Comments on the Competition Bureau's Discussion Paper: *Options for Amending the Competition Act*

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.

Comments on the Competition Bureau's Discussion Paper: *Options for Amending the Competition Act*

I. SUMMARY

The National Competition Law Section of the Canadian Bar Association (the CBA Section) appreciates the opportunity to respond to the Government of Canada's June 23, 2003 discussion paper entitled *Options for Amending the Competition Act: Fostering a Competitive Marketplace* (the Discussion Paper).

The Discussion Paper sets out numerous and wide-ranging proposals to reform the *Competition Act*, including:

(i) new administrative monetary penalties ("AMPs") and private actions for damages in respect of civil reviewable matters;

(ii) new restitution order powers under Part VII.1 of the Act dealing with civil deceptive marketing practices;

(iii) the creation of a *per se* criminal conspiracy offence;

(iv) a new civil strategic alliances provision to deal with horizontal agreements that do not fall under the proposed new criminal offence;

(v) a new clearance certificate mechanism in respect of horizontal agreements;

(vi) the repeal of certain criminal pricing provisions and the treatment of predatory pricing and price discrimination under the Act's civil abuse of dominance provisions; and

(vii) a new power allowing the Commissioner of Competition, with the approval of the Minister of Industry, to ask an independent body to inquire into the state of competition and the functioning of markets in any sector of the

Canadian economy. For ease of reference, the CBA Section's comments follow the same order and general format as the Discussion Paper, addressing in turn each proposal in the form of answers to the questions posed in the Discussion Paper. With respect to the proposals to strengthen the Act's civil provisions, the CBA Section's answers are supplemented by an introduction to provide context to the answers that follow. Reference is also made to the CBA Section's February 2003 Submission on Reform of Section 45 of the *Competition Act* (Conspiracy), a copy of which is appended.

The CBA Section notes with some concern the very rapid rate of proposed and actual change to Canada's competition law framework in recent years. The significant and far-reaching proposals in the Discussion Paper continue this trend. The CBA Section cautions against the hurried adoption of reform proposals whose full implications, individually and taken together, cannot adequately be appreciated until carefully studied by all stakeholders in an environment and in a time frame conducive to meaningful evaluation and consultation. The Act is framework legislation that has a fundamental effect on business organization and structure, and therefore the efficiency and the international competitiveness of the Canadian economy. Fundamental changes to this legislation should not be made without taking the time for careful and reasoned consideration of not only the grounds for change to the Act, but also the potential implications of specific proposed new provisions.

A. Strengthening the Civil Provisions

The CBA Section does not believe that the introduction of AMPs, private actions for damages or restitutionary remedies in respect of the Act's civil reviewable matters is appropriate at this time. These remedies are not consistent with the established and carefully considered philosophy underlying the reviewable matters provisions of the Act, which considers reviewable conduct to be most often benign or pro-competitive and therefore not to be deterred through punitive

sanction. Rather, such conduct is viewed as legal and desirable until found to be anticompetitive by the Competition Tribunal (the "Tribunal"). The Discussion Paper does not explain why this framework should be reviewed or abandoned. In the circumstances, the CBA Section is of the view that current remedies available in respect of reviewable matters are based on sound policy and the regime should not be transformed by new and overlapping remedies that threaten over-deterrence of generally salutary conduct.

B. Amending the Conspiracy Provisions

Members of the CBA Section are divided on the necessity or wisdom of departing from the current regime governing conspiracies to create a two-track system under which "hard core" conspiracies are captured by a *per se* criminal prohibition and conduct that is less clearly anticompetitive is treated under a parallel civil provision. Even accepting or assuming that amendments to section 45 will proceed, the CBA Section is of the view that the scope of the criminal offence proposed in the Discussion Paper is overly broad. For example, it has the potential to prohibit vertical arrangements such as agreements between manufacturers and distributors where manufacturers also sell direct to market. In addition, the draft language in the Discussion Paper raises serious interpretive issues and due process concerns that appear to undermine the proposal's purpose of making hard-core conspiracy law simpler and more effective without "chilling" pro-competitive conduct. On the civil side, the CBA Section does not believe that a new strategic alliances provision is required. In the CBA Section's view, with some minor clarifying amendments to section 79, the Act's civil abuse of dominance and merger provisions are sufficiently robust to effectively address non-criminal strategic alliances. Should the two-track proposal be adopted as contemplated in the Discussion Paper, the CBA Section is in favour of a clearance certificate procedure in respect of horizontal agreements. However, the CBA Section believes that the suggested clearance provisions do not provide adequate comfort that proposed conduct receiving a favourable certificate would not attract subsequent liability.

C. Pricing Provisions

The CBA Section supports the proposal in the Discussion Paper to de-criminalize price discrimination and predatory pricing and to address such conduct under the abuse of dominance provisions in section 79 of the Act. Such conduct is appropriately dealt with as reviewable conduct given its often pro-competitive nature and the difficulty of assessing *a priori* whether it is anticompetitive in a given case. The CBA Section sees no reason to supplement civil enforcement of price discrimination or predatory pricing with additional remedies such as AMPs or rights of private action for damages.

D. Market References

Finally, the CBA Section does not support the re-introduction of a market reference power vested in the Commissioner and the Minister of Industry. There are already sufficient methods for conducting inquiries into the state of competition and the functioning of markets in specific industries, and it is submitted that these methods are more appropriate than the new mechanism proposed in the Discussion Paper. The new mechanism presents significant concerns with respect to due process, and there is no demonstrated need for imposing the tremendous cost of such inquiries on the public or industry participants in the absence of grounds to believe that conduct contrary to the Act has occurred.

The foregoing is a brief summary of the CBA Section's response to the Discussion Paper. Detailed responses to the questions posed in the Discussion Paper are provided below.

II. STRENGTHENING THE CIVIL PROVISIONS

A. Introduction

The Discussion Paper proposes, among other things, to strengthen the non-merger civil provisions of the Act by:

> (i) enabling the Tribunal to issue an administrative monetary penalty ("AMP") in any amount it considers appropriate in respect of refusal to deal (s.75), consignment selling (s.76), exclusive dealing, tied selling and market restriction (s.77), abuse of dominance (s.79), delivered pricing (s.81), and any new civil "s.45"/strategic alliance provision (proposed s.79.11); and
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> (ii) expanding the right of private parties to seek damages in the provincial courts for competition law infractions by expanding section 36 to cover the civil reviewable practices.

An additional remedy, restitution orders, is also proposed for civil misleading advertising under section 74.1 of the Act, with the Tribunal also being empowered to issue accessory ("freezing") orders in support, to ensure that assets are not depleted with a view to frustrating such a restitution order.

The CBA Section's comments on the individual questions posed appear below. It is useful, however, to consider these proposals in the context of the history of the non-merger reviewable practices as they are currently embodied in Part VIII of the Act.

The events leading up to the enactment of the non-merger reviewable practices provisions that are now found in Part VIII of the Act began in 1966, when the newly created Economic Council of Canada was asked to undertake a study of the Canadian marketplace and to make any relevant recommendations in respect of competition policy. Among the fundamental reforms suggested by the Council was the recommendation that the existing criminal offences relating to monopoly and merger be replaced by civil law provisions to be adjudicated by a Competitive Practices Tribunal composed of experts in economics, business and

law. The Economic Council concluded in its 1969 Interim Report that a criminal regime was not appropriate for dealing with certain trade practices:

> ". . we have recommended that an important part of Canada's competition policy legislation be on a civil rather than a criminal base, and that a specialized tribunal be created. Uppermost in our minds in suggesting these changes is the view that certain features of criminal law and procedure, such as the onus of proof beyond a reasonable doubt and the handling of charges by ordinary courts in ways that do not permit a full exploration of economic facts and analyses, are ill-suited to the effective treatment of some situations and practices relevant for competition policy. For this reason, it is suggested that only five business practices should continue to be regarded as criminal offences. For the rest, we have made the [assumption] that it would prove constitutionally possible for the federal government to establish a civil tribunal, perhaps under the power to regulate trade and commerce. This tribunal would address itself to mergers, business practices and export and specialization agreements. Unlike the five instances where criminal law still appears to be a valid approach, most of the practices to be referred to the tribunal are capable in some circumstances of working to the public advantage, but the distinction between likely good and bad effects may require a difficult weighing of relevant economic circumstances and probabilities, and therefore a kind of expertise that only a body of mixed professional disciplines could provide. The tribunal would be armed with injunctive remedies, with the power to recommend other remedies, and with a power of general inquiry." [1] (emphasis added)

The so-called "Stage I" amendments, enacted in 1976,[2] enlarged the responsibilities of the Restrictive Trade Practices Commission (RTPC) to include the review of refusals to sell, consignment selling, exclusive dealing, tied selling and market restriction. Only the Director of Investigation and Research was permitted to bring cases to the RTPC, and only prohibition and remedial orders designed to restore competition could be issued. Private actions were not permitted, and the RTPC was not empowered to issue fines or restitution, nor to award damages.

That same year, Skeoch and McDonald released their report entitled *Dynamic Change and Accountability in a Canadian Market Economy*.[3] The authors

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1 Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa, The Queen's Printer, 1969) at pp. 195-196.

2 *An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend the Combines Investigation Act and the Criminal Code*, S.C. 1974-75-76, c.76.

3 L.A. Skeoch & B.C. McDonald, *Dynamic Change and Accountability in a Canadian Market Economy* (Ottawa: Queen's Printer, 1976) ("Skeoch McDonald Report").

discouraged excessive government intervention, discussing even the tendency of monopolies to come and go as the dynamic forces of competition tended to prevail over time.[4] They advocated continuing the move away from exclusive reliance on criminal sanctions for competition law enforcement. The report explained:

> "The primary shortcoming of overemphasis on criminal law is the economic ineffectiveness of the judgment and remedy… The judgment and remedy are usually (and properly, in the context of criminal law) backward-looking and behaviourally oriented, and pay little concern to fostering desirable market situations. They are, in short, largely unconstructive so far as the economy is concerned."[5]

While Skeoch and McDonald discussed the role of private actions as a complement to public enforcement, a review of that discussion reveals that they did so only in the context of the activities that they advocated remain subject to criminal prohibition. They do not appear to have considered private actions for reviewable practices, including the abuse of dominance provision whose creation they advocated. Similarly, fines were simply not discussed. In keeping with the recommendations of Skeoch and McDonald, the Stage II amendments that saw the creation of the Competition Tribunal as well as the reviewable practice of abuse of a dominant position confined the Tribunal to consider whether the conduct under review ought to be prohibited on a going-forward basis. Fines, private court actions and damages were not imposed on such conduct, as no deterrent effect was considered appropriate.[6]

This is in keeping with the economic teachings that most vertical restraints on trade can be pro-competitive. Only when practised by one or more firms with market power might they lead to a substantial lessening or prevention of competition and thus harm the consumer.[7] Economists therefore advocate a case-

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4 *Ibid.* at p. 131.

5 *Ibid*. at pp. 40-41.

6 Bill C-91, An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, 1st Sess., 33rd Parl., 1984-85-86 (assented to 17 June 1986) [c.26].

7 For a detailed review of the economic arguments supporting the ability of restrictive trade practices ("vertical restraints") to be pro-competitive, see Trebilcock, Winter, Collins and Iacobucci, The Law and Economics of Canadian Competition Policy (University of Toronto Press: Toronto, 2002), chapters 6 and 7.

by-case approach to vertical restraints and do not condemn them out of hand. The current non-merger provisions in Part VIII of the Act embody that perspective. Also, certain "abusive" practices (such as predatory pricing) address conduct that provides an immediate, clear and measurable benefit to consumers, whereas any harm, if the conduct succeeds, occurs in the future and is speculative.

