Joint Comments of the American Bar Association Sections of Antitrust Law and International Law on the Canadian Government's Proposed Price Transparency Act (Bill C-49)

The views expressed herein are presented jointly on behalf of the Sections of Antitrust Law and International Law of the American Bar Association (the Sections). These Comments have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

The Sections respectfully submit the following comments concerning the Canadian Government’s proposed legislation, Bill C-49, the Price Transparency Act. We welcome the opportunity to share our perspectives, and hope that the following considerations can be taken into account in the legislative process.

The following comments focus on the proposed amendments to the Competition Act, which authorize the Commissioner of Competition to conduct inquiries, while vested with coercive production powers, to determine the reasons why a product or class of products has a higher selling price in Canada than in the United States, and require the Commissioner to make public reports on completed inquiries (“Unjustified Price Discrimination Provisions” or “Provisions”). The Sections commend the government for removing the originally proposed approach of prohibiting “unjustified cross-border price discrimination” and imposing administrative monetary penalties.

The Sections recognize and support the government’s desire to ensure that Canadian consumers do not overpay for goods and services. However, the Sections are concerned that the Provisions would distort market forces by, in effect, introducing the threat of regulation of certain prices in Canada. Such regulation, or the threat of it, would significantly (and, the Sections believe, unreasonably) increase uncertainty and impose costs on businesses; these businesses, in turn, may pass their increased costs on to consumers in the form of higher prices or discourage businesses from entering, expanding or even remaining committed to the Canadian market. The Provisions therefore risk having the opposite effect from what was intended in that they could result in Canadians paying higher prices or having fewer choices than they would otherwise.

Like the U.S., Canada is a mature antitrust jurisdiction with a sophisticated approach to competition law that, over time, has fashioned a range of provisions to address unilateral and concerted anticompetitive conduct, all designed with a view to advancing competitive markets in Canada consistent with the core objectives of the Competition Act. The Sections are concerned that Bill C-49, by focusing on disciplining “higher” prices, does not address a sound competition policy goal rooted in principles of competition law and economics. While the Sections offer herein our suggestions for ameliorating the likely detrimental effects of specific aspects of Bill C-49, we respectfully recommend that the Canadian government reconsider the Bill as well as the price regulating notions that underlie its introduction. Not being mandated to implement this legislation
would free resources for more productive and pressing goals including continued enforcement of the *Competition Act*.\(^1\)

The Sections respectfully raise four primary concerns with the Unjustified Price Discrimination Provisions, as follows.

1. **The Unjustified Price Discrimination Provisions undermine basic tenets of competition law**

United States competition law, to which we understand Canadian competition law is similar in this regard, has long held that charging “high” prices absent specific prohibited conduct is in and of itself not actionable, nor does it justify government intervention, including by coercive “name and shame” powers.\(^2\) This perspective recognizes that ‘higher” prices in a market economy incent new entry and reward innovation.\(^3\) The long term benefits to consumers of short term “higher” prices in the form of new and innovative products, efficient allocation of resources, and new and vigorous competitors that can compete internationally potentially lower prices over time and greatly exceed any short term harm. Regulation of “higher” prices risks depriving consumers of these benefits, which are the foundation of a strong and internationally competitive economy.

The Canadian *Competition Act* appears to support this principled approach. The *Competition Act* seeks to maintain and encourage competition for four fundamental purposes: (i) to promote the efficiency and adaptability of the Canadian economy; (ii) to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada; (iii) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and (iv) to provide consumers with competitive prices and product choices.\(^4\) However, the Unjustified Price Discrimination Provisions appear to depart from these longstanding principles that underlie Canadian competition policy and do not further any of these purposes. Indeed, the Canadian Parliament stated that the *Competition Act’s* fourth purpose is to provide competitive prices, not “low” prices, and explicitly mandated the Commissioner of

