

**Submission on
Reform of Section 45 of
the *Competition Act*
(Conspiracy)**

**NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION**



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PREFACE

The Canadian Bar Association is a national association representing 38,000 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 as a public statement of the National Competition Law Section of the Canadian Bar Association.

Submission on Reform of Section 45 of the Competition Act (Conspiracy)

I. INTRODUCTION

There are divided views within the National Competition Law Section of The Canadian Bar Association (the CBA Section) regarding the necessity or wisdom of amending section 45 of the *Competition Act*¹ in the manner proposed by the House of Commons Standing Committee on Industry, Science and Technology (the Industry Committee) in its *Plan to Modernize Canada's Competition Regime*², and as supported by the Government in its Response.³

Within the CBA Section, opinions are strongly held on both sides of the debate. The CBA Section formed a Task Force comprised of members of the Criminal Matters, the Reviewable Matters and Private Actions, and the Legislation and Competition Policy Committees. The Task Force raises serious issues with the premises upon which the proposed reforms are based. Several CBA Section members, including the current Chair, have published articles along these lines. At the same time, however, other CBA Section members, including the immediate Past Chair, have spoken and written publicly in support of the general thrust of the proposed reforms.

A significant portion of the CBA Section as a whole holds the view that there are substantial concerns that the present system is not working well. We recommend, however, that more study is required to clarify the objectives being sought by the proposed amendments, and consideration be given to alternative proposals to a two-track approach. Acting before the analysis

¹ R.S.C. 1985, c. C-34, as amended (hereinafter, the “*Competition Act*” or the “Act”).

² House of Commons Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada’s Competition Regime*, (tabled April 23, 2002, adopted April 9, 2002), available on-line at: <http://www.parl.gc.ca> (the Industry Committee Report).

³ Government Response to the Report of the House of Commons Standing Committee on Industry, Science and Technology “A Plan to Modernize Canada’s Competition Regime”, October 1, 2002, available on-line at <http://www.ic.gc.ca/specialreports> (hereinafter, the “Response”).

recommended in this submission would run the risk of actually exacerbating the problems which are said to affect section 45 as it already stands.

This is because it may not be possible to define the criminal track of any new two-track framework in a way that would avoid inadvertently bringing within its scope a significant range of agreements not ordinarily considered harmful to competition. The risks that may flow from legislating before these issues have been fully explored include:

- the potential chilling effect of any ambiguity in the amendments, on a broad range of legitimate conduct;
- inadvertently exposing business to increased costs of compliance and negatively affecting business arrangements which are sensible and not untoward, by broadening the scope of section 45, and
- inadvertently decriminalizing or otherwise reducing the ability of the law to deter truly hard-core cartel conduct.

Whatever else may be said, the existing provisions have resulted in recent convictions – generally based on guilty pleas – which have generated hundreds of millions of dollars in fines. A new law is likely to face significant testing in the courts before a similar result will be obtained, if ever.

The following analysis of the relative merits of the proposed amendments to section 45 will show that further debate is required, and that the nature of any legislative solution which may ultimately be proposed stands to be improved. This can be accomplished by consideration of the precise nature of any proposed amendments, the objectives they seek to achieve and their likely efficacy in achieving those results.

The Industry Committee erroneously perceived competition law experts to be “almost unanimous” in their support for section 45 reform, and therefore saw “no reason for going to

great lengths to validate” the justifications for reform. In reality, some competition law experts see the current section 45 as being too lenient, others see it as too strict, some support both views, and many see no compelling evidence to support the need for change. The CBA Section believes that, although further study has been undertaken since the Public Policy Forum consultations in July 2000, to some extent the debate remains mired in theory and has not significantly advanced.

The CBA Section recommended further study of the issues surrounding any amendment to section 45 in its response to Bill C-472. Unfortunately, while the reports of the consultants retained by the Commissioner of Competition (the Commissioner) did address, in varying degrees, the objectives of the proposed amendments, their terms of reference forestalled consideration of alternative proposals.

It is the CBA Section’s hope in developing this submission that the Competition Bureau’s upcoming Discussion Paper will address these issues.

II. REFORM OVERVIEW

i. Introduction

This part describes the principal rationale advanced by those who advocate reform. These views are by no means the prevailing opinion of the CBA Section’s membership, a significant portion of which is firmly opposed to reform of any kind.

Although the debate concerning the reform of section 45 has been underway for some time, there is not any official proposal in this regard. Suggestions have been advanced by a variety of commentators. The Bureau has indicated its general support for legislative reform and has outlined the key features of proposed changes it would like to see. Finally, the Industry Committee Report generally endorsed the broad features of amendments. These amendments would convert the present section 45 into a law applicable to horizontal arrangements, which would be enforced under two alternative tracks - one criminal and one civil .

Almost every proposal is different in some respects from the others. Although these differences are undoubtedly of significance, most of the proposals advanced to date reflect an agreed approach on two principal elements:

- refocusing criminal provisions to a limited range of specified hard-core cartel arrangements (price-fixing, customer and market allocation arrangements and output limitation agreements); and
- providing for civil adjudication of the legality of all other (non-cartel) horizontal agreements and arrangements.

The proposed reform also contemplates that the revised criminal law provisions applicable to cartel arrangements would be of a *per se* character. The proposed civil regime would, on the other hand, apply a full “rule of reason”, or substantial prevention or lessening of competition standard. This would allow consideration of any efficiency-enhancing, innovative or other pro-competitive elements of such arrangements.

B. Proposed New Criminal Provision

The proposed reform is considered by its advocates to be superior to the current law in its ability to control cartel behaviour. Such behavior is generally considered to pose the most serious threat to competition. In addition, cartel behaviour is not considered to have any socially redeeming qualities warranting the application of a more tolerant or forgiving legal standard, such as a rule of reason.

As a consequence of widely publicized international cartel activities during the last decade, there is a growing world-wide appreciation of the perniciously anti-competitive character of cartels, and a re-dedication in many countries to more active and effective enforcement of laws to prevent and punish such behaviour. Most countries either have, or are in the process of amending, their legislation to create competition laws which are focused on cartel behaviour. While such laws are not universally criminal, many of them are (and others are being amended to be made criminal).

Advocates of reform point out that the Canadian law, in being criminal in character and, at the same time, containing a rule of reason standard (requiring the prosecution to demonstrate that the anti-competitive effects of an arrangement transgress an “undueness” standard) is unusual, if not unique. An October 2002 OECD report was critical of section 45’s “effects” test in its assessment of the effectiveness of anti-cartel laws in various countries. Proponents of reform point out a world-wide trend towards increased anti-cartel enforcement involving tougher sanctions and increased deterrence. A number of countries have enacted, or are in the process of enacting, criminal sanctions for such conduct.⁴ There is also a move to greater co-operation between competition law enforcement agencies in regard to cartel law enforcement. Immunity and leniency policies have also been established in many countries to induce compliance with these laws, with the growing appreciation of the costs of international cartel arrangements and the need for more active enforcement to control them.

Proponents of reform hold that section 45’s inclusion of an undueness standard or qualified rule of reason makes prosecution of hard-core cartel behaviour unnecessarily difficult. The present law requires the government to prove, beyond a reasonable doubt, not only what the relevant market is but also that the agreement or arrangement between the parties has, or is likely to have, material adverse effects on competition in that market. This is a challenging requirement in the context of business activity in markets which are difficult to delineate, even with a more relaxed civil evidentiary standard of the balance of probabilities.

While recognizing difficulties associated with definition and characterization of whether particular conduct or arrangements constitutes true cartel behaviour, advocates of reform point out that other countries with similar laws seem able to deal with such questions. Moreover, no socially or economically redeeming purpose associated with that kind of activity would warrant assessing it according to a broader rule of reason standard. Also, in cases of true cartel behaviour, definition concerns typically do not arise. Accordingly, it is considered that the *per se* prohibition of such behaviour is the appropriate approach.

Those advocating reform generally believe that, on an honest appraisal basis, the enforcement record of section 45 over a long period of time in contested cases is less than exemplary and that the *PANS*⁵ case has done nothing to clarify the law's application. The *Freight Forwarders*⁶ case is seen as an example of the apparent contrariness of having a rule of reason standard built into a provision intended to control cartel behaviour. In that case, it was not disputed that parties had entered into an actual price-fixing arrangement. However, they were acquitted on the basis that the Crown had failed to prove the requisite anti-competitive effects on the marketplace flowing from that arrangement. Proponents of reform consider it difficult to object to a restructuring of section 45 to limit its criminal focus to cartel activity only, and that in terms of the law as so refocused being *per se*, it is hard to make a convincing case that there are any socially redeeming qualities in true cartel behaviour.

C. Proposed New Civil Provision

The second principal element of section 45 reform is proposed decriminalization of other non-cartel horizontal arrangements. Although section 45 has a modified rule of reason standard built into it, the Supreme Court of Canada held in the *PANS* case that section 45 does not take any account of efficiencies, innovation or other pro-competitive benefits which may be generated by such an agreement. Accordingly, making this part of the law civil rather than criminal in its application to other (non-cartel) agreements, and providing a "full rule of reason" or "substantial lessening of competition" legal standard for assessment better enables consideration to be taken of pro-competitive benefits.

Knowledge that such considerations are to be taken into account should encourage parties proposing to enter into a non-cartel arrangement. They can do so knowing they not be subjected to potentially harsh criminal sanctions, and that the efficiency-enhancing or pro-competitive benefits flowing from their arrangement will receive consideration if challenged in a civil law context. Proponents of change also think it makes more sense to apply the civil evidentiary standard of the balance of probabilities, as opposed to the criminal law standard of proof beyond

⁴ Examples of countries which have either recently moved, or are moving, in this direction are the UK, Ireland and Australia

⁵ *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 ("PANS").

⁶ *R v Clarke Transport* (1995), 130 D.L.R. 4th 500, 64 C.P.R. (3d) 289 (Ont.Ct.Gen.Div.)

a reasonable doubt, to determination of relevant product and geographic markets and to complex issues of entry and dynamic market conditions. Another anticipated advantage is that such cases are moved from the criminal court system (which is typically charged with deliberating over the commission of pure crimes) to the Competition Tribunal, which has an acknowledged expertise in the competition law field.

Advocates for change believe removal of potential criminal sanctions, such as \$10 million fines and possible imprisonment, as possible consequences of transgressing the provision should provide significant comfort to parties considering entering into non-cartel horizontal agreements and will make it less likely that they will be deterred from doing so.

In summary, advocates of reform believe that continuing to subject non-cartel arrangements to criminal prosecution under the present section 45 cannot be justified, given that a civil standard would allow for a full rule of reason analysis and consideration of efficiencies and other pro-competitive benefits. This is not the case with the present section 45. While advocates for change believe that existing law imparts a “chill” to parties considering entering into strategic alliances and other non-cartel horizontal arrangements, they are also of the view that, whether or not this is in fact the case (a proposition that is inherently difficult to prove), such arrangements ought to be evaluated according to a civil standard.

D. Issues of Definition/Characterization

Even the most ardent advocates of reform acknowledge that, in the absence of other provisions, there are likely to be practical difficulties in interpreting and applying these provisions in borderline cases. This will occur particularly where some element of cartel activity is bound up with non-cartel arrangements entered into between competitors. Most advocates of reform have, therefore, proposed mechanisms for distinguishing cases for adjudication as between the criminal or civil law routes. As well, there is concern about the desirability of having a law which would render an agreement criminal (thus subject to potentially serious criminal sanctions), simply by reason of its cartel character, notwithstanding that it may have only negligible adverse competitive effects.

Dealing first with situations which involve both cartel and non-cartel behaviour in a single arrangement between competitor firms, some reform advocates suggest there should be a preliminary determination as to whether the cartel arrangements are simply part of a larger agreement which has, as its principal purpose, some objective other than engaging in proscribed cartel behaviour. If the predominant purpose is determined not to be cartel activity but, rather some other objective, the overall arrangement would then be evaluated under the civil (rather than the criminal) track. If, on the other hand, the predominant purpose of the arrangement is found to be of a cartel character, the case would be subject to prosecution under the amended criminal provision. There are variations on this suggestion, including requiring an initial demonstration that the overall agreement has some efficiency-enhancing or other pro-competitive characteristics. It could then be determined if the arrangement is subject only to civil enforcement. In almost all of these proposals, the cartel components of the agreement would need to be considered reasonably necessary to the achievement of the overall purpose of the agreement.

