

# Competition Act Reform

## COMPETE TO WIN? IMPLEMENTATION OF THE COMPETITION POLICY REVIEW PANEL RECOMMENDATIONS FOR REFORM OF THE CANADIAN COMPETITION ACT

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### Introduction

On March 12, 2009, the Governor General granted royal assent to the *Budget Implementation Act, 2009*, which had been introduced by the Government of Canada on February 6, 2009 as *Bill C-10* (the "Bill"). In an unexpected addition to the Government's economic stimulus program, the Bill implemented most of the recommendations of the Competition Policy Review Panel (the "Panel") with respect to changes to the *Competition Act*<sup>1</sup> (the "Act"). These changes represent the most extensive reform of the Act since 1986.

This paper provides an overview of the *Competition Act* amendments in the Bill in light of the Panel's recommendations contained in its final report, *Compete to Win*, released in June 2008.<sup>2</sup>

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In addition to providing a functional summary of the changes to the Act, we discuss to what degree the Panel and the Bill incorporated the often contrary commentary from the various parties that made submissions to the Panel as part of the public consultation process, and our own views on the merits of the changes.

One interesting issue that bears immediate consideration is the process through which these changes were enacted, namely as part of a federal budget implementation bill. It is a reasonable concern that the sweeping nature of the amendments could have benefited from greater debate and longer scrutiny than has been afforded the legislation, driven as it was by the urgent fiscal and financial measures that constituted the major objectives of the Bill. In the case of certain reform provisions, such as those respecting creation of a “second request” merger review process, which were not truly canvassed in submissions to the Panel, this concern is exacerbated.

The apparent rush to have the changes enacted into law is very difficult to understand. As part of a stimulus program designed to deal with the current economic crisis, it is clear the competition law aspects are largely irrelevant, since they are unlikely to result in any significant near or mid-term economic effects given the lag which their operation entails. There was simply no urgency with respect to the operation of existing competition laws, and calls had come from several quarters for the government to disengage competition law reform from the Bill, which did not happen. Moreover, given the potentially significant long-term economic impacts of these changes and the stated intention to make Canada more competitive, it is difficult to understand linking the amendments to a federal budget implementation bill. The most plausible explanations are various political motivations, including a desire to prevent reforms from being bogged down in lengthy discussion and consultation or thwarted by a change of government. Also, the current government may want to point to a piece of showcase legislation in the midst of an economic crisis. Our view is that additional debate and discussion, including the circulation of draft legislative provisions with sufficient time for comment, would have been the preferred course of action.

## A. History of Canada's Competition Act

Significant amendments to Canada's competition law in 1986 were preceded by a series of exploratory discussions, both academic and involving the wider public, as to the appropriate objectives and purposes of a modern competition law.<sup>3</sup> To the extent one can summarize the pre-amendment deliberations, it would likely be to identify a Canadian trend towards the recognition of economic efficiency as a primary objective. That the trend towards such a position was not uniform is well reflected in the cluttered purposive statement contained in section 1.1 of the Act. This section purports to simultaneously address several disparate and potentially inconsistent objectives (which potential inconsistency has been recognized explicitly by at least one Court).<sup>4</sup>

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The Act enjoyed a post-reform honeymoon following 1986, and although significant changes had been repeatedly proposed the next amendment was not until 1999<sup>5</sup>, following which the Act has existed as a continuous work in progress, with ongoing reflection as to its purpose, scope and substance. Various reform efforts dealt with a range of topics, including advertising, private actions and international cooperation, provisions relating to Canadian airlines, amendments to certain threshold amounts, efficiencies defences, and broader efforts dealing with competition policy generally. Several of these reform efforts led to new legislation or proposed legislation. Viewed in the context of previous efforts to amend the Act, the Panel's reform proposals are neither revolutionary nor surprising. Recurring themes of reform, such as efficiency and competitiveness, have again surfaced along with some evolutionary thought which we describe in our paper.

## B. Competition Policy Review Panel

In keeping with successive government promises to reform Canada's competition and investment laws, Prime Minister Stephen Harper's minority Conservative Party government promised to initiate a new round of reviews in the 2007 budget proposal.<sup>6</sup> With the death on the order paper of previous reform attempts, the promise of yet another round of deliberations was greeted with cautious optimism. The government's chosen vehicle for carrying out the review was an independent panel announced on July 12, 2007. The Panel was comprised of five members, led by Lynton Wilson, O.C. Mr. Wilson, a former executive with several of Canada's leading banks and telecommunications companies, was joined by three industry representatives and a Canadian private-practice solicitor.<sup>7</sup>

The Panel's terms of reference were set out by the Minister of Industry and were framed so as to permit the Panel significant discretion as to the scope and subject matter of its final report.<sup>8</sup> The Panel was asked, among other things, to:

- determine how our competition laws can best cope with a global economy in which a great deal of market activity takes place outside Canada's borders;
- examine how other countries are managing these challenges, identify best practices and assess how they could be adapted to the Canadian context; and,
- carry out research and hear views from Canadians on how markets can work more efficiently, while protecting consumers from unfair practices wherever they originate.

In addition to these competition-specific requests, the Panel was also asked to consider a broad range of foreign investment issues that generally fall within the purview of the *Investment Canada Act*<sup>9</sup> ("ICA"). We do not discuss here the proposed amendments to Canada's foreign investment regime and the ICA.

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The Panel sought to fulfill its consultative mandate by requesting comments from Canadian individuals and companies on the basis of a consultation paper entitled *Sharpening Canada's Competitive Edge* (October 30, 2007) (the "Consultation Paper").<sup>10</sup> The Consultation Paper provided a descriptive lead-in of various trade, investment and productivity issues, along with select statistics providing background for a series of guiding questions on a broad range of related policy themes. It also added some further substance to the terms of reference, categorizing the Panel's mandate into four general areas: investment policies, competition policies, outward investment by Canadians and Canada as a destination for investment and opportunity. Within the competition policy rubric, the Panel wrote:

Fair and transparent competition policies are a key building block in the foundation of modern commerce. However, the establishment of these policies is more complex in a global economy where the marketplace extends beyond Canada's borders. The Panel will therefore review Canadian policies affecting competition, including an examination of the Competition Act, to ensure that they foster competition in the Canadian market.

