guidelines are not law, they do reflect the Commissioner’s interpretation of the relevant provisions and when, in her view, violations of those provisions will be said to have occurred. Industry Canada, “Enforcement Guidelines on the Abuse of Dominance Provisions”, (July 2001), available online: <\textit{http://strategis.ic.gc.ca/pics/ct/aod.pdf}> [hereinafter the \textit{ADP Guidelines}].}

- Abuse of dominance is a reviewable practice which, if the requisite elements are established, is subject to a remedial order issued by the Tribunal. No fines, imprisonment or damages are currently available under the abuse of dominance provisions \footnote{Note, however, that subsection 79(3.1) of the Act provides that an administrative monetary penalty of up to $15 million can be imposed if the person engaged in a practice of anti-competitive acts is an airline.}, though a remedial order may contemplate prohibition of the impugned conduct and the costs of the Commissioner’s investigation and application for relief. However, recently proposed amendments to the Act would allow for the imposition of administrative monetary penalties of up to $10 million for the first incident and up to $15 million for repeat

\footnote{Price discrimination, which is presently a criminal offence under the Act, may also be relevant in some situations. Bill C-19 (\textit{Supra} note 20) proposes to decriminalize price discrimination, likely leaving such conduct subject to the more open textured abuse of dominance provisions. For this reason, we have not considered price discrimination separately in this outline.}
“offenders”.

• Determination of whether a firm substantially or completely controls a market is the threshold element to be proven under section 79. This requires definition of the relevant product and geographic markets. The general approach taken with respect to market definition is broadly similar to that employed in U.S. monopolization cases. In determining whether a firm has control or substantial control of a market, factors such as market share, barriers to entry, and other market characteristics such as the extent of technological change, the extent of excess capacity, and customer and supplier countervailing power are taken into account.

• Presuming that a firm or group of firms meets the threshold requirement of dominance, the second element of section 79 also requires that it be shown that the dominant firm(s) has engaged in “a practice of anti-competitive acts”. Section 78 defines “anti-competitive act” non-exhaustively to include conduct that is, broadly speaking, predatory, exclusionary or disciplinary. A “practice” has been defined by the Tribunal as meaning more than an isolated act or acts. However, different individual anti-competitive acts may constitute a practice when taken together. In addition, the Bureau has taken the position that an isolated act may constitute a “practice” if it is sustained and systemic or has had a lasting impact on the state of competition.

• In 2000, and as noted above, Bill C-402 tabled before Parliament proposed to add slotting allowances to the list of activities which would constitute an “anti-competitive act”.

Though the legislative proposals did not become law, they received strong support from smaller retailers and manufacturers.

• Once it has been established that a dominant firm (or firms) has engaged in a practice of anti-competitive acts, it must then be shown that such conduct will or is likely to result in a substantial lessening or prevention of competition. In considering the content of the SLC requirement, the determinative issue is whether the anti-competitive act(s) results in the preservation or enhancement of the firm’s market power. The preservation or enhancement of market power can be achieved in a number of ways, for example, by erecting or strengthening barriers to entry.

• A recent case of relevance is the decision of the Tribunal in Canada v. Canada Pipe Co. Ltd. In Canada Pipe, the Commissioner alleged, inter alia, that Canada Pipe’s “Stocking Distribution Program” (“SDP”) contravened the Act’s abuse of dominance provisions. Specifically, the Commissioner argued that Canada Pipe’s SDP was anti-

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33 Supra note 20.
34 ADP Guidelines at 17.
35 Supra note 16.
36 Hereinafter SLC.
38 Canada v. Canada Pipe Co. Ltd., 2005 Comp. Trib. 3 at para. 273 [hereinafter Canada Pipe].
competitive because it locked-in distributors and, therefore, excluded the company’s competitors from certain distribution channels. In finding that the SDP did not contravene the abuse of dominance provisions, the Tribunal placed significant weight on the fact that the terms of the program were transparent and well known, that the switching costs of distributors who wished to leave the SDP were low, that distributors were not contractually obligated to participate in the SDP for any length of time, and that there were valid business reasons for the SDP which resulted in consumer benefits.  