The proposal to impose additional remedies, designed not to change behaviour and restore competition going forward, but to punish[8] for past wrongs and/or to compensate "victims" of past "wrongdoing" views such conduct in a very different light. The public policy goals appear to have changed. In 1976 and 1986, the goal was to permit Canadian businesses to use all of the means at their disposal to compete against one another, and to enable the Tribunal to curb the excesses that threatened in the circumstances to limit the competitive process (as opposed to competitors). The public policy behind the Discussion Paper, however, is that of deterrence: firms should shy away from such behaviour, or at least ask the Commissioner for advice before taking actions that might put them at risk of impeding competition or gaining significant competitive advantage over their competitors. Industry is to be told to be much more cautious than has hitherto been necessary.

We are told that enforcement has been sub-optimal and that additional deterrence is required. The CBA Section does not believe that facts have been adduced to support the allegations that the non-merger civil provisions have been under-enforced. That said, if the case is made and additional deterrence is thought to be desired, the benefits of such deterrence ought to be weighed against the costs to the economy of the more constrained competitive behaviour that will result. The policy change from treating competitive behaviour as reviewable, to the creation, in essence, of civil offences should be recognized, and the importance of this change and the consequences for the Canadian economy given full weight.

Finally, as an over-arching comment, the CBA Section is very concerned that the Discussion Paper appears to take something of a "scatter-gun" approach to fixing the perceived problem of under-enforcement. Rather than taking a staged, incremental approach, it appears to consider implementing all of the proposed additional remedies simultaneously – and this with only one year of experience with private enforcement of some of these provisions. Canadian businesses will go from a world in which aggressive competitive behaviour will expose them to a risk of (a) investigation by the Commissioner of Competition,[9] and (b) the potential for a prohibition order and other behavioural orders – to a world in which they are potentially liable not only to investigation and behavioural orders, but also to unlimited fines (to be based, in part, on the profits derived from the behaviour), damages (potentially based on those same profits) and, in the case of civil misleading advertising, restitution orders (which, depending on what is "restored" to the customer, might cover not just profits but total revenues from the sales of the products in question).

Layering all of these additional remedies onto the current enforcement approach would be too much, too fast. As seen below, the CBA Section advocates against invoking either fines or damages for civil reviewable practices. Restitution orders, if appropriate for misleading advertising, are appropriate for criminal cases, not civil. If additional remedies are nonetheless enacted, however, the CBA Section strongly urges the Government to amend the Act incrementally, and to assess the experience with one remedy before subjecting business to the spectre of, in essence, double (or triple) punishment for the same behaviour.

8 Even the term "administrative monetary penalty" admits on its face the goal of punishment.

9 This is a risk that Canadian businesses do not take lightly in view of the incredible time, expense and effort involved for the object of an inquiry under the Act, even if the Tribunal ultimately does not issue an order.

B. Administrative Monetary Penalties for Civil Reviewable Matters under Part VIII (Except Mergers)

Question 1.

Do you agree that the Competition Tribunal should have the ability to impose AMPs when firms contravene the civil reviewable matters provisions of Part VIII (except mergers)? Why or why not?

Generally

In its submissions on Bill C-23, the CBA Section expressed its strong objection to the imposition of monetary penalties for any reviewable practice.[10] The CBA Section sees no reason to depart from this position.[11]

The Discussion Paper does not provide a clear or convincing rationale for the addition of AMPs as an available remedy under Part VIII of the Act, despite the fact that the proposal represents a dramatic policy shift with respect to the regulation of reviewable matters and raises significant issues concerning the use of AMPs generally.[12]

The addition of AMPs to the remedies currently available under Part VIII of the Act is inconsistent with the current structure and purpose of the Act. The addition of AMPs, damages and restitution orders for reviewable conduct would represent

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10 National Competition Law Section – Canadian Bar Association, "Submission on Bill C-23 *Competition Act* Amendments" (the "Bill C-23 Submissions"), p. 6.

11 Other commentators have also expressed concern over the proposed inclusion of AMPs as a remedy under Part VIII of the Act. See, *e.g.* J. Laskin, "Administrative Monetary Penalties and Damages for Reviewable Conduct: Not So Fast!", delivered at 2003 Competition Law Invitational Forum, April 30, May 1-2, 2003, Langdon Hall, Cambridge, Ontario; P. Franklyn & A. Balinsky, "Damages and Administrative Penalties under the *Competition Act*: The Case Pro and Con" (2002), 21 Can. Comp. Rec. 1; S.M. Hutton & C. McKenna, "*Competition Act* Reform Agenda: Government Responds to Parliamentary Committee Report" (2002), 21 Can. Comp. Rec. 1 at 22-3.

12 The Legislative Services Branch of the Department of Justice has noted that AMPs raise a variety of legal policy issues, including strict or absolute liability, the processes by which liability for and the amount of a penalty will be determined, the relationship of AMPs to criminal prosecution and other administrative sanctions and the institutional structure of required impartial review. See Department of Justice Canada, Legislative Services Branch, "A Guide to the Making of Federal Acts and Regulations", section 2.5 (http://canada.justice.gc.ca/en/jus/far/Guidd01.htm). These considerations obviously do not necessarily apply with equal force to the contemplated addition of AMPs under Part VIII of the Act (for example, it is not contemplated that the Commissioner be granted the power to impose AMPs), though they demonstrate the need to carefully consider how such an addition will operate within the broader legislative scheme.

a dramatic change in the approach of Parliament to the "reviewable practices" identified in Part VIII of the Act. Currently, reviewable practices identified in Part VIII of the Act are, effectively, lawful until found unlawful in the circumstances. As a consequence, a finding that a party has engaged in a reviewable practice carries no risk of monetary penalty until and unless an order is issued against that party under Part VIII.[13] Parliament decided not to impose sanctions other than remedial orders in dealing with such conduct because it recognized that "reviewable" practices are, in many (if not most) circumstances, pro-competitive or benign, and that the line establishing when this conduct becomes offensive to competition policy objectives is often difficult to define.[14] The proposed introduction of AMPs (as well as damages and restitution orders) would abandon Parliament's current approach to reviewable practices, effectively rendering conduct under Part VIII unlawful, *ab initio*, and thus subject to sanction – as is, for example, tortious conduct. In the absence of convincing evidence to support such a significant policy shift, the CBA Section is of the view that the current reviewable practices regime and its underlying rationale are sound and should not be displaced.

In the Discussion Paper, the Government has suggested that the remedies currently available under Part VIII of the Act have limited deterrent value, and that "there is little incentive for businesses to comply with the Act". On the contrary, there is little evidence that the current remedies are insufficient. Moreover, the current remedies reflect a deliberate balance between deterrence of uncompetitive conduct and a desire not to discourage pro-competitive conduct that could come within the scope of these provisions. Reviewable matters should be subject to lesser consequences than more serious criminal conduct that is unambiguously harmful to competition. Indeed, if market actors are exposed to

13 See Laskin, supra, note 11 at p. 5.

14 Trebilcock and Roach have noted (albeit in a different context) that the structure of the Act suggests that Parliament essentially "eschewed deterrence objectives with respect to reviewable practices" in electing not to attach any public sanctions to reviewable conduct save the possibility of preventing their continuance: M. Trebilcock & K. Roach, "Private Enforcement of Competition Laws" (1996), 34 Osgoode Hall L.J. 461 at 498.

AMPs for conduct subject to the civil provisions, they may be less likely to engage in risk-taking or innovative behaviour that may be competitively neutral or pro-competitive, particularly with respect to conduct such as refusals to deal, exclusive dealing or tied selling.[15] Indeed, severe consequences for vertical trade practices will logically serve to encourage vertical integration. Further, the risk of even an investigation under the current reviewable matters provisions of the Act does provide a significant deterrent effect. For example, the cost of responding to information requests or section 11 orders can be substantial both in terms of out of pocket expenditures on legal fees and other costs and the disruption to management time. While the CBA Section opposes the imposition of AMPs in respect of any reviewable practice, it notes that AMPs are especially unwarranted in respect of refusals to deal contemplated by section 75 of the Act. Such conduct is only tenuously linked to competitive injury and is in most cases already subject to contract and tort law.

Constitutional Ramifications

The ability to impose AMPs in respect of reviewable matters may raise significant issues under subsection 11(d) of the *Canadian Charter of Rights and Freedoms* (the "Charter"), as such penalties are arguably penal in nature. In *R. v. Wigglesworth*,[16] the Supreme Court of Canada made clear that the presumption of innocence and the right to a fair hearing before an independent and impartial tribunal guaranteed by subsection 11(d) are available to persons prosecuted for regulatory offences involving punitive sanctions. These are important issues that the CBA Section has not had adequate time to consider within the limited period provided for comments on the Discussion Paper. The CBA Section believes that further consideration and consultation of the possible ramifications of the proposed AMPs under the Charter are advisable.

15 See, e.g. M. Trebilcock et al., supra note 7 at p. 503, where the authors note the inherent ambiguity of the competitive impact associated with vertical restraints such as exclusive dealing and refusals to deal.

16 [1987] 2 S.C.R. 541.

Existing use of AMPs is insufficient precedent

Though AMPs are currently available under the civil deceptive marketing provisions and reviewable abuse of dominance provisions as applicable to persons operating a domestic airline service, this does not in itself justify making them available in other contexts. The availability of AMPs under section 74.1 was the result of the creation in 1999 of a hybrid regime to address misleading advertising.

The hybrid regime decriminalized conduct that would previously have been potentially subject to criminal sanction.[17] In this particular situation, the absence of some form of monetary penalty in the civil provisions would have been peculiar, as the only other remedies available under the civil provisions would have been imposition of a prohibition order and/or a corrective notice (while fines, imprisonment and a civil right of action would continue to be available for contravention of the criminal misleading advertising offence in section 52). In this limited circumstance, AMPs were a seemingly appropriate addition to the civil provision.

The availability of AMPs under section 79(3.1) is similarly context specific – the Tribunal was empowered to award AMPs of up to Cdn.$15 million against (effectively) a single firm in a particular industry sector in the event of a finding of abuse of dominance.[18] The availability of AMPs for breaches of section 74.1 and subsection 79(3.1) is not, therefore, a persuasive precedent for their general inclusion under Part VIII.

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17 There is some suggestion that the inclusion of AMPs in subsection 74.1(1) was, at the time, the result of recognition that other types of remedial relief (including disgorgement) were not appropriate to address the impact of deceptive marketing practices. See *Report of the Consultative Panel on Amendments to the Competition Act* (March 6, 1996), available online at http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct00064e.html. It is also noteworthy that Parliament did not place the reviewable marketing practices provisions in Part VIII, and instead created a new Part VII.1, which suggests that they were to be viewed as in distinct categories.

18 This point was also made by the CBA Section in the Bill C-23 Submissions, *supra*, note 10 at p. 5.

Foreign antitrust regimes

Though AMPs are a feature of some foreign competition/antitrust regimes, such as the EU, the UK and Australia, it is incorrect to suggest that this in itself provides significant support for their inclusion in Part VIII of the Act. There are significant substantive and procedural differences that should be considered when examining such foreign regimes.