As part of this review, the Panel will look to international best practices and see how they may be adapted to fit the Canadian context. In undertaking its review, the Panel's principal focus will be whether Canada's competition policies enhance our ability to both serve the interests of domestic consumers and enable our most successful enterprises to grow beyond Canada.<sup>11</sup>

Submissions from 155 individuals and organizations were posted on the Panel's website. These ranged from broad policy-oriented submissions to highly specialized comments relating to specific legislative sections or industries, and came from a wide range of sources. The diversity and depth of submissions is at least one testament to the continuing interest in changes to the existing competition and investment regime, repeated previous reform attempts notwithstanding.<sup>12</sup> Some submissions came from the expected quarters of financial institutions, the Canadian and American bar associations, private law firms, public policy organizations, business and professional associations and chambers of commerce; others derived from corporations and arts and trade associations within industries that currently enjoy protection from competition or takeovers by reason of sectoral regulatory regimes; and still others were submitted by government agencies themselves, such as the Canadian Radio-television and Telecommunications Commission and the Commissioner of Competition. Few submissions addressed all the questions posed by the Panel, with most focusing on their areas of special interest or expertise and some straying considerably off-topic. Our analysis below tries, where possible, to reference the most salient of these public submissions.

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## Mergers

### A. History

The statutory provisions regarding merger review are found in Part IX of the Act, and were originally included as part of the 1986 amendments which also repealed the ineffective criminal substantive merger provisions. The regime was modelled on the American system under Title II of the *Hart-Scott-Rodino Antitrust Improvements Act* of 1976, as implemented by certain Rules of the United States Federal Trade Commission. The Act treats mergers as a matter reviewable by the Competition Tribunal, also created in 1986 by the companion *Competition Tribunal Act*. The previous statutory regime, prior to the current changes, had thus been in place for over 20 years.

In 1999, the information requirements for the merger notification process were revised and the statutory waiting periods before mergers could be completed were lengthened.<sup>13</sup> In 2003, the merger notification threshold and fees were increased.<sup>14</sup>

### B. Submissions

The Consultation Paper issued by the Panel posed this question in the area of mergers regulation: Does Canada's approach to mergers strike the right balance between consumers' interest in vigorous competition and the creation of an environment from which Canadian firms can grow to become global competitors?<sup>15</sup>

Remarkably, only a minority of the submissions touched on the question of mergers at all, and many of those that did restricted their comments to an ongoing debate about the treatment of efficiencies under the Act. Section 96 of the Act prohibits the Competition Tribunal from making an order concerning an anti-competitive merger if it finds that efficiency gains brought about by the merger will be greater than and offset the anti-competitive effects. The Panel expressly concluded there was no compelling need to alter that law, and the subject was not addressed in the Bill.<sup>16</sup>

The American Bar Association commended the Canadian merger review process for remaining neutral as to the nationality of parties and cautioned against any approach favouring the creation of "national champions" in a given sector. Notably, they did not suggest any changes to the current Canadian pre-notification and merger review regime, and did not call for more alignment with the U.S. merger clearance system; nor did the Canadian Bar Association.

The Canadian Chamber of Commerce cited as a particular concern the absence of a statutory timeframe for review of a merger by the Commissioner of Competition, suggesting that this created needless uncertainty and increased transaction costs for parties and stating that including a "deemed approval" mechanism as part of a new statutory timeline would increase certainty.

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The Commissioner of Competition filed a submission that supported the current merger review regime and entered into the debate about the efficiencies defence. She also filed a subsequent discussion paper that set out statistics concerning the timing of the Bureau's merger reviews, concluding that 90% of merger notifications are cleared within 10 days, with the balance processed in less than two months on average, "well within international norms".<sup>17</sup> For highly problematic cases, she indicated that the average four month review time was faster than under the European Union and American systems, which were described in detail in a schedule.

Most interestingly given the Panel's final recommendation in this area, the Commissioner's discussion paper characterized the Canadian regime as "relatively permissive" insofar as it permits the parties to close their merger transaction after the "mere" expiration of 42 or a maximum of 102 days following notification. It also pointed out at some length that unlike the European and U.S. systems, there is no tie in Canada between the requirement for parties to provide the Bureau with necessary information and the right to close: the Bureau cannot compel information without a court order and the "resort to litigation". These issues raised in the discussion paper had not formed the basis of any submission by the Commissioner in the earlier filing.

## C. Panel's Recommendations and Implementation

The Panel made a number of recommendations for changes to the Act concerning the current system of merger review. The most significant of these was to align the Act's merger review process more closely with the American Hart-Scott-Rodino ("HSR") procedures. Namely, an initial review period of 30 days for the authorities to consider the merger, with the Commissioner empowered, in her discretion, to initiate a second stage review for an additional indeterminate period only ending 30 days following full compliance with the second-stage information request. The parties could only close the transaction after the applicable 30-day period in either case.

The Panel also recommended reducing to one year the current three-year limitation period following closing of a merger during which the Commissioner can challenge it substantively before the Competition Tribunal<sup>18</sup>, increasing by an unspecified amount the existing thresholds for pre-merger notification, both as to the size of the parties and the size of the transaction, and considering creation of additional classes of transactions as exemptions from the pre-notification requirements.

Finally, on an amorphous and perhaps reproving note, the Panel advised the Bureau to "reinforce its commitment" to giving timely decisions, strengthening its economic analysis capabilities, giving appropriate weight to the global marketplace and providing advance or other informal advice to parties.

Both the second stage merger review and the shorter timeframe for substantive challenges by the Bureau following a completed merger are adopted by the Bill.<sup>19</sup> The transaction sizes triggering

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merger notification requirements are raised to a uniform \$70 million for all types of transactions, from \$50 million (the threshold for amalgamations, which was already set at \$70 million, does not change).<sup>20</sup> This change is relatively minor, but fits within the Panel's recommendations, which did not specify a new threshold amount. The Bill also created an adjustment mechanism through which the threshold amount is indexed to changes in price levels by a formula operative in the absence of the threshold being specifically prescribed for a given year by the Minister of Industry.<sup>21</sup>

The Bill did not adopt the Panel's recommendation to increase the size of parties notification threshold level, which remains at \$400 million.

