

CANADIAN COMPETITION RECORD

COMMENT & ANALYSIS***LAW SOCIETY OF UPPER CANADA V. CANADA (A.G.):
THE DIRECTOR COMES KNOCKING AGAIN****

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In November 1994, criminal attorney Paul Calarco and five associates complained to the Director of Investigation and Research, Bureau of Competition Policy, about the compulsory character of basic insurance coverage for lawyers' errors and omissions.¹ Their complaint was that basic insurance levies² – fixed pursuant to Law Society Rule 50³ – are a violation of the abuse of dominant position sections (sections 78 and 79) found in Part VIII of the *Competition Act*.⁴ The Director began his investigation shortly thereafter, but before a decision could be made, the Law Society of Upper Canada put a stop to it.

Between 28 and 30 November, McCombs J. of the Ontario Court, General Division, heard the Law Society motion for three declarations: (1) that the *Competition Act* does not apply to the conduct of the Law Society and its Benchers acting in accordance with the *Law Society Act* and its regulations and rules; (2) that the *Competition Act* does not apply to the conduct of the Law Society and its Benchers in establishing a mandatory insurance program for lawyers through the LPIC; and (3) that the Director does not have jurisdiction under the *Competition Act* to inquire into the Law Society's conduct in establishing, operating or administering its mandatory insurance program through the Lawyers' Professional Indemnity Company (LPIC).⁵ McCombs J. granted all three declarations.

While McCombs J.'s decision will be determinative in the matter of the Calarco complaint,⁶ it will probably not be determinative with regard to the Director's authority to investigate the activities of self-regulatory bodies when their activities call competition policy into play. In this paper, I will attempt to explain why this is so, and in so doing, I will offer an alternative analysis as to how the matter should have been decided. My analysis will be based on the relationship between two unanimous decisions involving federal competition law by the Supreme Court of Canada, in 1982 and 1989: *Jabour v. Law Society of British Columbia*⁷ (hereinafter "*Jabour*") and *General Motors of Canada Ltd. v. City National Leasing*⁸ (hereinafter "*City National*"). Having explained these two cases, I will then turn to McCombs J.'s decision and posit two alternative analyses, in order to demonstrate why McCombs J.'s decision should not be followed.

At its root, the Calarco dispute is about whether the Competition Tribunal should be entitled to offer a dissenting, and pre-emptory, opinion on whether the public interest could be better served in a less anti-

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competitive manner. It is precisely because the Director's investigation of the Calarco complaint would potentially "have [had] implications for the authority the law societies have over their members pursuant to their statutes"⁹ that a declaration and injunction were sought.

According to the Calarco submission, basic insurance costs for lawyers in Ontario are twice that paid by members of other provincial law societies for similar coverage and twice the amount that a criminal lawyer might be able to pay should she be able to purchase coverage from a private insurer.¹⁰ Calarco's complaint echoed the calls of solicitors who do not practice in particularly high risk areas that even basic insurance should be optional – much less mandated through a monopoly seller.¹¹ These practitioners seem unimpressed by the LPIC argument that mandatory professional liability insurance "offers the greatest stability over time for the majority of insured members while providing the scope of coverage the Law Society believes is necessary to adequately protect the public."¹²

Professional Self-Regulation: In Whose Interest?

The fact that a professional serves people by bringing highly specialized training to bear on their problem lies at the root of professional self-regulation. Lacking this specialized training, lay persons cannot understand fully what professionals do and cannot evaluate the judgements professionals must make. Lay Persons, therefore, must trust professionals to make decisions in their best interest... The premise – and the promise – of professional self-regulation, then, is that it will raise the quality or lower the costs of services in areas which lay persons, because of a lack of sophisticated training, are not particularly able to achieve these goals. Professionals can be relied on ideally to set standards of excellence, or at least of uniformity, so that inadequate service will be minimized. They will monitor and accredit educational institutions to raise the competence of the graduates of these schools. They will establish ethics committees to discipline those who act against the best interests of their patients or clients. They will set up fee review programs to make sure that members of the public are not exploited. In short, professionals will regulate themselves with but one objective – advancing the public interest in the area in which they practice.¹³

Two types of arguments – one positive, one negative – are normally put forward to justify self-regulation of the legal profession, and both appeal to what might be seen as the overall public interest. The positive argument is demonstrated by the opening paragraph of this section. In economic terms, self-regulation is to be preferred because it will result in decreased search costs for consumers, improved service quality, and risk-reduction (preventing the loss that results from poor service increases public welfare).¹⁴ The negative argument alternatively warns of the dangers inherent in direct regulation of the legal profession – that is, that it will hinder independence and ultimately undermine the legal system.

In a nutshell, the negative argument is that, because an independent legal profession is an important force in preserving government under law (a hallmark of a liberal-democratic state), self-regulation ensures that abuses of government authority will be challenged by a profession that is not dependent on government for the right to practice law.¹⁵ The negative argument, however, is easily rebutted. "The term self-regulation is a misnomer. It obscures the statutory basis of such regulation... The Benchers' power to self-regulate rests on the police man under the bench."¹⁶ On a more practical level, the question of whether the Benchers'

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authority to regulate is constrained by federal competition law is hardly one that leads inextricably to consideration of whether the profession will be capable of defending the public against the forces of tyranny. Nonetheless, this argument seems to have struck a chord with some members of the judiciary.¹⁷

The positive argument for professional self-regulation relies on the presumption that most consumers of legal services are incapable of judging service quality and that this information deficiency hinders efficient economic outcomes. However, a large volume of legal services is not consumed by persons suffering from information deficiencies, but by sophisticated, corporate consumers that possess the resources and expertise required to make the necessary quality appraisals and determinations of risk, and who use legal services repeatedly.¹⁸ Moreover, while competition may be enhanced and efficiency promoted through self-regulation, it also enables special interests in an industry to limit the independence of individual competitors or to deny desirable options to consumers.¹⁹

Essentially, professional self-regulatory bodies may lack the necessary incentives to control and enforce quality standards.²⁰ Whereas competitive pressures might lower the consumer's search costs, professional ethics restrict the information available to consumers through advertising.²¹ Whereas a redistribution of the risk rising from errors and omissions could more rationally reflect the cost and value of legal services, basic liability insurance is mandated as a condition of legal practice.

W.T. Stanbury argues that the potential for self-interested regulation is greatest "when the scope of delegated regulatory powers is very wide and where the specific regulations established by the body are not subject to approval by either the cabinet or the legislature."²² The scope of the Law Society's powers is certainly wide. It controls entry into the profession, regulates the process of legal service production, and controls information flows between members of the profession and consumers.²³ And in the case of levy-setting for insurance, the Law Society is not required to achieve cabinet approval.²⁴

The Need for the Director's Interest in the Legal Profession

With a system firmly entrenched and supported by the Benchers and the Law Society, who are presumably acting in what they perceive to be the public interest, is there any need for the Director to investigate professional liability insurance? In consideration of this question, it is useful to note that regulation of risk is not a straight-forward proposition. What might initially appear to be simple regulation by government, or in this case delegation of regulatory authority, is actually only one element in a web of interrelated factors.²⁵ In addition to regulation by the Law Society, other factors can impact on the character of the provision of legal services.²⁶ These include: civil law, personal ethics and values, the professional legal culture, and the potential cost of private insurance on a free market.²⁷

Yet another element of the regulatory web affecting the practice of law – and professional self-regulation – could be federal competition policy. Normally, competition policy and government regulation are seen

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as "alternative modes by which society seeks to modify the economic behaviour of individuals and firms in the private sector."²⁸ Whereas competition policy removes private restraints that subvert market efficiencies, regulation intervenes where natural market outcomes are deemed unsatisfactory for reasons of public policy. However, the question remains as to whether the two can – or should – work in tandem.²⁹

This question is further complicated by the realities of a federal state – where two legislatures hold competencies to regulate within their respective spheres. How should federal competition policy affect activities carried out under otherwise valid provincial regulation? This question must be answered in consideration of what the best mix of regulatory factors should be for regulation of the profession. Professional self-regulation has much to commend to it, but it could possibly be made more effective. Accountability could be improved though the addition of requirements for cabinet approval of important issues such as the structure of liability insurance.³⁰ Consumer interests could be enhanced by subjecting Law Society activities to the scrutiny of competition policy, and the operation of a more open insurance system could itself regulate service quality in a manner more beneficial to the public interest. The Calarco complaint is indeed larger than a simple question of how and where he can purchase his insurance.

The American Approach

Owing to the shared characteristics of a federal separation of political powers and a national competition law that is largely consumer-welfare driven, the larger and more litigious American society provides a substantial case history from which Canadians might draw. In response to the problem of national antitrust laws that come into direct conflict with validly enacted state regulatory regimes, American courts developed something called the *state action doctrine*.

The doctrine contemplates that there is "nothing in the language of the *Sherman Act* or in its [legislative] history which suggests that its purpose [is] to restrain a state or its officers or agents from activities directed by its legislature..." and that the Act "must be taken to be a prohibition of individual and not state action."³¹ However, owing perhaps to the comparatively more prominent nature of the American federal government in this past century,³² this doctrine has come to mean that while antitrust law is paramount, that anti-competitive conduct will be exempt only if it is found to have been explicitly compelled by state action.