In the EU, for example, the Commission has power under Articles 15 and 16 of Regulation 17/62 to impose fines on undertakings that infringe Article 81 or 82.[19] A firm may be fined up to a maximum of EUR 1,000,000 or 10% of its turnover in all products (whichever is greater). On the other hand, there is no criminal liability under EC competition law, and no provision whereby individuals may be imprisoned. This is similar to the position in Australia. Nor are AMPs necessarily (or even commonly) used to address cases of monopolization or other civil conduct brought under U.S. antitrust laws. We understand that the ABA Section of Antitrust Law will be addressing this point in its comments on the Discussion Paper.

Question 2.

Should AMPs be imposed at the discretion of the Competition Tribunal? Why or why not? Should there be a statutory maximum such as currently exists in subsection 79(3.1) (a maximum of $15 million)? If not, what alternative would you suggest?

If it is the case that AMPs are to be made available as remedies under Part VIII of the Act, the CBA Section submits that it would be preferable to provide stakeholders with some degree of certainty in evaluating contemplated conduct under the relevant reviewable provisions. Though the Tribunal may exercise its

19 Under Regulation 2003/1/EC cif May 1, 2004, the Competition Authorities of Member States may impose fines on undertakings that infringe upon Article 81 or 82. See Chapter II, Article 5.

discretion in imposing an AMP, there ought to be a maximum quantum consistent with the substantive nature of the provisions for which the remedy is sought. In relative terms, such maximum amounts should not be in the same order of magnitude as the maximum statutory fines applicable in the case of serious criminal offences. Also, as noted in the response to Question 1 above, even if AMPs are to be made generally available (which we submit has not been justified), the CBA Section sees no legitimate reason to impose any level of AMP in respect of conduct contrary to section 75 of the Act.

Question 3.

If AMPs are available for reviewable matters under Part VIII of the Act, should the general regime replace the current one that applies specifically to airlines (s.79)?

The CBA Section has previously expressed its reservations about sector specific regulation in the Bill C-23 submissions.[20] If AMPs were to be made available under Part VIII of the Act, it would be undesirable to have two remedial regimes in place to address conduct subject to an order under section 79. It is preferable, in such circumstances, to have a general regime replace the one specifically applicable to airlines. However, the CBA Section's preferred approach would be to delete the provision pertaining to AMPs for airlines.

Question 4.

Do you agree that the proposed criteria for assessing AMPs as outlined in the draft provision in subsection 107.1(2) are appropriate? Should other criteria be added to guide the Tribunal's assessment? If so, which criteria do you suggest?

If it is the case that AMPs are to be made available under Part VIII, the CBA Section submits that their use should be limited to exceptional circumstances and

20 Bill C-23 Submissions, *supra*, note 10 at pp. 5-6.

the Act should contain some guidance on assessment in the interest of certainty. However, any list of criteria should be specifically tailored in order to ensure that it is relevant to the merits of each specific reviewable practice in issue. In this regard, the CBA Section is of the view that proposed paragraphs 107.1(2)(b), (c) and (f) should be deleted, and paragraph (g) should be narrowed to include consideration of any factor that will promote compliance (rather than any other "relevant" factor). It may also be helpful to clarify in the provision that the Tribunal should consider and weigh any particular criterion in light of the particular facts and the specific reviewable practice under consideration.

Question 5.

Should the general regime for AMPs also apply to cases of refusal to supply by a foreign supplier (section 84)? Why or why not?

Section 84 has never been the subject of an application by the Commissioner to the Tribunal. It is therefore difficult to assess the impact of AMPs in the context of this provision. On a plain reading, however, section 84 currently provides that a person in Canada "by whom or on behalf or for whose benefit the buying power was exerted" may be subject to a remedial order, notwithstanding the fact that the refusal to supply was conducted by another party. The imposition of AMPs in this situation raises concerns of fairness, given their essentially punitive nature (see discussion in response to Question 1). If AMPs are to be made available under Part VIII, the CBA Section submits that conduct meriting an order under section 84 should not be subject to such remedies.

Question 6.

Additional comments?

Not at this time.

C. Administrative Monetary Penalties for Civil Reviewable Matters Under Part VII.1

Question 7.

In case of deceptive marketing practices, should the courts have the power to impose AMPs at their discretion? Why or why not?

It is proposed that the current "civil monetary penalties" in Part VII.1 of the Act AMPs not be limited in amount. As stated in the Discussion Paper, a court would have the ability to set the amount of an AMP in its discretion to:

(i) allow for dollar figures that provide a better incentive for compliance with the Act;

(ii) ensure "coherence and consistency" with the general regime for AMPs under Part VIII; and

(iii) achieve deterrence.

The cases to date do not lead one to conclude that the inability to set higher AMPs is either hampering the administration of Part VII.1 or failing to provide proper incentives to encourage compliance. The Tribunal has decided only two contested matters under Part VII.1.[21] In the circumstances, it is unclear why the Government has reached the conclusion that the existing maximum level for AMPs set out in subsection 74.1(1) is insufficiently high to "achieve deterrence". On the contrary, cease and desist orders and corrective notices generally provide very good incentives to comply with Part VII.1. The CBA Section is therefore of the view that the existing civil monetary penalties provided in paragraph 74.1(1)(c) of the Act are sufficient to address instances of deceptive marketing that do not meet the criminal offence criteria of knowing or reckless deception.

21 Canada (Commissioner of Competition) v. Universal Payphones Inc. (September 24, 1999) (Comp. Trib., Lutfy, J.); Canada (Commissioner of Competition) v. P.V.I. International Inc. et al. (2002), 19 C.P.R. (4th) 129 (Comp. Trib.). A third case, Canada (Commissioner of Competition) v. Sears Canada, is currently before the Tribunal. There has also been a number of consent agreements registered with the Tribunal involving conduct subject to section 74.1.

The "coherence and consistency" argument is also not persuasive. Parts VII.1 and VIII are different. They deal with different matters and use different procedures. There is no reason why the remedies should be identical. Misleading advertising and deceptive marketing practices are already subject to a strict criminal regime if the conduct is undertaken knowingly or recklessly. This is generally not the case for conduct subject to Part VIII. Given, therefore, that the conduct under Part VII.1 is not egregious (if it were, it would be pursued criminally), frequently what is under discussion is conduct about which there are legitimate uncertainties. The CBA Section submits that AMPs, along with many of the other additional remedies proposed by the Discussion Paper, are unnecessary and inappropriate in such circumstances.

Question 8.

Subsection 74.1(5) currently sets out a list of criteria for courts to consider when assessing AMPs. Should other criteria be added to guide the courts' assessment? If so, which criteria do you suggest?

As a general principle, the criteria set out in proposed subsection 74.1(5) with respect to the civil misleading advertising provisions will likely provide some assistance to a court or the Tribunal considering the imposition of an AMP. On the other hand, the criteria set out in subsection 74.1(5) make reference to factors (such as injury to competition in the relevant geographic market) that are arguably irrelevant to the major substantive elements of section 74.1.[22] Reference to such factors in this context is likely inappropriate, as the Tribunal or court may not have a sufficient record upon which to properly assess their application. Alternatively, a serious assessment of factors like market definition and injury to competition would significantly expand the scope and length of hearings under

22 Although the ordinary price provisions (subsections 74.01(2) and (3)), bargain price provisions (subsection 74.04(2)) and sale above advertised price provisions (section 74.05) contain or can be construed to contain references to the relevant geographic market, subsection 74.01(1), which has attracted the most enforcement activity of all the Part VII.1 provisions, contains no such reference.

section 74.1, placing increased resource demands both on the parties and the court or Tribunal. This result would seem to be inconsistent with the goal of establishing in section 74.1 a more effective and expeditious hearing process than that formerly available under the criminal offence provision in section 52 of the Act.

Question 9.

Additional comments?

Not at this time.

D. Restitution for Deceptive Marketing Practices

Restitution Orders

Question 10.

Do you agree the courts should have the ability to order restitution to consumers in certain circumstances and on application by the Commissioner of Competition? Why or why not?

The CBA Section is opposed to this proposal. The Discussion Paper addresses restitution orders in the context of reviewable matters. The fact that Part VII.1 deals with reviewable practices means that Parliament clearly intended that there be nothing illegal about such practices until they are made the subject of a court or Tribunal order. Thus, as described above, reviewable matters under Part VII.1 do not constitute a "wrong" that should be legally compensable.

Notwithstanding the CBA Section's view that restitution orders are inappropriate in the circumstances, the CBA Section also notes that if a civil cause of action is extended to prior conduct in respect of which an order is made under section 74.1, the perceived need or purpose underlying the proposed restitution order provision would be greatly diminished or even eliminated.

The concept of restitution orders is one that arises most commonly in a criminal context. Where an advertiser's actions do not meet the criminal standard of section 52 of the Act, allowing restitution orders to be made in situations that involve less culpable behaviour creates the potential for injustice to advertisers and other inappropriate results. For example, a restitutionary remedy under Part VII.1, particularly in conjunction with a private right of action, could expose marketers of unsophisticated or inexpensive goods to complaints concerning the quality of the goods that are unreasonable given the price at which the goods are offered. The CBA Section notes that restitution has for many years been part of provincial consumer and trade practices legislation and is available to deal with such issues, particularly given the judicial development of class actions. Adding a parallel restitutionary remedy in the Act would be needlessly duplicative of existing provincial legislation and would depart from the Act's traditional emphasis on targeting deceptive marketing practices that cause injury to competition or to the marketplace in general.

In summary, the CBA Section believes that restitution is an unnecessary addition to the remedies regime of the Act in the advertising context. The marketplace should not be subject to the "chill" that would result from a regime including restitution.

However, in the event that restitution orders are introduced to the Act, the CBA Section believes it is wise to limit such orders to a maximum amount, being the amount paid by the consumer plus an appropriate level of interest. Since the proposal is to provide restitution, not damages, the relevant provision should be drafted to safeguard against the risk of awarding damages disguised as restitution.

This risk may be illustrated by an example. Suppose a consumer buys a good for $100 that has been misleadingly advertised as having a certain quality that it does not in fact possess. Assume that the value of the good containing the lesser quality is $90. Based on a restitutionary principle, the consumer might be entitled

to $10. The argument could be made that, if the missing quality was particularly important to that good (or to the consumer), an appropriate restitutionary principle would allow the consumer to return the good (if possible) for a full refund of $100. In practice, the absence of the promised quality may have been of critical importance to the purchaser such that he or she may then have suffered a consequential loss by way of damage to some other property. If in a given case the first manner of looking at restitution is correct (*i.e.*, leading to a $10 refund), then it is important that a court not award the maximum restitution (*i.e.*, $100) for the purpose of giving partial compensation for the consequential loss suffered by the consumer.

Proposed subsection 74.1(4) states "the terms of an order made against a person under paragraph (1)(b), (c) or (d) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with the view to punishment". With respect, the CBA Section questions whether this would in fact be the case if the proposed amendment were enacted.

Question 11.

Should the draft provision address the appointment of a fund administrator to administer and distribute the fund created as a result of a restitution order? Why or why not?

In the event that a restitution order provision is added to Part VII.1 of the Act, the CBA Section believes it is reasonable for the Tribunal or a court to have the authority to appoint a fund administrator where required. However, rules or guidelines for the appointment of an administrator and standards relating to the duties and conduct of an administrator must be carefully considered before drafting the relevant provision.

Question 12.

Do you have additional comments?

Not at this time.