Other commentators suggest that if an agreement which might otherwise be subject to criminal prosecution is publicly notified, or perhaps filed with the Competition Bureau, the agreement would then not be subject to criminal prosecution. Instead, it would be reviewed under the civil provisions relating to horizontal agreements. It is thought that adverse public reaction to publicity surrounding such arrangements would deter parties from entering into them. Alternatively, in the context of a notification and review regime, a requisite waiting period to enable Bureau review of the arrangement would also provide an opportunity to enjoin the parties from carrying out such an agreement, if it is determined to be anti-competitive.

Some reform advocates believe that initially, the number of cases where there is doubt about whether a particular agreement is, in its essence, of a true hard-core cartel character, will be quite limited. The Bureau (or Department of Justice), when it is in doubt as to the proper characterization of such an arrangement for this purpose, will invariably elect to proceed on the civil track, to avoid the possibility of being in the wrong forum in a criminal proceeding. Indeed, the Bureau has only pursued a practice of prosecuting hard-core cartel cases under section 45. Accordingly, the view is held that prosecutorial discretion will continue to be exercised in favour of only bringing those kinds of cases under the criminal provision.

Regarding agreements that might be characterized as cartel arrangements but which lack any significant anti-competitive effects, the Bureau will likely have no inherent interest in prosecution. Its resources are limited, and the Bureau needs to focus its activities on more competition-threatening types of arrangements. While it is true that private plaintiffs might nevertheless pursue such cases under section 36, the claim will only be successful to the extent that the plaintiffs can establish they have sustained damages (in cases having a *de minimis* effect on competition, this would be highly unlikely). Accordingly, it is doubtful that cases would be brought involving arrangements where there is no significant adverse anti-competitive effect. While proposals for amending section 45 vary in details, there is broad agreement on the thrust of the principal elements of the reform advanced by those who seek to change the law.

III. IS CHANGE NECESSARY/DESIRABLE?

Several commentators since the early 1990's, and more recently the Commissioner, have advocated amendment of section 45.⁷ The issue was also studied during the Public Policy Forum consultation process in 2000,⁸ following the introduction of a private member's bill in the House

⁷ The first serious modern proposal for change was made by Presley Warner and Michael Trebilcock in "Rethinking Price-Fixing Law", (1993) 38 McGill L.J. 679 ("Warner and Trebilcock"). Tim Kennish and Tom Ross followed with proposals that were set out in "Towards a New Approach to Agreements between Competitors" [1997], 28 *Can. Bus. L.J.* 22 ("Kennish and Ross").

The Commissioner described his concerns with section 45 in October 2001 (See *2001 Invitational Forum on Competition Law*, "Section 45 at the Crossroads", (October 12, 2001)). In May 2002, Raymond Pierce, the Deputy Commissioner of Competition, Criminal Matters, did likewise (see *2002 Competition Law Invitational Forum*, "Reform of Section 45 - The Bureau's Perspective", (May 8-10, 2002)). And, see note 9.

⁸ The Public Policy Form *Final Report to the Commissioner of Competition, December 2000* concluded in regard to strategic alliances and the reforms to section 45 proposed in Bill C-472 that there was general agreement that section 45 needed to be modernized, as well as substantial support for a two-track criminal/civil approach whereby only the most harmful behaviour would be potentially liable to criminal prosecution. It also noted, however, the lack of consensus on the propriety of change along the lines suggested by Bill C-472 (creation of a *per se* offence accompanied by an "ancillary agreement" defence, civil review of non-criminal agreements, and a safe harbour for agreements the parties to which have less than 25% market share), and the general agreement that further study was required. The Final Report also noted a concern on the part of many participants that the language employed by Bill C-472 in defining a *per se* criminal offence was over-broad and would result in a greater chilling effect than the current section 45. See Public Policy Forum "*Amendments to the Competition Act and the Competition Tribunal Act: A Report on Consultations*" (Final Report to the Commissioner of Competition, December 2000), available on-line at www.pppforum.com/English/competitionact/index.html.

of Commons advocating amendment of section 45.⁹ The Commissioner subsequently

commissioned three reports on the feasibility of replacing section 45 with a two-track approach. This approach would include a *per se* prohibition against price-fixing, market allocation, output restriction and competitor boycotts (subject to an ‘ancillary restraints’ defence), and a civil provision applicable to all other competitor agreements and subject to a rule of reason and public interest analysis.¹⁰ Following release of these Reports, the Industry Committee released its recommendations for change. These were supported by the Government in its Response.

Broadly stated, proponents of change assert the “undueness” standard in section 45 is uncertain, with several consequent ill-effects:

- The law is “under-inclusive”, because it does not adequately capture “hard-core” cartels; there are too many acquittals in contested cases.
- The law is “over-inclusive”, because it criminalizes agreements between competitors that could have pro-competitive effects. This has created a “chill” on pro-competitive business arrangements.
- It is also argued that section 45 should be amended to harmonize Canada’s conspiracy laws with similar laws of its major trading partners.

The evidence cited in support of change, and some questions raised by the Task Force and other CBA Section members, are discussed below, followed by a detailed analysis of reform proposals to date. Other issues, including inclusion of an efficiency defence in section 45, trends in similar laws of Canada’s major trading partners, and limitation periods are then addressed.

A. Section 45 is Under-Inclusive

Advocates of section 45 reform argue that one of the principal failings of section 45 is that it is “under-inclusive”, *i.e.*, that because of difficulties in enforcing the provision in a criminal context, otherwise illegal cartel activity is not being prosecuted or deterred effectively.¹¹ This is seen as justification for introducing a *per se* offence in relation to the most blatantly anti-competitive behaviour. This would eliminate the need to define markets and to prove an undue

lessening or prevention of competition for cases involving such “hard-core” cartel behaviour.

Trebilcock and Warner, for example, observed that “the current prohibition, which requires the Crown to prove on a criminal burden of proof that an arrangement has lessened competition “unduly”, can allow price-fixers to escape conviction, using the kind of specious arguments that were advanced in *Aetna Insurance*”.¹² More recent commentators such as Quinn *et al* point to the data developed by Chandler and Jackson¹³ and the “dismal” track record of successful prosecutions, stating that:

“proof of economic effects, or worse, predictions of future effects, cannot be established beyond a reasonable doubt. Consequently, the Crown, who carries the burden of establishing guilt beyond a reasonable doubt, will probably lose the vast majority of contested section 45 cases. We therefore agree that the law as drafted is probably under-inclusive.”¹⁴

The three Reports commissioned by the Bureau also support a *per se* offence for the most egregious behaviour. They point, albeit in varying degrees, to the costs to Canadian society of anti-competitive conspiracies that are thought to go undeterred and/or unpunished under the current section 45. The Macleod Dixon Report,¹⁵ for example, acknowledges that creation of a *per se* unlawful offence for certain types of agreements would impose costs, associated with the prosecution of cases that do not cause any harm to society. It posits, however, that such costs would likely be exceeded by the costs currently imposed on society of unpunished yet harmful conspiracies. Such current costs are said to include the cost of conspiracies which are either not prosecuted at all, or if prosecuted are not successfully prosecuted (because of the need to prove an “undue lessening” of competition, and an objective intention to have such an effect, beyond a reasonable doubt). The Macleod Dixon Report recognizes that the relative societal costs of the two approaches (an ‘undueness’ test *versus* a *per se* offence) are difficult to quantify, but states a belief that the net benefits of a *per se* approach would exceed the costs of prosecution of non-harmful cases. This belief is based in part upon an assumption that the Crown would exercise its discretion to settle cases not involving significant anti-competitive effects, and in part upon a belief that “hard-core” conspiracies will not be proposed by business men and women if they do not believe they will be effective.

The McCarthy Tétrault Report states, with regard to under-inclusiveness, that:

“in many cases, the market is not readily definable – and experts can have

legitimate disagreement on the issue – with the result that establishing guilt beyond a reasonable doubt is a very difficult, if not impossible task. Because of the uncertainty surrounding the interpretation of unduly and of the burden of proof on the Crown, section 45 is much less effective to challenge other types of horizontal agreements which significantly lessen competition, for example hard-core cartels where the market is not readily definable or other agreements which may not constitute cartels but where the competitive harm is greater than the benefits resulting therefrom. From a public policy perspective, these agreements should be prevented, although not all should attract criminal sanction”.¹⁶

Interestingly, the McCarthy Tétrault Report found fault with the current section 45 in part (as discussed below) because of its inability to consider efficiencies and other beneficial economic effects, thus potentially prohibiting agreements which do not harm society. Unlike the McLeod Dixon Report, however, which saw prosecutorial discretion as a means of alleviating this problem, the McCarthy Tétrault Report states that “if section 45 is meant to apply to certain types of agreements, we should change the law, not rely on prosecutorial discretion, which can be exercised differently, depending on the individuals.”¹⁷

The Borden Ladner Gervais Report cites Trebilcock and Warner, as well as the results of the study by Chandler and Jackson which showed that of 22 contested cases brought under section 45 from 1980 to 2000, the Crown obtained convictions in only 3. Of the 17 acquittals, 6 were stated to be due to the failure of the Crown to prove beyond a reasonable doubt that there had been an agreement (an issue unaffected by creation of a *per se* offence), and 11 were due to the Crown’s failure to establish either that the agreement had lessened competition “unduly” or that the parties to the agreement ought reasonably to have known that this would be the likely outcome of their agreement (the so-called “objective intent” element of the offence). Apparently taking the need for reform as being established, the Borden Ladner Gervais Report states that “a “dual track” regime represents the most advantageous approach to balancing the need, on the one hand, for effective deterrence and punishment of hard-core cartel behaviour...”¹⁸

As noted above, opinion within the CBA Section is sharply divided as to whether section 45 in its current form results in the failure to deter and punish anti-competitive agreements with significant anti-competitive effects. Many seasoned members of the competition bar, as well as several government competition law enforcers with considerable experience, believe this to be the case. Others believe that the current provision exerts considerable deterrent effect, and that the rate of conviction in contested cases is appropriate, especially given clarification of the law

following the Supreme Court of Canada decision in PANS.¹⁹

Those opposing creation of a *per se* offence for “hard-core” cartels point to the lack of hard evidence that section 45 as currently drafted, and as interpreted by the courts in the post-PANS era, either fails to deter anti-competitive agreements or leaves significantly harmful behaviour unpunished. Neither the Commissioner nor any commentator has provided empirical data indicating that the Canadian economy is presently beset by horizontal restraints (naked or otherwise) which have been the subject of improper acquittals or which were not pursued by the authorities due to the inadequacies of the current law.²⁰ Instead, as noted above, the Commissioner and others rely principally on the Bureau’s allegedly “undistinguished prosecutorial track record in contested cases” as the basis for the concern that section 45 is under-inclusive.²¹

Several critics of the reform proposals, however, point out that the Bureau’s win/loss record in contested proceedings may not shed much light, if any, on the under-inclusiveness issue. For example:

- It is to be expected that the Bureau’s record of success in contested cases will be low, because these cases by necessity involve situations that are “closest to the line”, where the evidence will be ambiguous or difficult to obtain. Litigated cases often are ones in which the accused believe the Commissioner’s case is not justified, and the fact that an accused is acquitted seems to support that position. Indeed, the track record of the U.S. Antitrust Division is similarly “mixed”, notwithstanding the presence of a *per se* standard.²²
- More than one-third of the Bureau’s losses during the period 1980-2000 were due to the Crown’s inability to prove the existence of an “agreement”, not to an inability to prove an “undue” lessening of competition in the relevant market.²³ Even under the current reform proposals, the Crown would still be required to prove the “agreement” element of the offence.
- When guilty pleas and other forms of uncontested resolution are included, the Crown’s overall success rate during the period 1980-2000 climbs to a more than respectable 60%. As noted by Facey and Assaf, moreover, in the period since legislative amendments in

the 1980s and the SCC decision in PANS, during which the law has been applied in its current form (1993 to October, 2001), there were 2 acquittals, 1 discharge and 28 convictions. These netted fines of over \$148 million. This implies a success rate of over 90%. Moreover, it is clear from the data that so-called hard-core cartel activity is being caught in the prosecutorial net.²⁴

Critics of the proposed reforms argue further that complaints about the ineffectiveness of section 45 are belied by the Bureau's continued success in securing guilty pleas and significant fines. This is particularly so with respect to international cartel activity, which typically involves "hard-core" arrangements.²⁵ As Facey and Assaf have remarked: "If defendants thought they had a chance of acquittal, because of a weak law, one would not expect to see firms consistently entering guilty pleas."²⁶ While Paul Crampton argues that firms are motivated by factors other than guilt or innocence and will tend to plead guilty in order to avoid any criminal proceedings regardless of their chances of winning, this points rather to an over-inclusive application than to under-inclusive application of the law in its current form.²⁷ The Bureau's Immunity Program has only increased the pressure on cartel participants to come forward, given the potential risks involved in failing to be the "first in".²⁸ And, the Immunity Program has made available to the Bureau powerful evidence from co-conspirators, which was not available during the period when the Commissioner and others claim the Bureau was unable to win cases.