## D. Analysis

The Panel's recommendation to move to a U.S.-style "second request" system for merger review in Canada was controversial because of the perception that it would lead to increased information demands on both merging and third parties, unchecked by the Federal Court's current gatekeeper role under section 11 of the Act. There was also concern about increased delays for the consummation of mergers that are either mechanically complex or raise competition concerns. Most of the Canadian competition bar is of the view that the American process can lead to more onerous compliance issues and more uncertain delays toward completion of a transaction.

Some American antitrust lawyers, with the benefit of closer proximity and participation in that system, support this view. In one recent article reflecting on the effect of twenty years of the HSR regime on American merger practice, the authors refer to HSR as creating:

...essentially unreviewable agency power to demand thousands of boxes of documents, marked and indexed in a particular way, all organized in file folders with particular labels and placed in boxes of a particular size, with overseas documents translated, and all the while the transaction is effectively enjoined until the collection and review process is completed and the agency has taken all the time it wants to decide what to do...

The agencies have used the Second Request process to create a whole new discovery mechanism, unconstrained by the Federal Rules (or any other rules, for that matter) and free of any practical oversight by any neutral arbiter. Notwithstanding recent efforts to make Second Requests marginally more reasonable, the fact remains that they are, in most cases, highly intrusive, overly burdensome, and exceedingly expensive – totally different from what was intended and expected by the Congress that passed the HSR Act.<sup>22</sup>

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Not only did the Panel not dismiss, on reasoned grounds, any such existing criticisms of the U.S. HSR process, levelled as they are with the hindsight of decades of experience, but the Report contained no analysis at all of the actual implementation of the second request regime and its impact on merging parties or the economy as a whole.<sup>23</sup> No empirical evidence was offered to support the proposed reform. Rather, the Panel referred generally to the importance of our Canadian merger review process being better harmonized with the American one. One suspects that, given the choice, some American commentators would prefer that harmonization work the other way around.

The Panel's recommendation was surprising since it did not form an issue that it asked the public to specifically comment on and was not addressed in any of the submissions filed, including that of the Commissioner. The issue was only indirectly raised subsequently by the Commissioner in a discussion paper that made reference to the inadequate time and power to compel information afforded the Bureau under the then current regime. This was discussed in that paper in the context of an unattributed concern regarding whether the current merger review framework facilitates the Bureau's ability to carry out its mandate – a contrast made with the enhanced powers of competition authorities in the U.S. and the EU to hold up transactions while directly compelling additional information relevant to the proposed merger – and the following apparent complaint:

The key to the design and enforcement of merger review provisions is to ensure that they lead to the right decisions, i.e., challenging only those mergers that are likely to harm competition, and allowing the vast majority of transactions that do not meet this threshold to proceed as soon as possible. To do this, the Bureau requires relevant information and time to complete a sufficiently thorough and responsible analysis of the likely competitive effects of the merger. The Bureau must do so in an environment in which the Tribunal and the Courts are demanding ever more sophisticated economic analysis and a high burden of proof.<sup>24</sup>

It would seem, then, the Panel accepted the Bureau's concern set out in the backgrounder in making its recommendation to give the Bureau both more time and more clout in reviewing complex mergers, while attempting to achieve balance by concurrently chiding the Bureau to increase its timeliness, analytical capacity and procedural flexibility.

We accept that for complex mergers the Bureau may need more time to conduct its reviews, however we are not convinced a shift to a U.S. second request model is necessary to accomplish this. Section 11 of the Act provides the Bureau with an effective tool for obtaining information and records which parties do not provide voluntarily. While the manner in which section 11 of the Act has been used by the Bureau has been the source of disagreement between it and the

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practising bar, and the Federal Court in the *Labatt*<sup>25</sup> decision recently rebuked the Commissioner in relation to her disclosure obligations in that respect. section 11 remains an effective tool for the Bureau to get the records and evidence it needs. We consider that a better approach would be an amendment that provides a mechanism for the Commissioner to be able to extend the waiting period for complex mergers, perhaps to 90 or 120 days. Wholesale adoption of the American model is not warranted, at least not on any argument the Panel relied on in recommending that change.

Implementation of the Panel's merger recommendations in the Bill is, consequently, problematic. Because they were not subject to significant discussion prior to the Panel making its recommendations, the manner in which the merger review changes were implemented is doubly troublesome. The increases in the thresholds for notification are very minor and do not include an increase to the \$400 million size-of-parties threshold, suggesting they are unlikely to have any significant effect on merger enforcement. The introduction of the ongoing adjustment mechanism is a step in the right direction.

## Cartels

### A. History

Cartel provisions have long formed a part of Canada's competition laws; the prohibition against conspiracies that restrain trade was first introduced in 1889.<sup>26</sup> Prior to the current amendments, the cartel prohibition (substantially the same as when it was first enacted) was found in section 45 of the Act, which made it an offence to "conspire, combine, agree or arrange with another person...to prevent or lessen, unduly, competition..." Although the Act had created a series of *per se* illegal arrangements - bid-rigging in section 47 and certain arrangements between financial institutions in section 49 - the narrow scope of these sections meant most horizontal arrangements were analyzed under the broader language of section 45.

The core wording of section 45 had remained largely intact since its introduction in predecessor legislation to the Act in 1889, although the wording was progressively broadened by expanding the application of the legislation to services and removing a line of judicial interpretation which had established an overly aggressive standard of undueness.<sup>27</sup> With the 1986 amendments, Parliament clarified through section 45(2.1) that the existence of a conspiracy under section 45 could be proven by circumstantial evidence and, through section 45(2.2), that actions need not be intended to create the undue anticompetitive effects prescribed in section 45(1) in order to trigger application of the section.

