Submission on

Anticompetitive Pricing Practices and the Competition Act: *Theory, Law and Practice*

[00-23]

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

May 2002

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PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved by the Executive Officers as a public statement by the National Competition Law Section of the Canadian Bar Association.

Submission on *Anticompetitive Pricing Practices and the* Competition Act: *Theory, Law and Practice*

I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the Section) appreciates the opportunity to respond to the October 22, 1999 report by J. Anthony VanDuzer and Gilles Paquet entitled *Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice* (*the Report*).

The Report was prepared at the request of the Commissioner of Competition (the Commissioner) pursuant to certain terms of reference.[1] The Section notes that the terms of reference were limited to:

> *some* of the provisions of the *Competition Act* dealing with anticompetitive pricing practices by suppliers and powerful competitors and the practices and procedures of the Competition Bureau relating to these provisions.[2] [emphasis added]

Accordingly, the Report does not directly address substantive, procedural or enforcement issues respecting other important provisions of the *Competition Act* (the *Act*).

We welcome the increased role taken by the House of Commons Industry Committee in the ongoing development of Canadian competition law and policy. The Committee should

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1 Set out in Appendix 1 of the Report.

2 Paragraph 1 of the terms of reference. The provisions are in sections 50(1), 61 and 79 of the *Competition Act*.

note that the authors of the Report were not instructed to undertake a comprehensive review of competition law and enforcement. We trust that the Committee will look beyond the scope of the Report in its deliberations. In the meantime, this response is limited to the issues that were raised by the Report itself.

II. PRICE DISCRIMINATION

A. VanDuzer Report Summary

The Report sets out briefly[3] the legislative history and the apparent purpose of the principal price discrimination provisions in the *Act*.[4] It reaches the following conclusions about these criminal law provisions:

- The exclusion of transactions other than sale of articles is an apparent anachronism that fails to account for the broader range of transactions in the contemporary market and the growing importance of transactions involving services and intellectual property.[5]

- The price discrimination provisions are out of step with contemporary economic thinking and much of the rest of the *Act*, focus on protection of competitors rather than the competitive process, do not require an assessment of the effect on competition and do not even focus on truly discriminatory behaviour.[6]

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3 Report, p. 24.

4 Paragraph 50(1)(a) and subsection 50(2).

5 Report, p. 30.

6 *Ibid.*, p. 30.

- The provisions probably discourage pricing practices that are not harmful to competition.[7]

- The provisions impose unnecessary compliance and monitoring costs on business.[8]

- The prohibited conduct in these provisions is not inherently criminal and should not carry a "criminal stigma."[9]

- The Competition Bureau's June 1995 Discussion Paper on *Competition Act* Amendments advocated repeal of the provisions.[10] The Consultative Panel[11] agreed with the Bureau that these provisions should be repealed.

- The Price Discrimination Enforcement Guidelines[12] create leniency in the following four areas in a manner which appears to depart from the strict language of the *Act*:[13]
  - the meaning of "available";
  - the exemption of sales between affiliates;
  - the treatment of franchisees in a franchise system, who may be considered to be a single purchaser or " single economic unit"; and

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7 Report, p. 31.

8 *Ibid.*, p. 31.

9 *Ibid.*, 31.

10 The Bureau also recommended repeal of the prohibition on discriminatory promotional allowances, which is contained in section 51 of the *Competition Act*.

11 Established in 1995 in response to the Bureau's June 1995 Discussion Paper.

12 Published by the Competition Bureau in 1992.

13 Report, pp. 26-28.

- the application of a "not wilfully blind" test in place of the word "knowingly", without authority in the *Act* and in the face of a finding by a Restrictive Trade Practices Commission Inquiry that the standard was negligence.

B. Repeal Sections 50(1)(a) and 51

From these findings the Report then recommends that the criminal provisions in section 50(1)(a) be repealed in the next round of amendments. It suggests that section 79 (abuse of dominant position) could be used to deal with cases of price discrimination or that a new civil provision could replace section 50(1)(a).[14]

The Section supports the criticism of section 50(1)(a) contained in the Report. In our November 1995 submission concerning the Bureau's June 1995 Discussion Paper, we proposed that the price discrimination provisions be repealed and not replaced by any other provision.[15] We continue to be of this view. The price discrimination rule that exists is unsound because it:

- enacts a policy that confers no economic benefit,
- imposes unnecessary organisational and labour costs on suppliers, and
- would not be an effective remedy even if there were an economic or competition problem.

C. No Economic Benefit

The Section continues its view, as expressed at the pages 54-56 of its November 1995 submission, that:

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14 Report, Recommendations 2 and 3.

15 Canadian Bar Association, National Competition Law Section, *Response to the Proposed Changes to the* Competition Act, November 1995, pp. 54 to 57.

> ...we recognize that there is a substantial body of economic opinion which argues that price discrimination prohibitions do not promote the
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> efficiency of the economy as a whole.
>
> In *Canadian Competition Policy*: *A Legal and Economic Analysis*, (1987) Canada Law Book, Dunlop, McQueen and Trebilcock, the authors note:
>
> > [S]o great and economically costly are the pitfalls likely to be occasioned by unwisely drafted legislation on price discrimination, in relation to likely benefits, that some economists hold that no legislation at all might be the best of all practical options (p. 220)
>
> …In addition to their questionable economic merit, we note that there is no empirical evidence that the price discrimination laws in the *Act* actually do protect small or medium-sized enterprises. As the law allows volume discounts, permissible discounts may disadvantage smaller enterprises if sellers wish to grant discounts to larger purchasers. Indeed the provisions may even harm smaller, more vigorous enterprises in that discounts they might otherwise be capable of negotiating are rendered effectively unattainable by reason of their supplier's obligation not to discriminate.