In *Goldfarb v. Virginia State Bar* (hereinafter "*Goldfarb*"),³³ a case concerning restrictions placed upon the advertisement of legal services, the state action doctrine was applied directly to the activities of a self-regulating body not unlike the Law Society of Upper Canada.

The threshold inquiry in determining if any competitive activity is a state action of the type the *Sherman Act* was not meant to proscribe is whether the activity is required by the state acting as sovereign. Here we need not inquire any further into the state action in question because it cannot be fairly said that the State of Virginia, through the Supreme Court Rules, required the anti-competitive action by either respondent... The fact that the State Bar is a state agency for some limited purpose does not create an anti-trust shield that allows it to foster anti-competitive practices for the benefit of its members.³⁴

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With *Goldfarb*, the United States Supreme Court gave clear indication that it would uphold antitrust law unless, and only unless, the otherwise anti-competitive conduct had been explicitly sanctioned by some form of state action. This was demonstrated two years later in another case concerning the legal profession and prohibitions on advertising. In *Bates & O'Steen*,³⁵ a state supreme court – acting as the state, more so than a mere agent or delegate – meted out punishment for a violation of ethical rules which it had promulgated.

The doctrine has been further clarified to the effect that only actions pursued under a “clearly articulated and affirmatively expressed” policy would receive an antitrust exemption. Moreover, the activity in question would require active supervision by the state – *carte blanche* mandates for a self-regulating body would not suffice.³⁶ That is not all, “a sharply divided United States Supreme Court [has gone] so far as to find that even state-compelled anti-competitive activities are not immunised from the federal antitrust laws if they take place in areas which are ancillary to the regulatory goals of a state.”³⁷

The Canadian Approach

If it can be said that American courts have given the occasional nod to the merits of professional self-regulation in consideration of the application of federal competition policy, with *Jabour* the Supreme Court of Canada essentially genuflected. In applying the Canadian equivalent of the *state action* doctrine (the *regulated industries* doctrine³⁸) to self-regulation by the legal profession – a matter solely within provincial jurisdiction³⁹ – the court came within a whisker of providing a blanket exemption from federal competition law for any provincially regulated industry.⁴⁰ However, it did not. The court concluded that there was no general exemption for regulated industries.⁴¹ Instead, it gave an indication that an exemption would nonetheless be relatively easy to attain.

A reasonable rationale for the regulated industries doctrine was only fully articulated – as a matter of statutory interpretation – with the Supreme Court of Canada’s decision in the *Farm Products Marketing Act Reference*.⁴² In it, a divided court, concurring in result, directed that as a matter of statutory construction, if a federal statute can be read so as not to interfere with a provincial statute, that reading should be chosen over conflict.⁴³ In this manner, the court avoided allowing federal criminal law (for that is the head of power under which the Act had largely been sustained during its first century)⁴⁴ override valid provincial legislation as a function of the constitutional law *paramountcy* doctrine.⁴⁵

The *Farm Products Marketing Act Reference* stands for two propositions: first, “where market conduct is regulated pursuant to validly enacted provincial regulation, such conduct must be presumed to be in the public interest and, hence, cannot be taken to offend the federal [criminal] competition law and the public interest protected thereunder;”⁴⁶ second, the criminal conspiracy provisions of the Act require a voluntary character of the agreement to engage in anti-competitive activities that cannot be said to exist where individuals or agents of the crown are engaged in activities mandated by provincial statute.⁴⁷ Both of these propositions were relied upon by a unanimous court in *Jabour*.⁴⁸

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So long as the *Combines Investigation Act* or at least Part V is styled as a criminal prohibition, proceedings in its implementation and enforcement will require a demonstration of some conduct contrary to the public interest. It is this element of the federal legislation that these cases all conclude can be negated by the authority extended by a valid provincial statute.⁴⁹

Jabour concerned disciplinary action taken against a member of the Law Society of British Columbia for violating its code of professional ethics concerning the prohibition of certain forms of advertising. The Law Society was empowered by a valid provincial statute to make rules concerning professional conduct and disciplined *Jabour* accordingly when his newspaper and billboard advertising were found to be in contravention – not unlike the State Bar of Virginia in *Goldfarb*.⁵⁰

However in considering the applicable American cases, the court seemed to have missed the element of the *state action* doctrine – stated in *Parker*⁵¹ – that requires the state (not the delegated authority) to actively supervise the restraints on trade effected by regulation.⁵² Moreover, the court “ignored the operative distinction applied by the United States Supreme Court in *Goldfarb* between a specific statutory command prohibiting advertising or an equivalent ruling by a state court or public agent and the case-by-case rulings of an elected governing body of a profession exercising authority delegated to it by a provincial legislature.”⁵³ Rather, the Court showed considerable deference to the Law Society in concluding that if the provincial legislature chose to place few limits on the authority of the Benchers, it would not allow federal competition policy to interfere.⁵⁴

There are only a few notable cases concerning the regulated industries doctrine that have occurred in the wake of *Jabour*. In *Industrial Milk Producers Association v. Milk Board, Canadian Dairy Commission et al.*,⁵⁵ the criminal law provisions of the substantially amended *Competition Act* were found to be equally affected by the *regulated industries* doctrine as those under the old Act.⁵⁶ *Waterloo Law Association v. A.G. Canada* (hereinafter “*Waterloo Law*”),⁵⁷ confirmed that the *Competition Act* was to apply to the activities of professions generally, and that the *regulated industries* doctrine was not to operate unless there was a direction or authorization by the legislature to engage in anti-competitive activities.⁵⁸

Moreover, the treatment of the *regulated industries* doctrine in *Waterloo Law* suggested that it was only a defence to *Competition Act* proceedings, rather than an outright exemption. Certainly, the judge was equivocal about what facts might be satisfactory to justify his making a declaration as to the applicability of the Act to activities potentially covered by the doctrine. Nonetheless, he found – notwithstanding that a Bureau investigation had already resulted in the seizure of a number of documents – that the issue of applicability of the doctrine in this case was not “ripe” for decision.⁵⁹ Surprisingly, McCombs J. did not even mention *Waterloo Law* in his consideration of the ripeness issue.⁶⁰ Therefore, the question of whether the regulated industries doctrine could be applied as an exemption, or only as a defence, was not addressed.

Finally, in *Alex Couture Inc. v. Canada (Procureur Général)* (hereinafter “*Couture*”),⁶¹ the applicability of the *regulated industries* defence to non-criminal provisions of the Act (in this case concerning mergers) was

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cast in some doubt.⁶² In doing so, the court searched for “functional or operational incompatibility” between the *Competition Act* and the provincial regulatory scheme rather than applying the approach in *Jabour*.

The record showed that the Minister of Agriculture had acted in the past to limit the number of participants in the industry. However, the court concluded that the only grounds for doing so were health and public safety, in terms of the capacity to monitor operators. The Court found that the regime was not designed to control the efficiency of the market or to regulate competition in it, and in particular it was not intended to prevent or sanction anti-competitive monopolistic practices. Therefore, there was no incompatibility between federal and provincial laws and the doctrine was inapplicable.⁶³

***City National* and a New Justification for Competition Law**

Couture not only opened the door for substantial reconsideration of the applicability of the *regulated industries* doctrine to non-criminal provisions of the *Competition Act*. It also cemented the constitutional grounds for federal competition policy that had been pronounced in *City National*.⁶⁴ *City National* signalled the final stage of the Supreme Court’s distancing from the analysis of the federal trade and commerce power⁶⁵ which it had inherited from the Judicial Committee of the Privy Council in a long line of cases since *Citizen’s Insurance v. Parsons*.⁶⁶

Actually, the unanimous court in *City National* did retain the essential elements of the *Parsons* analysis – a case-by-case approach, and a division of jurisdiction into the power to regulate international and interprovincial trade and the power to generally regulate trade affecting the whole dominion.⁶⁷ What it did as well though, was adopt minority positions in two more recent Supreme Court decisions⁶⁸ as to the proper analysis that should be applied to consideration of the largely abandoned general commerce power.⁶⁹ With this decision,⁷⁰ the Court displayed a distinct willingness to favour a stronger role for the federal government in general economic regulation,⁷¹ and with competition policy in particular.⁷²

The analysis of applicability of the general trade and commerce power to a federal regulatory scheme is composed of three elements⁷³: (1) consideration of whether the provision at issue intrudes upon an area of provincial jurisdiction, (2) consideration of whether the legislation is validly enacted by comparison to five criteria developed from the case law, and (3) consideration of the degree to which the provision at issue is integrated into the legislative scheme. First, if the provision at issue does not intrude upon provincial jurisdiction, the analysis is complete. If it does, the court is to ask to what extent it intrudes and proceed to the second step of the analysis. In *City National*, the court concluded that the civil right of action contained within s. 36 of the *Competition Act* did intrude upon the authority of a province to regulate property and civil rights.