Canadian cartel law has developed in a markedly different fashion than in the United States, which "is remarkable for the prominent role that courts there have played in shaping the substance of the law".<sup>28</sup> American cartel law is primarily contained in the *Sherman Act*<sup>29</sup>, with additional

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elements of the law found in the *Clayton Act*<sup>30</sup> and the *Federal Trade Commission Act*<sup>31</sup>. Section 1 of the *Sherman Act* prohibits conspiracies in restraint of trade, and has survived largely intact since its enactment in 1890.<sup>32</sup> This American statute, often described as minimal and vague, has allowed the courts to develop a deep jurisprudence in the area. Under the American system hardcore cartels are considered *per se* illegal, but a *rule of reason* approach applies to other agreements.

## B. Submissions

A number of submissions to the Panel commented on possible amendments to the cartel provisions of the Act. While the recommendations were varied, notable examples are mentioned here.

The Canadian Bar Association (the “CBA”) expressed a note of caution with respect to any moves to reform the current cartel provisions of section 45, citing certainty of the law as

a quality that should not be undervalued. While section 45 is not perfect, it has had the benefit of almost 120 years of judicial consideration, scholarly commentary, and enforcement policy. The language is sufficiently flexible to allow modernization through judicial interpretation.<sup>33</sup>

The CBA specifically discussed proposals to remove the undue-ness requirement from section 45 and restrict the section to “hardcore” cartels so as not to chill collaboration or joint ventures that may be economically beneficial.<sup>34</sup> However, the CBA warned that “while there is not much serious debate about the desirability of these objectives, finding language to achieve them that would not carry a significant risk of greater uncertainty has so far been elusive.”<sup>35</sup> Underlining some of the controversy surrounding reforms to section 45, the CBA noted in its submission that the National Competition Law Section itself was divided as to the wisdom of pursuing reforms of section 45.

The American Bar Association also provided comments on section 45, voicing support for

a ‘dual track’ approach to enforcement policy...with *per se* criminal liability for hard-core cartel conduct (to replace the competitive effects test in the current law) and civil liability for agreements that lessen competition, but have some plausible connection to legitimate joint commercial activity.<sup>36</sup>

This approach would bring Canadian practice in line with the practice in the United States.

One suggestion included the possibility of modifying the undue-ness requirement of section 45 to include consideration not only of the anti-competitive effects but also pro-competitive and efficiency effects.<sup>37</sup>

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The Canadian Chamber of Commerce suggested that no changes be made to the existing conspiracy provisions in the Act, and that “there has been a notable absence of enforcement activity by the Bureau in this area and failure to enforce the provisions in question [does] not justify amending the law. The law is well known and clear.”<sup>38</sup>

Given the wide range of perspectives brought to bear, it is not surprising that there was no unanimity in terms of emphasis in the various submissions. Interestingly, the Panel’s recommendations in terms of the cartel provisions reflect more closely the recommendations of the American Bar Association than many of the Canadian submissions on the subject.

## C. Panel’s Recommendations and Implementation

The Panel proposed repealing the existing conspiracy provisions in the Act and replacing them with a *per se* criminal offence for “hardcore cartels” and a civil provision that would deal with other types of agreements between competitors that have anti-competitive effects.<sup>39</sup>

The Panel considered hardcore cartel behaviour “agreements between competitors to fix prices, allocate markets or customers, or limit production” because these forms of collaboration “reduce the normal economic incentives created by competitive markets to reduce costs and innovate, key factors that influence productivity.”<sup>40</sup> Other types of cartel behaviour, such as strategic alliances or restrictions on advertising, are of less concern from a productivity perspective, hence the Panel’s recommendation that they be repositioned as civil offences, notwithstanding that they “may harm competition nonetheless”.<sup>41</sup>

The Bill creates a new criminal conspiracy provision by replacing the existing section 45 with a revised provision stating:

Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

(a) to fix, maintain, increase or control the price for the supply of the product;

(b) to allocate sales, territories, customers or markets for the production or supply of the product; or

(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.<sup>42</sup>

The Bill provides for the inference of the existence of a conspiracy “from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it.”<sup>43</sup> The Bill also adds a civil provision to address any “agreement or arrangement”

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between competitors that “prevents or lessens, or is likely to prevent or lessen, competition substantially”.<sup>44</sup>

## **D. Analysis**

The Panel’s recommendations with respect to the cartel provisions of the Act were ambitious in scope and, in some respects, lacking in detail. A move to reclassify certain types of less harmful activities so that they are only subject to civil sanctions is sound. Unfortunately, while the theoretical concept of a bifurcated analysis of cartel activities is welcome, the difficulty lies in constructing a clause that would effectively capture the so-called “hardcore” activities. Without providing guidance on how to solve the problem of drafting language that would readily allow for a distinction to be made between “naked” or “hardcore” restraints on competition, and those arrangements that may have efficiency or other pro-competitive benefits, the Panel provided an answer that was not a solution.

We believe the jurisprudence and enforcement practices made the provisions of the previous section 45 well understood. It may be debatable whether that section has worked in terms of adequately deterring or punishing transgressors without unduly chilling efficient interaction among market participants. However, it is our view that most businesses that have compliance programs or who obtain advice from experienced competition law counsel are advised to assume hard core cartel activity is a *per se* offence.<sup>45</sup> Enforcement under the previous section 45 could have been enhanced, and there may have been situations where the criminal nature of the conspiracy provisions scared off potentially welfare-enhancing transactions for fear of having certain activities deemed “undue”. It is doubtful that, except in the very long term, the statutory changes will lead to a superior outcome. The result of these changes is discarding the interpretive assistance of over a century of case law, commentary and enforcement policy, requiring the slow common law forging of adequate replacements.

The previous section 45 regime was often contrasted with the *per se* regime in the United States. The American Bar Association’s comments notwithstanding, it is erroneous to conclude that a similar statutory scheme in Canada will lead to similar outcomes. As at least one submission to the Panel mentioned, the American system has had the benefits of significant interpretation and refinement which will be non-existent in the newly reconstituted Canadian system.<sup>46</sup> The interpretive exercise will start from the ground up, suggesting that any desire for greater clarity and a reduction in the disincentive for pursuing economically beneficial joint ventures, etc., will take time to materialize. Without convincing proof that the previous system was ineffective, we think the Panel’s proposal was unwarranted and the Panel’s objectives would have been served by retention (or possibly minor refinement) of the previous system.