D. Imposition of Unnecessary Costs

The Section repeats its concern, expressed at page 55 of its November 1995 submission, that:

> ...it is generally recognized among competition law practitioners that considerable organizational efforts are made, and expense is incurred by suppliers, in order to attempt to conform economically benign distribution and pricing arrangements to the price discrimination provisions. These efforts include, but are not limited to, structuring buying group arrangements. Our perception is that this effort represents a significant legal and administrative cost to suppliers throughout Canada, and that the requirements of these provisions do inhibit economically beneficial price reductions and flexible marketing arrangements.

The world is substantially different from 1935 when the price discrimination provision was first enacted. Advances in telecommunications and the increasingly rapid spread of information through the internet have made markets generally much more efficient. The recent rise of business-to-business and business-to-consumer internet-based services, many of which include automatic surveillance of on-line markets for the best available price on a real-time basis, facilitate the acquisition by small businesses and individual consumers

of goods at competitive prices. The price discrimination provisions of the *Act* should not fetter the availability of these advantages to Canadians.

E. Ineffective Remedy

The price discrimination provisions of the *Act* are directed against the conduct of *suppliers* to remedy possible problems created by the conduct of *buyers*. It is virtually impossible to prevent anti-competitive conduct by one party to a transaction in an effective manner by prohibiting acts of the other party. The Section stated at page 55 of its November 1995 submission:

> We would also note that the existence of laws which are of general application, but which are also uncertain in the degree of their enforcement, unfairly prejudices enterprises seeking to conform their conduct to the law.

While the Report pays little attention to section 51, it is subject to the same or similar criticisms and should be repealed along with section 50(1)(a).

F. Application of Section 79

The Report suggests that the competition rules applying to price discrimination should apply to:

- all products, including articles and services; and
- all forms of transactions, not just sales;

should not apply to:

- cost-justified price differences; or
- price differences that are temporary or in response to competitive prices; and

should take into account:

- the supplier's market power; and
- the competitive effects of the price discrimination.[16]

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16 Report, Recommendation 1.

With the exception of cost-justified price differences, these suggestions are nothing more than a statement that price discrimination should be dealt with under section 79 of the *Act*. We agree that price discrimination should be dealt with under section 79 of the *Act*. However, we do not agree with the suggestion in the Report that an exception should exist for cost-justified price differences under section 79. Cost alone should not be a basis for exempting a supplier from price discrimination. In the market system, prices are only indirectly determined by cost. Furthermore, it is impractical to assign costs or determine the appropriate measure of costs, as the experience with predatory pricing shows. Furthermore, price differences that have any reasonable or rational business basis should not be subject to legislative prohibition. Section 79 allows the Competition Tribunal to take this criterion into account both in its "anti-competitive effects" requirements and in the discretionary nature of its remedy provision.

The Report states that the exclusion of transactions other than sales of articles is an apparent anachronism. The authors state that this fails to take account of the broader range of transactions in the contemporary market and the growing importance of transactions involving services and intellectual property.

In our view, price discrimination in 1935 was only perceived to be a problem with respect to the sales of articles. However flawed the 1935 legislation was, it was intended to remedy the apparent limited scope of the problem. There is no evidence that price discrimination is a problem beyond the original concern in 1935. Indeed, experience since 1935 has failed to establish that the original concern was justified. Therefore, there is no basis to extend price discrimination to other transactions or to services.

In addition, it would be problematic to apply price discrimination rules to services. It is virtually impossible to compare between services on an "apples to apples" basis. Compared to articles, services that are sold by a particular supplier to competing businesses tend to be more specific to the purchaser. Competing purchasers of services

frequently want different qualities and types of services from a particular supplier, and consequently different prices would be justified in all such cases.

The Report suggests that not all transactions between affiliates should be excluded.[17] In our view there is no basis for considering sales between affiliates when considering sales to competing customers. From a competition policy point of view, it is incidental whether a business is organised into divisions or corporate affiliates. The *Competition Act* contains express affiliate exemptions for conspiracy,[18] bid-rigging[19] and price maintenance.[20] If price discrimination remains as a criminal offence, there should be an express exemption that transfers of property between affiliates would not be considered as a sale under the provision.

G. Price Discrimination Enforcement Guidelines

The authors of the Report appear not to think that any amendment is required to section 79 of the *Act* to deal with truly anti-competitive price discrimination.[21] However, they suggest that the Price Discrimination Enforcement Guidelines (the Guidelines) be amended to allow section 79 to apply to price discrimination.[22]

We agree that the Guidelines need to be rewritten but not until legislative amendments are made. If sections 50(1)(a) and 51 were repealed, as we have suggested, then only Recommendation 4(a) needs to be implemented. If any form of free standing price

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17 *Ibid.*, pp. 32-33.

18 Subsection 45(8).

19 Subsection 47(3).

20 Subsection 61(2).

21 The language of the Report's recommendations 1-4 does not suggest any amendment to section 79.

22 Report, Recommendation 4.

discrimination legislation remains, the Guidelines will need to reflect the relationship between that legislation and section 79.

RECOMMENDATION:

1. The National Competition Law Section of the Canadian Bar Association recommends that:

- **Sections 50(1)(a) and 51 be repealed;**
- **Section 79 be used to deal with price discrimination issues; and**
- **The Price Discrimination Enforcement Guidelines be rewritten after any legislative amendments are made.**

III. PREDATORY PRICING

A. VanDuzer Report Summary

The Report makes the following salient points with respect to the predatory pricing provision of the *Act* (paragraph 50(1)(c)):

- The provision is potentially very broad and is in conflict with economic analysis of predation, given that it protects all competitors, regardless of the overall effect on competition or efficiency.[23]

- Dealing with predation under section 79 would remedy this shortcoming by imposing a market power test and an assessment of the effect on competition.[24] However, a specific methodology for dealing with market power in section 79 predation cases would need to be developed, as would an appropriate remedial

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23 *Ibid.*, p. 75.