In the experience of many CBA Section members, the reality is that, notwithstanding that section 45 contains an undueness standard, most firms behave as if there was a *per se* standard in section 45 for "hard-core" offences: price-fixing and other naked restraints are avoided in almost any circumstance.²⁹ Other CBA Section members, however, believe that "we probably end up with a lot more welfare-reducing agreements from people who are willing to take a very small risk of a criminal punishment, than we do foregone opportunities for welfare-increasing collaboration."³⁰ It seems that the win/loss ratio in contested cases, after amendments to section 45 that eased convictions and before PANS, has not settled the debate.

The most relevant fact appears to be not whether the Crown wins most contested cases, but whether the Commissioner has been unable to bring cases against accused who clearly were

involved in “hard-core” behaviour, because the Commissioner or the Attorney General did not think the law was broad enough to catch the wrongful behaviour. Proponents of reform imply that they believe this to be the case, but the Commissioner has presented no evidence to support such a proposition. Such evidence as exists will only be available to him. If price-fixing or market allocation arrangements are made but cannot be punished because of the current law, then there would be a rational reason for amending section 45. The CBA Section hopes that the Commissioner, in the upcoming Discussion Paper, will do more than cite the familiar statistics from Chandler and Jackson, which have been challenged in the Facey/Assaf summary, or point to pre-PANS case law where “unduly” was (arguably) misinterpreted. Instead, it is hoped that the Commissioner will proffer evidence of harmful conspiracies that currently go unpunished. If such evidence is not available, the merit of creating a category of *per se* criminal offences may be called into question.

Indeed, Kennish and Ross, while of the view that there is significant value in deleting the word “unduly” from the criminal part of a new law, felt that this is not absolutely necessary. They conceded that “[i]f it was felt that retention of the word usefully protected parties to agreements with very minor effects on competition, “unduly” could be retained”. This could be done without serious damage to their proposal to create a separate, civilly reviewable practice to cover non-hard-core cartel agreements among competitors – a proposal they feel is necessary to address the allegedly over-inclusive nature of section 45.

B. Section 45 is Over-Inclusive

The other criticism leveled against section 45 is that the provision is “over-inclusive”, *i.e.*, that it encompasses within its criminal prohibition forms of agreements that may be pro-competitive in effect. This is said to have an unwanted “chilling effect” on such pro-competitive agreements. Again, while many Section members believe this to be true, many are concerned there is a lack of concrete evidence to support the “over-inclusive” criticism.

Trebilcock and Warner posited in 1993 that the language of section 45 is over-inclusive:

“because it subjects all horizontal arrangements to criminal prohibitions and casts a shadow over many arrangements that may potentially increase welfare. Apart from the obvious price-fixing case, the welfare effects of many horizontal

arrangements are ambiguous, and arrangements with ambiguous welfare effects should not be deterred and do not require criminal sanctions.”³¹

They further argued that the Competition Tribunal is better equipped to analyse the welfare effects of ambiguous arrangements than the criminal courts, in light of the Tribunal’s specialized expertise, and the civil (balance of probabilities) rather than the criminal (beyond a reasonable doubt) burden of proof. In light of these concerns, they advocated the review of all horizontal arrangements other than “naked price-fixing” by the Competition Tribunal.

Kennish and Ross, in their 1997 paper, were principally concerned that:

“the Canadian law as it stands does not properly take account of the almost endless possibilities for economically efficient co-operation among firms that may happen to be competitors. In so doing, it may be distorting the decisions managers make about the structure of their organizations, pushing them into ventures such as mergers that enhance neither their efficiency nor competition in the market.”³²

They proposed that a civil branch be added to the criminal prohibition against conspiracy, designed to address agreements which “do not have, as their sole or predominant purpose, an agreement not to compete or those which include a restraint on competition which is merely ancillary and reasonably necessary to a larger agreement”.³³ Agreements of this type would be reviewable by the Competition Tribunal in a manner analogous to the review it employs for mergers. The review would include not only substantive standards of review encompassing consideration of efficiencies in the same manner as that employed for mergers, but also administrative aspects such as the issuance of pre-clearance certificates (similar to advance ruling certificates for mergers), and the possibility of consent orders. Kennish and Ross admitted that “the challenge in this proposal is in drafting: can wording be found that will clearly distinguish between what we have been calling “naked restraints” and all other horizontal agreements?”.³⁴ As noted above, they concluded that “unduly” could be retained without serious damage to this proposal. Its most important property, the flexibility it offers for the review of complex agreements, would remain.”³⁵

The McLeod Dixon Report, in its consideration of a two-track approach with *per se* offences and exceptions based on the “ancillary restraints doctrine”, based its support for reform principally on the perceived under-inclusiveness of section 45. The authors also concluded, however (without discussion) that a new draft law ought to “release” from the “net those co-operative agreements and arrangements that have potential for efficiency generating or other benefits.”³⁶

In designing their legislative model for evaluating and prohibiting “hard-core” conspiracies, they recognized a need to avoid, among other things, “social costs resulting from the reluctance of businessmen and women to engage in socially desirable conduct because of the rigidity of the law and its criminal lenses”.³⁷ The Draft Code appended to the Report featured a release from *per se* condemnation for ancillary agreements or effects not aimed at harming competition and which could not be reasonably foreseen to harm competition.³⁸

The McCarthy Tétrault Report, on the other hand, like Kennish and Ross, based its support for the proposed two-track approach primarily on the perceived inappropriateness of the use of criminal law to address the vast majority of agreements between competitors. The authors acknowledged that “it is difficult to demonstrate the chilling effect of section 45 in respect of strategic alliances, because the decision not to proceed with a business arrangement is rarely made public”.³⁹ However, citing Kennish and Ross, and their own experience, the authors were “convinced that a large number of pro-competitive arrangements, which otherwise present some antitrust risk, do not proceed because counsel cannot give an unqualified opinion that there is no risk of criminal prosecution”,⁴⁰ and because efficiencies are not relevant to determine criminal liability under section 45. The authors concluded that:

“it is not appropriate for criminal liability, which entails heavy fines and possible incarceration, to depend on an analysis of complex economic factors by the court. A person’s guilt should not hinge upon the court’s views on cross-elasticity of demand, the height of barriers to entry or the strength of countervailing buying power, to give a few examples. That alone, in our view, justifies amending section 45 to ensure that the criminal prohibition meets with widely accepted moral disapproval, and that guilt or innocence does not depend upon the application of complex economic principles.”⁴¹

The Borden Ladner Gervais Report relied upon the conclusions of Trebilcock and Warner and the data cited by Chandler and Jackson both for the proposition that the current law is under-inclusive and for the proposition that it is over-inclusive.⁴² The authors concluded that any proposal for reform should be evaluated on the basis, among other things, of the objective that it provide “adequate punishment of economically harmful collaborations without deterring efforts to develop new, pro-competitive arrangements.”⁴³

As with the concern with under-inclusion, however, many in the CBA Section are concerned that

the posited “chilling effect” may not actually be affecting business behaviour. While recognizing that this concern may defy substantiation in any concrete fashion,⁴⁴ they point out that concerns about chilling effects seem to be anecdotal at best, and that there are equally logical reasons to suppose it is not, in practice, a problem. Indeed, Quinn *et al* point out that to the degree the current law is said to be under-inclusive and to lack sufficient deterrent effect, it must be presumed not to have a chilling effect.⁴⁵

Those not convinced of the need for reform argue that the complexities of the analysis required in the application of the current provision does not necessarily dissuade pro-competitive business arrangements. They point out that it is good business practice to consult legal counsel about any arrangement involving horizontal competitors for advice on whether the arrangement might give rise to anti-competitive effects leading to possible liability under the *Competition Act*. Such advice would be sought whether the matter raises issues under the conspiracy law or the proposed new civil regime. Indeed, counsel would still be consulted under any new regime and uncertainty, if it exists, would continue in respect of any matter within or close to any newly defined *per se* offence. The fact that counsel is consulted and may question the applicability of section 45 to any particular arrangement does not necessarily mean the law is so uncertain that it must be amended.

Those questioning the need for creation of a civil provision applicable to horizontal agreements point out that, if counsel or parties to an arrangement such as a strategic alliance cannot form a view about potential criminal liability, an advisory opinion about the arrangement could be sought under the Commissioner’s Advisory Opinion Program. This Program has been in place for many years.

From the CBA Section’s perspective as a whole, it would be useful for the Commissioner to provide empirical evidence regarding the extent to which the Program has been called upon to provide certainty about application of section 45 to strategic alliances. If there were material uncertainty in the law, one would expect that the Bureau would receive many requests for clarity of its view under the Program. The reliability of opinions under the Program will only be improved by recent amendments to the Act, which will make advisory opinions binding on the Commissioner. Those questioning the need for reform argue that this should go a long way to alleviate any uncertainty in the law and any resulting “chill” (if it exists). And, it has not gone

unnoticed by those questioning the need for reform that in all the years that reform of section 45 has been discussed, there has not been a call for reform from the business community on the grounds that the law is uncertain or creates a disincentive to enter into horizontal arrangements.

Finally, the creation of a civil provision whereby the Commissioner and the Competition Tribunal could explicitly deal with potentially anti-competitive agreements under a full rule of reason analysis does not necessitate the creation of a *per se* criminal offence for “hard-core” cartels.⁴⁶

C. International Harmonization

The CBA Section fully supports greater convergence between Canadian competition law and the comparable laws of other jurisdictions that are consistent with Canadian public policy objectives.

A starting proposition, however, is that while increased harmonization may be a desirable objective, it does not require that Canadian competition law be made uniform with that of other jurisdictions. Rather, the goal should be to ensure that respective legal structures and processes are compatible with each other, rather than identical, and that mechanisms are in place to deal with divergences should they arise.⁴⁷

Viewed in this light, some CBA Section members believe the reform proposals advanced by the Commissioner and his consultants⁴⁸ will not necessarily achieve greater harmonization, or even have a positive effect.

The underlying objective of greater harmonization in anti-cartel enforcement has been to persuade more jurisdictions to take the cartel issue seriously. Canada has been recognized as one of the leaders in anti-cartel enforcement, rather than as being a jurisdiction that is “too soft” on cartels. Indeed, this is a key reason why the Bureau has been able to develop a particularly close enforcement relationship with U.S. antitrust authorities on cartel issues, as described by former Assistant Attorney General James in the following comments:

“Because the U.S. and Canada have similar views on the criminality of cartel behaviour, and now, an effective mechanism for co-ordinating investigations, both countries have become more effective in attacking conspiracies that straddle the border. The U.S. and Canada have co-

operated in a wide range of criminal investigations, including the plastic dinnerware, graphite electrodes, and vitamins investigations which resulted in U.S. fines exceeding US\$1.3 billion and commensurate Canadian fines of more than CDN\$115 million. Our co-operation has included simultaneously executed search warrants, as well as searches by one authority on behalf of the other. In many of these investigations, our Canadian counterparts and we would have found it far more difficult, if not impossible, to conclude our investigations successfully without the other's assistance. I think it is safe to say that both nations, and especially the consumers of both countries, have benefited enormously from our efforts".⁴⁹

Many CBA Section members believe that dramatic changes to section 45 are not required in order to demonstrate that Canada is vigilant against cartel activity. In contrast to some of the jurisdictions cited by the Commissioner's consultants that are in the process of reforming their conspiracy laws, Canada is already regarded as a "serious player" in this area.