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2. See e.g., *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.”); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.3d 263, 297 (2d Cir. 1979) (“[a] pristine monopolist ... may charge as high a rate as the market will bear”). Similarly, fundamental economic principles underlying differentiated products industries indicate that “high” or “higher” prices often reflect different attributes of the product, such as quality. Higher prices do not in and of themselves indicate market power or a competition problem. This is reflected in the treatment of mergers in differentiated products industry. See, e.g., Shapiro, Carl, “The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years,” Antitrust Law Journal, 2010, 77 (1), 709 (“In a market with differentiated products, different price levels are neither necessary, nor sufficient, to demonstrate the exercise of market power. Established models of monopolistic competition show differentiated products will sell at different prices at the same point in time, even in the long run when economic profits are zero.”); Deborah Haas-Wilson & Christopher Garmon, *Hospital Mergers and Competitive Effects: Two Retrospective Analyses*, 18 INT’L J. ECON. BUS. 17 (2011).
3. See *Trinko*, 540 U.S. at 407 (“The opportunity to charge monopoly prices - at least for a short period - is what attracts ’business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.”).
Competition to safeguard a competitive marketplace, not to regulate prices. Likewise, just six years ago, Parliament repealed the criminal provisions concerning both price discrimination and geographic price discrimination, which had generated significant compliance burdens without corresponding benefit to the Canadian economy. The repeal of such provisions, in the words of the Competition Bureau, promoted “innovative pricing programs and increases certainty for Canadian businesses.”

By simply targeting “higher” prices, the Unjustified Price Discrimination Provisions risk distorting the traditional role of competition enforcement as well as the competitive process. Disruption of competitive markets, whether by public or private actors, typically results in long term harm to consumers, including higher prices and reduced choice.

2. The Unjustified Price Discrimination Provisions are vague

The Unjustified Price Discrimination Provisions target a product or class of products that sell at higher prices in Canada than they do in the United States. On their face, the Provisions provide little definition of the relevant factors to be considered. There is therefore a significant risk that the Provisions will result in uneven and potentially arbitrary enforcement, ineffective judicial screening of ex parte production orders, and significant compliance challenges.

Among the more notable open questions are:

- How will businesses (or the Commissioner) determine whether Canadian prices are “higher” than or "different" from U.S. prices? The Provisions appear to focus on nominal price differences, but this focus ignores the many legitimate and procompetitive reasons that prices may differ between jurisdictions. For example, how will exchange rates and differences in sales volumes and costs related to supplying the products in the U.S., as compared with Canada, be taken into account? The Provisions would expose business to unwarranted, burdensome and costly investigations and could result in findings of “higher” prices based on nominal price differences without regard to sound economic reasons for such “higher” prices.

- How will comparable products be identified? Price variation is common, particularly in differentiated products industries. Products that appear comparable on their face may in fact

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5 In testimony before the Senate Committee examining the Canada-US price gap, representatives from the Competition Bureau stated: “it is important to understand that the Bureau is not a price regulator. We do not determine what is or is not a fair price for any product or service…. High prices in and of themselves do not fall under the purview of the Act unless they are the result of anti-competitive conduct.” Canada, Senate, Proceedings of the Standing Senate Committee on National Finances, 41st Parl., 1st Sess., No. 12 (Feb. 4, 2012) at p. 41.


7 Differentiated products industries are common across a wide range of sectors; competition issues in these sectors in which differentiation and price variation is common are recognized as requiring careful consideration. See Shapiro, supra, n. 2, on unilateral effects, especially at n. 124, which notes that "In markets involving differentiated products, prices typically differ among various products in the market, and the price effects of a merger need not be uniform." See
be differentiated because they are of different quality or include different associated services. In this regard, the Provisions apply as drafted even when the product sold in Canada is merely “similar” to the product sold in the United States.

- Will the comparison be between prices in certain Canadian regions and certain U.S. regions? Will there be any assessment of whether the comparators chosen are appropriate? Will the Provisions apply only to products that are priced on a national basis?