Disposition of Remaining Funds

Question 13.

Should the provision state that the courts may make an order about the use of any balance in the restitution fund?

Question 14.

Should the provision direct or suggest that any balance in the restitution fund be given to non-profit organizations in Canada for projects that would benefit consumers in similar situations?

Unclaimed amounts in consumer class actions are a common element in the American experience. The draft language distributed with the Discussion Paper clearly proposes that the bias be towards not returning that money to the payor but rather handing it over to a new non-governmental or quasi-governmental bureaucracy that will fund consumer education and other "good causes". This has the potential to amount to a tax on business without proper legislative oversight. In the CBA Section's view, this is an inappropriate way to tax and spend. If these monies are truly meant to be restitution, failure by someone who has suffered the "harm" to claim his or her share of the fund should end the analysis. At that point, the unclaimed funds should be returned to the respondent.

As noted previously, provincial consumer protection laws already deal with much of the "harm" to which the proposed restitution provision is directed. The CBA

Section believes that while there may be scope to improve provincial consumer legislation, restitution is a matter best left to that level of government in this context.

Question 15.

Do you have additional comments?

Not at this time.

Accessory Orders

Question 16.

Should the courts be empowered to make a freezing order to ensure that the purpose of the restitution remedy is not defeated? Why or why not?

The proposed accessory orders provision would allow the court to issue an order that is very much like a *Mareva* injunction. It is anticipated that accessory orders would be used sparingly and only as a tool against truly fraudulent operations and scam artists. Nonetheless, the addition of an accessory order provision to the civil regime is worrisome. Once such a provision is in the Act, it may come to be used in situations for which it was not originally intended. Indeed, if accessory orders are truly intended for only egregious types of conduct such as fraud and scams, then the provision should properly be limited to cases of criminal marketing practices. Section 52 of the Act continues to exist, and having a *Mareva*-like power limited to criminal cases would be much more appropriate.

Question 17.

Do you have additional comments?

Not at this time.

E. Civil Cause of Action for Civil Matters

Question 18.

Should section 36 be amended to allow businesses and individuals who have suffered damages to recover their losses in civil court once an order by the Tribunal or a court has been made? Why or why not?

As noted above, the extension of private rights of action for damages to Part VIII reviewable matters would represent a significant departure from the established position that reviewable conduct is not unlawful unless prohibited by the Tribunal after thorough analysis. The Discussion Paper does not expressly identify, explain or attempt to justify this policy shift. More importantly the Discussion Paper does not articulate the objectives of the Government in proposing the extension of section 36 of the Act. The Discussion Paper alludes, generally, to the "encourage[ment] of voluntary compliance" with the Act and the provision of "an appropriate incentive to encourage businesses to refrain from anticompetitive practices" through the provision of "a flexible range of remedies" available to antitrust authorities in other jurisdictions around the world.. Seen in this context, it is unclear whether the objective of the proposed extension of section 36, specifically, is to create an incentive – beyond that now existing or beyond that which would flow from proposed AMPs and restitution orders if they were introduced – to refrain from engaging in reviewable conduct ("deterrence"), or to provide that reviewable conduct causing harm should be subject to recompense.

The CBA Section is of the view that extending section 36 to reviewable conduct would create an unnecessary incentive for competitors to litigate, perhaps strategically, which would have a chilling effect on the legitimate (*i.e*. pro-competitive) conduct of businesses. Moreover, the extension of section 36, coupled with the proposed provision for AMPs and restitution orders, raises serious concerns with respect to duplication of remedies and over-deterrence. It also raises important and difficult issues related to multiple plaintiffs, joint and

several liability, and limitation of liability, all of which require thoughtful consideration in advance of any amendment to section 36.

Indeed, it is surprising that the Government would consider introducing damages for non-criminal conduct. In the past, the Government has concluded that it would be inappropriate to consider both damages and AMPs at the same time, believing it best to re-examine damages once it gained some experience with AMPs.[23] The Government has no experience with AMPs in the context of reviewable practices under Part VIII of the Act and little experience, to date, with AMPs in the context of deceptive marketing practices under Part VII.1 of the Act. Particularly, should the Government decide to introduce AMPs, it is recommended that the Government revisit the issue of damages at a later time, once it is in a position to determine that its objectives (*i.e.*, seemingly to encourage compliance with the Act) have not been sufficiently met.

If one of the Government's objectives is to encourage private enforcement of competition laws, it should be noted that the proposed extension of section 36 covers reviewable practices considerably beyond those (sections 75 and 77) which can currently be the subject of private applications to the Tribunal, a right with which the Government has minimal experience to date. The same considerations which led to a cautious approach to extending private access to the Tribunal in respect of reviewable matters suggests that even more extensive private remedies should not be provided with respect to these or other reviewable matters absent a clear demonstration that the current regulatory regime is not adequately accomplishing its intended objectives. The CBA Section submits that it is too early to assess the impact of the extension of private access to the Tribunal.

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23 See 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 online at http://www.ic.gc.ca/cmb/welcomeic.nsf/ICPages/SpecialReports.

Question 19.

What should be the starting point for the assessment of the loss or damage suffered as a result of the reviewable practice: the day of the start of the practice or of an investigation by the Commissioner, or the date of an application to the Tribunal or a court?

As previously noted, the objective of extending section 36 to conduct under Part VIII of the Act is not clearly set out in the Discussion Paper. Question 19 confirms the element of confusion surrounding the section 36 proposal because it reveals the inherent uncertainty as to whether any particular type of reviewable conduct is truly unlawful. If the proposed extension of section 36 is primarily intended to recognize the right of parties injured by unlawful (presently called "reviewable") conduct to recoup losses resulting from such conduct, any claim under the extended section 36 should logically be allowed to seek provable damages flowing from the impugned conduct in accordance with the established law of civil damages, subject to an appropriate limitation period such as that currently envisaged by subsection 36(4).

Having said that, should the Government wish to proceed with the proposed extension of section 36 but be reluctant to fully effect the fundamental policy shift discussed above, a compromise between the above principle and the principle underlying the existing section 36 (where assessment starts from the time of a violation of a Tribunal order) would be to establish as the starting point for the assessment of damages suffered the date on which the Commissioner or, where permitted, a private party files a notice of application with the Tribunal in respect of reviewable conduct under the Act. This possible reference date would at least give the responding party an opportunity to discontinue the impugned conduct and thus avoid the possibility of damages having to be paid (and is preferred to the commencement of an inquiry by the Commissioner because the respondent may have no knowledge of the inquiry, and such date is not applicable to private applications to the Tribunal). The justification for such an approach would have

to partially revert to the policy underlying the current regulation of practices identified in Part VIII, *i.e*. that the conduct may be benign or pro-competitive, and the party may not know that the practice may have an anticompetitive effect until an application is initiated. Such a compromise would, necessarily, diminish any deterrent effect of the proposed extension of section 36. On the other hand, even this compromise also risks chilling conduct that the Tribunal subsequently finds to be benign or even pro-competitive.

If section 36 is extended as proposed in the Discussion Paper, care will of course have to be taken to ensure that liability does not extend to conduct occurring prior to the coming into force of the amendment.

Question 20.

Under the proposed provision, consent agreements under sections 74.12 and 105 of the Act are exempt from recourse under section 36. Do you agree with this? Why or why not?

Assuming that section 36 is extended to reviewable practices, the CBA Section agrees that consent agreements under sections 74.12 and 105 of the Act should be exempt from recourse under section 36. Currently, parties to consent agreements agree to any factual assertions of reviewable conduct as defined in Part VIII of the Act solely for the purposes of the consent agreement. A party will be unlikely to enter into a consent agreement if the agreement will subject it to an action for damages. In essence, the CBA Section is of the view that the benefits of consent agreements outweigh the diminished deterrent effect of exempting consent agreements from an extended section 36.

An alternative to exempting consent agreements from an extended section 36 would be to add a provision in the Act allowing parties to make binding undertakings to the Commissioner in respect of reviewable conduct. Naturally, an undertaking under such a provision would not constitute an order for the purposes

of an extended section 36. While this proposal would promote consensual resolution of cases, it could lead to the disuse of the consent agreement provision.

Question 21.

Is it necessary to explicitly refer in the draft provision to an order made for restitution under paragraph 74.1(1)(d)? Why or why not?

The CBA Section believes it is necessary to explicitly refer in the proposed provision to an order made for restitution under paragraph 74.1(1)(d) in order to reduce the risk of duplicative remedies.

Question 22.

Should section 36 apply to cases of refusal to supply by a foreign supplier (section 84)? Why or why not?

For the same reasons that AMPs should not be imposed in respect of conduct meriting an order under section 84 (see the answer to Question 5), the CBA Section also believes that section 36 should not be extended to cases of refusal to supply by a foreign supplier. An order under section 84 may relate to conduct beyond a local respondent's control and therefore should not be compensable by that party.

Question 23.

Do you have any additional comments?

Not at this time.

III. REFORMING THE CRIMINAL CONSPIRACY PROVISION

A. Criminal Conspiracy Provisions

Question 24.

Do you agree with the House of Commons Standing Committee on Industry, Science and Technology's recommendation that the Competition Act include a criminal provision to deal with egregious anticompetitive cartel activity and a companion civil provision to deal with other types of agreements among competitors?

This matter was the subject of a recent submission by the CBA Section entitled *Submission on Reform of Section 45 of the Competition Act (Conspiracy)*, February 2003. The CBA Section relies on the submission and incorporates it by reference.

In summary, the submission reflected divided views within the CBA Section regarding the necessity or wisdom of amending section 45 in the manner proposed by the House of Commons Industry Committee. The CBA Section recommended further study to clarify the objectives being sought by the proposed amendments and that consideration be given to alternative proposals to a two-track approach. Briefly, the CBA Section is concerned that acting before the analysis recommended in the submission would run the risk of 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 harmful to competition.

Indeed, as the comments regarding the specific draft language in the Discussion Paper suggest, that language suffers from capturing much more than the "hard core" cartels that the *per se* criminal provision was ostensibly supposed to address. It is difficult to distinguish what, other than prosecutorial discretion, would protect a strategic alliance that nonetheless substantially lessens competition (and thus has the effect of maintaining prices) from being subject to criminal prosecution – particularly if the alliance could have been implemented in a way that would not have lessened competition to the same degree (thus making the "ancillary and necessary" defence unavailable).

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 did address, in varying degrees, the objectives of the proposed amendments, their terms of reference forestalled consideration of alternative proposals.

It was the CBA Section's hope in developing the submission that the Government's Discussion Paper would address these issues. Unfortunately, the Discussion Paper repeated the erroneous statements of the Parliamentary Committee report, and ignored the issues raised in our submission. The CBA

Section sincerely hopes that such issues will now be addressed in these consultations.

Question 25.

Do you agree that the phrase "persons who compete or could reasonably be expected to compete" will ensure the provision only captures horizontal agreements among competitors? Will this language require the Competition Bureau to do a complex competition analysis for each criminal case? If so, how else could horizontal agreements be captured by the provision? Please explain.

First, it is not clear that the phrase "persons who compete or could reasonably be expected to compete" will ensure that section 45 would only capture horizontal agreements among competitors. Second, the Competition Bureau has clearly intended to simplify section 45 and any resulting analysis through the simplification of the language in the provision. In our view, the introduction of the phrase "compete or could reasonably be expected to compete" has the potential to introduce much more uncertainty regarding the application of section 45 than now exists with respect to the word "unduly", given that the term enjoys the benefit of significant jurisprudence. It will – unavoidably – require an analysis of product and geographic markets. Third, it is not clear how one proves "beyond a reasonable doubt" that persons could "reasonably be expected" to compete.

i. Do you agree that the phrase "persons who compete or could reasonably be expected to compete" will ensure the provision only captures horizontal agreements among competitors?