In addition, many CBA Section members are concerned that the proposed reforms may actually be at odds with developments in our key trading partners. For example, as recognized in the Borden Ladner Gervais Report,⁵⁰ U.S. law has been steadily moving towards a greater "rule of reason" approach to horizontal agreements, particularly in regard to non-cartel agreements, and away from a strict *per se* rule, *i.e.*, towards the current Canadian position.⁵¹ Similarly, the E.U. is planning to alter its notification system radically, based on the conclusion that it "does not serve to safeguard competition."⁵² Many CBA Section members contend it would be ironic if Canada were to adopt radical changes in section 45 with a view to promoting harmonization, only to find that these measures would have the effect of moving Canadian law in a direction opposite to that of other key jurisdictions.

IV. PROPOSALS FOR REFORM – A CRITIQUE

Several commentators have made specific proposals for reform of section 45, most recently the competition law specialists retained as consultants by the Commissioner.⁵³ Each of the Borden Ladner Gervais Report, the McCarthy Tétrault Report and the Macleod Dixon Report supports the creation of a "dual track" regime. The regime would include a criminal *per se* prohibition against "hard-core" cartel behaviour and a civil track for "non-hard-core" arrangements that result in an adverse effect (*e.g.* substantial lessening) on competition. W.T. Stanbury made similar proposals in 2002.⁵⁴ The Industry Committee Report, taking support for such proposals

as “almost unanimous”, recommended their adoption but called on the Government to develop specific statutory language.

A detailed critique of the proposals contained in each Report and the proposals made by Professor Stanbury is provided in Appendix A to this Report. Some Section members are concerned that the proposals will be no clearer, and in fact could be more uncertain, than the perceived uncertainties of section 45. In particular, they are concerned that:

- None of the proposals clearly demarcate the bounds between a *per se* offence and matters subject to review on a civil standard. The proposed *per se* offences are dramatically over-inclusive and, if enacted, could deter legitimate, pro-competitive business arrangements.
- The proposals would make criminal many arrangements that have no effect on competition.
- The notification/exemption regimes proposed are impractical and would not likely be used.
- In addition to the specific comments provided in Appendix A, critics of the Industry Committee recommendations have the following general comments on the Committee’s “dual track” approach.

A. *Per Se* Criminal Offence

- (i) Not all conduct should be criminally sanctioned on a *per se* basis

The necessary implication of a *per se* offence is that certain arrangements will be unlawful (with the potential result of significant fines and/or imprisonment) without regard to the effect (if any) of the arrangement on competition. Thus, a fundamental question that first needs to be addressed is whether the objective of conspiracy law is to prohibit (and punish) certain types of agreements and arrangements regardless of their effect on competition or whether the goal is to ensure that competition is not adversely affected by certain types of agreements and arrangements. Hunter and Royal have suggested that “[w]here agreements do not reduce economic welfare, there is no strong policy reason for pursuing enforcement, particularly in light of limited enforcement resources”.⁵⁵

(ii) “*Per se*” conduct defies definition with legislative clarity

Leaving aside the issue of whether a criminal *per se* offence would meet broader policy objectives, there is also the practical issue of whether a *per se* offence could be drafted clearly. Few persons would oppose reform if they were confident that a clear and correct demarcation between harmful and non-harmful conduct could be drawn. However, many doubt that this is possible. All of the Reports stressed the need to ensure that the criminal prohibition be defined with as much clarity and certainty as possible. However, all of the Reports acknowledge the inherent difficulty in doing just that. The CBA Section expressed a concern in July, 2000 that it may not be possible to define narrowly the criminal track of any two-track framework so as to avoid significant over-breadth.⁵⁶ Some CBA Section members still question whether it is possible to draft *per se* conspiracy prohibitions with sufficient clarity and precision so as to target only truly hard-core criminal behaviour. That is, there may be no practical way to avoid the use of some mechanism like “undueness”. Moreover, if such a mechanism is required it may well be preferable to keep the existing one, which has had the benefit of extensive judicial consideration. Creating a new mechanism would no doubt generate litigation as to its meaning.

In the U.S., the *per se* rule was developed in jurisprudence respecting the broadly worded section 1 of the *Sherman Act*. This section makes unlawful every “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”. Presumptive rules of *per se* illegality of certain arrangements were developed by the judiciary in response to the breadth of the prohibition, and to distinguish between arrangements that would be treated as unlawful because of their very nature and other arrangements that would not be found unlawful without further inquiry into their competitive effects. However, the jurisprudence under section 1 of the *Sherman Act* produced considerable uncertainty as the courts added to and then removed various practices from the list of matters that are subject to *per se* criminal prohibition. And, the trend in the U.S. today is away from presumptions of *per se* illegality toward a more broadly applied rule of reason approach.⁵⁷

(iii) No consensus on what conduct should be *per se* unlawful

As demonstrated by the Reports and other proposals on section 45 reform, there is no clear consensus on what type of behaviour should constitute a *per se* prohibition. For example, the

Macleod Dixon Report would include price-fixing, market allocation, agreements to limit production and impede entry and group boycotts in the *per se* category. In contrast, the McCarthy Tétrault Report would include price-fixing, market allocation and agreements to limit production. The Borden Ladner Gervais Report recommends prohibiting hard-core behaviour “such as price-fixing and market allocation.”⁵⁸ The Industry Committee Report, on the other hand, would apply section 45 (with the removal of the word “unduly”) to “agreements that are devised to restrict competition directly through raising prices, or indirectly through output restrictions or market sharing, such as customer or territorial assignments, as well as through group customer or supplier boycotts.”⁵⁹

Other arguments against a statutory *per se* approach stem from its inflexibility. As noted by Facey and Assaf, “the economics of competition policy changes over time and the industries to which the law applies are changing even more rapidly today, and so what may be perceived to be harmful today may turn out to be beneficial in light of changed economic factors and new learning.”⁶⁰

Any attempt to reduce uncertainty in a *per se* rule will likely create a conspiracy law that is more over-inclusive than the current law. Bill C-472, which was given first reading in April 2001, is an example of this. The Bill made it a criminal offence for a person to agree with competitors on certain subject matters if the person knew or ought reasonably to have known that the effect of the agreement would be to fix, establish, control, or maintain the minimum price of a product. It is readily apparent that literally read, the provision would have prohibited sales transactions between competitors. Another provision would have made it a criminal offence for competitors to agree to lessen the production or supply of a product. Again, the language would have created criminal offences out of restrictive or exclusivity arrangements commonly found in franchise agreements, sales of businesses and other common inter-competitor agreements. The reform of section 45 as advocated by the Industry Committee appears to focus, as recommended by the CBA Section in its Submission to the PPF in July, 2000,⁶¹ on the purpose rather than on the effects of an agreement between competitors. Clarification in the form of specific language would be helpful.

B. Proposed Exemptions

(i) Inappropriate Cure of Over-Reach

The Industry Committee and all three consultant Reports recognise that, regardless of how clearly the proscribed *per se* offence is drafted, some pro-competitive arrangements (and competitively neutral and other less significant arrangements too) are likely to include an element that falls within the scope of the criminal *per se* prohibition. To address this problem, all three Reports recommend some form of exemption mechanism to remove from the *per se* offence certain types of ancillary agreements. These would include agreements arising from transactions that are not aimed at harming competition and which could not reasonably be foreseen to harm competition. The Industry Committee Report, on the other hand, would exempt agreements if:

- the restraint is part of a broader agreement that is likely to generate efficiencies or foster innovation, and
- the restraint is reasonably necessary to achieve these efficiencies or cultivate innovation.⁶²

Any attempt to create a substantive legislative distinction between a *per se* offence and other reviewable matters creates an “unintentional over-reach”. The Bureau has recognized this.⁶³ As is evident from the discussion in Part III, those CBA Section members who view under-inclusion as the most significant problem of section 45 accept the need for some form of “ancillary restraint” defence to cure the over-breadth of a *per se* offence. Others, however, do not believe it appropriate that the over-reach be corrected through a patchwork of defences and exceptions to the offence. In their view the issues raised by adopting a *per se* approach, coupled with the difficulties in defining and implementing an exemption system, do little to reduce uncertainty and any resulting chilling effect.

C. The Civil Track

The Industry Committee Report, like the three consultant’s Reports, proposes that agreements

and arrangements falling short of *per se* criminal behaviour would be subject to a civil reviewable regime. This would enable the Commissioner to take action against all agreements having a substantially adverse effect on competition.⁶⁴ As noted above, CBA Section members who advocate reform do so principally out of a desire to provide explicitly civil treatment for the vast majority of competitor agreements which do not qualify as “hard-core” cartel behaviour. Some CBA Section members question, however, whether the addition of further civil provisions to the Act is necessary.

As noted by some commentators, the Act’s merger and abuse of dominance provisions are generally sufficient to address joint ventures and other forms of competitor collaborations.⁶⁵ With the recent amendments to the Act, parties who wish to reduce the risk that their collaboration will be scrutinized by the Bureau under section 45 of the Act can apply for a binding advisory opinion in respect of proposed conduct.

While there has been much attention paid to the issues surrounding the proposed *per se* criminal track, there has been considerably less discussion about the proposals for a civil track.⁶⁶ Although the criminal law imposes serious penalties, Professor McFetridge has expressed concern that increased civil review powers could increase parties’ costs and result in delays and lost opportunities. Delays in implementing commercial arrangements could result in pro-competitive transactions not being completed. If one of the goals of section 45 reform is to reduce the so-called “chilling effect of section 45”, this may not happen if the threat of a criminal investigation is simply replaced with the threat of a lengthy and costly civil investigation.⁶⁷ The Competition Bureau has not as yet articulated a major enforcement gap in this area, or outlined with any detail the type of conduct which such provisions would seek to curb.

V. OTHER ISSUES

The CBA Section also wishes to reflect on the following additional issues: whether the conspiracy law should include an efficiency defence; trends of Canada’s major trading partners; the treatment of existing agreements should section 45 reform occur, and whether the conspiracy law should include a limitation period.

A. An efficiency defence

Some within the CBA Section hold it is inappropriate to provide a specific efficiency-based defence to agreements subject to section 45. As the Supreme Court has noted in section 45 cases, the purpose of the agreement is one of the most important aspects of determining whether section 45 has been violated. Moreover, the Court has developed structural proxies for determining the purpose and effect of such agreements in conducting the “unduly” analysis. Implicit welfare or efficiency effects of such agreements, if any, may already be incorporated into the analysis. As such, the likelihood of increasing social welfare by considering specific efficiencies as a matter of law in all cases is likely to be of limited value when compared to the cost and complexity of undertaking such an analysis in these types of cases. This is particularly the case in the context of a criminal proceeding before a judge without economic training or expertise.⁶⁸

On the other hand, many commentators advocating reform – as well as some who are opposed to the two-track *per se*/civil approach – see the closing of the door on consideration of efficiencies by the Supreme Court in PANS as a serious flaw in section 45.⁶⁹ At a minimum, the topic deserves detailed debate.

B. Trends in Canada’s Trading Partners

A survey of trends in the laws of Canada’s major trading partners is provided in Appendix B to this submission. Of particular note are the following points:

- In the U.S., the distinction between *per se* and rule of reason offences is becoming more blurred. That is, if international harmonization is a goal of the proposed amendment, it may not be furthered by creation of a *per se* prohibition.
- E.U. cartel laws only apply to corporate undertakings, not to individuals, and cartel behaviour is not enforced under criminal laws. Any arrangement (even if “hard-core”) can be saved if it has pro-competitive benefits. The European Commission has authority to “authorize” agreements, even if they fall within the *per se* category.