The five criteria – used in the second stage of the analysis to determine the validity of the legislation as a whole – are: (i) that the Act constitute a regulatory scheme, (ii) that the scheme must be subject to the continuing oversight of an agency; (iii) that the Act must be aimed at trade as a whole, rather than a specific industry; (iv) that the scheme be of a nature that the provinces could not accomplish it jointly or severally;

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and (v) that failure to include a province in the scheme would jeopardize its operation in the remainder of the country.⁷⁴ The court had little difficulty in finding that the Act met each criterion for validation under the general branch of the trade and commerce power.⁷⁵

Finally, the court concluded that the provision in question was sufficiently integrated into the scheme of the *Competition Act*. In so doing, it placed particular consideration on the American antitrust experience,⁷⁶ and socio-economic evidence.⁷⁷ It also indicated that the standard of integration would vary depending upon the degree to which the impugned provision encroached upon provincial jurisdiction. In this case, it was sufficient that the Act's civil provision was "functionally related to the general objective of the legislation." That was because the section was remedial, only one of a selection of possible sanctions, and restricted in its application only to competition law matters. It was also considered to be in the public interest that a wide selection of remedial measures be available under the Act (conforming to the American experience) – particularly because such provisions would hasten the movement of Canadian competition policy from its traditional base, criminal law.⁷⁸

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As much as *Jabour* exemplifies the willingness of the Supreme Court to accommodate professional self regulation – or at least that which is undertaken by members of the legal profession – *City National* demonstrates that it is equally as earnest that federal competition policy is of sufficient importance to warrant its measured intrusion onto provincial turf. With the Supreme Court's approval of the Québec Court of Appeal's decision in *Couture*,⁷⁹ one wonders how McCombs J. could have managed to ignore it, and still apply, *holus-bolus*, the *regulated industries* defence to the reviewable matters (i.e. non-criminal provisions) complained of in Calarco's submissions.

More surprising than his omission of *Couture*, however, was McCombs J.'s failure to include any direct analysis of the provisions of the *Competition Act* in question in the Calarco complaint.⁸⁰ In my opinion, this oversight should be corrected.

The complaint involved two sections of the Act: ss. 77 and 79. In neither of the sections does the word "unduly," or the concept of anti-competitive acts being within the public interest, appear. Therefore, as these are not criminal provisions, it is unnecessary – at first blush – to apply the *regulated industries* doctrine to them at all. Operating on that assumption, one might assume that the first step in an analysis of the Law Society's application (undertaken as a result of the Calarco complaint) should be to decide whether the provision of mandatory basic insurance – on penalty of the loss of one's license to practice law – comes under the terms of the sections as complained.

Section 77 poses three possible choices. Either the compulsory insurance levy is "exclusive dealing" or "tied selling," or it is neither. The practice fits best, conceptually, with the first branch of either definition (paras.

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(a)(i). As a condition of allowing a member to practice law, the Law Society mandates that she purchase insurance from the LPIC. But can a license to practice law rightly be considered a "product" under the Act? The Act does not provide a comprehensive definition. Therefore, the word must be given its ordinary meaning – that which is produced by any action, operation or work – extended only by s.2 to include an "article or service."⁸¹ A license is more appropriately considered a statutory permit to conduct an activity. As such, s. 77 should not apply to the Calarco complaint.

On a preliminary reading, determining that the Law Society's compulsory insurance plan is an anti-competitive act under s. 79, and therefore subject to redress by the Competition Tribunal, seems much more promising. However, interpretation of the abuse of dominance provision (as it is known) has revealed that the anti-competitive act must also contain some element of predatory intent or purpose.⁸² This stipulation should work as an opportune entry point for some form of *regulated industries* defence.⁸³ Assuming some kind of defence is considered appropriate,⁸⁴ at least three distinct approaches could be followed.

First, the approach in *Jabour* could be applied, as it was by McCombs J. The Law Society possesses the general power to raise levies and make arrangements respecting indemnity for professional liability under its statute.⁸⁵ This more than satisfies the requirement for authority provided for in *Jabour*, and as such s. 79 would be read in a manner that would not be found to conflict with the *Law Society Act*.⁸⁶

Given the development of case law since *Jabour*,⁸⁷ one might have thought that an application of *Jabour* to the facts of the Calarco complaint would be very difficult.⁸⁸ McCombs J. did it by failing to provide any analysis of the question of whose interest was to be protected through the LPIC and its mandatory insurance scheme (or how), and without any mention of how the *Jabour* result could be followed without explaining the applicability of its reasoning⁸⁹ to the non-criminal provisions of a new Act.⁹⁰ Instead, he stated that he would rely upon the Law Society's argument that the case of *Re Beltz v. Law Society of British Columbia*⁹¹ brought its application "within the ambit of *Jabour* and *Industrial Milk*."⁹²

The sufficiency of this reasoning is lacking, however. For its part, *Industrial Milk* merely extended the application of the regulated industries exemption to the criminal provisions of the new *Competition Act*.⁹³ *Re Beltz* was a decision that stemmed from a request for judicial review of whether the Law Society of British Columbia had interpreted a statutory provision reasonably in its maintenance of a mandatory insurance program. *Re Beltz* had absolutely nothing to do with the *Competition Act*.⁹⁴

The second approach to employing the regulated industries doctrine as a defence to a s. 79 complaint is found in the *Couture* decision. This approach is actually the antithesis of the *Jabour* method.⁹⁵ Whereas the *Jabour* method leans toward the protection of provincial jurisdiction in its interpretation of a statute, the *Couture* approach favours federal law. The Tribunal is to search for functional incompatibility between the two regulatory regimes.⁹⁶ Unless conflict is expressly authorized by statute, the *Competition Act* provisions will apply. Should the requirement of active oversight by the province also be required, this approach would

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essentially import the American *state action* doctrine⁹⁷ into Canadian competition policy concerning abuse of dominance.⁹⁸

Without the requirement of active oversight, the Law Society's compulsory insurance scheme would arguably come within the more strict test of express authority set in *Couture*. However, because its authority to extract levies is not pursuant to cabinet approval,⁹⁹ a more strict application of the American doctrine could pose serious problems for the Law Society and Benchers.

The third approach to employing the regulated industries doctrine in interpretation of anti-competitive purpose under s. 79 would be to focus on the reasonableness of that purpose. This "rule of reason"¹⁰⁰ would allow the Tribunal to weigh, on a case-by-case basis, the competing interests that exist between the impugned conduct and competition policy. In doing so, it would inquire as to whether a less anti-competitive alternative was available to accomplish the Law Society's objectives, and if so, order that it be undertaken instead.¹⁰¹

With regard to professional liability insurance, the Law Society would be forced to justify the benefits of its programme in light of the public interest in competition – both for members and for consumers. Whether its function in bolstering confidence in the legal system, ensuring prompt, ensuring predictable compensation for clients, or guaranteeing that all lawyers receive coverage are justifiable in light of available alternatives, would become the focus of the inquiry. While a complete analysis is beyond the scope of this paper, one would not be surprised to find that a more competition-policy-friendly alternative exists that would not irrevocably jeopardize the other interests in play. Alternatively, it may be concluded that non-competitive interests, such as the redistributive effects of ensuring all lawyers are covered, simply be given less (or no) weight.

Failing application of any of these approaches to s. 79, or in the event that s. 77 is actually employed successfully against the Law Society, recourse might still be had to the discretionary character of each section. The permissive "may" is used to empower Tribunal action – obliging it to consider the appropriateness of its order.¹⁰² This authority could be exercised with a mind towards the same kind of issues raised by the "rule of reason" approach to self-regulating professions. Alternatively, regard could be had to the balancing approach of *City National*.¹⁰³ In either case, the Tribunal would probably still make some order, given that it would have advanced so far as to find anti-competitive activities had taken place that had had a substantial effect on competition. But that order could certainly be moderated by such further considerations.

Conclusion

Should Calarco have had to Purchase LPIC Insurance? McCombs J. certainly thought as much, and his opinion is probably the only one that matters for Calarco and his colleagues at this point.¹⁰⁴ However, the answer to the question of whether a state-sanctioned self-regulating body should be held accountable to the

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public interest represented in federal competition policy is still up for grabs. This is because *Law Society of Upper Canada v. Canada (A.G.)* is contrary in result to *Waterloo Law*, a decision of equal level and merit, and because of *McCombs J.* failed to address the development of the regulated industries exemption (much less mention the relevant provisions of the *Competition Act*) in his decision.

It is submitted that bodies such as the Law Society should be held accountable under Canadian competition law. The mechanism for that accountability should be application of provisions such as abuse of dominance to the Law Society's activities, with the guarantee that such scrutiny would be balanced through the application of a modified *state action* doctrine, or a "rule of reason," or both. Because the issues are better addressed within the framework of competition policy and because the Director's investigation in this case was arguably not yet ripe for a decision, the future venue for a similar battle should be the Competition Tribunal. A political realist might expect less.¹⁰⁵ A concerned consumer cannot but hope for more.

Notes

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¹ Unless otherwise stated, the facts of this case are reported from copies of the briefs submitted to the Ontario Court of Justice by Mr. Calarco and associates and the Law Society of Upper Canada. I am very grateful to both Mr. Calarco and Ms. Denise Bourque, Executive Director of the Canadian Federation of Law Societies, for their assistance in providing me with this material.

² The Lawyers' Professional Indemnity Corporation (hereinafter "LPIC"), the sole provider of basic errors and omissions insurance in Ontario, is wholly owned by the Law Society and governed through a Society-appointed Board of Directors. Failure to pay any of its mandatory levies can ultimately result in suspension or revocation of one's license to practice law under s. 36 of the *Law Society Act*, R.S.O. 1990, c. L-8.