Given that there exist theoretical reasons to support the Panel’s recommendation, the exercise will thrive or flounder on the basis of the clarity of the statutory language. If previous efforts to find suitable wording are any indication, this is a daunting task indeed. Separating out

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“hardcore” cartel offences will ultimately always be a subjective exercise, save in some very clear instances (where the previous law would function effectively). The difficulty lies not in identifying the hardcore offences but in determining where the line should be for decriminalizing anti-competitive behaviour.

The Bill attempts to draw the distinction by articulating three “classes” of activities that are subject to punishment (see the excerpt from the Bill above). Our view is that the language is overly broad in its potential application, and is almost certain to lead to significant chilling of various activities which market participants will fear could be captured through judicial or regulatory interpretation. While many could agree on a “reasonable” interpretation of the provisions which would result in the appropriate sanction of economically damaging behaviour while permitting benign or pro-competitive conduct, we are not confident the courts will not struggle with interpreting the provisions, in light of the judicial history evident in the U.S. evolution of the offence. The breadth of the provisions means that they could potentially be applied to agreements among competitors that should not normally raise competition concerns. For instance, the provisions might apply in relatively common commercial situations, such as:

- competing refineries who enter into a swap agreement to minimize transportation costs;
- competing suppliers of a commodity, who also occasionally trade with each other, enter into a purchase and sale agreement to purchase the commodity; and,
- a manufacturer who supplies some customers directly and others through an independent distributor enters into an agreement with the independent distributor restricting the territory in which or the customers to whom the distributor may sell.

While it is likely that the Bureau will enforce the new provisions responsibly, in a manner consistent with economic theory, the availability of private actions means potentially less attentive parties could rely on the breadth of the provisions to impose costs on parties whose behaviour should not be subject to competition law remedies. The usefulness of certain defence provisions shielding otherwise prohibited conduct from the new criminal conspiracy rules is unclear.

In addition to the difficulties with the potential interpretation of the Bill’s wording, there were alternatives to the solution proposed by the Panel which should have been carefully considered and which, given the state of jurisprudence on the previous section 45, would have likely offered superior outcomes. An analysis of these alternate proposals is beyond the scope of this paper, but we would have recommended revisiting several of them.<sup>47</sup> For instance, Warner and Trebilcock have suggested adopting a notification system whereby any agreement or understanding between competitors was *per se* illegal, assuming a certain joint market share threshold is met, but where immunity from criminal prosecution would be granted to all parties that notified the Competition Bureau of the agreement or understanding.<sup>48</sup>

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## E. Conclusion

The Panel's consideration of section 45 stemmed from valid concerns that the previous section 45 was both under and over inclusive: Under inclusive in that hardcore activities were given the benefit of a rule of reason approach, and over inclusive in that some pro-competitive or efficient arrangements were discouraged or prevented as a result of the legislation. However, given the uncertainty of the actual harm created by the statute's lack of precision, the practical difficulties in implementing the Panel's recommendation, and the availability of other, possibly superior alternatives, we think that the recommendations with respect to section 45 should not have been implemented, and should have at the very least been provided with a thorough review process which the Bill conspicuously failed to do. The chosen language does provide a framework within which an appropriate interpretation may be envisaged, but it does not provide the clarity or direction that would have been required to forestall the risk of misinterpretation, if in fact clear language can be found. Indeed, the risk flows from the very creation of a new prohibition, regardless of the language chosen. Ultimately, even if the new provisions are interpreted in a manner consistent with economic theory after the passage of some time, it is not clear that the risks were worth whatever pro-competitive effects these provisions may have, given the relative success of the previous law.

## Criminal Pricing Provisions

### A. History

Section 61 of the Act imposes a criminal prohibition on a supplier attempting to impose, by agreement, threat, promise or any like means, minimum resale prices or minimum advertised prices on its dealers. It also prohibits a supplier from refusing to supply because of a dealer's low pricing policy. The language of section 61 is arguably broad enough to make it applicable to the conduct of competitors, thus making it a *per se* price fixing provision.<sup>49</sup>

Given the *per se* nature of the price maintenance prohibition, conviction under section 61 does not require the Commissioner of Competition to demonstrate that the activities in question were harmful to competition, or that any such harm was undue. The Competition Bureau has a strong record of convictions under section 61.

The price maintenance provisions were first introduced in 1951 following a recommendation of the MacQuarrie Committee that price maintenance be prohibited, and have since then been amended several times.<sup>50</sup> Amendments in 1976 broadened the language so that it was arguably applicable to purely horizontal arrangements.<sup>51</sup> The refinements to the legislation have been inconsistent with the evolving economic understanding of price maintenance. In 1951, price maintenance was viewed as being harmful in all instances and therefore deserving of criminal *per se* prohibition. More recently, however, economists have increasingly viewed some price maintenance arrangements as benign, and still others as even beneficial to social welfare.<sup>52</sup>

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In 1998, Bill C-235, a private members' bill proposing amendments to the *Competition Act*, included a civil price maintenance provision but no repeal of the criminal provision. The Minister of Industry commissioned an independent study of the pricing provisions of the Act, the report of which became known as the VanDuzer Report.<sup>53</sup> The VanDuzer Report pointed out that economic theory recognized pro-competitive rationales and effects for vertical price maintenance, such as use by a supplier of a product to encourage non-price competition by providing better service; to avoid free riding by permitting suppliers to control the image of their brand relative to others in the market; and by ensuring retailers have sufficient margins to expand sales outlets and displays and cover other costs associated with levels of service. The VanDuzer Report also identified potential anti-competitive effects, including the argument that price maintenance may facilitate cartel activity at the supplier level or at the retail level, ultimately concluding that a *per se* approach for vertical price maintenance was overly broad. The Report recommended that vertical price maintenance could be addressed under the abuse of dominance provisions, but pointed out some problems including the need to take into account the efficiency reasons of the supplier.