To address the first point, the phrase "persons who compete or could reasonably be expected to compete" does appear to catch horizontal agreements between competitors. That said, the scope of the proposed provision is not limited to purely horizontal agreements between competitors. On a closer reading, it appears that the proposed section 45 could apply to any agreement dealing with pricing or customers that has any potential for a horizontal element or element of

competition between the parties to the agreement. For instance, if a supplier sells to a distributor but also sells directly to end-users, the supplier could reach an agreement with its distributor apportioning customers. That is, the supplier could direct its distributor to sell only to customers located in Ontario. Under the proposed language, any such agreement could be caught as the supplier and distributor may "reasonably be expected to compete". A similar agreement could also arise in a franchisor/franchisee context where the franchisor also owns some distribution outlets. The provision could also apply to a supply agreement, where the seller faced a choice between selling on its own behalf or through a distributor.

In the above situations, it could be argued by the franchisor/franchisee or supplier/distributor that this agreement would fall under the proposed ancillary agreement defence. That said, given that this defence would need to be proven by the persons entering into such an agreement, such language could create a "chilling effect" upon any horizontal agreements between any entities that could possibly be viewed as competitors. Furthermore, rather than having to rely on the applicability of defences, in our view the overbreadth of the section itself should be avoided if at all possible.

ii. Will this language require the Competition Bureau to do a complex competition analysis for each criminal case?

Given that the proposed section 45 would apply to agreements between potential competitors as well as actual competitors, the proposed section could have fairly broad reach and implications. The reach will depend upon the way in which "compete or could reasonably be expected to compete" is interpreted.

In a traditional antitrust context, two entities will be considered to "compete" if they are present in the same product and geographic market. Thus, at a bare minimum, an analysis of whether two entities compete would typically involve an analysis of the relevant geographic and product market. Absent a traditional

antitrust product and geographic market analysis, the meaning of "compete"

becomes unclear. For instance, do movies and live theatre "compete" with each other for an individual's entertainment spending?

Furthermore, the use of the phrase "reasonably be expected to compete" creates the possibility that agreements between entities that are currently not in the same product and geographic market could be caught under section 45. If a manufacturer is currently not in a given product or geographic market, when will it "reasonably be expected to compete" in those markets? If a manufacturer makes widgets and could potentially make gadgets if it invested in its factory, will this be sufficient to be considered as reasonably be expected to compete? Will the analysis depend on the magnitude of change and investment that is required to enter the product market? What will be considered to be "reasonable"?

In our view, determining whether two companies and their respective products can reasonably be "expected to compete" could require a significant level of competitive impact analysis. As well as requiring an analysis of the viability of entry by potential competitors, the use of the language "reasonably be expected to compete" raises with it the possibility that a section 45 analysis could require the consideration of whether close substitutes outside a particular geographic or product market are still able to discipline behaviour in the market. Determining whether there are any close substitutes and to what extent close substitutes should be considered in every fact situation will likely require a detailed economic analysis.

Furthermore, the language proposed for the revised section 45 could require the consideration of the effect of an agreement or arrangement between competitors. Thus, in addition to the analysis introduced by "compete or reasonably be expected to compete", a competitive impact analysis will be required in order to demonstrate whether an agreement has the effect of fixing or maintaining prices.

The issues raised above illustrate that some level of competitive impact analysis will be required in order to make a determination of whether the parties to an agreement or arrangement are potential competitors or actual competitors. At the very least, such a determination would require an analysis of relevant product and geographic markets as well as the ease with which a potential participant could enter a particular product or geographic market. Demonstrating whether two competitors could reasonably be expected to compete will require an even deeper analysis.

iii. If so, how else could horizontal agreements be captured by the provision? Explain.

In our view, there is no alternative language that could be used that would avoid at least some level of competition analysis. It is difficult to imagine a criminal offence based in antitrust law that does not require some level of competitive impact analysis. Furthermore, it is not clear why the level of competitive impact analysis should be simplified, particularly in light of the serious implications associated with a breach of these provisions.

That said, revising the current section 45 to create a purported *per se* offence that applies to "persons who compete or could reasonably be expected to compete" may serve only to shift the debate from what is meant by "unduly" to what is meant by "compete" or "could reasonably be expected to compete", while depriving the courts of the benefit of existing jurisprudence.

The CBA Section suggests that the Government consider language that would more precisely capture horizontal agreements (as opposed to agreements between parties that may possibly compete in some aspect unrelated to the agreement), along the lines of "persons who compete or who would in the absence of the agreement compete".

Question 26.

The draft provision would apply to agreements among competitors or potential competitors that have the "purpose" or "effect" of fixing prices, allocating customers or markets, or restricting production or supply of a product. Do you agree with the inclusion of a purpose and an effect test? Why or why not?

The CBA Section believes that some of the over-breadth of the draft language appended to the Discussion Paper arises from the use of the "purpose or effects" test. While agreements whose express purpose and effect is anticompetitive should properly be caught within the criminal provisions, agreements that are not entered into with anticompetitive intent but that nonetheless have indirect or unintended (although foreseeable) anticompetitive effects ought, we would think, to be dealt with civilly. For that reason, if the Government decides upon considering the issues raised in response to Question 24 to reform section 45, the CBA Section urges the Government to consider deleting "for the purpose of or where the agreement or arrangement has or is likely to have the effect of," and making section 45 applicable only to agreements to "fix, establish, control or maintain the price…", "allocate customers or markets…", or "prevent, eliminate, limit or lessen the production or supply of a good". As mentioned below, subsections 45(3) and 45(4) of the draft language should also be deleted, as without subjective intent to do these things, the agreement should not be dealt with criminally.

With regard to the types of agreement that are to be prohibited, particularly if the effects test is retained and only objective intent required for conviction, we believe that the anticompetitive effects outlined in proposed subsection 45(1) have not been sufficiently delineated or described. In particular, proposed paragraph 45(1)(c), which applies to "preventing, eliminating, limiting or lessening the production or supply of a product" is a very broad category that could apply to many types of agreements. If the conspiracy offence is to be applied by way of a *per se* effects test, marketplace participants must be given the

greatest possible clarity as to the anticompetitive effects that may be criminalized. When combined with broad language in provisions like paragraph 45(1)(c), many agreements will be caught by the "effects" test and in many types of agreements one will always be able to say the effect ought reasonably to have been known. Thus, in practice the provision may operate very much like a strict liability offence. This is troublesome since the apparent philosophy underlying a *per se* standard is to capture only the most egregious, "hard core", intentionally anticompetitive behaviour.

Question 27.

Does the provision as drafted capture the types of agreements that are the most egregious? Should boycotts be mentioned specifically, or are they captured by the provision as drafted?

The proposed subsection 45(1) does appear to capture the most egregious conspiratorial conduct amongst suppliers or potential suppliers. This issue is distinct from whether it is also too broad or prohibits benign conduct.
It is unclear the extent to which the proposed legislation would apply to agreements between purchasers or potential purchasers. On one hand, paragraph 45(1)(a) is directed only at agreements between competitors (or potential competitors) which affects prices charged or offered by the accused, and seemingly is not directed at conduct which affects the prices they pay. Hence, an agreement amongst purchasers having the purpose or effect of lowering the prices they pay is likely not caught by this paragraph. On the other hand, concerted buyer conduct may tend to limit, lessen or eliminate the supply of a product, contrary to paragraph 45(1)(c). To illustrate, buyers or potential buyers may agree or arrange not to deal with a particular supplier or group of suppliers who supply a particular product.

There is a further wrinkle. Subsection 45(1) is limited to conduct by persons who compete or could reasonably be expected to compete with one another. The

meaning of "compete" is uncertain. If it means competition in the purchase of products, then the section will apply to buyers if the elements of paragraph (a), (b) or (c) are otherwise satisfied. However, if "compete" means that the persons compete in the supply of products, the application of subsection 45(1) to agreements between buyers will be uneven since it is conceivable that buyers will sometimes, but not always, also be competitors in the supply of products.

Although buyer-side agreements can, in theory, lessen competition, in practice they are much less likely to do so. As a result, the CBA Section is of the opinion that they should properly be dealt with under the civil provisions. This could be made explicit by adding the words "by those persons" after "supply of a product" in paragraphs 45(1)(b) and (c).

With respect to "boycotts", the CBA Section does not believe that boycotts are captured by the current proposal. On the other hand, it is not universally agreed that all boycotts are inherently anticompetitive. This suggests that boycotts should not be included in a *per se* provision, but rather, addressed under a civil standard.

Whatever one's perspective, it would not be helpful to introduce the term "boycott" into the proposed subsection 45(1) since that expression is ambiguous or at least capable of different meanings. A "boycott" may refer to an agreement amongst buyers or potential buyers not to purchase the products of a certain person or persons. The buyers may or may not be competitors or potential competitors. A boycott may also refer to an agreement amongst sellers or potential sellers to withhold products. A boycott may be made for economic reasons (such as exerting pressure in negotiations), political reasons, or technical reasons (such as network operators or a professional standards body that excludes members lacking technical requirements or competence). As is outlined above, the proposed subsection 45(1) would capture at least some things known as boycotts without using that expression.

Question 28.

Does the draft provision deal appropriately with the issues of circumstantial evidence and intent? If not, what do you propose?

i. The Treatment of "Circumstantial Evidence" under Proposed Subsection 45(2)

The proposed provision is in all material respects similar to current subsection 45(2.1) of the Act. It would appear sensible to retain the provision given that (a) it has successfully resolved the *Atlantic Sugar* case issue with respect to "tacit agreements"; and (b) courts and stakeholders appear to have a clear understanding of the provision since its enactment in 1986. Accordingly, the CBA Section recommends that proposed subsection 45(2) remain unchanged.

ii. "Proof of Intent" under Proposed Subsections 45(3) and (4)

As noted above, the CBA Section is of the view that subjective intent to enter into a prohibited agreement should be required if *per se* criminality is to be imposed. Agreements with unintended effects ought not to be punished criminally if no harm to competition has been shown.

iii. "Proof of intent" under the "purpose" test (s. 45(4))

As noted above, the CBA Section is of the view that proposed subsections 45(3) and 45(4) should be deleted if the proposed new section 45 proceed, either as proposed in the Discussion Paper or as proposed above in our response to Question 26. If the Government nonetheless decides to retain the "subjective" and "objective" tests for intent under paragraph 45(1)(a) as drafted, the CBA Section points out that proposed subsection 45(3) is poorly drafted in that it would appear to provide that it is necessary to prove that "the parties… intended to …agree" to fix prices, but unnecessary to prove that they "intended…the agreement to have the effect" of fixing prices!

Question 29.

Does the defence in section 45(5) of the draft provision deal appropriately with the potential overreach of a per se provision? Does it provide appropriate safeguards from exposure to civil cause of action under section 36?

Question 30.

Do you agree that the burden of proof – on a balance of probabilities – should lie with the accused with respect to the proposed defence in subsection 45(5), taking into account the fact that they relate to information on potentially complex economic matters that are primarily within the knowledge and control of the accused? If you do not agree, what other options would you suggest?