(i) **Interpretation Bulletin: The Abuse of Dominance Provisions as Applied to the Canadian Grocery Sector**

- In recognition, perhaps, of the types of concerns expressed by the supporters of Bill C-402, and in response to concerns that consolidation and vertical integration in the Canadian grocery sector could lead to increased abuse of market dominance, the Bureau released an Interpretation Bulletin tailored to this particular sector in 2002.

- In addition to setting out the Commissioner’s interpretation of the abuse of dominance provisions, the Grocery Guidelines consider the circumstances in which certain types of conduct, including slotting allowances and CM, could raise concerns under those provisions. The Grocery Guidelines also include two hypotheticals which consider the application of the Act to CM and slotting allowances.

- The Grocery Guidelines explicitly consider slotting allowances, noting that the use of certain types of exclusive agreements and slotting allowances could constitute “anti-competitive acts” under section 78. Such arrangements, in the view of the Bureau, could be considered anti-competitive in that they may raise competitors’ costs and pre-empt access to either the distribution system or shelf space in retail stores. Specifically, the Grocery Guidelines suggest that where a firm or group of firms are dominant in a relevant market, issues may be raised under section 79 “…if the payment of a slotting allowance is being used by the dominant firm(s) to acquire exclusivity or to tie up enough of the available shelf space to preclude other competitors from entering or expanding into the market.” The slotting allowance hypothetical (Example 1) also suggests that fixed and unconditional allowances are more likely to raise risk under section 79 than conditional allowances.

- The Grocery Guidelines suggest that the Bureau will carefully examine contracts between manufacturers or suppliers and retailers and will give particular attention to clauses that:

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39 Subrata Bhattacharjee, “Canadian Competition Tribunal Upholds Dominant Firm Loyalty Program in Canada Pipe”, *Distribution - Franchise and Dealership Committee, Antitrust Section, American Bar Association (forthcoming).*

40 *Supra* note 16.


42 *Grocery Guidelines* at 9.

- Tie up a specific percentage share of shelf space devoted to a specific product category;

- Limit competitors to a specific number of SKUs;

- Exclude specific competitor SKUs;

- Require some form of price parity with competitors;

- Specify when and how competitors can advertise; and

- Obtain information on the terms of competitors’ contract offers.

While the discussion of CM in the Grocery Guidelines is limited, the Bureau does suggest that CM may constitute a facilitating practice. Specifically, the Bureau indicates that CM may result in incumbent firms co-ordinating their activities, thus creating market dominance. This could arise, for example, where the same category captain is employed by various retailers competing in the same market and makes identical recommendations to those retailers. If each of the retailers is aware of the practice, there would be little incentive for them to deviate from the category captain’s recommendation. The CM hypothetical contained in the Grocery Guidelines (Example 3) also notes that CM techniques that result in a dominant supplier becoming an exclusive dealer for a fixed amount of shelf space may also raise concerns as it could reduce the ability of competitors to expand their presence in the relevant market.

The Grocery Guidelines also note that:

- The Bureau has recognized that defining the relevant market may be challenging when dealing with multi-product businesses, such as retailers in the grocery sector. Specifically, a significant complication is how to determine which multi-product retailers are comparable so as to warrant inclusion in the same product market. The Grocery Guidelines summarize the Bureau’s approach in such circumstances as follows:

  The current approach used by the Bureau for relevant product definition for multi-product retailers begins by focusing on two retailers in close geographic proximity to each other and then treating each retailer’s entire product offering as the potential relevant product. That is, each retailer will be treated as representing a single product differentiated by a range of characteristics such as product selection, location, service, etc. The Bureau then establishes the competitive effect that each retailer has on the other through a statistical analysis of each retailer’s profits, pricing service standards and other measurable competitive variables. Where a statistically significant
relationship exists between the retailers they are included in the relevant product and geographic market.\textsuperscript{44}

- The Bureau will continue with the examination of other retailers’ product offerings and locations until the Bureau is satisfied that all retailers selling competing products are included in the relevant market.