- A new law in the U.K. will create a criminal offence for individuals who “dishonestly” engage in certain “hard-core” activities. The offence will not impose corporate liability or apply to vertical arrangements.
- In Australia, “hard-core” cartel behaviour is *per se* unlawful (but not a criminal offence) only if an “intention or likelihood to affect price competition” is proven. As in the E.U., the Australian antitrust agency has authority to “authorize” agreements even if they fall within the *per se* category.

These trends are relevant to the current debate in Canada because:

- among the major developed countries, only the U.S. and Canada, and to some degree the U.K., treat hard-core cartels as a criminal offence;
- no jurisdiction has an absolute, clear *per se* offence; and
- exemption/clearance mechanisms are common where cartels are prohibited through non-criminal regulation.

C. Treatment of Existing Agreements

Advocates of reform have been silent almost without exception⁷⁰ on the treatment that existing agreements should receive in the event of section 45 reform. Quinn *et al* propose that there should be “conditional grand-fathering” for a two-year period of horizontal agreements in place at the time amendments to section 45 are proclaimed in force.⁷¹ This period would allow for amendment (or presumably termination) if the agreements were not in compliance with the new legislation. In addition, the authors advert to exemptions and voluntary notification of agreements not exempted, with screens and guidelines to limit the resulting burden on the Competition Bureau of reviewing those agreements voluntarily notified.

The CBA Section believes that more extensive consideration is required of the potential inherent costs to Canadian businesses of section 45 reform. The many members of Canadian industry, whether large or small, that have inter-competitor agreements in place will have negotiated extensive terms and conditions, made significant investments, and changed business

arrangements in the implementation of agreements entered into lawfully on the basis of section 45. In the event of reform, all inter-competitor agreements of a company would need to be identified and reviewed. Legal counsel would have to be consulted to determine whether the agreements would fall within the new criminal provision. If counsel could not provide reasonable assurances as to the effect of the new legislation, companies with compliance policies would have no choice but to consider the need to renegotiate and revise or terminate those agreements, even if they had welfare-enhancing provisions. If an exemption and notification system were legislated, legal counsel would still have to be consulted to determine whether companies' agreements fell within the exemptions. Again, if reasonable assurances could not be provided, companies would need to renegotiate and revise the agreements or terminate them, or proceed through notification and Bureau review. The costs inherent in such exercises could be prohibitive to many businesses, with no resulting economic benefit to society.

The CBA Section recommends that any further consideration of section 45 reform include a full debate of what behaviour should be the subject of any *per se* prohibition. An effective system should be put in place to clearly exempt all agreements currently in existence that do not fall within the proscribed behaviour.

D. Limitation Period

Although not discussed in the Industry Committee Report, the CBA Section encourages the Commissioner to consider in his Discussion Paper the merits of amending the *Competition Act* to provide a five-year limitation period for the prosecution of offences. The limitation period should begin on the termination of the agreement. The inclusion of a limitation period will move the Act into line with U.S. and E.U. antitrust laws, which provide for a five year limitation period, and is in keeping with the trend in several other jurisdictions which now have limitation periods for analogous offences. In addition, limitation periods have been enacted in Canada for a variety of regulatory and quasi-criminal offences.

There are sound public policy reasons for adopting a limitation period, which explains why other major antitrust jurisdictions have them. A more full discussion of these policy reasons and other factors which support the creation of a limitation period is provided in Appendix C to this submission.

VI. CONCLUSIONS

The CBA Section remains divided over whether the reform of section 45 in the manner proposed by the Industry Committee Report and in studies by the Commissioner's consultants is both necessary, and the most appropriate means of achieving the desired goals. The consensus that the Industry Committee perceived to exist among competition law experts regarding its proposals is certainly not reflected in the views of the CBA Section membership.

The CBA Section is of the view that, while there may be substantial concerns that the present system is not working well, it may not be possible to define the criminal track of any two-track framework narrowly enough to avoid inadvertently bringing within its scope a significant range of agreements not ordinarily considered hard-core conduct. Serious risks may flow from proceeding to legislate before those concerns have been fully explored. These include the potential chilling effect of any ambiguity in the amendments on a broad range of legitimate conduct. Business may face increased compliance costs, and there may be negative effects for sensible, above-board business arrangements if the scope of section 45 is broadened. True hard-core conduct could be inadvertently de-criminalized, or the ability of the law to deter such conduct otherwise reduced. More detailed and extensive study is required to clarify the objectives of the proposed amendments.

To some extent, the lack of consensus amongst CBA Section members reflects the lack of hard evidence concerning the ability, or lack thereof, on the part of the Commissioner to investigate and prosecute economically harmful horizontal agreements. The fact that he loses many contested cases does not end the debate since – as recognized by the Industry Committee – “the object of competition policy is not about winning or losing litigated cases; it is about prescribing a framework for an efficient business sector that delivers products and services at competitive

prices.” The Commissioner could significantly advance the debate were the forthcoming Discussion Paper to offer evidence as to:

- economically harmful agreements that are beyond the reach of the current section 45 (as interpreted by PANS), and
- his experience of the chilling effect of section 45 on strategic alliances.

Other alternatives to section 45 should also be considered. These could include retention of the “unduly” standard along with the creation of an explicit second, civil track for competitor agreements, or inclusion of an efficiencies defence in the current section 45. Consideration should also be given to creation of a five-year limitation period for section 45 or any successor(s).

In addition to the need for more detailed study on the basic question of amendment, the CBA Section is united in its view that the particular wording of any amendment proposal, if one is ultimately advanced, will be critically important. The consultation will have to allow a considerable amount of time for careful and detailed review of the proposed wording in order to avoid what may be very serious and/or unanticipated consequences. Competition law commentators are virtually unanimous in noting the difficulty of trying to draw a line between conduct which may be competitively harmful in all or most circumstances, and conduct which may sometimes be competitively harmful but at other times is benign or pro-competitive. This exercise of legislative line drawing is critical in respect of section 45. A great deal of precision, care and time will be required in order to achieve the best possible result.

APPENDIX A

Recent Proposals for Change

Appendix A analyzes four recent proposals to amend section 45 of the Act:¹

- McCarthy Tétrault, “Proposed Amendments to Section 45 of the *Competition Act*, August 2001” (“McCarthy Tétrault Report”).
- Macleod Dixon, “A Report on Canada’s Conspiracy Law: 1889 – 2001 and Beyond, August 2001” (“Macleod Dixon Report”).
- Borden Ladner Gervais, “Legislative Framework for Amending Section 45 of the *Competition Act*, April 2001” (“Borden Ladner Gervais Report”).
- W. T. Stanbury, “Reforming the Conspiracy Provisions of the *Competition Act*”, (Spring/Summer 2000) Canadian Competition Record, 63 (“Stanbury Report”).

Each of the four proposals embodies, in one form or another, a “dual-track” approach to reform of the conspiracy law. Section 45 of the *Competition Act* would be changed to a *per se* offence respecting “hard-core” cartel conduct as defined in each proposal, and a new second “track” (a restrictive trade practice under Part VII of the Act) would give the Tribunal jurisdiction to make injunctive orders against parties to “non-hard-core” competitor agreements that it finds substantially lessen competition or would likely have that effect.²

A. McCarthy Tétrault Proposal Summarized

The authors of the McCarthy Tétrault Report criticize section 45 as:

- too vague to be a basis for criminal law,
- so broad that it has a chilling effect on strategic alliances, and
- so difficult to prosecute that it is ineffective to challenge “hard-core” agreements that lessen competition significantly.³

They also criticize the fact that efficiencies cannot be considered in the present section 45.

The proposal sets out a *per se* criminal conspiracy offence that prohibits agreements fixing minimum prices, allocating markets and customers and restricting supply among competitors or potential competitors. It is not directed at boycotts, and is the only one of the four proposals that excludes concerted boycotts from the specified *per se* prohibitions.⁴ The proposed offence relates only to “agreements”, and not additionally to “arrangements”, “conspiracies” or “combinations” as the current section 45 does, on the basis that the authors wish to avoid any doubt that a meeting of the minds is required.⁵ The proposed offence would not include vertical agreements or agreements among buyers.

B. Comments on McCarthy Tétrault Proposal

(i) “Nature of agreement” concept is too vague

The proposed offence does not refer to the effects or the object of a competitor agreement. The authors state that a reference to effects might result in having an over-inclusive criminal prohibition. They also state that they would avoid reference to the object of the agreement because it “would require the court to determine what is the true object of an agreement, which may in some cases prove to be a very difficult task.”⁶ The authors state that their draft of the criminal offence defines the prohibited conduct by reference to the “nature of the agreement”.

Some CBA Section members believe the “nature of the agreement” is a vague concept, which requires more discussion. It seems to be analogous to the “pith and substance” of legislation in the context of cases that deal with the jurisdiction of Parliament and the provinces. In addition, it appears that the draft language in the proposal is ambiguous. It refers to “Every one who agrees with another person to:

- (a) fix, establish, control or maintain the price ...
- (b) allocate any markets, ... or
- (c) prevent ...or limit the production or supply of a product.”

In this language a great deal would turn on the meaning of the word “to” that immediately precedes paragraph (a). Some question whether it is reasonable to expect that the word “to” in this context would import a meaning such as “nature of the agreement”. It is not clear why the authors used the words “nature of the agreement”. These issues require detailed consideration.

(ii) Inclusion of “Potential Competitors” Requires Economic Analysis

As noted above, the proposed section 45 applies both to competitors and “potential competitors”. The authors recognize that including potential competitors may lead to uncertainty.

The implications of including “potential competitors” should be carefully considered, not only because of the uncertainty of the result in a given case, but also because the definition of a potential competitor may require that a court undertake extensive economic analysis to determine a “market” in which the potential competitor and the other party could participate. This would likely require the court to consider extensive economic evidence, something that the authors state that they wish to avoid.⁷

(iii) Proposed Efficiency Defense Not Workable

Despite their concern not to be over-inclusive, and their efforts not to define the offence too broadly (for example by reference to effects), the authors recognize the need for exceptions to the *per se* offence. This is because both market allocation and output restriction are not

always anti-competitive.⁸ In the view of some CBA Section members, nothing illustrates more clearly the potential over-inclusiveness of the *per se* approach to criminal conspiracy law than this part of the McCarthy Tétrault paper.

In addition to other defences, the proposal contains two significant exceptions to the offence, which exist in order to minimize the possibility of unintentional over-inclusion. First, the offence would not apply where the impugned agreement is part of a broader agreement that brings about gains in efficiency, or is likely to do so, and is reasonably necessary to bring about the efficiency gains. This exception carries a reverse onus, to be established by the defence on a balance of probabilities. Second, the offence would not apply where an agreement in writing is registered with the Commissioner, for the time after the registration.

A defendant could not succeed in the first exception unless it could establish on a balance of probabilities that, among other things, the agreement would bring about efficiencies. This appears, however, to violate one of the proposal's objectives, which is to minimize the courts' application of economic concepts such as markets, market power and efficiencies.⁹ Moreover, it is interesting that the authors, having said that the economics are difficult, would impose the burden on the defence. The authors justify the reverse onus by saying that the defence is in a better position to show the agreement would likely bring about efficiency gains than is the Crown to prove that efficiency gains would not be likely. In our view, this conclusion requires further study, in light of the exceptional investigative resources that the Commissioner has under the Act. A further deficiency of this exception is that the proposal does not define the meaning of "efficiency" in the context of a criminal defence. The authors state that "this term is already well-known in competition law".¹⁰ As evidenced by the *Superior Propane* case, however, the term is quite controversial. Some believe it should not be left to the criminal courts to define it for the purpose of section 45 of the Act.

The second exception brings to light an important issue. The authors appear to have proposed the *per se* offence on the basis that "hard-core" cartel conduct "meets with widely accepted moral disapproval".¹¹ This is strong language, which goes beyond the economic purposes of the Act as set out in section 1.1. Our concern is with economic, not moral legislation. Nevertheless, having introduced the notion of moral disapproval of "hard-core" agreements, the proposal would exempt them from the criminal law if notice were given to the Commissioner. Presumably this inconsistency does not concern the authors because the Commissioner, having received notice of the agreement, could deal effectively with the agreement by means of the civil track under the proposed section 79.1. This leads to the suggestion that the civil track would be an important part of the enforcement arsenal. The implications of the importance of the civil track are discussed below.