The defence in subsection 45(5) of the draft provision does not deal appropriately with the potential overreach of the proposed *per se* criminal conspiracy provision (subsection 45(1)) for the reasons set out below.

First, prior to addressing the shortcomings of subsection 45(5), one must appreciate that, as currently drafted, subsection 45(1) creates a significant potential overreach in respect of a *per se* criminal conspiracy provision. As a result, this places significant importance on having a well-drafted defence in place to offset this potential overreach. In fact, it is submitted that the need to focus on the defence to such a degree demonstrates how flawed the offending language is in the first place. For the purposes of responding to Questions 29 and 30, however, the assumption is that the frame of reference is the proposed language in subsection 45(1).

For related reasons, subsection 45(5) does not provide appropriate safeguards from exposure to a civil cause of action under section 36. Specifically, for the reasons stated below, it creates a burdensome reverse onus that will be very difficult for an accused to satisfy, thereby presumably leading to a substantially higher incidence of convictions. Second, even in the absence of a conviction, the

combination of a significant *per se* overreach imposed by subsection 45(1) and the burdensome "reverse onus" defence under subsection 45(5), presumably will lead to substantially increased exposure for civil actions under section 36, and a substantially greater chilling effect than is currently the case.

One of the principal weaknesses of subsection 45(5) is that it reverses the onus of proof so that the accused must establish, on a balance of probabilities, each of the elements set out in paragraphs 45(5)(a)-(c). While the concept of a reverse onus defence is not unreasonable, the current proposal is unacceptable.

The fundamental problem is that the language in paragraphs 45(5)(a)-(c) is vague and subjective. For example, the notion of "ancillary" to a principal agreement can mean a number of different things. Is it ancillary from the perspective of revenue generation? profitability? duration? Also, the notion that the impugned agreement or arrangement must be "necessary" for implementing the principal agreement, as set out in paragraph 45(5)(b), is also vague and subjective. Is it sufficient, for example, to be "necessary" from a negotiation perspective, *i.e.* that the impugned agreement or arrangement was a "deal breaker" to one of the parties? Or, must the accused somehow demonstrate that the commercial merits of the agreement or arrangement were unachievable absent the impugned aspect? Finally, paragraph 45(5)(c) raises the concept of there being no "less restrictive alternative to the agreement or arrangement" available for implementing the principal agreement. Again, from what perspective is this being assessed? Is it objective or subjective in the context of the dynamics of the negotiation between the parties?

Another serious problem with the defence proposed in subsection 45(5) is that it assumes that the "principal" agreement can be easily distinguished from the "ancillary" agreement when these agreements are much more likely to be part of a single commercial initiative between two parties, the elements of which are inextricably intertwined.

The reverse onus aspect of subsection 45(5), in itself, would likely raise Charter issues and may need to be "saved" under section 1 of the Charter. The vague and subjective language would likely make subsection 45(5) even more vulnerable to a successful Charter challenge. In this regard, the McCarthy Tétrault Report (the "MT Report") of August 2001 on section 45 reform supported a reverse onus provision, and would have required the accused to prove, on a balance of probabilities, "that the agreement both is part of a broader arrangement between the parties that brings about or is likely to bring about gains in efficiency, and is reasonably necessary to bring about such gains in efficiency".[24] While the CBA Section is of the view that the broader agreement need not be likely to produce efficiencies, so long as it is not intended to fix prices, allocate markets or customers or limit output, this proposal has the benefit that it does not require hair-splitting as to whether the impugned agreement is "ancillary to" or part of a broader arrangement. Moreover, as the discussion in the MT Report concerning the phrase "reasonably necessary" makes clear, the authors of the MT Report were concerned that the accused ought to have to show a "reasonable relationship between the restraint and the efficiencies, otherwise the parties to a hard core cartel could avoid criminal liability by merely adding unrelated features to their anti-competitive restraints".[25] Equally, however, the authors were concerned that the exception should be designed to exempt from criminal liability all arrangements that are not hard core cartels. "The burden should therefore be to establish more than a mere contemporaneity between the restraint and the efficiencies, but less than showing that the restraint is essential to achieving the efficiencies or that no less restrictive alternative exists to achieve them."[26] Later, the MT Report adds, "the purpose of the inquiry is merely to determine whether

24 Proposed Amendments to Section 45 of the Competition Act (McCarthy Tetrault – August 2001).

25 Ibid. at 25 (emphasis supplied).

26 Ibid. at 25 (emphasis in original).

the anti-competitive restraint is a hard core cartel or is reasonably related to an efficiency-enhancing arrangement, in order to escape criminal liability".[27]

Again assuming, for the sake of discussion, that the Government decides to proceed with the creation of a *per se* offence for hard core cartels, the purpose of the defence should be to identify those agreements with a plausible connection to a broader, legitimate business arrangement. Whether such agreements nonetheless substantially lessen or prevent competition is a matter for the Competition Tribunal to decide in civil proceedings. Thus, the provision of a defence along the following lines would strike a more appropriate balance and better assist in identifying non-hard core cartels:

> "prove, on a balance of probabilities, that the agreement or arrangement in question both is part of a broader agreement or arrangement between the parties that is not of a type described in paragraphs 45(1)(a) to (c), and that the agreement or arrangement in question is reasonably related to the broader agreement or arrangement."

In summary, the CBA Section is of the view that:

> (i) The proposed language in subsection 45(1) creates a serious "overreach" problem that is not adequately addressed by the proposed language in subsection 45(5).
>
> (ii) A reverse onus on a balance of probabilities in not an unreasonable concept. Having said that, the language needs to be more balanced and to focus on identifying non-hard core cartels.

Question 31.

Should the defences in the current section 45 be repealed? Why or why not?

We can see no reason why the current defences afforded under section 45 and, in particular, those defences currently available under subsection 45(3), should be repealed. In fact, if the currently proposed section 45 is put into effect, then adequate defences will be an important part of curing the overbreadth of the suggested provision. As noted previously in this submission, curing the overbreadth of the section itself is preferable to having to ensure an adequate

27 *Ibid.* at 26 (emphasis supplied).

level of defences is available to cure the overbreadth.

The defences currently available under subsection 45(3) are quite narrow in application but still provide some certainty with respect to conduct that will or will not be caught under section 45. Furthermore, it is our view that the conduct exempted under the current subsection 45(3) is not the type of conduct that the *per se* prohibition is intended to catch. Thus, it should be made clear that such conduct will not fall within the parameters of the *per se* approach.

Since the proposed *per se* provision applies to agreements which have the effect of "fixing, establishing, controlling or maintaining the price at which those persons supply or offer to supply a product", some of the conduct that is currently exempted under subsection 45(3) could possibly be caught. For example, it is not clear whether an agreement between competitors in respect of customers' credit information would be caught under the proposed *per se* provision.

In addition, it is not clear that the defences afforded by subsection 45(3) will be covered under the proposed defences to the *per se* prohibition. For example, it is not clear that an agreement between competitors to exchange credit information or statistics would be covered under the proposed section 45 defences, unless the agreement is considered ancillary to some other larger agreement. As described elsewhere in this submission, what conduct would be covered under the ancillary defence remains unclear.

On a practical level, given that the current subsection 45(3) defences are not intended for a *per se* offence – subsections 45(3) and 45(4) would need to be redrafted so as to apply to the *per se* section 45. That said, the defences afforded under subsection 45(3) could easily be redrafted to fall into line with the suggested language for the proposed ancillary agreement defence.

Also on a practical level, eliminating defences for conduct for which it was

previously available could create a great deal of uncertainty. Corporations and their lawyers would be forced to revisit all arrangements or agreements they may have planned or reached under the prior subsection 45(3).

Given that it is not currently proposed to repeal the exception afforded by subsection 45(6), we will not comment further on this exception.
In conclusion, the defences proposed for the revised section 45 should either be expanded to clearly cover the defences existing under section 45, or alternatively the defences available under subsection 45(3) should not be repealed.

Question 32.

Do you think that block exemptions, such as exemptions by industry, sector or activity, as outlined in draft subsection 45.2(2), should be part of any new criminal conspiracy provision? Why or why not?

The need for defences and exemptions from subsection 45(1) stems from the over-inclusiveness of the proposed subsection 45(1) and the likely chilling effect it will have on pro-competitive agreements between competitors and potential competitors. While exempting particular classes of agreements from subsection 45(1) by regulation may be preferable to enshrining such exemptions in legislation because of the additional flexibility offered by the regulation format, significant issues must be addressed before promulgating any block exemptions.

The *Competition Act* is meant to be framework, principled legislation applicable across industries. Providing industry-specific exemptions would balkanize the application of competition legislation and should not be included. If certain industries should benefit from such exemptions (and it is not clear why they should), this should be achieved through exemptions under industry-specific statutes. (For example, the *Shipping Conferences Exemption Act 1987* has served to shelter certain agreements within shipping conferences from competition law.) The CBA Section notes also that, while law-making faces the discipline of the

Parliamentary process, regulation-making by the Governor-in-Council operates at a lower level of transparency and public scrutiny and is therefore more susceptible to exertions of political pressure.

The challenge in drafting block exemptions is striking the right balance between more formalistic, prescriptive exemptions that provide certainty and predictability and policy-based criteria that can address a wide range of restrictive clauses. The EU's experience with block exemptions indicates that formalistic block exemptions may

(i) be under-inclusive, *i.e.*, agreements without overall anticompetitive consequences may not benefit from the exemption; or

(ii) cause business persons to contort their agreements to fit within the exemption "template" rather than use a more efficient structure.[28] On the other hand, policy-based exemptions will be more dynamic and potentially cover a wider array of restrictive clauses but will offer less certainty.

28 Ian Forrester states in 23 *Fordham International Law Journal* 1028 that: "These block exemption regulations had some good consequences, but they also had the effect of constituting a de facto minimum standard, indeed a compulsory standard in the eyes of industry. Many contracts might be regarded as legitimate by the parties but, containing unblessed features, could not fit within a block exemption." Later in the same paper, Forrester states: "One of the criticisms made of the system of block exemptions was that the exemption texts became in effect a code of conduct for industry. The restrictions they permitted constituted the outer limits of acceptability in a contract. The lawyer or the client would simply adopt the terms of the block exemption unthinkingly, instead of considering whether an appreciable restriction of competition was present. In my view, the most detailed block exemption regulations went further than desirable or necessary in prescribing how parties should arrange their relationships. Why should it be necessary for licensed know-how to be recorded in writing in order for the license to be eligible for an exemption? Why should an agreement of fifty-seven months' duration be exempt under Article 81(3), but not one of sixty-three months? Why should a block exemption about the marketing of cars include a list of social protections for dealers? In the 1970s and 1980s, such a level of prescriptiveness was little resented, maybe because the legal principles were new, and perhaps also because it was widely believed that the exemption and notification system worked in accordance with theory. In any event, future exemption regulations ought to be less detailed, and their drafters should realize that chaos will not be unleashed if companies are given leeway in drafting their contracts. The laity must be trusted to behave properly without the perpetual supervision of sin-preoccupied clerics. A restrictive agreement, which is prohibited and irredeemable under Article 81(3), will not squeak through to validity because of an inadvertently generous block exemption. Also, a basically wholesome agreement should not become void or arguably void because it contains a few words that do not fit the block exemption."