24 *Ibid.*, p. 75.

approach for the Competition Tribunal (the Tribunal) to effectively deal with predation.[25]

- The Guidelines may have set a higher standard than is appropriate in practice. They do not address the challenges of the new economy or the possible application of the newer theories suggesting a wider array of situations in which predation may be present.[26]

- Finally, there is reason to be concerned about the lack of enforcement of the predation provision by the Bureau. The Bureau's case selection criteria appear to disfavour predation cases and the lack of certainty in the law suggests that the Bureau should seek to initiate predation cases more aggressively.[27]

B. Response to the Report's Recommendations

The Report makes five recommendations[28] with respect to predatory pricing, each of which the Section comments on.

i) The Report's Recommendation 5

> In order to target anti-competitive conduct accurately, competition rules dealing with predatory pricing should take into account:
>
> a. the market power of the alleged predator including the prospect for the predator to recoup the costs of its low pricing policy;
> b. the degree to which the predator is selling below its costs; and
> c. evidence of predatory intent.

The Section agrees with this recommendation.

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25 *Ibid*, p. 76.

26 *Ibid*, p. 76.

27 *Ibid*, p. 77.

28 *Ibid*, pp. 83 and 84.

ii) The Report's Recommendation 6

> Predatory pricing should not be a criminal offence but should be subject to civil review

The Section submits that predatory pricing might be continued as a criminal offence in those circumstances where actual predatory intent exists, although the likelihood of criminal enforcement is probably very low. The Section disagrees with the Report's conclusion that predation is not an inherently criminal activity.[29] Criminal liability could apply where predation is conducted with the intent to eliminate a competitor or substantially lessen competition. The application of the provision by the courts in Canada supports this view. In the only two cases where convictions were entered, the courts found that the accused had the requisite subjective intent akin to true criminal *mens rea*.[30]

We submit that it would be inconsistent to decriminalize paragraph 50(1)(c) to the extent suggested by the Report, given that the intent required for predatory pricing is at least equivalent to that required for conspiracy under section 45. Moreover, continuing to treat predatory pricing as a criminal offence where actual predatory intent exists would enable victims of the conduct to benefit from the right to recover damages pursuant to section 36 of the *Act*.

RECOMMENDATION:

2. The National Competition Law Section of the Canadian Bar Association recommends that paragraph 50(1)(c) be amended by replacing the phrase "or designed to have that effect" with the phrase "and designed to have that effect", so that section 50(1)(c) would state:

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29 *Ibid.*, p. 20.

30 *R v. Hoffman – La Roche Ltd. (Nos. 1 and 2)*, 33 O.R. (2d) 694, pages 707 to 709 (Ont. C.A.) and *R v. Perreault*, [1996] R.J.Q. 2565, (Qué. S.C.).

> **"engages in a policy of selling products at prices which are unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, and designed to have that effect."**

The Section also believes that predatory pricing should normally be subject to civil review – where predatory intent is alleged, and where it is not proven. We note that paragraph 78(i) applies to predatory pricing when it is conducted "for the purpose of disciplining or eliminating a competitor". It might be argued that paragraph 78(i) requires an intent similar to that which we have suggested should be required for the criminal provision. However, the Tribunal has consistently found that the words "for that purpose" and "with the object of" in paragraphs 78 (a) to (i) do not carry the same subjective intent which we suggest should be required for the criminal provision.[31] Rather, the Tribunal has clearly distinguished the "purpose" requirement of section 78 from criminal subjective intent. The Tribunal found that the determination of whether an alleged anti-competitive act falls within the purview of section 78 turns on:

a) the nature and purpose of the acts and their effect on the relevant market, taking into account the commercial interests of both parties and the resulting restriction on competition;[32]

b) the inference that parties are deemed to intend the effects of their actions in the absence of convincing evidence to the contrary;[33] and

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31 *Canada v. NutraSweet* (1990) 32 C.P.R. (2d) 1 (C.T.), pp. 34 and 35; *Canada v. Laidlaw Waste Systems* (1992) 40 CP.R. (3d) 289 (C.T.), pp. 334 and 342 and *Canada v. D. and B. Companies* (1995) 64 C.P.R. (3d) 216 (C.T.) p. 257.

32 *D. and B. Companies*, p. 257 and *Canada v. Tele-Direct (Publications) Inc. et al.* (1997), 73 C.P.R. (3d) 1 (C.T.), p. 179.

33 *Laidlaw*, p. 343 and *D. and B. Companies*, p. 257.

c) the existence or non-existence of legitimate efficiency arguments and business justifications.[34]

iii) The Report's Recommendation 7

> Civil review could be accomplished under the abuse of dominance provision, section 79, in a manner consistent with recommendation 5, but revision of the criminal predatory pricing provision, section 50(1)(c), should be considered in the next round of amendments to the *Competition Act*.

The Section agrees that civil review of predatory pricing could occur under the abuse of dominance provision. We recommend amending section 78 to add predatory pricing, as described in substance in recommendation 5, to the definitions of anti-competitive acts. Section 78(i), as presently drafted, probably does not apply to some forms of predatory pricing due to the use of the words "acquisition cost".

RECOMMENDATION:

3. The National Competition Law Section of the Canadian Bar Association recommends amending section 78(i) to state: "selling products at a price lower than average variable cost for the purpose of disciplining or eliminating a competitor."