- The Bureau has established “bright line” market share thresholds which, if exceeded, and accompanied by one or more anti-competitive acts, would likely raise enforcement concerns under section 79. Though the Grocery Guidelines are not law, and the thresholds are not of conclusive application in all cases, the Bureau has taken the position that a market share of less than 35\% will generally not give rise to concerns of market power or dominance, while a market share of 35\% or more will generally prompt further examination. In the case of a group of firms alleged to be jointly dominant, the Bureau has stated that a combined market share of 60\% or more will generally prompt further examination.

- The Grocery Guidelines comment upon a settlement reached with the H.J. Heinz Company of Canada Ltd., which is of particular relevance with respect to slotting allowances.\textsuperscript{45} In 1997, the Bureau commenced an inquiry into the marketing and selling practices used by Heinz Canada in the promotion and sale of its baby food products.\textsuperscript{46} The Bureau alleged that Heinz Canada had engaged in a variety of anti-competitive practices, including large, lump sum, up-front payments made to retailers not to stock non-Heinz Canada baby food products, as well as multi-year contracts for exclusive supply, and discounts conditional upon exclusive supply.

- In its inquiry, the Bureau concluded that Heinz Canada (a major and dominant supplier in the baby food market) had engaged in activities which created a significant and additional barrier to entry for competitors, preventing or lessening competition substantially. Heinz Canada agreed to settle the matter by voluntarily signing a binding undertaking in which it agreed to:

  - Not enter into agreements which require or provide more favourable treatment (including lump sum payments) in exchange for such exclusivity;

  - Advise all users of gravity feed racks that they may be used to display any brand of jarred baby food.

  - Limit the terms of its supply arrangements for jarred baby food and infant cereal to one year except when meeting competitive offers of a longer duration;

\textsuperscript{44} \textit{Ibid.} at 5-6.

\textsuperscript{45} Hereinafter \textit{Heinz Canada}.

- Not enforce the exclusivity provisions of any existing supply agreements with retailer and wholesaler customers of jarred baby food and infant cereal;
- Not provide volume discounts which induce exclusivity; and
- Not engage in tied selling of its jarred baby food and infant cereal products;

(b) Exclusive Dealing

- The exclusive dealing provisions of the Act are also of relevance to CM and slotting allowances, though exclusivity arrangements involving dominant suppliers or retailers are more likely to be examined under section 79.

- Exclusive dealing is defined in subsection 77(1) of the Act to include any practice whereby, as a condition of supplying, a supplier requires, or induces by way of more favourable terms, a customer to deal only or primarily in products designated by the supplier, or to refrain from dealing in a class or kind of product except as supplied by the supplier. As is the case under the abuse of dominance provisions, the Commissioner must establish that the supplier of the product engaged in a “practice” of exclusive dealing before liability under the provisions can be established. If, upon application to the Tribunal, the following elements are proven, the Tribunal may issue a remedial order:
  - The practice of exclusive dealing must have been engaged in by a major supplier or have been widespread in relation to the product;
  - The practice must be likely to impede entry into or expansion of a firm in a market, impede the introduction of a product into or expansion of sales of a product in a market; or have any other exclusionary effect in a market; and
  - The anti-competitive conduct must result in a substantial lessening of competition, or be likely to do so in the future.

- The term “major supplier” is not defined in the Act, but has been interpreted as meaning “…one whose actions are taken to have an appreciable or significant impact on the markets where it sells.”47 As a practical matter, it is generally accepted that any supplier who can substantially lessen competition in a relevant market by engaging in a practice of exclusive dealing is likely to be held to possess sufficient market share and importance to be a “major supplier”.

- Even if the practice of exclusive dealing is not engaged in by a “major supplier”, subsection 77(1) of the Act may still apply if the practice is “widespread in a market” and substantially lessens competition, or is likely to do so. It is generally accepted that any practice that is found to have resulted in a substantial lessening of competition is likely, if not engaged in by a major supplier, to be “widespread in a market”.