The difficulty in establishing the right balance between the competing objectives of certainty and economic coherence in block exemptions and the lack of Canadian experience with the block exemption format, especially in the context of a radically overhauled section 45, underscores the necessity for extensive research, experience (*e.g.*, potentially in the form of case law under both a new section 45 and proposed section 79.11) and consultation before establishing block exemptions. As a result, it may be preferable to proceed by way of guidelines initially.

The pre-condition for issuing a block exemption might be the establishment of a category of agreements that are frequently concluded in business, for which a full competition analysis would in the overwhelming majority of cases lead to the conclusion that no competitive harm results.

In summary, the CBA Section is of the view that:

> (i) The proposed block exemption is an admission of concern by the Government about the significant over-inclusiveness found in the proposed subsection 45(1). Unfortunately, it is very difficult to provide any detailed commentary on this proposal as the Government has not indicated what these block exemptions would look like.
>
> (ii) It is not clear why there should be any industry-specific block exemptions. If such exemptions can be justified, they should be pursued by way of industry-specific legislation rather than by way of regulation given the lack of transparency in regulation-making.
>
> (iii) The EU's experience with block exemptions indicates that it is difficult to establish the right balance between formalistic, prescriptive exemptions that offer certainty but also rigidity, and more policy-based exemptions that offer economic coherence but less predictability.
>
> (iv) In view of the lack of Canadian experience with the block exemption format, the need for extensive consideration, experience (*e.g.*, potentially in the form of case law under both a new section 45 and proposed section 79.11) and consultation before establishing block exemptions cannot be overemphasized. It may be preferable to proceed by way of guidelines initially.

Question 33.

Given the amounts of recent fines obtained from conspiracy prosecutions, would allowing the courts to set the fines at their discretion be a more appropriate way to respond to criminal conspiracies than the current $10 million fine? Or, should the fine be set based on a fixed percentage of affected commerce? Why or why not?

As a preliminary matter, we note that question 33 may create a misimpression in its reference to "allowing courts to set the fines at their discretion" as a "more appropriate way to respond to criminal conspiracies than the current $10 million fine". As the present section 45 provides for a fine in the range of $0 - $10 million, courts are currently permitted a large measure of discretion in assessing the appropriate penalty.

The Competition Bureau has achieved success in the area of domestic and international cartel enforcement over the past decade leading to the imposition of substantial fines. Given this record, some members of the Competition Law Section question whether the removal of the $10 million fine cap under section 45 would provide any greater deterrent to potential criminal behaviour. Moreover, members question the necessity of removing the fine cap to allow for an unlimited fine — a review of conspiracy cases over the past decade indicates that the maximum $10 million fine per offence charged under section 45 has never been imposed (although fines in excess of $10 million have been cumulatively imposed in cases where multiple offences were charged).[29] Apart from a very few, exceptional cases, fines imposed under section 45 have not exceeded $5 million per count charged. Thus some members are of the view that the $10 million fine cap under section 45 provides marketplace participants with much-needed

29 In 1998, Archer Daniels Midland received a fine of $9 million on a count of illegal price-fixing under section 45 (an additional $7 million in fines was imposed under two additional counts) — see Competition Bureau, News Release, "$16 Million in Fines Paid by Archer Daniels Midland for Violations of the Competition Act in the Food and Feed Additive Industries", (May 27, 1998).

certainty as to the potential penalty that can be imposed under the Act. It is noted that there is a cap for monetary penalties for cartels in the European Union (albeit with formulas to compute the penalties) and reform proposals have been advanced in the United States towards imposing a cap.

Other members question the consistency of a fine cap for section 45 – arguably the most serious of the competition law offences – with the absence of a cap for fines under other certain provisions, such as bid rigging (section 47), price maintenance (section 61) and false or misleading representations (section 52). In response, others say that the absence of a cap for certain provisions alone does not justify the removal of a cap for section 45. They point out that an unlimited fine increases stakes in plea bargain negotiations with the Competition Bureau and Crown prosecutors and puts accused persons at a disadvantage.

In short, whatever approach the Government adopts, there should be an explanation of why the cap should be removed for section 45 together with an articulation of why certain criminal offences under the Competition Act carry maximum fines and others do not.

Most members share the view that a statutory formula for calculating fines would not provide greater clarity or deterrence. A criminal sentence is not a mathematical formula, and it must take into account a wide range of sentencing principles adopted by the courts to reflect the seriousness of the conduct. A fundamental principle that Canadian courts have repeatedly endorsed, now incorporated in the *Criminal Code*,[30] is that sentences must be proportionate to the gravity of the offence charged and the degree of responsibility or culpability of the offender. Sentences should also take into account aggravating or mitigating circumstances. These issues require a level of flexibility and discretion

30 *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.1.

to be applied in determining sentences that a statutory formula for calculating fines would not provide.

Question 34.

The new draft criminal provision applies to existing and proposed agreements. How should existing agreements be handled under the new provision? Should there be transitional provisions to deal with existing agreements? If so, what do you suggest? Please explain.

The question asks about "transition provisions". However, the fundamental issue is not whether to have a transition period, but whether the parties' expectations should be preserved entirely, partly or not at all. The parties have a legitimate private interest in retaining their contractual expectations and not losing the economic value of their investments. In the balancing of public and private interests, is there a reason that the private expectation interests should be eliminated or reduced in favour of the public interest? Expressed in another way, should the private interests that depend on the continuation of the agreement be "grandfathered"? It is submitted that the private interests should be continued for the reasons set out below. This would be accomplished by having the existing section 45 continue in force with respect to existing agreements, and the new section 45 apply only to agreements that are made after it comes into force.

In this response we consider the following hypothetical facts:

- Two or more persons who compete, or could reasonably be expected to compete with each other, entered a lawful agreement for a term of 15 years, commencing in 2003.
- The amended section 45, as proposed in the 2003 discussion paper, would come into force in mid-2004.
- The agreement does not lessen competition unduly, but it does lessen competition to some extent in that it has the effect of lessening the production of a product.

- The agreement produces efficiencies in the form of cost savings that are greater than the economic cost of lessening production.
- The parties to the agreement made investments in order to perform the agreement, and those investments would be of no value if the agreement were terminated.

In the hypothetical example, if there were no transition provision, the parties would lose the benefits of their agreement from 2004 to 2018 (14 of 15 years). If a transition provision allowed the parties a grace period of, for example, five years from the amendment coming into force in 2004, the parties would lose their benefits from 2009 to 2018 (9 of 15 years). If there were a full exemption, the parties would have the entire benefit of their bargain for the 15 years to 2018.

Land use regulation provides a useful comparison. The concept of legal non-conforming use is well known and widely used in land use regulation. The policy basis for legal non-conforming use is that it would be unfair and would deprive a landowner of reasonable expectations and investment if the continued use should be prohibited after a restriction comes into force. This recognizes the reasonable expectations of the owner at the time of acquisition. The public interest in the new regulation is merely postponed until the existing use expires.

The temporary protection of private economic interests should also apply to the amendment of section 45. The justification for legal non-conforming land use applies also to existing lawful inter-competitor agreements. Are there distinctions that would lead to the conclusion that the legitimate expectations of parties to inter-competitor agreements should be extinguished? For example, is it material that section 45 creates an indictable offence, while land use regulations create provincial summary offences? We consider that this is not an important distinction in practice. Significant private economic investments can and ought to be protected in both cases. Secondly, does it matter that land use ownership is not the same as contractual benefits? We submit that there is no material difference

between them. The landowner and the parties to the agreement both suffer reduced expectations caused by the new restriction, and this translates into economic loss in the form of diminished returns on actual or potential future invested capital.

In addition to economic expectation and reliance, the reason that the agreement should be allowed to run its full course is that it would avoid unfairness to the parties while not being an undue imposition on the public interest in competition. The law that was sufficient to protect the public's interest against conspiracies since 1889 is sufficient to continue to protect that interest for the temporary period of the grandfathered agreement.

It might be argued that the continued existence of a hard-core agreement that did not unduly lessen competition could provide an unfair competitive advantage to the parties in relation to third party competitors. These third parties would be unable to enter an efficiency-enhancing hard-core agreement after 2004 regardless of its likely effect on competition. The question is whether an exemption for the agreement would remove the unfairness or merely transform it into another type of unfairness to be suffered by someone else. The third party competitors are analogous to the neighbouring landowner that wants to initiate a prohibited use that is the same as the adjoining legal non-conforming use. It is submitted that the neighbouring landowner is not unfairly treated because it had the opportunity to commence the use before the restriction became effective. Similarly, third party competitors would have the same opportunity before mid-2004 to enter competitor agreements of their own. Moreover, they can achieve efficiencies by other methods that will continue to be available after the law comes into force.

Would the prospect in 2003 and early 2004 of a full exemption cause a rush of inter-competitor hard-core agreements that do not lessen competition unduly, to "beat the clock" on the new hard-core regime? While this possibility cannot be

entirely discounted, it seems unlikely because, as the Competition Bureau has said repeatedly for many years, the existence of the present law is a chill on the very type of inter-competitor agreement under contemplation. However, to the extent that parties may not be discouraged from entering efficiency-enhancing agreements, this is on balance a good thing for the economy and for avoiding unfairness. After all, if there is a rush to conclude agreements that do not lessen competition unduly, the public harm of such agreements is difficult to discern.

In conclusion, the CBA Section is of the view that existing agreements ought to be subject to the current section 45, and that only agreements entered into after the coming into force of any new *per se* provision ought to be subject to the new law. As a practical matter, if it were thought to be unrealistic to protect extremely long-term (or perpetual) contract-based expectations, a limit (*e.g.*, 10-15 years) could be imposed on the period for which such agreements would be grandfathered. Further consultation on an appropriate maximum time period for grandfathered agreements would be helpful.

In addition, if any category of agreement is grandfathered, thought would have to be given to how to handle new parties joining existing agreements, minor or non-substantive amendments of such agreements (i.e., when does it amount to a new agreement?), and automatic renewals, for example.

Question 35.

Do you have additional comments?

Particularly if a *per se* criminal provision is introduced in section 45 for agreements among competitors generally, then the CBA Section questions the need to retain sections 48 and 49 in the Act. The House of Commons Standing Committee on Industry, Science and Technology recommended the avoidance of industry-specific regulation, and the CBA Section supports that goal. With

a *per se* offence of general application, there would be no need for specific provisions pertaining to professional sport or to financial institutions.

B. Civil Strategic Alliances Provision

Question 36.

Do you think that a new civil provision is required or can the current abuse of dominant position and merger provisions adequately address all other types of agreements not covered by the proposed criminal provision? Why or why not?

A new civil strategic alliances provision is not required. The current abuse of dominance and merger provisions are sufficiently robust to cover non-criminal strategic alliances.[31]

Historically, Tribunal abuse cases have focused on the requirement, found in almost all of the enumerated examples of "anti-competitive acts" in section 78, that an anticompetitive act must be disciplinary, predatory or exclusionary in purpose or effect. This would apparently exclude anticompetitive agreements that are not directed against competitors (*e.g.*, agreements to raise prices).

However, the Tribunal has never considered paragraph 78(1)(f), "buying up of products to prevent the erosion of existing price levels". This example refers to the practice of forestalling or regrating, in which goods destined for a particular market were intercepted in order to maintain higher prices in that market. It may be noted that this anticompetitive conduct is directed to maintaining higher market prices and not as a disciplinary, predatory or exclusionary measure against any competitor. This supports the position that section 79 in its current form was intended also to address horizontal arrangements such as strategic alliances.