³ This rule is a statutory instrument that, while it has the force of law, does not require Lieutenant Governor in Council approval. Rule making is authorized under s. 62 of the *Law Society Act*, *ibid.* In this instance, s. 62(1)13 applies:

prescribing fees and levies for members and student members or any class of either of them, and providing for the payment and remission thereof and exempting any class of either of them from all or any part of such fees or levies;

Other decisions made by the Society — those that take the form of regulations — do require cabinet approval under s. 63.

⁴ R.S.C. 1985, c. C-32. In September 1995, Calarco and associates made a supplemental complaint that the levies used to capitalize the LPIC fund exemptions from levies by certain classes of Law Society members, and pay premiums, also violate the exclusive dealing provisions of Part VIII of the Act (s. 77).

⁵ *Law Society of Upper Canada v. Canada (A.G.)*, [1996] O.J. No. 995 (Q.L.) at para. 2.

⁶ A *fiscally-challenged* Competition Bureau has declined to appeal this particular case.

⁷ [1982] 2 S.C.R. 307.

⁸ [1989] 1 S.C.R. 641.

⁹ Lawson Hunter, Counsel for the Canadian Federation of Law Societies, quoted in Daryl-Lynn Carlson, "Law Societies Intervene to Thwart Investigation" *Law Times* (September 18, 1995) 3.

¹⁰ The range for basic coverage (in 1994-1995, excluding Québec) spans between \$1760 in New Brunswick and \$5450 in Ontario. The average is \$2772.94 (\$2600 if Québec is included).

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¹¹ In such cases, it is assumed that sophisticated clients – fully informed of the absence of coverage, and capable of insuring against it – would nonetheless be more than willing to assume the risk of an error or omission.

¹² LPIC, "Insurance Program Update & 1995 Policy Summary" brochure.

¹³ J.R. Bierig, "Whatever Happened to Professional Self-Regulation?" (1983) 69 Am. Bar Ass. J. 616 at 617.

¹⁴ "As a result of asymmetric information, producers are unable to signal differences in their relative quality to consumers. This leads to a reduction in the average level of quality perceived by consumers, a further reduction in market price, and another dilution of quality (adverse selection)." R. Van Den Bergh & M. Faure, "Self-Regulation of the Professions in Belgium" (1991) 11 Int'l Rev. L. & Econ. 165 at 171.

¹⁵ A. Blumenthal, "Attorney Self-Regulation, Consumer Protection, and the Future of the Legal Profession" (1994) Kansas J. Law & Pub. Pol. 6 at 13.

¹⁶ W.T. Stanbury, "Provincial Regulation and Federal Competition Policy: The Jabour Case" (1983) 3 Windsor Y.B. Access Just. 291 at 328.

¹⁷ *Infra*, note 55.

¹⁸ Iteration in the use of services – more common among corporate consumers – also decreases information deficiencies, *supra*, note 14 at 172.

¹⁹ C.C. Havughurst & P.M. Brody, "Accrediting and the *Sherman Act*" (1994) 57 Law & Contemp. Prblms. 199 at 200. Stanbury, *supra*, note 16 at 337, also notes that the benefits of self regulation do not come without considerable costs – i.e. redistribution from consumers to professionals. He concludes that self-interested self-regulation results in "a dead-weight burden on society through technical inefficiency, allocative inefficiency, and service mix inefficiency."

²⁰ Van Den Bergh, *supra*, note 14 at 174; J.R. Bierig, *supra*, note 13 at 618; Stanbury, *supra*, note 16 at 312-313.

²¹ Rule 12, "Making of Legal Services Available" in Law Society of Upper Canada, "Professional Conduct Handbook" [unpublished].

²² Stanbury, *supra*, note 16 at 320.

²³ *Ibid.* at 328.

²⁴ *Supra*, note 3.

²⁵ See generally: T.J. Weiler, "The Consultation Requirement in Regulatory Reform" (1995) 8 C.J.A.L.P. 101 at 104-107; and T.J. Weiler, "Professional Self-Regulation and Federal Competition Policy: The Calarco Case" *supra*, at *.

²⁶ Van Den Bergh, *supra*, note 14 at 174. Van Den Burgh and Faure criticize Belgium's compulsory professional liability scheme – which is carried on by private insurers – as ineffective because of insufficient control of the practitioner by the insurer and insufficient use of tools such as deductibles and upward policy limits. One wonders if a captive insurer, such as the LPIC, would be more or less capable of achieving similar ends.

²⁷ See generally: E. Meidinger, "Regulatory Culture: A Theoretical Outline" (1987) 9 Law & Policy 355.

²⁸ Stanbury, *supra*, note 16 at 312-313.

²⁹ *Infra*, notes 100-103 and surrounding text. This approach to interpretation of the *Competition Act* answers the question of how interests could be reconciled.

³⁰ Whether the Cabinet would want such added responsibility is another matter altogether.

³¹ *Parker v. Brown*, 317 U.S. 341 at 350 (1943).

³² The historical development of American antitrust law is admittedly beyond the scope of this paper.

³³ 421 U.S. 773 (1975).

³⁴ *Ibid.* at 790.

³⁵ 433 U.S. 350 (1977). However, in this case the regulatory activity was found to violate the First Amendment right of free speech, and was therefore nullified.

³⁶ *California Retail Liquor v. Mideal* 445 U.S. 97 at 105 (1980).

³⁷ R.J. Roberts, *Roberts on Competition/Antitrust: Canada and the United States* (Vancouver: Butterworths, 1992) at 452; citing *Cantor v. Detroit Edison Co.* 428 U.S. 579 (1976). In this case, a utilities regulator acquiesced in agreeing to the light bulb exchange programme of a private electricity provider when it approved its tariff schedule. It should be noted, however, that Goldfarb contained some interesting dicta that did not rule out the court's providing special consideration of a *per se* offence, such as price fixing, should some form of self-regulation of the legal profession be involved.

³⁸ See: *Gibbons v. Metcalfe* (1905), 15 Man. R. 560; *R. v. Chung Cluck*, [1929] 1 D.L.R. 756 (B.C. C.A.), *aff'd* [1930] A.C. 244 (J.C.P.C.); *Rex v. Simoneau*, [1936] 1 D.L.R. 143 (Que. Ct. Sess.); *R. v. Cherry*, [1938] 1 D.L.R. 156 (Sask. C.A.); and *Reference Re: Farm Products Marketing Act*, [1957] 1 S.C.R. 198.

³⁹ *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 92(13-14). These heads of jurisdiction concern "property and civil rights in the province" and "the administration of justice in the province."

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⁴⁰ In *R. v. Canadian Breweries Ltd.*, [1960] O.R. 601 (H.C.J.), “the mere existence of power to regulate conduct in an industry appeared to suffice to insulate such conduct from the reach of anti-combines [competition] laws.” J. Roberts, *supra*, note 37 at 441. However, others see this high water mark in the regulated industries doctrine as being narrower. It could be said that the defence was restricted only to activities specifically subject to regulation, and that the authority to regulate had to have been exercised. B.S. Romaniuk, “Whither the Regulated Conduct Defence?” in R.S. Khemani & W.T. Stanbury, eds., *Canadian Competition Law and Policy at the Centenary* (Halifax: Institute for Research on Public Policy, 1991) 439 at 442-443.

⁴¹ *Jabour, supra*, note 7 at 354.

⁴² *Supra*, note 38; B.S. Romaniuk, *supra*, note 40 at 440.

⁴³ G.E. Kasier, “Regulation or Competition: Where Do We Go From Here?” in R.S. Khemani & W.T. Stanbury, eds., *Canadian Competition Law and Policy at the Centenary* (Halifax: Institute for Research on Public Policy, 1991) 427 at 428-429.

⁴⁴ D. Rutherford & J.S. Tyhurst, “Competition Law and the Constitution: 1889-1989 and into the Twenty-First Century” in R.S. Khemani & W.T. Stanbury, eds., *Historical Perspectives on Canadian Competition Policy* (Halifax: Institute for Research on Public Policy, 1991) 253 at 276.

⁴⁵ See generally: P.W. Hogg, *Constitutional Law of Canada* (Scarborough, Ontario: Carswell, 1992) chapter 16, “Paramountcy,” at 417-434.

⁴⁶ B.S. Romaniuk, *supra*, note 40 at 440; *Farm Products Marketing Act Reference, supra*, note 38 at 307.

⁴⁷ *Ibid.* at 441; G.E. Kasier, *supra*, note 43 at 429.

⁴⁸ *Jabour, supra*, note 7 at 354-5. Re: proposition one — use of the word “unduly” in the charging provision “connotes essentially the same meaning as the more general words in the same statute ‘operated or is likely to operate to the detriment or against the interest of the public.’” *Jabour, supra*, note 7 at 355. Re: proposition two — “In so ‘agreeing’ the Benchers are said not only to have been doing that which was permitted by their admittedly valid parent statute but were in fact discharging their assigned duties under the Act.”

⁴⁹ Estey J., in *Jabour, ibid.* at 354.

⁵⁰ *Supra*, note 33.

⁵¹ *Supra*, note 31.

⁵² W.T. Stanbury, *supra*, note 16 at 310.