• The content of the “substantial lessening of competition” requirement under section 77 is essentially the same as under section 79.\textsuperscript{48}

(c) \textit{Conspiracy and Price Maintenance}

• The conspiracy and price maintenance provisions of the Act are of particular relevance to CM and, in particular, category captain activities. In its \textit{Report on Slotting Allowances and Other Marketing Practices in the Grocery Industry}\textsuperscript{49}, the FTC highlighted the potential risk of facilitating collusion among retailers or manufacturers through category captain activities.\textsuperscript{50} Collusion among retailers could be facilitated, for example, if a category captain serving several retailers makes identical recommendations to those retailers. In addition, a category captain’s recommendations with respect to the price at which retailers sell the category captain’s and other manufacturers’ or retailers’ products could raise concerns under of the price maintenance provisions of the Act.

(i) \textbf{Conspiracy}

• Section 45 of the Act makes it a criminal offence for someone to conspire, combine, agree or arrange with another to restrain or injure competition unduly. The provision is roughly analogous to section 1 of the Sherman Act.\textsuperscript{51} Upon conviction, a court may impose a fine of up to $10 million, a term of imprisonment of up to five years, or both. Convictions have been sought not just against corporations, but also individual officers. The Commissioner has been particularly aggressive in seeking convictions under section 45, and fines imposed have increased exponentially in the last few years.

• The elements of section 45 are:
  
  o The existence of an agreement;
  
  o The agreement must have the likely effect of preventing or lessening competition unduly;
  
  o Establishment of the intention of the accused to enter into the agreement, that the accused was aware of the agreement and intended to carry it out; and,
  
  o That the accused knew the agreement would likely result in the undue lessening or prevention of competition.

\textsuperscript{48} \textit{Supra} note 38 at para. 281. Unlike section 79, however, there is no reference to a substantial prevention of competition in section 77, though it is arguable that the section ought to be interpreted to encompass conduct tantamount to a prevention of competition.


\textsuperscript{50} \textit{Ibid.}, at 52-54.

\textsuperscript{51} \textit{Supra} note 30.
In order for a conspiracy to exist, there must be an “agreement” between the co-conspirators. As an agreement requires a “meeting of the minds”, a court will require evidence of communication between the co-conspirators in order to find the existence of a conspiracy. A Canadian court may also infer the existence of an agreement from the conduct of the parties to a conspiracy where such conduct can only be explained by the existence of an agreement between the parties. Courts will consider whether conduct is explicable only through the existence of an agreement and may draw adverse inferences from conduct suggesting an attempt to enforce or conceal an agreement or complaint about the conduct of competitors.

The conspiracy provisions also require proof that an agreement would or would be likely to prevent or lessen competition “unduly”. This aspect of section 45 has been described by the Supreme Court of Canada as akin to a ‘partial rule of reason’ standard.

(ii) Price Maintenance

The prohibition of price maintenance is contained in section 61 of the Act. Section 61 makes it a criminal offence for a person engaged, inter alia, in the business of producing or supplying a product, “by agreement, threat, promise or any like means, [to] attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada.”

As is the case in the U.S., price maintenance is a per se offence in Canada. The Crown is not required to demonstrate that competition has been lessened unduly in order for the accused to be found guilty. Similarly, whether or not any harm has resulted is irrelevant.

Suggestion of a resale price or minimum resale price by a producer or supplier of a product is deemed to be proof of an attempt to influence the person to whom the suggestion is made, though the presumption may be rebutted if the producer or supplier makes it clear that the customer is under no obligation to accept the suggestion and would in no way suffer in its business with the producer, supplier, or any other person if it failed to accept the suggestion.

