The Price of a Dormant Provision: Revisiting Section 49 of the *Competition Act*

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Section 49 of the *Competition Act* (the "Act") is a criminal offence prohibiting agreements or arrangements between federal financial institutions with respect to interest rates, customer service charges, loans and other matters. The provision was transferred from the *Bank Act* in 1986 because the subject matter of the offence was generally related to competition law.[1] Contraventions of section 49 are punishable by imprisonment of up to five years and a maximum fine of $10 million.

In 1986, the *Banking Finance Law Review* published commentary on the impact of this new provision, warning that "[t]here should be some concern in banking circles" because the Act could now be contravened by banks engaged in separate but parallel conduct, such as where "[m]arket forces may cause competitive banks to respond to particular events in a similar fashion (for example, interest rate movements)."[2] Decades later, section 49 has proven to be a cause for concern, but for a different reason than the one predicted in 1986.

Reflecting on experience since the 1986 amendments, this paper argues that section 49 has proven to be (1) redundant, due to the co-existence of a conspiracy offence in section 45 in the Act; (2) dormant, due to the lack of enforcement and guidance issued by the Competition Bureau (the "Bureau"); (3) unfair, due to its discriminatory treatment of federal financial institutions vis-à-vis both provincially-regulated financial institutions and other commercial actors; and (4) costly, due to the superfluous constrains imposed on legitimate contracting practices. These constraints are particularly troubling at a time of significant disruption in the banking industry by non-traditional competitors. For these reasons, section 49 should be repealed or, at the very least, detailed enforcement guidance should be provided by the Bureau to provide certainty for federal financial institutions.

1. SECTION 49 IS REDUNDANT

The purpose of section 49 is to protect the public interest in preserving a competitive environment for basic financial instruments and services due to the importance of banks to the Canadian economy.[3] At the time that the provision

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[1] R.S.C. 1985 2nd Supp, c. 19, s. 34.

[2] Barry R. Campbell, "The Competition Act — The Special Case of Banks" (1987) 1 B.F.L.R. 225 at 226.