- For how long must price difference be sustained to attract scrutiny? How will costly investigations of transitory differences be avoided?

The Sections respectfully submit that this lack of very basic information about the parameters of the Provisions is problematic from a transparency and predictability standpoint and, as such, risks chilling cross-border trade and investment, to the detriment of Canadian consumers. One way in which this vagueness could be addressed, at least to a considerable extent, would be by having the Provisions require the Commissioner to publish enforcement guidelines, following public consultation, upon the Provisions coming into force.

3. The Unjustified Price Discrimination Provisions do not appear to provide procedural fairness

The Unjustified Price Discrimination Provisions require the Commissioner to report the conclusions of investigations conducted pursuant thereto. Such a report could have a serious negative impact on a business, such as by harming its brand or reputation in Canada. Yet despite those very real consequences, the Unjustified Price Discrimination Provisions appear to provide no explicit procedural fairness rights to the target of the Commissioner’s inquiry. Targets are not granted the right to be heard by the Commissioner (let alone by an independent judicial body) as conclusions are drawn from the inquiry, nor are they provided details of the Commissioner's “case” against them as gathered through the inquiry. There also is no meaningful opportunity for judicial review of the Commissioner’s decision, given that a business may be irreparably harmed by the very publication of the report. Such a lack of procedural fairness is inconsistent with the fundamental importance Canada otherwise places on ensuring procedural fairness of government action.\(^8\) One central concern, among others, is to ensure that errors the Commissioner may make (including calculation errors that may have significant impacts on his conclusion) are caught and evaluated before irreversible consequences are set in motion.

In addition, the Unjustified Price Discrimination Provisions do not explicitly protect from disclosure the target's (or anyone else’s) competitively sensitive information gathered in the course


of the Commissioner's inquiry. The Sections understand that section 29 of the *Competition Act* protects from disclosure certain information gathered by the Commissioner, but excepts disclosure made “for the purposes of the administration or enforcement of [the Competition] Act.” The Commissioner's obligation to report the conclusions following an inquiry under the Unjustified Price Discrimination Provisions appear capable of being characterized as being “for the purposes of the administration or enforcement” of the *Competition Act*. As a result, parties cannot rely on section 29 to protect their competitively sensitive information, but would be left to rely entirely on the Commissioner's discretion regarding the contents of the report.

The Sections respectfully urge the explicit inclusion of procedural fairness protections at least as robust as those provided in the *Inquiries Act* and similar provincial legislation governing public inquiries. The *Inquiries Act* prohibits the making of any report against a person until reasonable notice has been given and the person has been allowed full opportunity to be heard in person or by counsel.

### 4. The Unjustified Price Discrimination Provisions may increase prices and decrease choice to Canadians

As noted above, distortion of market forces by either public or private actors risks depriving Canadians of the numerous benefits of a competitive market. In the Sections’ view, the Unjustified Price Discrimination Provisions risk further harm to Canadians by:

- imposing additional compliance costs on Canadian businesses operating in the United States;
- exposing Canadian (and U.S.) businesses to other administrative investigations/actions and potential civil claims; and
- reducing the participation of U.S. businesses in the Canadian economy owing to the uncertainty, increased risks, and increased costs associated with the enforcement of the Unjustified Price Discrimination Provisions.

All of the above could result in Canadians paying higher, not lower, prices, or experiencing reduced quantity, quality, or other aspects of choice among providers or products or services. Increased costs faced by business, whether related to complicated compliance efforts owing to a lack of clarity in the law, litigation costs, or otherwise, may be passed on to Canadian consumers in the form of higher prices. Likewise, reduced participation in the Canadian economy of U.S. businesses that could otherwise offer lower prices through innovation or economies of scale would deprive Canadian consumers of access to those lower priced goods and services.

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9 *Id.*, s. 29.

Conclusion

The Sections appreciate the opportunity to provide these comments. We would be pleased to provide any additional information or clarification that you may find helpful.