(iv) Civilly Reviewable Approach Creates Uncertainty

The civil track is proposed, in addition to the criminal track, because, the authors state, "other anti-competitive horizontal agreements (in addition to "hard-core" agreements that would be prohibited by section 45) need to be prevented or discontinued if their prejudicial impact on competition is not offset by the benefits that they create."¹² Hence, a new section 79.1 would give the Tribunal jurisdiction to grant injunctive relief to the Commissioner in

respect of agreements among actual or potential competitors that prevent or lessen competition substantially, or are likely to do so.

All four proposals considered in this Appendix propose a second track, which parallels the substantive test in section 92 of the Act. Consideration must be given to the “chilling effect” that the second track - an additional restrictive trade practice - might have on Canadian business. This is particularly apparent where, as we have mentioned above, a legislative structure is erected which relies on the civil track to remedy “hard-core” cartel conduct that can be immune from criminal prosecution by the mere filing of a notice. Furthermore, while at present “non-hard-core” competitor agreements are not prosecuted, the Bureau and Tribunal would regulate them under the proposed second track. The picture that emerges is one in which Canadian business might be more disinclined to enter efficiency-enhancing competitor agreements than is the case under the current section 45.

In summary, while the McCarthy Tétrault proposal contains some useful suggestions, it rests on two doubtful premises: first, that over-inclusiveness of a *per se* offence can be effectively mitigated by exceptions or defences, and second, that a second track is necessary or desirable.

C. Macleod Dixon Proposal Summarized

The authors of the Macleod Dixon Report suggest that the conspiracy provisions of the Act have been a failure in terms of protecting the public interest.¹³ They propose to remedy this by creating:

- a *per se* criminal offence having the object or effect of affecting prices, output, expansion, entry, customers or suppliers in respect of a market,
- an exception to the *per se* offence for certain “ancillary” agreements,
- a “broader civil net”, that is, a second track restrictive trade practice within the Tribunal’s jurisdiction, and
- a clearance mechanism whereby the Commissioner could exempt from the offence categories of conspiracies (“block exemptions”) and specific conspiracies of which the Commissioner is notified.¹⁴

The proposed *per se* conspiracy offence would prohibit agreements (i) fixing or otherwise affecting prices, (ii) eliminating or restricting output or supply, (iii) impeding expansion or entry or (iv) allocating, ceasing to supply or purchase or otherwise affecting relations with customers or suppliers. Like Bill C-472, and unlike the McCarthy Tétrault proposal, it would include boycotts. The offence applies only where the parties to the agreement “compete in the market”. This is similar to Bill C-472, whereas the McCarthy Tétrault proposal would also expressly include “potential competitors”. The Macleod Dixon proposal

relates to an “agreement or arrangement”. The proposed offence could include vertical agreements (but only if the parties were competitors, in which case the relationship would be horizontal) and agreements among buyers. It applies where the agreement has either the “purpose” or the “effect” set out in (i) to (iv) above.

D. Comments on Macleod Dixon Proposal

(i) The Proposed Offence is Over-inclusive

The offence as defined in the Macleod Dixon proposal is likely to be over-inclusive, more than the McCarthy Tétrault proposal, because:

- It is defined in terms of either the purpose or the effect. The CBA submission on Bill C-472 in July 2000 stated:

“Any attempt to focus a reformulated section 45 on the effects of horizontal agreements is fraught with difficulties. As reflected in Bill C-472 such an approach easily leads to substantial over-inclusiveness. It also makes it exceptionally difficult to distinguish between the objects of an agreement and its ancillary effects. A principal purpose of a two-track approach is to retain criminal sanctions - and the corresponding deterrent effect of those sanctions - only for truly hard-core cartel agreements ... it would be far more effective and workable to define the revised criminal offence in terms of the object of the agreement, rather than its effects (which can be either ancillary or central to the agreement). Some believe that even this suggestion may not prove workable after further consultation and analysis.”¹⁵

- The price-fixing provision is defined as “fixing, stabilizing or otherwise affecting prices” in a market. The underlined words would apply to many inter-competitor transactions that are not “hard-core” conduct, including the sales of goods and services.
- The supply restriction provision is defined as “eliminating or restricting capacity, output or supply” in a market. The underlined words would include an agreement where a competitor sold or exchanged products to a competitor in order to use surplus capacity, which is not “hard-core” conduct.

(ii) “Ancillary Agreement” Exemption Impractical

The proposal contains an exception for “ancillary agreements”, in addition to other defences. This exception is impractical because, unlike the McCarthy Tétrault exception for an efficiency-enhancing agreement that is part of a broader agreement, the Macleod Dixon proposal would require the defendant to raise a reasonable doubt respecting all of the following:

- the impugned agreement is one of at least two agreements (the other being “another agreement or arrangement”, defined as the “principal agreement”),

- the impugned agreement is “ancillary” to the principal agreement,
- the principal agreement was not entered for the purpose of price-fixing, market restriction, supply restriction or boycott (provided that it is deemed not to have been entered for this purpose if the predominant purpose of the principal agreement is to achieve efficiency gains), and
- it was not reasonably foreseeable at the time the principal agreement was entered that competition would be substantially lessened by the ancillary agreement.

Unlike the McCarthy Tétrault proposal, the Macleod Dixon proposal does not reverse the burden of proof. But, the McCarthy Tétrault Report explains that it would be necessary to reverse the burden because it would have the defence merely show that efficiencies could result, not that they would. Although the Macleod Dixon proposal does not reverse the onus, we consider that it would be very difficult to raise a reasonable doubt in accordance with the above four-point test. The underlined words would likely prove very difficult for the defence, especially the last one which, at the least, would require the defence to introduce some evidence or other basis to show that it was not reasonably foreseeable that competition would be substantially lessened by the ancillary agreement. This would lead to a consideration of economic evidence and concepts within a hypothetical consideration of foreseeability, which is impractical.

(iii) Proposed Clearance Regime Impractical

The Macleod Dixon proposal contains an exception to the offence where the Commissioner issues a certificate. This clearance regime differs from the exception in the McCarthy Tétrault proposal because the latter would apply where the parties merely give notice to the Commissioner. The clearance certificate regime proposed by Macleod Dixon is like a combination of the block exemption regime in the E.U. and the advance ruling certificate under section 102 of the Act.

It is not obvious that businesses would use the individual clearance certificate approach, other than in very exceptional circumstances, because it is likely that business people would view the approach as impractical and risky. Before any certificate was filed, business people would have to conclude that any help the Bureau could give would be offset by the risk of the Bureau’s interference in the transaction. Furthermore, it goes without saying that the Bureau must be careful and would be inclined to impose conditions in all but the clearest cases. Yet businesses would not need the Bureau’s clearance in clear cases, only in complex or doubtful ones.

(iv) Civilly Reviewable Approach Creates Uncertainty

The second track reviewable practice approach is implemented by amending the definition of “market restriction” in section 77 of the Act.

The comments above on the McCarthy Tétrault proposal (that no case has been made for a civil track to deal with conspiracy, and the risk of a business chill) apply to this proposal.

The Macleod Dixon proposal contains an over-inclusive, and thus a problematic definition of the *per se* offence. The “ancillary agreement” defence is unlikely to mitigate this problem because it is impractical. The clearance regime also may not mitigate the problem because of the time and resources required to seek a clearance and the risk of an adverse result. As in all the proposals, the second civil track has not been sufficiently studied to determine if it would create a business chill for pro-competitive (or even competitively neutral) strategic alliances.

E. Borden Ladner Gervais Proposal Summarized

This proposal does not contain draft legislation, but rather a description of amendments to the Act.¹⁶ The proposal rests on the following stated concerns:¹⁷

- it is necessary to overcome the deficiency in section 45 of the Act that members of a “hard-core” cartel might not be successfully prosecuted because the prosecution could not prove that they would lessen competition unduly,
- although the *per se* rule in the U.S. addresses this deficiency, it contains another deficiency, which is the inflexibility that can result in over-inclusiveness,
- an exception to the *per se* rule is needed to overcome the problem of inflexibility,
- an option to overcome inflexibility is a rule of reason approach, but this is a problem because it introduces uncertainty at the outset as the courts develop a body of jurisprudence, and because the many economic variables make it very costly to analyze and to litigate rule of reason cases,
- the preferred second option to overcome inflexibility is a notification and clearance regime, and
- it is necessary or desirable to have a second track civil regime.

The Borden Ladner Gervais approach is similar to the Macleod Dixon proposal, but differs in that the language of the offence would be the same as or similar to Bill C-472¹⁸ and in the details of the notification and clearance regime. Both the Borden Ladner Gervais and Macleod Dixon proposed *per se* offences would be more likely to be over-inclusive than the McCarthy Tétrault proposal.

F. Comments on Borden Ladner Gervais Proposal

(i) “Ancillary Agreement” Exemption Impractical

In response to the Borden Ladner Gervais proposal to amend section 45(1) using the language of Bill C-472, the comments that the CBA made in its July 2000 criticism of the proposed section 45 in Bill C-472 are applicable.¹⁹ In particular, the “ancillary” agreements

exception, criticized by the CBA in July 2000, contains many elements also found in the Macleod Dixon ancillary agreements defence, upon which we have commented above.²⁰

(ii) Proposed Notification/Clearance Regime Impractical

The Borden Ladner Gervais proposal describes two types of notification and clearance systems, which are put forth, at least in part, as exceptions to the proposed *per se* offence. The proposal's stated purpose of a notification and clearance system is to reduce the inflexibility and overbreadth of the *per se* prohibition and to reduce the Commissioner's detection and evidence gathering costs. The first alternative described in the proposal is a "discretionary track model", which would apply both to arrangements that have been entered into or given effect and those that have not. Where the parties request an exemption from sanction under the Act, the Commissioner would have the jurisdiction to:

- grant an exemption by issuing a clearance certificate,
- refer the matter to the Tribunal under the civil provision, or
- advise the parties that he will refer the matter to the Attorney General for prosecution (with the possibility that the Bureau's Immunity Program would apply).

The authors state that the advantage of this model is that it removes the opportunity for "strategic behaviour" which would follow from an automatic notification and exemption system (such as that proposed by McCarthy Tétrault).

The second alternative is a "civil track model", which would apply only to arrangements that have not been entered into or given effect. Where the parties request an exemption under the Act, the Commissioner would have the jurisdiction to

- grant an exemption by issuing a clearance certificate, or
- refer the matter to the Tribunal under the civil provision.

The authors state:

"Upon receipt of notification, criminal prosecution would cease to be an option under this model ... This approach is somewhat problematic because naked, hard-core cartel behaviour that is more effectively and more appropriately addressed and deterred through the application of a *per se* criminal prohibition, would be subject to a full-blown competitive effects analysis under the civil provision."²¹

The authors recommend that criminal immunity depend on non-implementation of the proposed agreement pending the Commissioner's clearance, commencement of Tribunal proceedings or a fixed time limit, so that "hard-core" cartel conduct could be prosecuted.

Some CBA Section members feel that neither alternative models of a notification and clearance system described in the Borden Ladner Gervais proposal is likely to be used by business people, for the reasons that we described above in relation to the Macleod Dixon proposal. The question of whether the *per se* offence would discourage competitor collaboration, or the second track would do so, requires further consideration.

(iii) **Civilly Reviewable Approach Creates Uncertainty**

As in all the other proposals, this one calls for a civil reviewable approach, which would parallel the substantive requirements and the procedures in the merger provisions of the Act. The comments above on the other proposals apply here. Some feel that no case has been made for a civil track to deal with conspiracy, and the risk of a business chill has not been studied adequately.

G. Stanbury Proposal Summarized

This proposal is based on three stated principles, which are consistent with the Macleod Dixon and Borden Ladner Gervais proposals:

- *per se* criminal offence for specified types of agreements,
- the civil track, and
- an advance clearance mechanism.