The Report does not make a specific recommendation with respect to paragraph 50(1)(b). Clarifying the law with respect to paragraph 50(1)(a) and 50(1)(c) but not with respect to the closely related paragraph 50(1)(b) would be anomalous.

We submit that paragraph 50(1)(b) is only a complement to paragraph 50(1)(c) and is designed to prohibit a firm from subsidising its predatory conduct in one geographic market by raising its prices in other geographic markets. This has been found to have occurred

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[34] *D. and B. Companies*, pp. 270-271 and *Tele-Direct*, pp. 235 and following.

in at least one instance.[35] As presently drafted, paragraph 50(1)(c) may not capture such conduct.

Moreover, repealing paragraph 50(1)(b) would deprive victims of the right to recover damages pursuant to section 36 of the *Act* in those geographic markets where prices are artificially inflated.

RECOMMENDATION:

4. For the same reasons given for amending paragraph 50(1)(c), the National Competition Law Section of The Canadian Bar Association recommends that paragraph 50(1)(b) be amended to provide that predatory intent must be proven by replacing the phrase "or designed to have that effect" with "and designed to have that effect".

In addition, the prohibited conduct under 50(1)(b) will typically accompany predation in another market. It would therefore be consistent to require at paragraph 50(1)(b) that the products are being sold in that other market at prices "unreasonably low" as is required by paragraph 50(1)(c).

RECOMMENDATION:

5. To accomplish this, the National Competition Law Section of the Canadian Bar Association recommends that paragraph 50(1)(b) be amended by replacing the phrase "engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada" with "engages in a policy of selling products at prices unreasonably low in any area of

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35 *R. v. Perreault, supra*.

Canada while exacting higher prices for the sale of the products elsewhere in Canada", so that section 50(1)(b) would state:

"engages in a policy of selling products at prices which are unreasonably low in any area of Canada while exacting higher prices for the sale of the products elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor, and designed to have that effect."

iv) The Report's Recommendation 8

The *Predatory Pricing Enforcement Guidelines* should be revised to:

a. provide guidance regarding the application of the abuse of dominance provision, section 79, to predatory pricing, including an analytical framework for the assessment of market power and competitive effect under section 79;

b. expand the discussion of how firms may create strategic barriers to entry by their behaviour, such as by creating a reputation for predation, to reflect current economic thinking regarding the broader range of circumstances in which predation may occur; and

c. provide guidance on the application of the Guidelines to industries most affected by the accelerating pace of innovation and the other characteristics of the new economy.

The Section agrees with recommendation 8(a).

The Section agrees with recommendation 8(b) in that it would be beneficial to have a better understanding of the Competition Bureau's views with respect to the strategic predatory behaviour. The actual law with respect to such behaviour should continue to be developed in the courts or the Competition Tribunal.

The Section agrees with recommendation 8(c). The application of the law regarding predatory pricing – not to mention most other substantive provisions in the *Competition Act* – is considerably less certain in the case of information-economy industries than in traditional manufacturing, distribution, retailing or service industries. There is a very

substantial risk that without better guidance on the application of the *Competition Act* to developing industries, pro-competitive efficiency-enhancing activity will be discouraged or impaired.

In particular, guidance on the law regarding predatory pricing is needed in the following areas:

- the analysis regarding barriers to entry in technology/information markets,
- the extent to which network effects may create barriers to entry (in addition to having positive efficiency effects),
- the amplification of first-mover advantage through the use of low, zero or negative pricing,
- the tension between the efficiencies and barriers to entry created by standard setting, and
- product and geographic market definition in the case of internet sales (e.g. does the product market include other retail channels of distribution, and whether it does or not, how is the geographic market properly defined).

v) The Report's Recommendation 9

> The bureau should consider adopting a more aggressive approach to initiating formal enforcement actions in predation cases, taking due account of budgetary implications and competing priorities.

The Section recommends that the Bureau's approach to the enforcement of the criminal provisions of the *Act*, including the predatory pricing provision, be reconsidered in light of the Section's general comments regarding enforcement set out below in section V of this submission.

The Section also agrees with Recommendation 9 to the extent that the law concerning predatory pricing will continue to languish if enforcement proceedings are not brought by the Competition Bureau on a more regular basis.

IV. PRICE MAINTENANCE

In this section, we deal first with general comments on the analysis and findings in the Report related to vertical price maintenance (VPM). We then respond to the specific recommendations made with respect to VPM in the Report. The discussion below must be distinguished from horizontal price maintenance, which we submit should remain exclusively a criminal offence – that is, enforced in a manner consistent with section 45 of the *Act*.

A. Analysis and Findings of the Report Related to Vertical Price Maintenance

The Report provides a well-balanced analysis of the VPM issue, particularly compared to its current treatment under the *Act*, which is focussed on traditional customer-oriented concerns. Since its introduction to Canadian competition law in 1951, with amendments occurring in both 1960 and 1976, the law of VPM largely has been driven by a customer orientation. It has been based on the freedom of the customer to set its resale prices independent of influence by its supplier.

More recent economic theories, canvassed to some extent in the Report,[36] focus on efficiency-based reasons for suppliers engaging in VPM. The Report explores the fundamental economic question of why a supplier would seek to influence upwards the downstream price of the product and thereby possibly reduce the quantity demand for the product, once a supply arrangement with the seller of its product had been completed.[37] This is an inquiry which, in turn, leads to an analysis of legitimate supplier-oriented considerations related to product distribution.

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36 Report, pp. 14, 15 and 46.