⁵³ *Ibid.* at 305.

⁵⁴ Estey J., in *Jabour, supra*, note 7 at 313, 334. The court’s justification for showing considerable deference to the Law Society was a familiar mix of positive and negative arguments (*supra*, notes 14 & 15 and surrounding text) that was greeted with much condemnation by academic observers. See, e.g., W.T. Stanbury, *supra*, note 16 at 307-308.

⁵⁵ (1989), 47 D.L.R. (4th) 710 (F.C.T.D.).

⁵⁶ *Jabour, supra*, note 7 at 362. This conforms to dicta in *Jabour* that should the Act be founded upon a federal power other than criminal that such would not affect the analysis of its criminal provisions.

⁵⁷ (1986), 58 O.R. (2d) 275.

⁵⁸ Approved in: *R. v. Independent Order of Foresters* (1989), 26 C.P.R. (3d) 229 (Ont. C.A.).

⁵⁹ *Waterloo Law, supra*, note 57 at 282.

⁶⁰ As a result of this aspect of his decision, McCombs J. spared the Law Society from having to leave the more familiar confines of a General Division Court for the chambers of an administrative tribunal — of mixed judicial and lay composition — whose speciality is applying competition law. This is because the Competition Tribunal is solely responsible for adjudication of reviewable measures. Moreover, having to frame the issue of professional self-regulation in terms of a defence may have been viewed as more confining than the luxury of couching it within a more general, quasi-constitutional argument. In the least, this declaratory action prevented a potentially damaging set of facts from driving the case and receiving additional press coverage.

⁶¹ (1987), 18 C.P.R. (3d) 382; app. den’d [1992] 2 S.C.R. v.

⁶² One might recall the words of Estey J., in *Jabour, supra*, note 52: “So long as the *Combines Investigation Act* or at least Part V is styled as a criminal prohibition...” Times have certainly changed.

⁶³ “Victory for Competition Bureau in Couture Appeal” (1991) 12 Can. Comp. Pol. Rec. 5 at 6.

⁶⁴ It did so by validating the whole of the legislative scheme — and the function of the Competition Tribunal in particular — by following the reasoning and decision in *City National, supra*, note 8.

⁶⁵ *Constitution Act, 1867, supra*, note 39, s. 91(2).

⁶⁶ (1881), 7 A.C. 96.

⁶⁷ *Ibid.* at 113; *City National, supra*, note 8 at 655-657.

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⁶⁸ *MacDonald v. Vapour Canada Ltd.* (1976), 66 D.L.R. (3d) 1, min. dis't.; *Canadian National Transportation v. A.G. Canada*, [1983] 2 S.C.R. 206, min. conc., rev'g (1982), 135 D.L.R. (3d) 89 (Alta. C.A.).

⁶⁹ See generally: P. Hogg, *supra*, note 45, chapter 20, "Trade and Commerce" at 521-536; D. Rutherford & J.S. Tyhurst, *supra*, note 44.

⁷⁰ As well as with *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, a decision concerning application of the federal residual power under the "Peace order and good government clause of s. 91 of the *Constitution Act*, 1867, *supra*, note 39.

⁷¹ In *City National*, *supra*, note 8 at 669, Dickson C.J., stated: "In determining the proper test it should be remembered that in a federal system it is inevitable that, in pursuing valid objectives, the legislation of each level of government will impact occasionally in the sphere of power of the other level of government; overlap of legislation is to be expected and accommodated in a federal state. Thus, a certain degree of judicial restraint in proposing strict tests which will result in striking down such legislation is appropriate"

⁷² *Ibid.* at 676. "I have no difficulty in concluding that the [*Competition*] Act as a whole embodies a complex scheme of economic regulation. The purpose of the Act is to eliminate activities that reduce competition in the market-place. The entire Act is geared to achieving this objective. [Its components] constitute a well-integrated scheme of regulation designed to discourage forms of commercial behaviour viewed as detrimental to Canada and the Canadian economy."

⁷³ *Ibid.* at 671-672.

⁷⁴ D. Rutherford & J.S. Tyhurst, *supra*, note 44 at 273, note that the fourth and fifth criterion of this portion of the analysis bear a "close resemblance" to the "provincial inability test" used in *Crown Zellerbach*, *supra*, note 70, to validate federal environmental legislation under the residual power of the "peace order and good government" clause. They suggest that the tests for both powers may be converging.

⁷⁵ *City National*, *supra*, note 8 at 676-683; and *supra*, notes 71 and 72. Though at 668, the court stressed that not all five criteria need to be found for the legislation to still be validated.

⁷⁶ *Ibid.* at 688.

⁷⁷ *Ibid.* at 687; in particular the notable report by the Economic Council of Canada, *Interim Report on Competition Policy*, Ottawa, Minister of Supply and Services, 1969, which led to major reforms of the Act in 1975 and 1986.

⁷⁸ D. Rutherford & J.S. Tyhurst, *supra*, note 44 at 276.

⁷⁹ *Supra*, note 61.

⁸⁰ By doing this, he imperilled his consideration of the regulated industries doctrine by removing it from the nature of the provisions in question (reviewable measures, as opposed to criminal). Because McCombs J. failed to address the issue of whether the regulated industries doctrine should be construed as anything more than a defence in his decision (*supra*, note 5), I will treat the foregoing analysis of the doctrine as if it was contemplated by the Competition Tribunal, as a defence, rather than by a court.

⁸¹ *R. v. Grange*, [1978] 5 W.W.R. 39 (B.C. Co. Ct.).

⁸² B.M. Graham, "Abuse of Dominance - Recent Case Law" (1993) 38 McGill L.J. 800 at 807-808; L. Hunter, "Tribunal Releases Nutrasweet Decision" (1990) 11:4 Can. Comp. Pol. Rec. 74 at 76; *Director of Investigation and Research v. Nutrasweet Co.* (1990), 32 C.P.R. (3d) 1 at 34.

⁸³ It is interesting to note, however, that in Graham's critique of this provision, *ibid.* at 811-812, that he specifically suggests a situation analogous to the Calarco facts as the rare case to which the provision should apply. He rightly states that the provision is "based principally on predation theory" and that the "theory depends upon creation of sustainable artificial entry barriers (which usually only exist when supported by government regulation of some sort). Circumstances in which alleged abuse of dominance actions are likely to be anti-competitive will or should be rare."

⁸⁴ It would be possible for the Tribunal to either find that a purpose was not required in this instance - basing its analysis on the fact that s. 78(f) defines a type of anti-competitive act that requires no predatory purpose - or that the Benchers (or Law Society) had some sort of predatory purpose. This would necessarily be predicated on some sort of economic theory that indicated that the profession or certain members could benefit from the scheme, to the detriment of consumers.

⁸⁵ *Supra*, note 2; ss. 62(1)13 & 61, which follows:

The Society may make arrangements for its members respecting indemnity for professional liability and respecting the payment and remission of premiums in connection therewith and prescribing levies to be paid by members or any class thereof and exempting members or any class thereof from all or any part of such levy.

⁸⁶ A separate issue, however, is the application of s. 2.1 of the *Competition Act*, *supra*, note 4, to the activities of the Law Society as an agent of the crown. In *Industrial Milk Producers*, *supra*, note 61, s. 2.1 was found not to bind

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a crown agent because the activity complained of fell within its "explicit mandate" and because it was not found to be engaging in commercial activity. If the actions complained of by Calarco are found to be commercial (i.e. providing insurance) rather than regulatory, and the actions are judged to be beyond the Law Society's explicit mandate, it would be affected by the *Competition Act* regardless of whether the *Jabour* method is chosen.

⁸⁷ *Supra*, notes 55-63.

⁸⁸ The weaknesses of *Jabour* have been outlined earlier in this paper. *Supra*, notes 51-54.

⁸⁹ Which had been based upon the criminal provisions of an old act.

⁹⁰ *Supra*, note 5 at para. 60.

⁹¹ (1986), 31 D.L.R. (4th) 685.

⁹² *Supra*, note 5 at para. 53.

⁹³ *Supra*, note 65. In fact, the passage from *Industrial Milk* quoted by McCombs J. in his decision (*supra*, note 5 at para. 50) highlights the loose manner in which the regulated industries exemption was applied in *Jabour*. It noted (at 721) that: "In *Jabour*, the Benchers were merely given a broad mandate to set standards for the profession. There was no specific or explicit authority to prohibit or regulate advertising. Thus, in that case, there was much more scope than in this, for the argument that the *Combines Investigation Act* (now the *Competition Act*) might apply."

⁹⁴ Not surprisingly, the reviewing court in *Re Beltz* showed a significant degree of deference to the Law Society in its interpretation of the provisions of its empowering Act. The same amount of deference was also shown by the Supreme Court in *Jabour*. But why such deference should be shown, and what such a display has to do with the regulated industries exemption in federal competition law, are questions that remain unanswered.

⁹⁵ In its purest form, it would be a simple application of the paramountcy doctrine (*supra*, note 45). Whereas both the *Competition Act* and the *Law Society Act* are validly enacted under the trade and commerce power, the provisions of the former shall take precedence over the latter. In the extreme, there would be no defence other than that no purpose had been proved on the evidence.

⁹⁶ *Supra*, notes 62-63 and surrounding text.

