declined to define precisely what is to replace the *per se* illegality standard.[2] Under the Canadian Competition Act, resale price maintenance may still be considered "per se illegal" in the sense that tying in the United States is "per se illegal": in both instances adverse competitive effects must be shown so that it can be said that the practice is not really per se illegal.

Third, I understand that there currently is no private treble damage enforcement regime in Canada like there is in the United States, apart from a private regime to recover damages resulting from conduct like hard core price-fixing or bid-rigging that is criminal in nature. Nor, it seems, is there anything resembling our state enforcement regimes pursuant to which the states, as well as the federal government, can enforce not only their own antitrust laws but also enforce the federal antitrust laws as well. (I will refrain from commenting on whether these differences are good or bad; I will only observe that they exist.)

Fourth, our systems of appellate review also differ. Whereas in the United States, antitrust decisions in public and private cases are reviewed by one of 12 regional appellate courts and may also be reviewed by the United States Supreme Court, appellate review in Canada is more unitary and more closely resembles the system of appellate review that the European Commission employs. The latter appellate review is limited to the European Court of First Instance, to begin with, and the European Court of Justice subsequently. Similarly, in Canada the Competition Tribunal's decisions (though not, as Mr. Goldman has emphasized, the Competition Commissioner's decisions)[3] are

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[2] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007)).

[3] Goldman, *supra* note 1, at 15-25.

appealable only to the Federal Court of Appeal and thereafter to the Supreme Court of Canada.[4]

Some (but not all) of these differences may be discussed at length by the Hot Topics panel tomorrow. In the meantime, however, I would like to suggest to you that even if Canada did have a Section 5 analog, some of the differences that I just discussed might have a substantial effect on the way our Section 5 should be applied (and might limit it to the point that such a statute would arguably serve a much more limited purpose in Canada).

Let me begin by describing our Section 5 briefly. With a few amendments, Section 5 has been the Commission's organic statute since the Federal Trade Commission Act was enacted back nearly 100 years ago. It broadly prohibits, among other things, unfair methods of competition.[5] To be sure, sometimes those unfair methods of competition also violate the basic antitrust laws of the United States – the Sherman, Clayton, and Robinson-Patman Acts (though the latter is sometimes derided as not being a true antitrust statute). When that is the case, Congress is deemed to have incorporated those statutes into Section 5, meaning that the Commission has authority to enforce those statutes when it enforces Section 5. That much is settled.

The debate over Section 5's scope, however, concerns whether and under what circumstances Section 5 should extend to conduct that the other antitrust statutes do not cover. We know from our Supreme Court's decision in *FTC v. Sperry & Hutchinson*

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[4] *Id.* at 10.

[5] 15 U.S.C. § 45.

Co.,[6] that Section 5 goes beyond those statutes. There the Court observed that Section 5 authorizes the Commission "to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws."[7] In holding that Section 5 authorizes the Commission to go beyond the federal antitrust statutes, the Court interpreted Section 5 consistent with its text: after all, if Congress merely intended to authorize the Commission to enforce other federal antitrust statutes, it could have stated as much. It did not.

So how far does Section 5 go? In my view, the Commission must identify limiting principles to circumscribe Section 5's breadth. One of those limiting principles, in my view (and I think nearly all would agree), is that Section 5 should only be used to combat conduct that has an anticompetitive effect. If a party's conduct is not harming competition, then I believe there is no role for Section 5.

As another limiting principle, I have suggested that we should not use Section 5 as a "safety net" for situations when the Commission cannot prove an essential element of a Sherman Act claim.[8] It seems to me unfair, as well as unwise, to use Section 5 in those circumstances. But that limiting principle assumes that the law is settled that the element in question is, in fact, "essential" as a matter of law under controlling Supreme Court precedent or by agreement among our 12 regional federal appellate courts. That is

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[6] 405 U.S. 233 (1972).

[7] *Id.* at 239.

[8] J. Thomas Rosch, "Perspectives on Three Recent Votes," Remarks before the National Economic Research Associates 2006 Antitrust & Trade Regulation Seminar, Santa Fe, N.M. (July 6, 2006), *available at* http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf; J. Thomas Rosch, "The FTC's Section 5 Hearings: New Standards for Unilateral Conduct?," Remarks before the ABA Antitrust Section Spring Meeting, Washington, D.C. (March 25, 2009), *available at* http://www.ftc.gov/speeches/rosch/090325abaspring.pdf.

more likely to be the case in Sherman Act Section 1 cases than in Section 2 cases. There

OAG, the regional courts of appeals are in agreement as to what that law is. But absent those circumstances, it is hard to argue that Section 5 is simply being used as a "safety net."

Beyond that, however, there is room for legitimate debate about when Section 5 should be used. Should it be used, for example, only when there is a "gap" in the traditional antitrust statutory or case law that should be filled? There are such "gaps." One of them, most seem to agree, is an "invitation to collude" case. There is no agreement in that situation so there is no Section 1 violation. Moreover, since neither the firm extending the invitation nor the firm to whom the invitation is extended may have monopoly or near monopoly power, there is no Section 2 violation in that situation either (though our Fifth Circuit Court of Appeals somehow found a Section 2 violation in the *American Airlines* case[11]). A "gap" may also be said to exist in cases involving multiple exclusionary practices, no one of which, standing alone, may be sufficient to violate Section 2, but whose synergistic effect may create or maintain monopoly power. The case law of our regional federal appellate courts is inhospitable to such "course of conduct" claims under Section 2, but it cannot be said that the law permitting that kind of behavior by a firm with monopoly or near-monopoly power is "well forged." In fact, the Supreme Court's decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*,[12] arguably condemns it.

Apart from these "gaps," a separate and appropriate use of Section 5 may be in those numerous instances in which our Supreme Court has not definitively ruled on the

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[11] *United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984).