37 *Ibid.*

Having acknowledged the merits of both supplier- and customer-oriented considerations in the context of VPM, the Report then focuses on identifying the market parameters which might be addressed in an effort to distinguish between anti-competitive VPM and VPM which may be justified on efficiency grounds. There is extensive literature that addresses a variety of efficiency-based justifications for VPM, some of which are referred to in the Report and merit further consideration.[38]

We believe, however, that the Report pays an insufficient amount of attention to VPM, relative to other pricing practices, such as predatory pricing and price discrimination. This is particularly disappointing considering that the Competition Bureau has enforced section 61 vigorously over the years. For example, it would have been helpful for the Report to have included a more detailed comparative analysis of the treatment of VPM in the United States and Europe. Compared to other jurisdictions, VPM under the Canadian *Act* appears to be situated at or near the "high water mark". Suppliers in the United States, for instance, enjoy considerably more flexibility in the context of VPM due largely to the operation of the *Colgate* doctrine.[39] Among other things, this doctrine enables a seller to unilaterally maintain prices and refuse to deal with price discounters. This is an interesting contrast, considering the far more stringent treatment of price fixing and other anti-competitive horizontal arrangements in the United States than under section 45 of the *Act*. Other jurisdictions, such as the United States, implicitly recognize the merits of efficiency-based justifications for VPM.

B. Response to Recommendations in the Report

i) The Report's Recommendation 10

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38 *Ibid.*

39 *U.S. v. Colgate & Co.*, 250 U.S. 300 (1919).

> In order to target anti-competitive conduct accurately, competition rules dealing with vertical price maintenance should take into account:
>
> (a) the market power of the supplier, including the availability of alternative sources of supply, and
>
> (b) the competitive effects of the price maintenance, including any efficiency based explanations.

Traditional competition law theory suggests that conduct inherently anti-competitive, with no pro-competitive prospect, should be impugned regardless of the market power of the supplier and regardless of the competitive effects of the conduct in issue. Since its introduction into Canadian competition law, this has been the treatment accorded to VPM. While certain case law may suggest otherwise, the strict language of section 61 makes VPM a *per se* criminal offence under the *Act*. As such, VPM falls into the same category of criminal offences as bid-rigging.

Once competitively neutral or pro-competitive explanations for a party to engage in VPM are acknowledged, some form of "market test" should be introduced into the statutory provisions. Having said that, of the two considerations raised in Recommendation 10 (a) and (b), we submit that 10(b) – related to the competitive effects of the price maintenance – is the more important. From a practical perspective, it is unlikely that any attempt to engage in VPM will have any bearing in the market unless a party with a minimum threshold level of market power engages in such conduct. Having said this, it is theoretically possible for price maintenance to have an anti-competitive effect without it being engaged in by a party with market power. For example, a retailer could enter into a contract with a supplier who dictates the resale price in the supply contract without any efficiency-based justification for doing so. This may be anti-competitive without involving a supplier that necessarily has market power.

The challenge facing the introduction of flexibility into the VPM provisions of the *Act* is to not have the pendulum swing too far in favour of recognising efficiency-based justifications for VPM. In other words, the challenge is striking the appropriate balance between

legitimate customer- and supplier-oriented issues. In this regard, we submit that the traditional test under the *Act* of assessing whether conduct "will or will be likely to prevent or lessen competition substantially in any market" should be imported into section 61.

ii) The Report's Recommendation 11

> Vertical price maintenance should not be a criminal offence but should be subject to civil review.

In light of the scope for legitimate efficiency-based justifications for engaging in VPM, there would appear to be a reasonable impetus for shifting this provision from being a criminal offence to being subject only to civil review. In light of the history of this provision, however, this may be too drastic an amendment to the legislation at this time.

As an alternative to a complete shift away from criminal treatment, VPM could be converted to a hybrid offence, along the lines that misleading advertising has been treated under the *Act* since the enactment of amendments in 1999. This would raise the problem of distinguishing between those instances where the conduct would be pursued as a criminal offence and those where it would be pursued as a practice subject to civil review. Only egregious cases would be pursued as a criminal offence where an efficiency based justification would not be appropriate.

iii) The Report's Recommendation 12

> Civil review could be accomplished under the abuse of dominance provision, section 79, in a manner consistent with recommendation 10, but revision of the criminal price maintenance provision, section 61, should be considered in the next round of amendments to the *Competition Act*.

The Section agrees with this recommendation to consider amending section 61 of the *Act* in the next round of amendments. Some important reasons for doing so have been raised above.

Having said this, creating a civil review regime for VPM in the context of abuse of dominance under section 79 of the *Act* may set the review threshold inordinately high.

Requiring a party to meet the requirement of dominance under section 79 could be too extreme an amendment in favour of supplier oriented considerations. It fails to recognize the genuine scope for anti-competitive VPM. However, the Tribunal has not been overly concerned with a high standard for substantial or complete control once market power is evident.

iv) The Report's Recommendation 13

> Consideration should be given to the development of guidelines regarding the application of section 79 to price maintenance cases, including an analytical framework for the assessment of market power and competitive effect under section 79.

We agree with this recommendation to develop guidelines regarding the analytical framework for the assessment of market power and competitive effects related to VPM. Having said that, for the reasons stated above, this should not occur in the context of section 79. Guidelines should be developed within the VPM specific provisions of the *Act*.

v) The Report's Recommendation 14

> Consideration should be given to developing guidelines to address the relationship between the current criminal provision, section 61, as it applies to horizontal price maintenance, and section 45, dealing with conspiracies and agreements to lessen competition.

Many commentators have noted the inconsistency between section 45 and horizontal price maintenance under section 61.[40] Reconciling this inconsistency would be best accomplished by amending section 61 so that it does not apply to horizontal price maintenance. We note that horizontal pricing arrangements are to be considered in the next round of proposed amendments to the *Act*.