In 2002, a Parliamentary Standing Committee recommended that vertical price maintenance be dealt with under the abuse of dominance provisions and that horizontal price maintenance be addressed under proposals to reform section 45.<sup>54</sup>

Since it is a criminal offence, private parties who have suffered damages by reason of price maintenance could also bring private damage actions under section 36 of the Act.<sup>55</sup>

Given recent developments in American jurisprudence, it is useful to consider the treatment of price maintenance in that jurisdiction. Although vertical price maintenance is a *per se* offence in the United States, the offence arose as a result of judicial interpretation and has never been specified in statute. In 1911, the U.S. Supreme Court decided in *Dr. Miles*<sup>56</sup> that resale price agreements were *per se* illegal under section 1 of the *Sherman Act*.<sup>57</sup> Although American courts retreated somewhat from the strict interpretation in *Dr. Miles*, vertical price maintenance remained *per se* illegal until 2007, when the U.S. Supreme Court in *Leegin*<sup>58</sup> held that vertical price maintenance should be dealt with under a rule of reason analysis.<sup>59</sup> The Court made reference to an amicus brief submitted by twenty-three economists that apart from price maintenance being part of a horizontal agreement among manufacturers to raise prices, a manufacturer would have no incentive to overcompensate retailers with higher margins than necessary, and that in fact higher margins might be harmful to the manufacturer who would lose sales to inter-brand competitors. Both of the enforcement agencies submitted briefs supporting the abandonment of a *per se* rule.

## B. Submissions

Few submissions were received by the Panel commenting on price maintenance, a not altogether surprising result given the sentiment reflected in the Canadian Bar Association's submission

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that “eliminating criminal treatment for price maintenance and “predatory” pricing is largely uncontroversial”.<sup>60</sup> Likely the most detailed commentary on changes to the pricing provisions came from the Canadian Real Estate Association, which concluded:

The fact that price maintenance is a *per se* offence is inconsistent with the objectives of the Act and with current economic thinking, as evidenced by a recent change to the approach taken to vertical price agreements by Canada’s largest trading partner, the United States.<sup>61</sup>

## C. Panel’s Recommendations and Implementation

The Panel’s recommendation was to:

...repeal existing resale price maintenance provisions and replace them with a new civil provision to address this practice when it has anti-competitive effect. This new provision should be subject to the private access rights before the Competition Tribunal.<sup>62</sup>

As with several other proposed reforms to the Act, the Panel did not engage in an in-depth analysis of price maintenance, treating price maintenance in more general terms:

The resale price maintenance provisions of the Competition Act, broadly speaking, address pricing issues that can arise between suppliers and resellers of a product, but do so as a criminal offence under the legislation. This is an area of Canadian competition law that is more restrictive than comparable US law. Other provisions relating to refusal to deal and exclusive dealing, address competition issues between suppliers and resellers as civil matters. The Panel believes that resale price maintenance should also be treated as a civil matter.<sup>63</sup>

The Bill adopts the Panel’s recommendations and repeals the criminal price discrimination, predatory pricing and promotional allowance provisions previously found in section 61 of the Act.<sup>64</sup> The new civil provisions relating to price discrimination apply when impugned conduct “has had, is having or is likely to have an adverse effect on competition in a market”.<sup>65</sup> In keeping with the Panel’s recommendations, the Bill allows for a private right of access to the Tribunal.<sup>66</sup>

Several additional features of the Bill bear comment. For instance, a number of defences to price maintenance were previously enumerated in section 61(10) of the Act (e.g. relating to loss-leaders, misleading advertising and service standards). These defences applied to an offence under

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section 61(1)(b) (refusal to supply due to low pricing policy), but not to the broader category of offence in section 61(1)(a). The Bill retains these defences in the new price maintenance provisions, as well as a reformulated refusal to supply provision.<sup>67</sup>

## D. Analysis

Our view is that the Panel's recommendations were long overdue. No responsible government should continue to impose criminal sanctions for a practice that is widely viewed as often having beneficial effects on competition and economic welfare.<sup>68</sup> The difficulty of enforcing a statutory provision that is markedly out of line with modern economic theory is in part exemplified by the limited enforcement profile currently given to the price maintenance provisions by the Competition Bureau, which historically was not always the case. An appropriate regulatory framework would make price maintenance a reviewable practice that would have as an essential element the substantial lessening or prevention of competition. The Bill elaborates an "adverse effect on competition" requirement, which suggests that the focus of inquiry under the new provisions should be the effect on competition generally, rather than the effect on prices.

While some submissions to the Panel suggested dealing with price maintenance under the existing abuse of dominance provisions of the Act, the Panel did not recommend such an integration, and the Bill does not establish such a regime. In our view such a move would have been problematic given that the overriding focus of the abuse of dominance provisions is the conduct of a dominant firm to weaken or foreclose competition. Price maintenance does not neatly fit within this category of conduct. A fundamental issue is that price maintenance generally results in higher prices, at least in the short run, but the pro-competitive benefits are generally non-price, such as service associated with purchasing particular products. Similarly, where price maintenance is part of a cartel arrangement, it can be dealt with under the amended cartel provisions of section 45. Consequently, the focus on competitive effect as opposed to prices that is found in the Bill is warranted.

Retaining the various defences to a charge of price maintenance is also, in our view, appropriate, given the various pro-competitive explanations that may exist for certain behaviour which would otherwise fall within the ambit of the offence. It will be interesting to follow the evolving interpretation of the new provisions, since the elaboration of an appropriately robust adverse effect on competition criterion could limit the need to resort to the express defences.

## E. Conclusion

Repealing the criminal price maintenance provisions is long overdue. The Bill provides what could be an effective framework for administration of the reformed provisions, and the focus on effects on competition as the cornerstone of the offence is salutary, along with recognition that certain types of behaviour should not be punished by an overly broad interpretation of the provisions.

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## Other Matters

### A. Canadian Competitiveness Council

The Panel recommended that “the federal government should establish as expeditiously as possible an independent Canadian Competitiveness Council under the Minister of Industry.”<sup>69</sup> As conceived, the Competitiveness Council (the “Council”) would serve as an advocate for Canadian competitiveness, have the power to publish and advocate its findings, and would have independence in setting its own research agenda.