[12] 370 U.S. 690, 698-99 (1962) (observing that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after the scrutiny of each").

legality of the practice at issue, and the regional federal appellate courts are not in agreement.[13] Section 2 provides a good example. In the U.S., the Sherman Act prohibits monopolization, attempts at monopolization, and conspiracies to monopolize: that is the beginning and the end of the law. As a result, Congress has largely left to the court to define, through common law, what conduct by a monopolist is actually prohibited. And, because the Supreme Court has discretionary review and our 12 regional appellate courts are free to differ with one another, the law at the federal appellate level as to when a practice, if employed by a firm with monopoly or near-monopoly power, violates Section 2 is in disarray. It can be argued, for example, that that is true of loyalty rebates, bundled discounts, and various kinds of tying arrangements. In these cases, it is unclear whether conduct is permitted or prohibited by Section 2. Putting Section 2 to the side, however, if the Commission views the conduct in these cases as constituting an "unfair method of competition" that has anticompetitive effects, it may be appropriate for the Commission to use its Section 5 authority.

In contrast, my understanding is that there is considerably less ambiguity in Canada regarding the legality of various practices by a dominant firm. As I have stated, I believe the absence of this ambiguity is due, in significant part, to the fact that you have a unitary appellate system. However, I also think this absence of ambiguity is a product of two significant features of the Canadian Competition Act. First, the Act is much broader

of law that our Section 2 monopolization law has left to the courts. As a result, there is less ambiguity for the courts to sort out in the first place. As an illustration, because the Canadian Competition Act focuses more broadly on "abuse of a dominant position" as opposed to "monopolization," the Act draws no distinction between a firm with monopoly power "exploiting" its monopoly power on the one hand, and that firm engaging in exclusionary conduct on the other; instead, the Canadian Competition Act (as I understand it), prohibits both.[14] Likewise, the Competition Act specifically prohibits a host of defined acts, including certain types of price squeezes, exclusive dealing, and tying. The fact that Canada has a statutory framework governing an "abuse of dominance" that is both much broader and more specific than its U.S. Section 2 counterpart, in my view, underscores why there is less (if any) need for a Section 5-type statute in Canada.

Resale price maintenance may be another such example. And this gets me back

anticompetitive effects, there is arguably no reason for the Commission to force its claim into a questionable Section 1 box if Section 5 squarely prohibits the conduct.[15]

In Canada, by contrast, the need for Section 5 in this context would never arise. First, as a substantive matter, the statute itself arguably settles the matter. There is no need for the courts to resolve the question of under what circumstances resale price maintenance is anticompetitive. Second, as a procedural matter, Canada does not run the risk of the type of ambiguity that we must confront in the United States. In our appellate system, decisions from each of the 12 regional federal appellate courts are accorded equal weight unless and until the Supreme Court weighs in on an issue. As you can imagine, this creates considerable cacophony when it comes to difficult issues of antitrust law. There is reason to believe, for example, that the cacophony in the federal appellate courts' Section 2 jurisprudence will carry over into the post-*Leegin* resale price maintenance debate.

In contrast, such disagreement (and confusion for the business community) seemingly would not arise in Canada because under your system competition law can be settled definitively by only two courts. There is correspondingly less latitude for application of a statute like Section 5 in Canada – to the extent one use of Section 5 is to

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[15] One significant downside of the Commission proceeding under Section 5 in a post-*Leegin* resale price maintenance case is that the Commission would lose out on an opportunity to weigh in on the important debate over what standard should apply to analyze resale price maintenance claims under Section 1. The Commission took such an approach in *Nine West*, when we opined that, after *Leegin*, resale price maintenance agreements should be analyzed under a truncated rule of reason and found that Nine West lacked market power and therefore modified our consent decree. *See In the Matter of Nine West Group Inc.*d(Tf8.est Group b-.001f7(2 bP02 Tc7I.646 uskan)]Tp.7cn pric 3.97eegin)Tj/TT2 1 T

prohibit conduct that may or may not be covered by another antitrust statute, the lack of confusion in your unitary system probably obviates the need for a statute to serve that clarifying purpose. This is what I meant when I said that even if Canada had a statute like Section 5 it would not necessarily be applied in the same way that it can be applied in the United States.

Finally I'd like to describe one other difference in our jurisprudr

juries are in over their heads in private antitrust litigation (or cases brought by the states).[19]

The problem here, however, is that these Supreme Court decisions adversely impact *all* cases in which public antitrust enforcers proceed under the same statute as private plaintiffs and state enforcers, including, most significantly Sections 1 and 2 of the Sherman Act. The Commission can avoid implicating both of these concerns if it proceeds under Section 5: first, only the Commission (as divorced from private plaintiffs, for example), can proceed under Section 5 and, second, if the Commission proceeds under its Part 3 administrative process in a Section 5 proceeding, there is no role for the district courts or federal juries to play. Canada, by contrast, does not have to worry about the practical problems that have provoked these decisions and changes to the law because (1) it does not have a private or state enforcement regime, and (2) it has an expert Competition Tribunal that eliminates the role of a generalist district court or lay jury.

In a nutshell then, we have much to learn from each other about antitrust jurisprudence. But for better or worse, the substantive and procedural differences between our legal systems lead me to believe that Section 5 is not something that you

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[19] *See, e.g.*, *Twombly*, 550 U.S. at 558-59 (noting that "proceeding to antitrust discovery can be expensive" and that "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management'" because "threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those [summary judgment] proceedings"); *Billing*, 551 U.S. at 281-82 (noting that "antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries" and that "it will prove difficult for those many different courts to reach consistent results").

would clearly benefit from applying in conjunction with your application of the Canadian Competition Act.