H. Comments on Stanbury Proposal

(i) **Defined *Per Se* Offences Over-inclusive**

The proposed section 45 would define *per se* conspiracy offences in four categories:

- (1) agreements or arrangement involving price-fixing,
- (2) market and customer allocation, and
- (3) restricting supply and boycotts.

It is not limited to agreements among competitors or potential competitors. Moreover:

- Because it is not limited to agreements among competitors or potential competitors, it could apply to vertical agreements. This seems anomalous because section 61(1) of the Act establishes liability for vertical price maintenance based on “agreement, threat, promise or any like means”.
- The proposal repeats the mistake of Bill C-472 in that the categories of *per se* offences are so broadly written that innocuous and pro-competitive agreements between competitors would be caught in the net. The draft language does not

delimit the prohibited agreements by their effects, objects or nature, but a reasonable interpretation of the proposed section 45 is that it would prohibit agreements according to their effects, despite the author's criticism of this feature of Bill C-472.²² As discussed above, this likely would result in over-inclusion.

- The draft states that the intent of a person to enter into an agreement involving one of the four specified categories (price-fixing, market allocation, supply restriction or boycott) should be deemed to have been established by proof that the person was a participant in such an agreement. It appears to be circular reasoning to provide that “intent to enter into an agreement” is defined by proof of being a “participant” in an agreement, because it is reasonable to argue that the ordinary meaning of “participant” would be one who intended to enter and did enter into an agreement.

(ii) Proposed Notification Scheme Impractical

Among the statutory defences and exceptions, the proposal contains an exception against criminal conviction where “notice of a proposed agreement was given to the Commissioner pursuant to subsection 79.2(1).”

While this differs from the similar exception in the McCarthy Tétrault proposal, in that it is limited to notice of a proposed agreement, the inconsistency noted above in the McCarthy Tétrault proposal also exists in the Stanbury proposal. The author criticizes Bill C-472 on the basis that the exemption for conspiracies that have less than 25% undermines the “moral logic” of a *per se* approach to hard-core cartel conduct.²³ Whatever meanings could be attributed to “moral logic” in this context, it would seem that the author means at least that there is some ethical or moral wrong in allowing even a *de minimis* hard-core conspiracy to be exempt from the criminal law. As in the case of the similar McCarthy Tétrault exception for the giving of notice, the proposal appears to contain an inconsistency between the moral value of a *per se* criminal condemnation of “hard-core” cartel conduct in all circumstances and an exception where notice is given.

(iii) Proposed Fines for Civilly Reviewable Matters Inappropriate

The civil track would be a new reviewable trade practice that would apply where a person enters an agreement or arrangement with one or more competitors or potential competitors and the arrangement or agreement has, or would likely have, the effect of substantially lessening competition. It seems anomalous that the proposed civil track is not parallel to the proposed criminal track. The civil track relates only to agreements “with one or more competitors or potential competitors”. This differs from the proposed offence, which is not limited to agreements among competitors or potential competitors.

The proposed civil track would give the Tribunal jurisdiction to impose fines (“administrative monetary penalties”).

- The proposal contains no argument or suggestion for a policy basis for an imposition of a fine. As noted above, the proposal diminishes the stated “moral

logic” of a *per se* offence. Yet here there is a suggestion for punishment of something that is not criminal conduct at all. The proposal to impose fines:

- further confuses the attempt to distinguish between “hard-core” competitor agreements and other competitor agreements,
- illustrates that the proposed civil track is not well thought out and could well produce a business chill that exceeds anything that is now alleged about the existing section 45, and
- reduces the already low incentive for persons to apply for a clearance certificate.

(iv) Proposed Clearance Regime Impractical

The proposed clearance regime gives the Commissioner jurisdiction to exempt a party from an application to the Tribunal under the civil track. As mentioned above, the application for clearance of a proposed agreement would constitute an exception to criminal liability. A clearance certificate would be valid for three years or such shorter period as the Commissioner may specify. The Commissioner must publish a list of the clearance certificates that have been issued.

Although the existence of clearance certificates must be published, there is no requirement to publish the exemption from criminal liability for having applied for a clearance certificate. If the purpose of publication of the existence of a certificate is to enlighten buyers of the parties’ products, it seems anomalous that there is not a requirement to do so where the conduct is a “hard-core” cartel agreement. Publication of the mere existence of a certificate may be insufficient to accomplish the purpose of enlightening buyers of the products. A summary of the parties and the products would have to be required in order effectively to notify buyers. The three-year limitation period is arbitrary.

The proposal provides that the Commissioner can apply to the Tribunal to rescind a clearance certificate. This suggests that the author has in mind a form of certificate that would be unconditional. This problem, and the problem of having a limitation period, would be appropriately dealt with by deleting:

- the limitation period and
- the right to apply to the Tribunal to rescind a certificate,

and substituting a provision that the certificate is valid only so long as the material facts remain unchanged.

APPENDIX B

Laws of Major Trading Partners

Below is a summary of the competition laws of the United States, the European Union, the United Kingdom and Australia as they relate to conspiracies, and in particular, to cartels.

A. United States

i. *Per Se* vs. Competitive Impact Test

Conspiracies are dealt with under Section 1 of the *Sherman Act*. It prohibits “every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade”. Although this provision is very broad, U.S. courts have narrowed the scope of Section 1 by prohibiting only unreasonable restraints. The U.S. Supreme Court has used a *per se* analysis for agreements that are so likely to harm competition and to have no significant pro-competitive effect that there is no need to conduct a detailed inquiry into their effects. Naked price-fixing, bid rigging, and market allocation have traditionally been found by courts to constitute a *per se* violation of Section 1, with no competitive effects test. For other types of agreements falling under Section 1, the courts have applied a rule of reason analysis to determine if the prohibition is violated.

More recently, courts have been blurring the distinction between *per se* and rule of reason tests. In *NCAA v. Board of Regents*, the Court stated that “there is often no bright line separating *per se* from Rule of Reason analysis”.¹ For example, U.S. courts have recently subjected group boycotts and tying arrangements, traditionally subject to *per se* analysis, to an analysis that looks beyond the agreement itself. In a recent case, *Continental Airlines Inc. v. United Air Lines, Inc.*, the court tried to explain the distinction, stating that the “abbreviated” or “quick look” form of Rule of Reason analysis...skips the inquiry into anticompetitive effects because those effects are manifest from the nature of the restraint.”² The result is a new hybrid approach whereby a “quick look” as to the market effect may be applied, even in cases where traditionally there has been a *per se* analysis. In other cases where there are reasonable competing claims about whether or not the restraint has anticompetitive effects, there have been more detailed analyses of the effect on the relevant market.

ii. Sanctions

Section 1 of the *Sherman Act* applies to both corporations and the individuals involved. “Hard-core” cartels are prosecuted criminally. Prosecutions have resulted in large criminal fines (which can be to a maximum of U.S. \$10 million under the *Sherman Act* or calculated under the Federal Sentencing Guidelines at twice the gain or twice the loss to the victims). Corporations may be sentenced to a term of probation ranging from one to five years, while individuals may be sentenced to a maximum three years in prison. Conspirators may also be liable in private suits under the *Clayton Act*, in which their conviction in a preceding criminal case may serve as *prima facie* evidence of the alleged civil wrongdoing and prevailing plaintiffs are entitled to treble damages and litigation costs. Conspirators may also be liable for civil penalties under the *Federal Trade Commission Act* for conduct that violates the *Sherman* and *Clayton Acts*.

iii. Pre-clearance

Parties may make a request to either the Federal Trade Commission or Department of Justice to review and provide advice with respect to proposed business conduct, including potential violations of Section 1 of the *Sherman Act*. Any advice given by these institutions is without prejudice and can be rescinded (although this would be unlikely).

iv. Proposed changes

The Department of Justice is urging that the *Sherman Act* be amended to increase the maximum fine for a violation of Section 1 from U.S. \$10 million to U.S. \$100 million. Fines in most cartel cases are calculated pursuant to the alternative sentencing guideline rather than under the *Sherman Act*, resulting in much higher fines.

B. European Union

i. *Per Se* vs. Competitive Impact Test

Within the EU, both national and EU laws apply to cartels. However, EU competition law applies only to agreements or conduct that may affect “trade between Member States”. Anti-competitive conduct which is purely national in scope falls under the competition laws of individual member states.

Article 81 of the *European Community Treaty* (the “EC Treaty”) is the relevant provision for conspiracies. Article 81 can be enforced before national courts in all EU Member States and by the national competition authorities in some Member States. The rules regarding enforcement procedures are found in Regulation 17.

Article 81(1) prohibits “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market”. While Article 81(2) confirms that agreements that are prohibited under Article 81(1) are automatically void, Article 81(3) provides instances when Article 81(1) will not apply to an agreement.

In the *Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Agreements*, the Commission states:

“In some cases the nature of a cooperation indicates from the outset the applicability of Article 81(1). This is the case for agreements that have as their object a restriction of competition by means of price-fixing, output limitation or sharing of markets or customers. These agreements are presumed to have negative market effects. It is therefore not necessary to examine their actual effects on competition and the market in order to establish that they fall within Article 81(1).”³

This statement seems to attempt to suggest that agreements that fix prices, limit output or share markets or customers are *per se* offences with no competitive impact test. However, in theory, the use of the word “presumed” leaves open the possibility that a party could bring evidence demonstrating that the agreement does not have negative market effects, thus rebutting this presumption.

In any event, Article 81(3) provides that Article 81(1) may be declared inapplicable where the agreement has pro-competitive benefits, is not unnecessarily restrictive and does not impose the risk of eliminating substantive competition. In the case of *European Night Services v. EC Commission*, the Court of First Instance stated that with respect to agreements such as price-fixing, which obviously restrict competition, “...such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article 81(3) of the Treaty, with a view to granting an exemption from the prohibition in Article 81(1).”⁴ The implication is that even naked price-fixing cartels may be allowed. This is very different from the U.S. context, where “hard-core” cartels are illegal without any analysis of their competitive impact. For this reason, Article 81 can at best be considered to provide only a quasi *per se* prohibition.⁵

If the object of the agreement is not found to restrict competition, an analysis of whether this is the effect of the agreement is undertaken by the EC. The Guidelines indicate that these agreements must not only limit competition between the parties but also affect competition within the market to the extent that prices, output, innovation or the variety or quality of goods and services can be expected to be negatively effected.

ii. Sanctions

Article 81 applies only to undertakings, not to employees or officers of these undertakings. Undertakings include limited companies, partnerships, trade associations, individuals operating as sole traders, state-owned corporations and not-for-profit organizations.

Civil sanctions, in the form of fines are imposed on undertakings. The fines can be up to ten per cent of worldwide group turnover in the financial year preceding the decision. Despite the size of the fines, Regulation 17 states that the fines are not of a criminal nature. The Commission may also require offending parties to end the infringement or to take action to ensure that their future conduct is lawful.

iii. Pre-Clearance

Under Article 4 of Regulation 17, notification is a prerequisite for obtaining an exemption, subject to certain limited exceptions. A firm which seeks a negative clearance must also apply to the Commission. From the date of notification, the parties involved receive immunity, which extends until the date the Commission grants or refuses the negative clearance or exemption or decides to withdraw immunity following a preliminary investigation.

iv. Proposed Changes

In September 2000, the Commission proposed granting national authorities the power to apply not only Article 81(1) prohibition on anti-competitive agreements but also Article 81(3). Previously, exemptions under Article 81(3) were only granted by the European Commission. Further, it was proposed that EU competition law apply to the exclusion of national competition laws in cases where agreements affected trade between Member States and that the Commission would be given the power to impose structural remedies (divestments) as well as fines for a breach of Article 81.

C. United Kingdom

i. *Per Se* vs. Competitive Impact Test

The *Competition Act 1998* is the principal legislation for conspiracies (the “Act”). Chapter 1 of the Act, modelled closely on Article 81 of the EC Treaty, provides a prohibition on anti-competitive agreements.

Although the Act does not provide a specific definition of cartels, the Director General of Fair Trading Guidance on Penalties defines cartels as “...agreements, decisions by associations of undertakings or concerted practices which infringe the Act and involve price-fixing, bid rigging (collusive tendering), the establishment of output restrictions or quotas and/or market sharing or market dividing.” Although Chapter II provides a prohibition on the abuse of dominant market position which may be applied to cartels, Chapter I is the main tool to punish cartel activity.