Our view is that the creation of the Council, coupled with an augmentation of the Bureau’s enforcement and technical analysis capabilities (also recommended by the Panel), would be worthwhile and help push the Canadian public policy debate on issues of competitiveness. The problem of capturing the public’s imagination, in the face of often diffuse benefits, and motivating collective action will not be overcome with the creation of the Council, but the move is likely to place issues of competitiveness more firmly on the government’s agenda.

While the Bill did not address this matter, it is unlikely it would be properly included in the Competition Act, and it will likely be effected through other policy mechanisms or discrete legislation, if at all.

### B. Administrative Monetary Penalties

The Panel recommended that the Competition Tribunal be granted the power to order administrative monetary penalties (“AMPs”) of up to \$5 million for violations of the abuse of dominance provisions of the Act.<sup>70</sup> The Panel did not propose any other changes to the abuse of dominance provisions of the Act, save for repealing the so-called “Air-Canada amendments” that created special rules and penalties for a dominant air passenger service.<sup>71</sup> The Bill went beyond the recommendations and grants the Competition Tribunal the power to administer AMPs “in an amount not exceeding \$10,000,000 and, for each subsequent order...an amount not exceeding \$15,000,000.”<sup>72</sup> The Air-Canada amendments are also repealed through the Bill.

The granting of AMPs as an enforcement tool to the Competition Tribunal does not immediately reveal itself as a dramatic shift from the current legislative scheme, although on closer inspection the change is in fact fundamental. Our view is that the existing statutory framework was predicated on a presumption that reviewable practices are lawful unless they have significant anti-competitive effects. Where these effects are established, the existing abuse of dominance provisions provide for remedial orders and other injunctive remedies. The lack of punitive sanctions associated with a finding of anti-competitive effects reflects the complexity of evaluating the economic realities in abuse of dominance situations, and the overriding concern that an overly broad prohibition on behaviour that is reviewable under the Act would have an unacceptable chilling effect on benign or pro-competitive conduct. In light of the lively current

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debate on the potential for unilateral conduct laws to chill competitive behaviour, and the lack of clear evidence that the Canadian abuse of dominance regime is somehow fundamentally flawed, we would question the Panel's recommendations with respect to AMPs and the Bill's zealous implementation of those recommendations.<sup>73</sup>

## Conclusion

Through the Bill, the government has enacted nearly all of the *Competition Act* amendments recommended by the Panel. The specific wording of the new provisions of the Act will have to be analyzed in detail to determine what nuances exist in the text implementing the Panel's proposals, and whether the implementing legislation is open to interpretations that are particularly harmful to the Panel's stated objectives. We remain concerned about the rapid implementation of several of the Panel's proposals which, in our view, may not serve to foster competition, or which could engender a prolonged period of uncertainty. Time will determine whether the recommendations we have supported and which have been implemented will have the salutary effects hoped for, and the extent of any damage that may occur in the case of those changes that we suggest may have been ill-advised.

## Notes

- <sup>1</sup> Competition Act, R.S.C. 1985, c. C-34.
- <sup>2</sup> Canada, Competition Policy Review Panel, *Compete to Win: Final Report – June 2008* (Ottawa: Public Works and Government Services Canada, 2008).
- <sup>3</sup> See for instance Paul K. Gorecki & W.T. Stanbury, *The Objectives of Canadian Competition Policy 1888–1983* (The Institute for Research on Public Policy, 1984) and Organization for Economic Co-Operation and Development (OECD), *The Role of Competition Policy in Regulatory Reform* (OECD, 2002).
- <sup>4</sup> See *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104 at paras. 84-91.
- <sup>5</sup> *An Act to amend the Competition Act and to make consequential and related amendments to other acts*, S.C. 1999, c.2.
- <sup>6</sup> Canada, Department of Finance, *The Budget Plan 2007: Aspire to a Stronger, Safer, Better Canada* (March 19, 2007) at 177.
- <sup>7</sup> See *supra* note 2 at 1.
- <sup>8</sup> The original terms of reference are posted on the Panel's website at [www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/h\\_00004e.html](http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/h_00004e.html) (November 1, 2008).
- <sup>9</sup> *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.).
- <sup>10</sup> Canada, Competition Policy Review Panel, *Sharpening Canada's Competitive Edge* (Ottawa: Industry Canada, 2007).
- <sup>11</sup> *Ibid.* at 2-3.
- <sup>12</sup> Regrettably, comments from several parties that would likely have brought a unique perspective to the deliberations were not included in the public record on account of their late submission (e.g. the Conference Board of Canada, the Canadian Auto Workers and Amazon.ca).
- <sup>13</sup> *An Act to amend the Competition Act and to make consequential and related amendments to other acts*, S.C. 1999, c. 2.
- <sup>14</sup> *Notifiable Transactions Regulations, SOR/87-348 as amended by SOR/2003-04.*
- <sup>15</sup> *Supra* note 10 at 25.
- <sup>16</sup> Following public consultations, the Competition Bureau published, on March 2, 2009, a *Bulletin on Efficiencies in Merger Review*, outlining its enforcement approach in this area.
- <sup>17</sup> *A Synthesis and Review of Recent Reform Proposals Regarding Canada's Competition Act - Discussion Paper by the Commissioner of Competition and Competition Bureau*, March 31, 2008 at 4.

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<sup>18</sup> Bill C-10 adopts this recommendation but curiously under the new section 90.1 of the Act, a reviewable practice covering agreements among competitors that lessen or prevent competition substantially, which would include many mergers, has no limitation period.

<sup>19</sup> Bill C-10 (*Budget Implementation Act, 2009*), ss. 437 (second stage additional information request) and 430 (limitation period).

<sup>20</sup> *Ibid.* at s. 436.

<sup>21</sup> *Ibid.*

<sup>22</sup> Joe Sims & Deborah P. Herman, "The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation" (1997) 65 *Antitrust Law Journal* 865.

<sup>23</sup> For a sample of the U.S. discussion surrounding HSR, see *ibid.*

<sup>24</sup> *Supra* note 17 at 17-18.

<sup>25</sup> *Canada (Commissioner of Competition) v. Labatt Brewing Company Limited* [2008] F.C. 59 (F.C.T.D.).