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52 Subsection 45(2.1) of the Act allows a court to infer the existence of an agreement from circumstantial evidence.
54 Supra note 23.
56 It should also be noted that maximum resale pricing policies are not prohibited by the Act, though in certain circumstances, such conduct could raise concern’s under the Act’s conspiracy provisions. The position in Canada with respect to maximum resale prices is, therefore, broadly similar to that in the U.S. post-Khan. State Oil v. Khan, 522 U.S. 3 (1997).
57 Supra note 2 at subsection 61(3).
The Crown must establish that an attempt to influence price was made “by agreement, threat, promise or any like means”. At least one Canadian court has held that it is not illegal to attempt to maintain prices by discussion, persuasion, complaints, suggestions, requests or advice, though such attempts will obviously raise concerns if the means of persuasion are tantamount to an agreement, threat, promise or like means.\(^{58}\) Unilateral action (such as a threat or promise) is sufficient for a conviction under the price maintenance provisions in the Act.\(^{59}\)

Under the Act, price maintenance is punishable by a fine in the discretion of the court, a term of imprisonment of up to five years, or both. Fines imposed for offences under section 61 have varied depending on the circumstances of the particular case. The Commissioner has been successful in securing fines of up to $250,000 through guilty pleas, though recent settlements of section 61 cases have included other types of monetary penalties which, though not characterized as fines, as high as $2.3 million.\(^{60}\) In addition to public enforcement, conduct that is prohibited under section 61 may be the subject of a civil action under section 36.

IV. **CONTRASTS WITH U.S. ANTITRUST LAW**

- Slotting allowances and CM programs present issues under the Act that are broadly similar to those under U.S. antitrust law. In the U.S., such distribution practices may raise concerns under section 2 of the Sherman Act or, if the existence of an anti-competitive agreement is alleged, section 1.

- With respect to CM programs, there is much debate in the U.S. as to whether the collaboration between category captains and their respective retailers should be characterized as ‘vertical’ or ‘horizontal’ (and hence *per se* illegal) in nature.\(^{61}\) At first glance, it would appear that such arrangements should be analyzed as vertical restraints, as category captains are, primarily, suppliers of the retailers that they advise.
  
  - At least one commentator, however, has suggested that CM programs be assessed as being both vertical and horizontal in nature. In his paper entitled *A Second Look at Category Management*\(^{62}\), FTC Commissioner Thomas B. Leary argues that “…advice on the resale of the manufacturer’s own product should be viewed as vertical; advice on the resale of a competitor’s product should be viewed as

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59 This, we understand, is in contrast to the approach adopted by the U.S. Supreme Court in Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984).
61 See e.g. D. Desrochers et al., *supra* note 8 at 206.
horizontal.”\(^{63}\) Leary explains that while advice with respect to a manufacturer’s own products may serve a legitimate vertical interest, the same is not true with respect to advice on the sale of competitors’ products:

Any advice that the captain gives to a customer about the appropriate ways to distribute a competitor’s product is not likely to serve a legitimate vertical interest, but rather affects horizontal competition and serves a horizontal interest. It should be viewed as a horizontal communication. It is the nature of the interest, rather than the formal relationship, that should control.\(^{64}\)

- A significant U.S. decision with respect to CM is that of the Court of Appeals for the Sixth Circuit in *Conwood Co. v. United States Tobacco Co.*\(^{65}\) Unfortunately, the decision in *Conwood* is of limited analytical assistance, as the alleged conduct on the part of the defendant strayed far from the ‘traditional’ role performed by category captains. Specifically, it was alleged that United States Tobacco Co. had:

  - Removed and destroyed competitors’ display racks without the permission of store managers;
  - Trained its salespeople to take advantage of inattentive clerks in order to destroy the plaintiff’s display racks;
  - Provided misleading sales information in an attempt to deceive retailers into believing that its products were better-selling than those of its competitors (and, as a result, secured more shelf space); and
  - Entered into exclusive agreements with retailers.