V. GENERAL COMMENTS

A. The Enforcement of the Pricing Provisions

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40 For example, see p. 46 and footnotes 214 to 217 of the Report.

i) Summary of the Report's Analysis Respecting Enforcement

The Report discusses at some length[41] the Bureau's enforcement process and the record of the criminal pricing provisions of the *Act*.[42]

The Report makes the following observations about the adequacy of the Bureau's enforcement activity:

- The relative absence of formal enforcement proceedings raises several concerns regarding the certainty and, ultimately, the effectiveness of the law. More formal enforcement proceedings would force the courts and the Tribunal to progressively refine the law, making clear its appropriate application as well as signalling the seriousness of the Bureau's intent to enforce it. More cases would also expose the weaknesses in the law, which would, in turn, be an important catalyst for law reform. In addition, increasing certainty would encourage interest in private actions under section 36 of the *Act*;[43]

- Bringing some minimum number of cases is essential if the private sector is to regard enforcement activities as a credible threat and an incentive to comply with the law. Formal proceedings are needed in order to demonstrate the seriousness of the Bureau's intent to enforce the *Act* and ensure that voluntary compliance strategies are effective;[44]

- The lack of enforcement activity creates a disjunction between the expectations of people complaining to the Bureau about pricing practices and what the Bureau is

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41 Report, pp. 54 to 70.

42 Paragraphs 50(1)(a), 50(1)(b) and subsection 61(1).

43 Report, p. 70.

44 *Ibid.*

prepared to deliver. This is most serious in relation to price discrimination and predatory pricing, where the complete absence of formal enforcement actions opens the Bureau to the charge that it is choosing not to enforce the *Act*;[45]

- With respect to the price discrimination provision, it is impossible to draw any definitive conclusion regarding its lack of enforcement. Nevertheless, the present criminal provision is sufficiently defective that, in pursuing its general mandate to protect competition, it is appropriate for the Bureau to adopt a very conservative enforcement approach in dealing with the relatively few complaints made regarding discriminatory pricing.[46]

- With respect to the predatory pricing provision, it is impossible to draw any definitive conclusion regarding its lack of enforcement.[47] However, the authors suggest that the Bureau should seek to initiate predation cases more aggressively.[48]

- With respect to the price maintenance provision, an overall assessment of the Bureau's enforcement record of the provision could not be made despite a dramatic decline in the number of formal enforcement proceedings initiated by the Bureau. However, the Bureau's emphasis on alternative case resolution (ACR) as a substitute to formal enforcement seems appropriate.[49]

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45 *Ibid.*, p. 71.

46 *Ibid.*, p. 74.

47 *Ibid.*, p. 77.

48 *Ibid.*, p. 77.

49 *Ibid.*, pp. 78, 79.

- Generally, formal enforcement may be useful in relation to pricing practices. For guidelines and other voluntary compliance strategies to be successful, they must be accompanied by formal enforcement activity.[50]

ii) The Report's recommendation respecting enforcement

While the Report discusses at length the Bureau's lack of enforcement activity of the pricing provisions, it fails to make recommendations about enforcement. However, the essence of Recommendations 1 to 14, respecting price discrimination, predatory pricing and price maintenance, is to abandon criminal enforcement altogether, and to have the Bureau use its resources to bring such practices to the Tribunal.

iii) Response to the Report's recommendation respecting enforcement

The Section generally agrees with the Report's *observations* that enforcement of the pricing provisions is inadequate. However, it fails both to *identify* the reasons for this inadequacy and to *recommend* an effective remedy. Essentially, our disagreement with the Report's recommendations respecting enforcement lies in the belief that criminal enforcement of the pricing provisions should not be entirely abandoned. The remainder of this section of our submission examines the criminal enforcement record, identifies reasons for the inadequate enforcement, and recommends a criminal enforcement model that will restore functionality to those pricing provisions identified earlier as requiring criminal enforcement.

Over the last 20 years, there have been very few contested prosecutions or convictions under *any* of the criminal provisions of the *Act*. In particular there have been:

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50 *Ibid.*, p. 81.

- Twelve contested conspiracy prosecutions under section 45 since 1980,[51] all of which resulted in a discharge or acquittal except for one which resulted in a conviction[52] and one other which resulted in a committal.[53] All of the cases, except for one,[54] involved alleged conspiracies in local or provincial markets.

- Three consent guilty pleas for price discrimination under para. 50(1)(a) since the enactment of the section in its present form in 1960.[55] No contested proceedings have occurred.

- Two contested prosecutions for geographic predatory pricing under para. 50(1)(b) since the enactment of the section in its present form in 1960,[56] one of which resulted in a conviction.[57]

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51 *R.* v. *Canada Packers* (1988), 19 C.P.R. (3d) 133 (Alta. Q.B.)
R. v. *Ecole de conduite Lauzon – Saguenay* (unreported, August 24, 1987, Qué. S.C.)
R. v. *Dave Spear Ltd.* (1986), 11 C.P.R. (3d) 63 (Ont. H.C.J.)
R. v. *B.C. Fruit Growers Ass'n.* (1985), 11 C.P.R. (3d) 183 (B.C.S.C.)
R. v. *Thomson Newspapers Ltd.*, (unreported, Dec. 8, 1983, Ont. H.C.J.)
R. v. *Metropolitan Toronto Tenants Ass'n.* (1984), 3 C.P.R. (3d) 233 (Ont. H.C.J.)
R. v. *Nova Scotia Pharmaceutical Society* (1993), 49 C.P.R. (3d) 289 (N.S. S.C.)
R. v. *Clarke Transport Canada Inc.* (1995), 130 D.L.R. (4th) 500 (Ont. Ct. (Gen. Div.))
R. v. *Bayda and Associates Surveys Inc.* (1997), 78 C.P.R. (3d) 203 (Alta Q.B.)
R. v. *York-Hannover Hotels Ltd.* (1986), 9 C.P.R. (3d) 440 (Ont. Prov. Ct.)
R. v. *S. Trenner* [1982] C.S.P. 1055 (Que. S.C.)
R. v. *Perreault* [1996] R.J.Q. 2565 (Qué. S.C.).