As with the EC Treaty, “hard-core” cartels are presumed to have negative effects and thus there is no competitive impact test. However, exemptions are available (even for hard-core cartels). Other agreements are examined by looking at whether the effect of the agreement is to restrict competition.

ii. Sanctions

The Act applies only to agreements and practices between “undertakings”. Currently there are only civil fines for companies that engage in unlawful anti-competitive behaviour. These fines are up to a maximum of 10 percent of the UK turnover of each undertaking concerned for each of the last three years during which the infringement occurred.

iii. Pre-Clearance

Provisions for pre-clearance mirror those in the European Union, although the notification and application for a negative clearance is made to the Director General of Fair Trading.

iv. Proposed changes

A new *Enterprise Bill* (which we understand has been passed, but not yet proclaimed) will introduce *per se* criminal sanctions for individuals who enter into cartel agreements, with the possibility of up to five years in prison and/or fines. The definition of the offence is based on

the concept of “dishonesty” and covers price-fixing, market-sharing, limitation of production and bid-rigging. The offence will not be extended to vertical agreements or include corporate liability.

Notably, the proposed definition of the criminal offence is not directly linked to Article 81 of the EC Treaty. This would seem to be intentional, as in the debates surrounding the *Enterprise Bill*, many experts recommended against a direct link in order to distance the offence from possible arguments that the agreement in question should be exempt under Article 81(3) of the EC Treaty.

D. Australia

i. Per Se vs. Competitive Impact Test

In Australia the relevant legislation dealing with conspiracies is the federal *Trade Practices Act* (the “TPA”). Section 45 prohibits agreements, arrangements and understandings which have as their purpose, effect or likely effect the substantial lessening of competition. Section 45A establishes that certain agreements are deemed to fall under Section 45 and thus are *per se* unlawful. Price-fixing agreements, resale price maintenance, entering into “exclusionary provisions” (boycotts by competitors of dealings with another person or classes of person), and third line forcing (supplying goods or services on the condition that the purchaser must acquire other goods or services from a third party) fall under Section 45A. Some commentators have suggested that the *per se* nature of the proscription has been diluted because an “intention or likelihood to affect price competition” is required.⁶

Other arrangements are subject to a rule of reason analysis to assess whether their purpose or effect is to substantially lessen competition.

Notably, as under Article 81(3) of the EC Treaty, the Australian Competition and Consumer Commission may grant authorisations for agreements even if they fall within the *per se* category.

ii. Sanctions

The TPA applies to both individuals and corporations. It does not impose criminal sanctions for breach of Part IV. Civil penalties may be imposed on both corporations and individuals, with a maximum fine of A\$10 million for corporations per contravention and A\$500,000 per contravention for an individual.

iii. Pre-Clearance

Parties can apply to the Australian Competition and Consumer Commission for an authorisation with respect to potential anti-competitive agreements or practices. An authorisation provides immunity from future legal action in respect of the agreement or practice.

iv. Proposed changes

The Australian Competition and Consumer Commission has proposed creating new stand-alone criminal sanctions for individuals involved in “hard-core” cartel activity such as market sharing, price-fixing and bid rigging. Civil remedies would continue to be available for less serious conduct. The proposed amendment would not apply to vertical agreements.

The Australian Competition and Consumer Commission has also stated that it wants the existing maximum fine of A\$10 million for each offence raised to a maximum equivalent of up to three times the value of any commercial gain from the contravention, or, if no estimate of gain can be made, 10 percent of the offending firm’s annual turnover for the duration of the infringement for a maximum of three years.

APPENDIX C

Limitation Periods

The *Competition Act* (the “Act”) should be amended to provide a five year limitation period for the prosecution of offences. If the offence is of an ongoing nature (e.g. price-fixing) then the limitation period should begin on the later of termination of the commission or implementation of the offence (e.g. when the agreed price increase has ceased being effective). The inclusion of a limitation period will move the Act into line with U.S. and European Union antitrust law, which provide for a five year limitation period, and is in keeping with the trend in several other jurisdictions which now have limitation periods for analogous offences. In addition, limitation periods have been enacted in Canada for a variety of regulatory and quasi-criminal offences.

There are sound public policy reasons for imposing such a limitation period, which explains why other major antitrust jurisdictions have them.

A. Limitation Periods in Canada

(i) Federal Law

Generally, the tradition upon which the *Criminal Code*, R.S.C. 1985 c. C-46, (the “Code”) is founded does not provide limitation periods with respect to the commencement of the prosecution of indictable offences.¹ While this tradition applies to criminal statutes, the Act, though supported by penal sanctions, is essentially regulatory in nature. Hence the Act is part of our administrative law and is not strictly a criminal law statute.² The Act is aimed at regulation of the economy and business activities, with a view to preservation of the competitive conditions that are crucial to the operation of a free market economy. As such the Act has been characterized as not being concerned with “real crimes” but with what have been called “regulatory” or “public welfare” offences.³ The characterization of the Act as regulatory and not criminal in nature is further demonstrated by its characterization as valid federal legislation under the general trade and commerce power under s. 91(2) of the *Constitution Act, 1867*.⁴

There are, however, examples of Code offences for which limitation periods have been enacted. One example from the Code is section 48, which provides for a three year limitation period for charges of treason.⁵ Section 786(2) of the Code provides that proceedings to enforce summary conviction offences cannot be instituted more than six months after the time when the subject matter of the proceedings arose.

For summary conviction offences under a number of federal statutes, there are limitation periods of between two and eight years.⁶ The offences covered by these statutes include those where the prosecution elects to proceed by way of summary conviction for giving undue preference to a creditor (s. 981 of the *Bank Act*), fraudulent use of the title of “bank” (s. 983 of the *Bank Act*), and wilfully disposing of or withholding goods covered by security (s. 984 of the *Bank Act*). Other offences under federal regulatory statutes provide for limitation periods with respect to the prosecution of offences ranging from one to five years.⁷ The offences at issue include making prohibited share transfers (s.32(3) of the *CBCA*), transacting short sales of shares (s.130 of the *CBCA*), failing to meet corporate access and record keeping requirements (ss. 20 to 22 of the *CBCA*), and offering or accepting bribes in exchange for votes (s.481 of the *Canada Elections Act*).

(ii) Provincial Limitation Periods

Provincial regulatory and quasi-criminal offences also provide for limitation periods. Generally, section 76(1) of the *Ontario Provincial Offences Act*⁸ imposes a default six month limitation period for provincial offences, beginning from the date on which the offence is allegedly committed, where no other limitation period is prescribed. Due to the serious nature of both the offences and the penalties provided, the six year limitation period under the *Ontario Securities Act* is of particular note. Section 129.1 provides that, “[e]xcept where otherwise provided... no proceeding under this Act shall be commenced later than six years from the date of the occurrence of the last event on which the proceeding is based.”⁹

Offences under the *Ontario Securities Act* include improper insider trading (trading where there is knowledge of an undisclosed material fact), tipping (s. 76) and misleading statements in disclosure statements (s. 121(1)(b)). It also includes any contravention of Ontario securities law (s.121(1)(c)). Penalties for offences under the *Ontario Securities Act* are fines of up to \$1 million or imprisonment for up to two years or both.¹⁰

B. Foreign Limitation Periods

Other jurisdictions have concluded that limitation periods are appropriate for antitrust offences. The U.S. and E.U. have five year limitation periods. Canada should also adopt a limitation period for offences under the Act to continue the appropriate process towards soft convergence in international competition enforcement and harmonization of worldwide antitrust law.

(i) Limitation Periods in U.S. Antitrust Law

Title 18 of the *United States Code* provides for a five year limitation period for criminal antitrust actions.¹¹ The rules concerning the accrual of a criminal claim are different from those that apply in civil actions. In a civil conspiracy case, only those acts that occur during the limitation period give rise to liability and damages cannot be recovered for acts committed outside the limitations period. However, by contrast, the rule in criminal cases is that:

“as long as some part of the conspiracy continued into the five-year period preceding the indictment, the statute of limitations [does] not insulate [the defendant] from criminal liability for actions taken more than five years prior to the time of indictment.”¹²

In cases involving price-fixing or bid-rigging, the U.S. Courts of Appeal which have considered the issue have concluded that a criminal conspiracy to rig bids continues until either the final payments are received under the illegal contract or the final distribution of illicit profits among the conspirators occurs. Accordingly, the statute of limitations does not limit the antitrust defendant’s liability for restitution to those profits earned within five years preceding the indictment; rather, the defendant must pay restitution for all losses caused by the conspiracy provided that the last occurrence was within the five year limitation period.¹³

(ii) Limitation Periods in E.U. Competition Law

Under Regulation 2988/74, the Commission’s power to impose fines is subject to a limitation period of five years for substantive infringements of the European Union competition rules. The limitation period is three years for procedural infringements (i.e. infringements relating to requests for information, investigations, applications for negative clearance and notifications).¹⁴

The limitation period begins to run as of the day that the infringement is committed. However, if the infringement is continuing or repeated, time only starts running on the day on which the infringement ceases.

(iii) Limitation Periods in U.K. Competition Law

Criminal prosecutions in the U.K. may be commenced at any time after the commission of an offence, except where there are statutory provisions to the contrary.¹⁵ There is no limitation period for prosecutions under the proposed U.K *Enterprise Bill*¹⁶.

(iv) Limitation Periods in Australian Competition Law

Australian Competition Law does not currently include criminal offences as part of its enforcement mechanism.¹⁷ Section 76 of the *Australian Trade Practices Act 1974* (the

“TPA”),¹⁸ provides that courts may require pecuniary penalties for contravention of Part IV (Restrictive Trade Practices) of the *TPA*. The Australian Competition and the Consumer Commission may institute civil actions to recover these penalties on behalf of the Commonwealth within six years of the alleged anti-competitive acts. In addition, under s. 82(1) of the *TPA*, individuals may commence civil actions for losses caused by contraventions of Part IV within 3 years of the alleged anti-competitive acts.¹⁹

C. Public Policy Considerations

The general public policy considerations which favour limitation periods with respect to all potential legal proceedings are applicable in the circumstances of offences and civil actions under the *Competition Act*. Basic policy considerations favouring limitation periods include the following.²⁰

(i) Evidentiary Concerns

As time passes, inculpatory and exculpatory evidence is lost and evidence becomes too unreliable to form a sound basis for adjudication. As a result of document retention policies that are in keeping with statutory obligations under the *Income Tax Act* and are generally four to five years for most business records, there may be no documents for an accused to use to defend itself if an offence relates to alleged conduct five or more years ago. In addition, the frailty of human memory in recollecting unremarkable past events (e.g. events at routine trade conferences 10 or more years ago) compounds the difficulties for an accused in formulating its defence.

The evidentiary concerns are of particular significance in prosecutions and civil actions founded upon conspiracies to engage in offences under the Act. As a result of the immunity and “favourable treatment” programs utilized by the Competition Bureau,²¹ the first person to approach the Competition Bureau has an incentive to characterize another as the instigator or ringleader of the anti-competitive conspiracy, in order to obtain immunity or favourable treatment. Compounding the evidentiary issues is that the alleged agreements founding the conspiracies are frequently based upon the recollection of undocumented meetings between executives who may have retired or otherwise left the accused corporation, died, or who are unable to testify due to ill-health. In such circumstances, the length of time between the alleged offence and the prosecution may make it impossible for an accused corporation to make full answer and defence, and the alleged conspiracy may be inferred by circumstantial evidence alone.²²

(ii) Economic Considerations

Individuals and businesses must be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them after a certain time. Businesses faced with possible liability of an unknown magnitude may be unable or unwilling to enter into other business transactions. The cost of maintaining records for many years and obtaining adequate liability insurance is ultimately passed on to the consumer.

(iii) Public Interest

It is generally in the public interest that disputes be initiated and resolved as quickly as possible.

Although the absence of a limitation period alone will not deter international businesses from investing in Canada, having no limitation may be viewed, along with higher taxes and more stringent regulation of business, as part of a business environment which makes it increasingly difficult for Canada to attract international business investment.