⁹⁷ *Supra*, notes 31-36 and accompanying text.

⁹⁸ This notion has been advocated by a number of authorities. See: D. Rutherford & J.S. Tyhurst, *supra*, note 44 at 281-282; and W.T. Stanbury, *supra*, note 16 at 314-315, who in turn cites the 1969 Economic Council Report (*supra*, note 77) and the Skeoch-McDonald Report, Minister of Consumer and Corporate Affairs, *Dynamic Change and Accountability in a Canadian Market Economy*, Ottawa, Minister of Supply and Services, 1976.

⁹⁹ *Supra*, note 3.

¹⁰⁰ It is advocated by American writers who are interested in improving the state action doctrine in its application to professional self-regulation. See: J.R. Bierig, *supra*, note 13 at 619; and C.C. Havughurst & P.M. Brody, *supra* note 19 at 217-218.

¹⁰¹ This approach would also be in concert with the third recommendation of the Skeoch-McDonald Report, *supra*, note 98 at 151-2 that only the most efficient method of achieving other regulatory goals be supported.

¹⁰² See: *Director of Investigation and Research v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 at 24.

¹⁰³ *Supra*, note 8 at 660. That is, the need to balance federal intrusions on areas of provincial jurisdiction where the key is a matter of degree – if the provision offends, how much, and to what degree is it integrated into the scheme of the Act? Using such an analysis, it may be argued by analogy that if the Bureau has been vigilant in its use of the power to intervene in regulatory policy-making (see: J. Roberts, *supra*, note 37 at 442) – with good effects – it would be beneficial to extend its reach into the policy decisions of professional self-regulatory bodies as well.

¹⁰⁴ Actually, Mr. Calarco has indicated to me (telephone interview, 8 May 1996) that he and his colleagues are exploring political options, now that the Court has spoken and the Director has decided not to appeal.

¹⁰⁵ This requires the suspension of one's disbelief that a court hearing another application such as this one will be willing to see beyond the interests of the profession in question, in favour of the larger public interest in having competition policy determined by the Director and the Competition Tribunal.

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CURRENT ISSUES INVOLVING THE PRICE MAINTENANCE PROVISIONS OF THE *COMPETITION ACT*

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The price maintenance provisions of the Act began their legislative history in 1951 through an amendment to the *Combines Investigation Act*¹ which created a criminal prohibition against price maintenance in the resale context, that is, between suppliers and their customers. In 1976, the *Combines Investigation Act* was amended again² to include a prohibition against advertising of products in Canada intended to influence upward or discourage the reduction of the resale price of the product. The provisions of the present *Competition Act*³ (the "Act") are generally unchanged from the 1976 amendments.

The price maintenance provisions in section 61 of the current Act prohibit suppliers from directly or indirectly attempting to influence upward or discourage the reduction of the price at which anyone else supplies or offers to supply or advertises a product within Canada. These provisions do not apply where the supplier and the other person are affiliated corporations, principal and agent or directors, agents, officers or employees of the same or an affiliated business. Notably, the price maintenance provisions do not contain the requirement that competition be lessened substantially or unduly and, therefore, simply engaging in that conduct would be sufficient to attract criminal prosecution.

For the purpose of the price maintenance provisions, a suggestion by a supplier of a resale price or minimum resale price is proof of the offence in the absence of proof that the supplier also made it clear to the person to whom the suggestion was made that that person was under no obligation to accept the suggestion and would in no way suffer in that person's business relations with the supplier or with any other person if the suggestion was not accepted. The publication by a supplier, other than a retailer, of an advertisement that mentions a resale price is an attempt to influence upward the selling price of any person who has the product for resale unless the price is so expressed as to make it clear that the product may be sold at a lower price. The provisions outlined in this paragraph do not apply to a price that is affixed or applied to a product or its package or container.

Also included in section 61 of the Act are provisions dealing with refusals to supply in certain circumstances. Suppliers are prohibited from refusing to supply a product to or otherwise discriminating against someone because of their low pricing policy. As well, no person shall attempt to induce a supplier, whether within or outside Canada, as a condition of doing business with the supplier, 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.

Anyone who contravenes these provisions is guilty of an indictable offence and is liable on conviction to a fine in the discretion of the court or to imprisonment for up to five years or to both.

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Finally, it should be noted that the price maintenance provisions of the Act were put in place mainly to prohibit vertical agreements to maintain prices. Nevertheless, in recent years the provisions have been increasingly applied to prevent price maintenance in a horizontal context.⁴

Moving from the general to the specific, this paper will address two subjects that raise issues under section 61 of the Act. The first involves a "minimum advertised price" program whereby a supplier agrees to contribute to the cost of retailers' advertising as long as retailers do not advertise the supplier's products at less than a specified price. The second subject relates to the defences available to a supplier under subsection 61(10) of the Act in cases where a retailer is engaging in loss-leader pricing or bait-and-switch selling of the supplier's products. For the purposes of this discussion, the relevant provisions of the Act are as follows:

61. (1) *Price Maintenance.* No person who is engaged in the business of producing or supplying a product, or who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trade-mark, copyright or registered industrial design shall, directly or indirectly,
- (a) by agreement, threat, promise or any like means, 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; or
 - (b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.
- ...
- (10) *Where no unfavourable inference to be drawn.* Where, in a prosecution under paragraph (1)(b), it is proved that the person charged refused or counseled the refusal to supply a product to any other person, no inference unfavourable to the person charged shall be drawn from that evidence if he satisfies the court that he and any one on whose report he depended believed on reasonable grounds,
- (a) that the other person was making a practice of using products supplied by the person charged as loss-leaders, that is to say, not for the purpose of making a profit thereon but for purposes of advertising;

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- (b) that the other person was making a practice of using products supplied by the person charged not for the purpose of selling the products at a profit but for the purpose of attracting customers to his store in the hope of selling them other products;
- (c) that the other person was making a practice of engaging in misleading advertising in respect of products supplied by the person charged;
or
- (d) that the other person made a practice of not providing the level of servicing that purchasers of the products might reasonably expect from the other person.

Minimum Advertised Price Programs

The first issue to be explored involves a strategy whereby a supplier of a product proposes not to contribute to the cost of the retailers' advertising through a cooperative advertising program in cases where the retailer in question advertises the product at less than a specified price. As will be discussed, the application of Canadian competition law in these circumstances may differ from the application of U.S. antitrust law in similar situations. This divergence may be significant to suppliers that distribute products through retailers in both countries.

Use of a Cooperative Advertising Program

Several cases decided under the current or former price maintenance provisions of the Act involved the use of cooperative advertising programs to attempt to ensure that retailers did not advertise products at prices below a particular level. In these circumstances, suppliers have been found guilty of attempting to influence upward, or to discourage the reduction of, resale prices or advertised prices pursuant to paragraph 61(1)(a) above or its predecessor.

In the leading case of *R. v. Moffats Limited*⁵ (hereinafter "Moffats") decided by the Ontario Court of Appeal in 1957, Moffats introduced a plan of cooperative advertising with its authorized dealers whereby Moffats undertook to pay 50% of the cost of the dealers' advertisements of Moffats' products subject to the proviso that the prices designated in such advertisements would not be less than minimum prices specified by Moffats. Moffats argued that dealers were free to sell the advertised products at any price they wanted and that the sole purpose of the plan was to preserve a harmonious relationship with dealers. Moffats' conviction for resale price maintenance was upheld on appeal, the Court finding that Moffats was inducing its dealers to resell its products at not less than the minimum prices. It should be noted at this stage that at the time of the *Moffats*

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decision the Act did not include the reference to "advertising" in section 61 as it has since the 1976 amendments. In several more recent cases, all of which were decided by Ontario courts, suppliers were convicted under the price maintenance provisions for refusing to contribute to the advertising cost of retailers who advertised products at prices below particular levels. In one such case, *R. v. A & M Records of Canada Ltd.*⁶ decided by the Ontario County Court in 1980, the accused pleaded guilty to the offence in a situation in which, pursuant to its cooperative advertising policy, it refused to contribute to the cost of its dealers' advertising if the advertised price was below "dealer cost" which was fixed from time to time by way of distributed price lists. In that case, the dealers could advertise and sell at whatever price they wished, but no claim for cooperative advertising from A & M would be recognized and paid if the advertised price was below dealer cost.

In another Ontario decision, *R. v. Church & Co. (Canada) Ltd.*,⁷ the court found that the accused supplier had established a suggested retail price list together with a cooperative advertising program to ensure that retailers did not sell or advertise at prices below the suggested retail price. In cases where retailers did not comply with the program, the supplier either delayed in shipping the product or refused to supply any product at all. It is interesting to note that even though the supplier discontinued its cooperative advertising practice upon being advised that it violated the Act, the court convicted the supplier on the basis that the crimes were serious and the intent of the Act was to protect the consumer.

Finally, in *R. v. Matsushita Electric of Canada Ltd.*,⁸ the court found the supplier guilty of price maintenance for disallowing a retailer's participation in a cooperative advertising program on the basis of the price at which the retailer was advertising the supplier's product (stereo equipment) as well as for refusing to supply a retailer by reason of the retailer's low pricing policy. In making its decision, the court considered the size and scope of the market, the consumer demand for the product, the quality of the product and the effect of the illegal conduct on the price of that product. The court was also influenced by the fact that the supplier had continued the practice over a period of years.