52 *R.* v. *Perreault, supra.*

53 *R.* v. *York-Hannover Hotels Ltd., supra.*

54 *R.* v. *Clarke Transport Canada Inc.*, *supra.*

55 *R.* v. *Simmons Ltd.* (unreported, October 15, 1984, Ont. Prov. Ct.), *R.* v. *Neptune Meter Ltd.* [1986] C.C.L. 7046 (Ont. Dist. Ct.) and *R. v. Commodore Business Machines Limited* (unreported, January 31, 1989, Ont. Dist. Ct.).

56 *R.* v. *Carnation Co.* (1969), 4 D.L.R. (3d) 133 (Alta. C.A.) and *R.* v. *Perreault*, *supra*.

57 *R.* v. *Perreault, supra*.

- Four contested predatory pricing prosecutions under para. 50(1)(c) since the enactment of the section in its present form in 1960,[58] two of which resulted in convictions.[59]

- A dramatic decline in price maintenance prosecutions under paras. 61(1)(a) and (b) since 1986.[60]

- One contested prosecution for inducing a supplier to engage in price maintenance under subsection 61(6), which resulted in a conviction.[61] There were two guilty pleas by consent in 1995.[62]

- Seven contested prosecutions for bid-rigging under section 47 since 1986,[63] only two of which resulted in convictions.[64] All prosecutions involved local or provincial markets.

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58 *R.* v. *Producers Dairy Ltd.* (1966), 50 C.P.R. (2d) 265 (Ont. C.A.)
R. v. *Hoffman-LaRoche Ltd.* (Nos. 1 and 2) (1981), 58 C.P.R. (2d) 1 (Ont. H.C.J.)
R. v. *Consumers Glass Co.* (1981), 57 C.P.R. (2d) 1 (Ont. H.C.J.)
R. v. *Perreault*, *supra*

59 *R.* v. *Hoffman-LaRoche Ltd., supra* and *R.* v. *Perreault*, *supra*.

60 Report, pp. 56 and 57.

61 *R.* v. *Carmichael* (1993) 52 C.P.R. (3d) 518 (Qué. C.A.).

62 *R.* v. *La Boutique L'Ensemblier Inc.* (unreported, October 16, 1995, Qué. S.C.) and *Rittenhouse Ribbons and Rolls* (Bureau press release of December 18, 1995, No. 7375).

63 *R.* v. *215626 Alberta Ltd.* (1986), 12 C.P.R. (3d) 53 (Q.B.)
R. v. *Ecole de conduite Lauzon-Saguenay*, supra
R. v. *York-Hannover Hotels Ltd.*, *supra*
R. v. JO-AD Industries Ltd. (unreported, March 30, 1994, Ont. Ct. (Gen. Div.)
R. v. *Bison Bus Ltd.* (unreported, June 23, 1995, Alta. Prov. Ct.)
R. v. *Dr. Hook Towing Services Ltd.* (unreported, December 14, 1995, Man. Q.B.)
R. v. *Hélicoptères Abitibi Ltée* (unreported, September 8, 1997, Qué. S.C.).

64 *R.* v. *York-Hannover Hotels Ltd.* and *R.* v. *Ecole de conduite Lauzon-Saguenay.*

While there have been relatively few *contested* cases, this does not necessarily mean that there has been a lack of enforcement of the *Act*. There has been extensive use of ACR and in some of these cases guilty pleas have resulted. Furthermore, enforcement of the *Act* is achieved through the case evaluation process by eliminating complaints that are not within the scope of the *Act*.

Other than discussing the impact of the Bureau's screening criteria on the enforcement of the pricing provisions, the Report offers very little insight on the practical realities of criminal law enforcement. In addition, the Report does not explain the institutional and policy reasons why there has been so much Bureau emphasis on accepting guilty pleas and ACR at the same time as there has been very little enforcement of *any* of the criminal provisions of the *Act* through contested proceedings. The Section believes that the lack of enforcement through contested proceedings has been influenced by the following institutional and policy factors that have developed since 1980:

1. An ADR and compliance posture adopted in 1986 was suited for the new civil provisions of the *Act*, but has been applied over time to the enforcement of the criminal provisions.

2. The application of the *Charter of Rights* to the criminal provisions since 1983 has made resort to the criminal provisions more cumbersome.

3. The possibility of prosecuting individuals for corporate conduct gives rise to a host of true criminal law issues beyond the realm of competition law policy and regulation, such as non-pecuniary remedies (probation, jail terms, community work), true *mens rea*, jury trials, immunity, personal liability and community standing issues.

4. Criminal prosecutions require a second deciding authority (the Attorney General of Canada) and various local criminal courts, as opposed to the civil provisions which can be entirely administered and enforced from the centre (i.e. by the Bureau and the Competition Tribunal).

5. The Bureau's largely unsuccessful contested prosecutions before local criminal courts has had a chilling effect on prosecutions.

6. The Bureau's case selection criteria favours enforcement action only in large national and international cartels, which are more easily and rapidly resolved through consent proceedings at the centre (i.e. the Bureau and the Federal Court).

7. Little incentive or support is provided to officers and prosecutors to build local and provincial market cases over a number of years and to actually try these cases in local criminal courts.