- It has been suggested that the decision in *Conwood* increases the risk of antitrust liability for those category captains which are dominant firms, as the Court appears to have found the defendant liable under federal antitrust law based on the commission of various business torts.\(^{66}\) It has also been suggested that the decision “counsels” dominant manufacturers to be “particularly cautious” when acting as category captains, as the decision leaves unresolved the issue of where the line between appropriate and inappropriate conduct should be drawn.\(^{67}\)

V. **Observations & Conclusions**

- In Canada, as appears to be the case in the U.S., slotting allowances and CM programs are not necessarily problematic, but can raise significant competition law concerns. As

\(^{63}\) *Ibid.* at 3.
\(^{64}\) *Ibid.*
\(^{65}\) 290 F.3d 768 (6th Cir. 2002) [hereinafter *Conwood*].
\(^{66}\) See David A. Balto, supra note 6 at 106.
is the case with most distribution practices, considerations of exclusivity and access are paramount in any risk assessment. What follows are some general observations.

\textit{(a) Slotting Allowances}

- The Grocery Guidelines clearly suggest that with respect to slotting allowances, the broad issue to be considered is whether a firm or group of firms in a dominant position use slotting allowances to tie up shelf space to foreclose access to other competitors. If the payment of a slotting allowance permits a dominant retailer to obtain an exclusive product listing, thereby enhancing its market power vis-à-vis other retailers, this may pose concern under the abuse of dominance provisions. Such payments may also reduce competition in the manufacturers’ market, if, for example, only certain manufacturers are able to bear the cost of the slotting allowance. In addition, exclusivity arrangements that tie up shelf space are potentially suspect. These include the arrangements noted in the Grocery Guidelines and listed above, being limitation of competitors to a certain number of SKUs or outright exclusion, price parity with competitors, and restrictions on competitors’ advertising.

- The Grocery Guidelines are equally clear in suggesting that the use of fixed and unconditional slotting allowances raises particular risk under the abuse of dominance provisions, as they could lead to an inference that the purpose of the slotting allowance is to facilitate exclusivity. This risk can be reduced if the requested slotting allowance is made conditional and variable (for example, allowance payments based on sales performance of the product(s) in question).

\textit{(b) CM}

- CM raises issues of exclusivity under the abuse of dominance and/or exclusive dealing provisions of the Act – in addition to this, of course, the conspiracy and price maintenance provisions may also be relevant. In this regard, there are a number of general principles which should be considered to minimize risk under the Act.

  o The process used to select category captains should be carefully considered. Retailers should avoid restricting the pool of eligible candidates as much as feasibly possible. There may be good reasons to consider candidates other than the market leader. Depending on the nature of the product category, manufacturers which have lower market share than the leader, but have otherwise valuable insights or capabilities (e.g. particularly innovative marketing strategies, etc.) may also be suitable category captains. Co-captaincy arrangements whereby a retailer appoints two or more manufacturers to jointly manage a category should be avoided.

  o Notwithstanding which manufacturer is chosen to manage a product category, other competing suppliers should not be precluded from offering some form of input at any time.
The direction of payment (e.g. from retailer to manufacturer vs. from manufacturer to retailer) arguably can have an impact upon the strength of a pro-competitive justification for a CM model. Viewed in this light, retailers should not solicit payments from manufacturers for the right to be category captain.

In preparing a CM plan, a category captain should not structure the plan or provide the retailer with data in a manner designed to unjustifiably favour its own brands or SKUs over those of competitors. One method that has been used by some retailers to ensure that this does not take place is to have a second manufacturer subsequently verify the plan created by the category captain, subject, of course, to the information exchange issues noted below.

Care should be taken to ensure that the category captain’s activities do not raise horizontal concerns, either through the exchange of competitively sensitive information between competing manufacturers or as otherwise could be facilitated by the retailer. The general principles relating to information exchange are applicable in this context.

Category captains should be cautious in suggesting prices or price levels in marketing plans in order to avoid raising price maintenance concerns. Under the Act, it can be permissible for a category captain to suggest a price point, provided that it is clear that a retailer is under no obligation to accept the suggestion and will not suffer in its relations with a supplier if it chooses to sell for less. Care should also be taken in this context to avoid horizontal communications between suppliers with respect to proposed pricing.

Finally, and as a general point, the retailer should retain control over the entire CM process, reserving any final decisions on plans submitted by category captains to itself.