Accordingly, it seems clear that a contravention of paragraph 61(1)(a) of the Act would result if a supplier made it a condition of providing cooperative advertising funds that retailers not advertise its products below some specified price or if the supplier otherwise prevents the use of cooperative advertising funds in connection with such low price advertising.

It should be noted that in *R. v. Must de Cartier Canada, Inc.*,⁹ the supplier was charged with price maintenance for, among other things, attempting to influence upward or discourage the reduction of resale prices by controlling the advertising of one of its retailers and for requiring the retailer to submit all its advertisements in respect of the sale of its products to the supplier for approval, as well as for refusing to supply jewelry sold under the Cartier trade mark to that retailer. The court acquitted the supplier in finding that the Cartier trade mark was identified with high quality jewelry and that the supplier enjoyed a high image. Further, the court noted that the supplier had a legitimate concern that all its retailers comply with

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international advertising standards developed by the supplier's parent company in France. The court also found that the retailer had used its own judgment in agreeing to change its advertising and submit advertisements to the supplier for approval. Finally, the court held that the supplier was completely justified in terminating shipments to the retailer as the retailer was having cash-flow problems and was in fact indebted to the supplier at that time. Although it is clear that the circumstances of this case are unique, the decision is important insofar as the court recognized as legitimate a supplier's concerns with the image or value of its product and compliance with international advertising policies.

Enforcement by the Competition Bureau and the Prospect of a Civil Action

With respect to the enforcement of the price maintenance provisions of the Act, it should be noted that these provisions have not been an enforcement priority of the Competition Bureau's Criminal Matters Branch in recent years, the focus instead having been on conspiracy and bid-rigging activities. Generally, the Bureau has dealt with complaints regarding price maintenance activities through a compliance approach or Alternative Case Resolution ("ACR").

Under this approach, the Bureau would address minimum advertised price issues with the supplier involved with the object of the supplier changing its program in response to the Bureau's concerns. In cases where a satisfactory resolution cannot be reached, it is obviously open to the Bureau to refer the matter to the Attorney General to initiate a criminal prosecution.

In addition to criminal enforcement by the Competition Bureau, the Act also provides, in section 36, that any person who has suffered loss or damage as a result of criminal conduct under the Act may sue for and recover from the person who engaged in that conduct an amount equal to their loss or damage, plus the cost of any investigation concerning the matter and of the action for damages.

In the case of a minimum advertised price program which violates the criminal price maintenance provisions of the Act, it is conceivable that a retailer could claim to have suffered loss or damage as a result of the program, either as the result of lost sales if the retailer does not advertise at below the specified minimum price or lost cooperative advertising funds if the retailer advertises at below that price. The ability of a retailer to initiate such an action for damages does not depend on whether the Competition Bureau has successfully concluded a prosecution, but a conviction for criminal conduct under the Act will, in the absence of any evidence to the contrary, establish liability. In those circumstances, all that would remain is a determination of the amount of damages.

U.S. Enforcement Related to Minimum Advertised Price Programs

In the United States, the Federal Trade Commission (the "FTC") has adopted an interpretation of that country's antitrust laws relating to price maintenance, and particularly minimum advertised price programs, that may lead to a different result in circumstances similar to those at issue in the decided cases in Canada.

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With respect to minimum advertised price programs, this approach in the United States was reflected in the shift, during the 1980s, from a *per se* test to a "rule of reason" analysis and the amendment of several of the FTC's orders to permit a supplier to condition the granting of cooperative advertising funds on the advertising of designated prices. The most notable of these amended FTC Consent Orders is the modified Order issued to U.S. Pioneer Electronics Corp. in April, 1992¹⁰ (discussed below). Additional examples of the change in policy can be seen in court decisions such as *In re Nissan Antitrust Litigation*,¹¹ in which the court held that agreements that withhold cooperative advertising allowances from dealers that advertise discounted prices are to be analyzed under the rule of reason, and *Business Electronics Corp. v. Sharp Electronics Corp.*¹² (hereinafter "*Business Electronics*"), a decision of the U.S. Supreme Court which held that there was a clear difference between vertical restraints concerning price, which are *per se* illegal, and non-price vertical restraints, which are to be judged under the rule of reason standard. This latter case held that an agreement or conspiracy between a supplier and a complaining retailer to terminate a discounter due to price cutting was not sufficient to constitute conduct which was *per se* unlawful unless the agreement included some agreement on price or price levels.

The FTC's position in the early 1980's was that such restrictions with respect to advertising would be treated as *per se* violations of the U.S. antitrust laws.¹³ The more recent move to the rule of reason analysis with respect to cooperative advertising programs has led to a more flexible approach in dealing with such schemes. By way of explanation, the *per se* rule applies to conduct that is so plainly anti-competitive that it is conclusively presumed to be unreasonable without an elaborate inquiry into competitive effects. Cooperative advertising programs that restrict reimbursement for the advertising of discounts are said not to fall into this category as they do not establish the existence of an agreement on price between a supplier and a dealer and do not necessarily affect the resale prices of dealers. In fact, the FTC has found that like other vertical restraints that are subject to the rule of reason analysis, such cooperative advertising programs may, at best, provide competitive benefits, or at least that they may be competitively neutral.

The modified Consent Order issued to U.S. Pioneer Electronics Corp. in 1992 demonstrates the trend of the FTC towards a more lenient approach to cooperative advertising policies. In 1975 the FTC issued a Consent Order against the company which limited Pioneer's ability to impose restrictions on its dealers' advertised prices in connection with the sale of consumer electronics products. However, as a result of Pioneer being able to demonstrate that it had been injured by its inability to compete with other manufacturers, the FTC determined that it was in the public interest for the original Order to be modified. Specifically, Pioneer asked that it be allowed to impose minimum advertised prices on its dealers, as opposed to minimum sale prices, and that it be able to terminate dealers that advertised below its suggested advertised prices. The FTC agreed with this submission and further agreed that the law had become more flexible now that the *per se* rule was no longer strictly applied. In removing certain restrictions in the original Order, the FTC granted Pioneer the right to withhold cooperative advertising payments to dealers *advertising* at below suggested retail prices and the right to terminate, unilaterally, those dealers *advertising* at below Pioneer's suggested resale prices. In addition, the FTC, of its own volition, issued an order to show cause why, in

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light of *Business Electronics* and other recent decisions,¹⁴ Pioneer should not be allowed, unilaterally, to terminate dealers *selling* Pioneer products at a price other than that suggested by Pioneer.¹⁵

In spite of the foregoing, the FTC stopped short of allowing Pioneer the right to agree with dealers to fix the prices at which Pioneer products would be advertised or resold by its dealers. Such arrangements were still considered by the FTC as *per se* illegal. Therefore, any cooperative advertising program implemented by Pioneer as part of a "resale price maintenance scheme" would be *per se* unlawful as well as violating the original Order issued against Pioneer in 1975.

Conclusion Minimum Advertised Price Programs

There are fundamental differences between Canadian and U.S. price maintenance laws relating to minimum advertised price programs. First, paragraph 61(1)(a) of the Act specifically refers to influencing the price at which another person *advertises* a product within Canada. This language makes it unnecessary to establish the link between the prices at which products are advertised and those at which they are sold, as was made in the *Moffats* case before the Act was amended. In the United States, and particularly in the context of the modified Pioneer Consent Order, the FTC notes that there may not be such a link. Second, there is no lessening of competition requirement in section 61 of the Act (that is, it is a *per se* offence) whereas, minimum advertised price programs of the type discussed above are subject to a rule of reason analysis in the United States. The bottom line is that minimum advertised price programs that are permissible in the United States may violate the price maintenance provisions of the Act in Canada. This may be a significant consideration for suppliers distributing products through retailers in both countries. Such suppliers may well need to have different cooperative advertising programs for retailers in Canada than in the United States.

Loss-Leader Pricing and Bait-and-Switch Selling

The second subject for discussion involves the circumstances identified in subsection 61(10) of the Act, and particularly paragraphs (a) and (b), which would require the court not to draw an "unfavourable inference" in a prosecution of a supplier under paragraph 61(1)(b). These circumstances involve a reasonable belief on the part of the supplier that a retailer was making a practice of using the supplier's products as loss-leaders, that is for advertising purposes, or for the purpose of attracting customers to their store in order to sell other products (bait-and-switch) and not for the purpose of making a profit on those products. Although not described as such in the Act, these circumstances have been considered to be "defences" to a charge under this provision of the price maintenance section of the Act.

In considering these defences, it is important to note that they are only available in respect of prosecutions under paragraph 61(1)(b), that is where a supplier is charged with *refusing to supply*, or otherwise

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discriminating against, a person because of that person's low pricing policy. The defences in subsection 61(10) are not available with respect to prosecutions under paragraph 61(1)(a), that is with attempting to influence upward or to discourage the reduction of resale prices. This is a significant limitation on the suppliers' options in this area, particularly if a supplier would prefer to avoid cutting offending retailers off from the supply of their products.