<sup>26</sup> *An Act for the Prevention and Suppression of Combinations formed in Restraint of Trade*, R.S.C. 1889, c.41.

<sup>27</sup> This line of analysis, which stemmed from a suggestion by the Supreme Court of Canada in *Howard Smith Paper Mills Ltd.* [1957] S.C.J. No. 24, [1957] S.C.R. 403, could have led to a requirement to demonstrate the existence of a monopoly, or of a virtual monopoly, in order for the undue-ness requirement to be satisfied. Statutory reforms in 1976 foreclosed this possible interpretation.

<sup>28</sup> B.A. Facey & D.H. Assaf, *Competition & Antitrust Law, Canada and the United States* (Markham, Ontario: LexisNexis, 2006) at 143.

<sup>29</sup> 15 U.S.C. §§ 1-7.

<sup>30</sup> 15 U.S.C. §§ 12-27 and 29 U.S.C. § 52.

<sup>31</sup> 15 U.S.C. §§ 41-58.

<sup>32</sup> *Supra* note 28 at 143.

<sup>33</sup> Canadian Bar Association (National Competition Law Section), *Submission to the Competition Policy Review Panel* (January, 2008) at 4.

<sup>34</sup> *Ibid.* at 3.

<sup>35</sup> *Ibid.* at 4.

<sup>36</sup> American Bar Association, *Joint Submission of the American Bar Association Sections of Antitrust Law and International Law in Response to the Request for Comments by the Canadian Competition Policy Review Panel* at 2-3.

<sup>37</sup> Blakes LLP, *Submission to Competition Policy Review Panel* (January 11, 2008) at 5.

<sup>38</sup> Canadian Chamber of Commerce, *Easing the Burdens, Unleashing our Potential: Fostering Growth and Investment in the New and Changing Global Commercial Environment* (January 11, 2008) at 10.

<sup>39</sup> *Supra* note 2 at 17.

<sup>40</sup> *Supra* note 2 at 58.

<sup>41</sup> *Supra* note 2 at 59.

<sup>42</sup> *Supra* note 19 at s. 410.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Supra* note 19 at s. 429.

<sup>45</sup> Section 61 is also regarded by the Bureau as creating a *per se* offence for horizontal price fixing. See note 49, below.

<sup>46</sup> *Supra* note 33 at 4.

<sup>47</sup> An excellent overview of some of the reform proposals can be found in Michael Trebilcock, et al, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2003) at 125-130.

<sup>48</sup> P.L. Warner & Michael Trebilcock, "Rethinking Price-Fixing Law" (1993) *McGill Law Journal* 679; "Fixing Price-Fixing Laws" (1996) 17:1 *Can. Comp. Rec.* 48; see also *ibid.*

<sup>49</sup> While the Competition Bureau takes the position that section 61 has application to agreements that are solely between competitors and section 61 has been used this way in some prosecutions, this point is arguable in light of the section's legislative history and in the context of other parts of section 61 which make it clear that it is applicable to a vertical relationship; no court has expressly addressed whether section 61 applies to

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purely horizontal price fixing or maintenance.

<sup>50</sup> *Report to the Minister of Justice of the Committee to Study Combines Legislation* (Ottawa: Queen's Printer, 1951).

<sup>51</sup> For a discussion of the history and application of the price maintenance provisions see *supra* note 47 at 399; see also James B. Musgrove, ed., *Fundamentals of Canadian Competition Law* (Toronto: Thomson Carswell) at 61.

<sup>52</sup> For an overview of the modern economic theory on price maintenance, see *supra* note 47 at 373-399.

<sup>53</sup> J. Anthony VanDuzer & Gilles Paquet, *Anti-competitive Pricing Practices and the Competition Act: Theory, Law and Practice* (October 22, 1999).

<sup>54</sup> House of Commons Standing Committee on Industry Science and Technology, *A Plan to Modernize Canada's Competition Regime* (Ottawa, April 23, 2002).

<sup>55</sup> For a discussion on private access in the context of price maintenance see Shuli Rodal & Geoffrey Macdonald, "Price Maintenance - Examining the Proposals for Reform" (Paper presented to the Canadian Bar Association 2008 Annual Fall Conference on Competition Law, September 19, 2008) [unpublished].

<sup>56</sup> *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

<sup>57</sup> 15 U.S.C.A. §§ 1-7.

<sup>58</sup> *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* 127 S. Ct. 2705 (2007).

<sup>59</sup> Many American states have antitrust laws and resale price maintenance may still remain as a *per se* offence in some of them. Many state Attorneys' General have expressed their opposition to the decision in *Leegin*. See Dan Slater, "The Legacy of *Leegin*: Price-Fixing, the Comeback Kid of Antitrust Law" *The Wall Street Journal Law Blog* (August 18, 2008) online: [blogs.wsj.com/law/2008/08/18/the-legacy-of-leegin-price-fixing-the-comeback-kid-of-antitrust-law/](http://blogs.wsj.com/law/2008/08/18/the-legacy-of-leegin-price-fixing-the-comeback-kid-of-antitrust-law/).

<sup>60</sup> *Supra* note 33 at 3.

<sup>61</sup> The Canadian Real Estate Association, *Submission to the Competition Policy Review Panel* (January 11, 2008).

<sup>62</sup> *Supra* note 2 at 61.

<sup>63</sup> *Supra* note 2 at 58.

<sup>64</sup> *Supra* note 19 at s. 417.

<sup>65</sup> *Ibid.* at s. 426.

<sup>66</sup> *Ibid.* at s. 431.

<sup>67</sup> *Ibid.* at s. 426.

<sup>68</sup> See for instance an overview in Alan Devlin, "On the Ramifications of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*: Are Tie-Ins Next?" (2008) 56 *Cleveland State Law Review* 387.

<sup>69</sup> *Supra* note 2 at 133.

<sup>70</sup> *Ibid.* at 17.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Supra* note 19 at s. 428.

<sup>73</sup> For an overview of the current debate see A. Neil Campbell & J. William Rowley "The Internationalization of Unilateral Conduct Laws – Conflict, Comity, Cooperation and/or Convergence?" (2008) 75 *Antitrust Law Journal* 267.