8. Because of the lack of contested cases, there has developed over time a shortage of officers, managers and prosecutors having actual experience in contested competition law prosecutions.

The above factors have naturally tilted the Bureau to focus on the enforcement of the civil provisions of the *Act*, while favouring the application of its criminal provisions only to those national or international cartels which have significant economic impact and which can quickly be resolved through proceedings at the centre. The emphasis in the last 10 years on proceedings against international cartels has diverted resources from the enforcement of the criminal provisions of the *Act* in local and provincial markets.

The case selection criteria, and other disincentives to prosecute local market cases as noted above, have resulted in fewer prosecutions. The Report, in effect, legitimises this trend by recommending movement of all of the criminal pricing provisions to the civil side

of the *Act*. Doing so would only amplify the factors that have tended to discourage enforcement of these provisions in local markets. The result would be to diminish the deterrent value of criminal corporate and personal liability. This in turn would likely be detrimental to the purpose of the *Act*, which is to maintain and foster a competitive market place in Canada. Moreover, it is not evident that the Tribunal at present has the resources or inclination to deal with local issues or a significant number of cases.

In our view the inadequacy of criminal enforcement in local and provincial markets, which was noted in the Report, can be overcome by the proper application of resources. It is paramount to successfully prosecute these offences to have a sound understanding of local markets (products and geographic markets), good knowledge of the participants and victims and familiarity with the local judiciary and bar. A centralized enforcement agency in which investigators and prosecutors are not encouraged or inclined to prosecute cases locally results in a situation where the local bars and judiciary are insufficiently exposed to prosecutions under the *Act* to properly appreciate their purpose or understand how they are to be dealt with.

In local market prosecutions, the extent of the anti-competitive conduct at issue cannot be fully appreciated and understood (in terms of product and geographic markets, number and nature of agreements, participants) until extensive interviews have been conducted over time and immunities from prosecution have been granted. Cases typically take years to develop before the full extent of the conduct or the time period during which it occurred becomes clear. Investigating and prosecuting cases from the centre thus results in a situation where investigators are naturally dissuaded from conducting extensive and ongoing evidence gathering and field work over time. Prosecutors are inclined to settle cases on a consent basis rather than building a case and fleshing out the issues through the use of formal powers or a preliminary inquiry.

Prosecutions under the *Act* in local markets also often involve markets and participants, which cannot be precisely defined at the outset of the investigation according to traditional

models. In most cases, the expert, investigator and prosecutor will only have a precise and useful understanding over time of the exact nature of the conduct and how the markets at issue have operated. This understanding often arises only after a preliminary inquiry has been held and/or after extensive "on the ground" field work has been performed. Investigations and prosecutions conducted from the centre consequently tend to draw premature conclusions at the outset based on insufficient knowledge of the local markets and the conduct at issue.

The model used in the administration and enforcement of federal narcotics laws suggests that a decentralized federal prosecution system can work well when the will and the resources are available. One of the essential components of such a system is that the investigators and prosecutors be situated in the local market areas where they can develop and prosecute cases more effectively over time.

If the Competition Bureau is not seen as enforcing competition laws in local markets, the provinces may find ways to regulate competition through regulatory codes respecting specific trades and industries. This would produce a fragmented and uncompetitive business environment in Canada, and is a result to be avoided if at all possible.

In summary, the Section submits that those pricing offences in the *Act* that are to remain criminal should be administered and enforced according to the model developed for the administration and enforcement of federal narcotics laws. The Section believes that a decentralized federal prosecution system for offences under the *Act* would work well in that investigators and prosecutors situated in the local markets could develop and prosecute cases more frequently and successfully than they do now.

B. Role of the Industry Committee

The Section welcomes the increased role of the Industry Committee in the ongoing development of competition law and policy. We are encouraged by the participation of the legislative branch in this development. In our view the Committee should consider

devoting resources to enable the members of the Committee to become familiar with the economic, legal and administrative aspects of competition law and policy. For example, the Committee may wish to retain research staff to prepare educational materials for Committee members and to provide analysis of legislative proposals to Committee members. In addition, the Committee could consider establishing a competition subcommittee to deal with competition law and policy issues on an ongoing basis and to analyze other legislative and policy issues in light of the continuing need for federal policy to encourage efficiency and competitiveness.

VI. CONCLUSION

We welcome the efforts of the Bureau to review the operation of the pricing provisions of the *Act*. In particular, we wish to thank the Committee for the opportunity to voice our concerns.

VII. SUMMARY OF RECOMMENDATIONS

The National Competition Law Section of the Canadian Bar Association recommends that:

1. **Sections 50(1)(a) and 51 be repealed;**
   Section 79 be used to deal with price discrimination issues; and
   The Price Discrimination Enforcement Guidelines be rewritten after any legislative amendments are made.

2. **paragraph 50(1)(c) be amended by replacing the phrase "or designed to have that effect" with the phrase "and designed to have that effect", so that section 50(1)(c) would state:**
   > **"engages in a policy of selling products at prices which are unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, and designed to have that effect."**

3. **section 78(i) be amended to state: "selling products at a price lower than average variable cost for the purpose of disciplining or eliminating a competitor."**

4. **paragraph 50(1)(b) be amended to provide that predatory intent must be proven by replacing the phrase "or designed to have that effect" with "and designed to have that effect".**

5. **paragraph 50(1)(b) be amended by replacing the phrase "engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada" with "engages in a policy of selling products at prices unreasonably low in any area of Canada while exacting**

higher prices for the sale of the products elsewhere in Canada", so that section 50(1)(b) would state:

> **"engages in a policy of selling products at prices which are unreasonably low in any area of Canada while exacting higher prices for the sale of the products elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor, and designed to have that effect."**