This limitation of the loss-leader and bait-and-switch defences has been judicially considered in several cases, particularly in the Ontario and Quebec courts. Suppliers have been acquitted on charges of price maintenance where they have refused to supply retailers on the basis of a reasonable belief that the retailers were making a practice of using the suppliers' products as loss-leaders.¹⁶ However, suppliers have been convicted of attempting to influence upward or discourage the reduction of resale prices of retailers through other actions, including threats to cease supplying the retailers if they did not discontinue the loss-leading and increase prices.¹⁷ Indeed, in the case of *R. v. George Lanthier & Fils Ltee.*¹⁸ decided by the Ontario District Court in 1986, the accused was convicted of resale price maintenance as a result of a threat to limit the volume of products supplied to a particular store in response to that store's expressed wish to advertise the supplier's products at a price below cost. The judge in that case commented that if a charge of refusal to supply had been prosecuted, he would have accepted the accused's loss-leader defence.

The other elements necessary to invoke the defences in paragraphs 61(10)(a) and (b) are that the accused must satisfy the court that he and anyone on whose report he depended *believed on reasonable grounds* that the reseller was engaging in loss-leader pricing or bait-and-switch tactics. In other words, it is not necessary to prove that the retailer actually used the products as loss-leaders or for bait-and-switch purposes, but only that the supplier believed on reasonable grounds that the retailer had acted in this manner. Another element of the loss-leader and bait-and-switch defences is that the retailer was making a *practice* of these activities. This implies a course of dealing more extensive than an isolated act or acts.

Finally, both paragraphs 61(10)(a) and (b) speak of practices engaged in *not for the purpose of making a profit*. The courts have held, particularly in *Regina v. Philips Electronic Industries Ltd. et al.*,¹⁹ decided in the Ontario High Court in 1966, that "loss-leaders" as used in these provisions means selling at less than cost, that is at a price less than the actual cost of the products to the retailer. Accordingly, the courts generally have not allocated any "normal mark-up", cost of doing business or overhead cost to the products in question.

One of the leading cases in this area is *Regina v. Sunbeam Corporation (Canada) Ltd.*²⁰ decided originally in 1966 in the Ontario High Court and then on appeal to the Ontario Court of Appeal in 1967 and to the Supreme Court of Canada in 1968. Sunbeam had initiated a nation-wide campaign designed to secure the sale of its products through retail outlets at prices not below a prescribed minimum level. This plan was designated as the "minimum profitable resale price" plan or "MPRP". Sunbeam sent out letters to the company's dealers enclosing a price list which set out various prices for Sunbeam products, including a

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“suggested dealer price”, “fair retail value” and MPRP. The letter notified Sunbeam dealers of the company’s interpretation of the loss-leader defence and stated that “[t]he offering of our products below these prices [MPRP] will be investigated as cases of loss-leading. It is our intention to withhold supply, or to counsel with our distributors to withhold supply, from persons who make a practice of loss-leading our products ...”. Sunbeam sales representatives subsequently followed up on the letter with attendances at dealers’ premises to persuade them to refrain from selling Sunbeam products below such prices. At the trial, Sunbeam submitted that paragraph 61(10)(a) of the Act provided justification for the letter sent to the dealers. Sunbeam was convicted on two of four counts of resale price maintenance, the trial judge holding that Sunbeam’s actions “... were directed towards retention of the minimum prices specified ... rather than to notification to the dealer of the area of resale price at which the retailer must be regarded by Sunbeam as loss-leading the article in question”.

The Quebec case of *Regina v. Solomon Canada Sports Ltée.*,²¹ decided on appeal by the Quebec Court of Appeal in 1986, seems somewhat inconsistent with previous cases, particularly those in the Ontario courts. In that case, Solomon was charged with resale price maintenance in respect of a retailer which, over a period of several months, advertised that it would give away a pair of Solomon ski bindings with the purchase of a pair of skis. The retailer also advertised Solomon products at below the market price, but at a price which was above the cost charged by Solomon to the retailer when it purchased the equipment. The Quebec Court of Appeal allowed the accused’s appeal from its convictions and entered acquittals on the basis that Solomon had reasonable cause to believe that the retailer had engaged in loss-leading and bait-and-switch selling, that the giving of free bindings with purchases of skis over a period of several months in four different stores constituted a practice and that “profit” as used in the context of what is now subsection 61(10) should be defined taking into account the “net cost price” to the retailer not simply the cost of the goods. One of the judges commented that the relevant consideration is “net profit”, that is with appropriate additions for overhead.

Notably, the Quebec Court of Appeal commented that Solomon had reproached the retailer for offering its bindings for free and that the retailer did not provide any proper explanation to reassure Solomon that it was not loss-leading Solomon’s products for the purpose of advertising or for the purpose of attracting customers to the store in the hope of selling them other products. After consulting its lawyer, Solomon advised the retailer that in future it would refuse to sell it Solomon products, justifying its refusal by telling the retailer that it was of the opinion that the retailer was using Solomon products as loss-leaders. The accused was acquitted of charges of refusal to supply and attempting to influence upward or discourage the reduction of prices under the price maintenance provisions. As noted above, this decision seems somewhat inconsistent with earlier decisions, particularly of the Ontario courts, with respect to the interpretation of the term “profit” and the exposure to a charge under paragraph 61(1)(a).

In the event that a supplier decides to refuse to supply a retailer on the basis of the circumstances in paragraphs 61(10)(a) or (b), there appears to be no reason why it could not refuse to supply only the product lines

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involved in the loss-leader or bait-and-switch pricing. The issue of whether the refusal to supply could be stated to be for a limited time is somewhat more difficult. Arguably, that sort of action would be, in effect, an attempt to discipline the retailer concerned and thereby to influence resale prices upward.

Conclusion - Loss-Leader Pricing and Bait-and-Switch Selling

From the discussion above, the result appears to be that a refusal to supply in situations in which there are reasonable grounds for believing that there is a practice of loss-leader or bait-and-switch pricing is permissible, but attempts to influence the retailers to raise prices in the same circumstances are not. This is one of the anomalies in the Act that suppliers must be aware of in order to avoid possible action by the Competition Bureau, including a prosecution under the price maintenance provisions, as well as the prospect of a civil action for damages under section 36 of the Act as discussed earlier.

Notes

¹ S.C. 1951, c. C-30.

² S.C. 1976, c. C-76.

³ R.S.C. 1985, c. C-34.

⁴ J. Musgrove, "The Change of Price: Some Modest Proposals to Amend Canada's Pricing Laws" (1995-1996) 16:4 *Can. Comp. Rec.* 66 at 75.

⁵ (1957), 7 D.L.R. (2d) 405 (Ont. C.A.).

⁶ (1980), 51 C.P.R. (2d) 225 (Ont. Co. Ct.).

⁷ (1980), 52 C.P.R. (2d) 21 (Ont. Prov. Ct.).

⁸ [unreported, January 30, 1981 (Ont. Co. Ct.)].

⁹ (1989), 27 C.P.R. (3d) 37 (Ont. Dist. Ct.).

¹⁰ U.S. Pioneer Electronics Corp. Order (FTC, 1992) [modifying *U.S. Pioneer Electronics Corp.*, 86 F.T.C. 1002 (1975)].

¹¹ 577 F.2d 910 (5th Cir. 1978) *cert. denied* 439 U.S. 1072 (1979).

¹² 485 U.S. 717 (1988).

¹³ The FTC has jurisdiction to deal with such matters under section 5 of the *FTC Act*. See, for example, the discussion in *ABA Antitrust Section, Antitrust Law Developments* (3d ed. 1992) Volume I (W.K. Tom et al., eds.), particularly at page 457, which states:

"Conduct prohibited by the *Clayton Act* or *Robinson-Patman Act* may be found unlawful by the Commission under those statutes as well as under Section 5 of the *FTC Act*. Moreover, while the Commission may not directly enforce the *Sherman Act*, it may proceed under Section 5 of the *FTC Act* against conduct that violates the *Sherman Act*. Thus, the scope of Section 5 is at least as broad as that of the combined *Sherman, Clayton, and Robinson-Patman Acts*."

¹⁴ 1990 *Magnavox* Modification (FTC, 1990) [of the original order: *The Magnavox Company*, 78 F.T.C. 1183 (1971)]

¹⁵ The FTC subsequently modified the Consent Order (1992) to permit Pioneer to engage in such conduct. [*ABA Antitrust Section, Annual Review of 1992 Antitrust Law Developments* (1993) - Volume I (J. R. Loftis, III, ed.), at 46].

¹⁶ *R. v. William E. Coutts* (1966), 52 C.P.R. 21 (Ont. H. C.), *aff'd* [1968] 1 O.R. 549 (Ont. C.A.).

¹⁷ For example, in *R. v. H.D. Lee of Canada Ltd.* (1980), 57 C.P.R.(2d) 186 and 62 C.P.R.(2d) 77 (Que. Sess.).

¹⁸ (1986), 12 C.P.R. (3d) 282 (Ont. Dist. Ct.), *aff'd* 24 C.P.R. (3d) 288n (Ont. C.A.).

¹⁹ (1966), 52 C.P.R. 224 (Ont. H.C.), *aff'd* [1969] 1 O.R. 386 (Ont. C.A.).

²⁰ (1969), 56 C.P.R. 242 (S.C.C.).

²¹ (1986), 28 C.C.C. (3d) 240 (Que. C.A.).

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