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31 See N. Campbell, "Two, Three or Four Tracks – How Chilly is the Current and Proposed Treatment of Strategic Alliances under the *Competition Act*", presented at the Insight Conference, Canada's Changing Competition Regime, February 26-27, 2003.

Nonetheless, to avoid confusion, it may be preferable to add a further enumerated example in section 78 specifically referring to anticompetitive arrangements among competitors (including with respect to either the prices charged for their products or the prices they pay for their purchases). This would eliminate confusion and avoid the need for a separate civil strategic alliances provision.

Question 37.

Do you think that the addition of a "no duplicate proceedings" clause could adequately address a potential overlap between the abuse of dominant position provision, the merger provision and the civil strategic alliances provision? Should notifiable transactions under Part IX be excluded from the civil strategic alliances provision? Why or why not?

The CBA Section is of the view that a "no duplicate proceedings" clause is appropriate in the circumstances to address potential overlap between the abuse of dominance, merger and proposed civil strategic alliances provisions. Indeed, as noted above, expanding section 78 to make it clear that "abuse" can include a horizontal agreement (as opposed to the creation of an entirely new provision) will eliminate the risk of duplicate proceedings as between abuse of dominance and strategic alliances.

The CBA Section submits that all transactions subject to notification under Part IX of the Act (and all transactions of which the parties voluntarily notify the Bureau that would otherwise be subject to notification under Part IX but do not exceed the relevant "size-of-parties" or "size-of-transaction" thresholds, and possibly other categories of voluntarily notified transactions) should be exempt from civil review as a strategic alliance. Such transactions fall squarely within the definition of a merger, and there is no practical purpose to subjecting them to the possibility of review as a strategic alliance.

Question 38.

Should a list of factors similar to that included in the Act for merger review be included for civil strategic alliances? Why or why not?

In principle, the strategic alliances and merger provisions should mirror one another. In effect, they are identical: all or part of a business is combined. Only the means differ – *i.e.*, combination through agreement versus combination through acquisition.[32] Thus, a list of factors should be included.

Question 39.

Should efficiencies be considered as a factor in the civil strategic alliances provision? Should efficiencies be considered as a factor in a merger review? Why or why not?

For the reasons stated above in response to Question 38, efficiencies should be treated identically in both provisions.

Question 40.

Do you think that the proposed civil strategic alliances provision could replace the joint venture and the specialization agreement provisions? Is this a desired outcome? Why or why not?

The strategic alliances provision could not replace the specialization agreement provision. The specialization agreement provision is designed to permit welfare enhancing agreements that may otherwise be criminal in nature (*e.g.*, market division). The strategic alliances provision is not designed to legalize otherwise criminal agreements.

32 See M. Trebilcock & P. Warner, "Fixing Price Fixing Laws", *Canadian Competition Record*, Spring 1996, Vol. 17, No. 1.

In our experience, the joint venture exception (subsection 95(1)) is a restrictively worded, little-used provision. We do not see why it could not be replaced.

Question 41.

Do you have additional comments?

Not at this time.

C. Clearance Procedure

Question 42.

Should the clearance certificate apply to both proposed and existing agreements? Why or why not?

Especially in light of the over-breadth of the proposed *per se* provision, and in order to foster certainty and predictability for Canadian business, a mechanism should be available to exempt both proposed and existing agreements from scrutiny under both section 45 (both new and old) and section 79, once they have been examined by the Commissioner and the Commissioner has concluded that they do not provide grounds for an inquiry under the Act.

Clearance certificates will be a useful compliance mechanism only if they preclude a substantive review and are legally binding. In this regard, clearance certificates should completely immunize the parties from both prosecution and civil liability. However, as proposed in the Discussion Paper, clearance certificates give parties no assurances that they will not be subject to investigation, criminal or civil proceedings, or civil liability.

What is required, in addition to the proposed language in Appendix 7 of the Discussion Paper, is to provide for an exemption in any new section 45, as well as the old section 45 and any new strategic alliance provision and other potentially

relevant provisions of the Act, for agreements or arrangements in respect of which the Commissioner has issued a certificate. This exemption would be analogous to the current section 103, which exempts mergers that have been the subject of an advance ruling certificate under section 102 from review by the Competition Tribunal, so long as they close within one year and the facts are substantially the same as those on the basis of which the certificate was issued. Such an explicit exemption is required, since not only the Commissioner, but also the Attorney General and private parties can bring cases in respect of agreements potentially subject to section 45, for example, and the Commissioner cannot bind the Attorney General or any other third party.

Question 43.

Should the Competition Bureau require certain types of information from parties applying for a clearance certificate similar to the information requested prior to issuing an advance ruling certificate in a merger review? Why or why not? Should this required information be defined through regulations?

The process by which clearance certificates are issued should be transparent, predictable and timely. Accordingly, the Bureau should develop and publicize a consistent review procedure and list the factors that the Commissioner will consider in determining whether to issue a clearance certificate.

Parties wishing to obtain a clearance certificate should be required to provide the Commissioner with the information necessary for him to decide whether it is appropriate to issue a clearance certificate. In addition to the fact that the parties are likely in the best position to provide the Commissioner with this type of information, requiring the parties to provide a minimum level of information will also likely conserve Bureau resources and speed up the review process. It is in the interest of the parties to obtain a clearance certificate and they are likely to provide whatever information the Commissioner considers to be necessary. To some extent, the type of information that the Commissioner is likely to require in

order to issue a clearance certificate will depend on whether the clearance certificate process is based on a review under the merger provisions, the abuse of dominance provisions or the proposed civil strategic alliances provision.

Regardless of the framework ultimately adopted, it is more useful to clearly set out the factors that the Commissioner will use in reviewing a clearance certificate request rather than adopting a "shopping list" of information that parties must provide. Our experience with notifications under the merger provisions of the Act is that they often do not provide the information most crucial to the Bureau's determination. At the same time, they frequently require parties to provide unnecessary or useless information. There is no need to replicate that practice in another section of the Act.

A regulation setting out a list of information that must be provided will likely often be both over and under-inclusive given the wide range of agreements that could be subject to the clearance certificate provision. So long as the factors that the Commissioner will consider in evaluating clearance certificate requests are clear, the parties are in the best position to determine what information best addresses those factors. In this regard, it would be useful for the Bureau to issue guidelines advising businesses and their counsel as to what types of information it generally considers to be useful in evaluating requests for clearance certificates. Nothing is prescribed for ARC applications; similarly, nothing should be prescribed for clearance certificates.

Question 44.

Subject to confidentiality requirements, should the Bureau contact third parties before issuing a clearance certificate?

The Bureau should contact third parties only where Bureau staff believes that it is necessary to obtain third party information to decide whether it is appropriate to issue a clearance certificate.

The Bureau should not be allowed to contact third parties without obtaining the permission of the parties seeking the clearance certificate. While parties should not be obliged to give their permission for the Bureau to contact third parties, the Bureau will similarly not be obliged to issue a clearance certificate where it considers its investigation to be incomplete.

Question 45.

Do you think that existing section 124.1 (written opinions binding on the Commissioner) should be used instead of a clearance certificate for both existing and proposed agreements? Why or why not?

As noted above, whether the existing section 124.1 is used, or a separate section is added specifically related to section 45 (old and new), any new civil strategic alliance provision and any other potentially relevant provisions, what is missing from the current language in Appendix 7 is an additional provision prohibiting the Commissioner, the Attorney General or a private party from commencing proceedings or litigation alleging a contravention of the section(s) covered in the certificate, "solely on the basis of information that is the same or substantially the same as that on the basis of which the certificate was issued" (see section 103). Section 124.1 is flawed, as currently drafted, in that it binds the Commissioner but nobody else. The addition of a counterpart to section 103 to 124.1, would obviate the need to have a separate clearance mechanism for horizontal agreements.

Question 46.

Do you have additional comments?

A difficulty with the clearance certificate is that the Commissioner does not have to consider the application expeditiously, or at all (as he must under section 102). Experience with ARCs suggests that in "grey" cases, the Commissioner will avoid

issuing a certificate. Hence, there are concerns that the certificate process will not in practice be useful.

IV. REFORMING THE PRICING PROVISIONS

A. Price Discrimination and Promotional Allowances

Question 47.

Do you agree that the criminal provision dealing with price discrimination should be repealed? Why or why not?

The Government proposes to repeal paragraph 50(1)(a) and section 51 of the Act, which set out criminal offences for price discrimination and discriminatory promotional allowances. It further recommends that these offences be addressed exclusively under the existing abuse of dominance provisions. We agree with these proposals.

To begin with, in general, many forms of price or promotional allowance discrimination are not harmful to social welfare and can be pro-competitive. For example, price discrimination may enhance welfare by:

> (i) lowering the price of a product to segments of the population, encouraging the consumption of a good or a service by an individual or group (*e.g.*, senior citizen or student discounts); and/or
>
> (ii) being employed as part of a competitive strategy, such as an entry strategy by a new competitor seeking to establish or gain market share.

Accordingly, these discriminatory practices must be assessed in a thorough way to determine whether a specific act of discrimination would be harmful to the market or not. In this context, it does not seem appropriate to make a practice that is so frequently pro-competitive a criminal offence under the Act because it may "chill" otherwise pro-competitive and welfare-enhancing practices.

More specifically, paragraph 50(1)(a) provides that it is a criminal offence for a seller to charge competing purchasers different prices for articles of like quantity and quality without the requirement that the seller possess market power or that the practice result in a substantial lessening or prevention of competition. It is unsound to have a criminal offence that permits conviction in cases where a seller does not possess market power because such cases imply that a purchaser has other acceptable suppliers from whom it can purchase the product.

The same reasoning applies to section 51 of the Act. Section 51 makes it a criminal offence for a supplier to provide an allowance, meaning any discount, rebate, price concession, or other advantage, to any purchaser that is not offered on proportionate terms to other competing purchasers. However, absent market power of the seller, a competing purchaser should have alternative sources of supply such that discriminatory allowances are unlikely to result in a substantial lessening of competition.

An observed price differential across purchasers may also be the outcome of a competitive negotiation process that reflects different relative bargaining power across the parties. Competition laws should not be used to realign negotiating power or to question business decisions made in otherwise competitive markets.

For the foregoing reasons, the CBA Section believes it would be more effective to repeal paragraph 50(1)(a) and section 51 of the Act, and to treat practices covered by those sections under the existing abuse of dominance provisions. This is because the harmful discrimination in regard to pricing or promotional allowances that must be remedied and deterred occurs only in situations where a seller has dominance and its discriminatory practices are resulting or will likely result in a substantial lessening of competition in the downstream market. As noted above, by repealing the criminal sanction and addressing these issues under the abuse of dominance provisions, the desired objective can be attained without causing an

unnecessary chill in the market's pricing dynamic and without punishing businesses for engaging in pro-competitive or otherwise benign practices.

In sum, the advantages of addressing these practices under the existing abuse of dominance provisions include:

> (i) only those incidents of discrimination that result in a substantial lessening of competition are subject to a remedial order;
>
> (ii) the chilling effect of criminal sanctions on sellers providing otherwise pro-competitive discounting and promotional allowances is eliminated;
>
> (iii) the burden of proof for enforcement authorities is lowered; and
>
> (iv) the specialized Competition Tribunal, rather than the courts, is responsible for distinguishing between pro- and anticompetitive instances of discrimination.

Question 48.

Should price discrimination govern all types of products, including articles and services? Why or why not?

The CBA Section notes that an application could conceivably be made under the Act's current abuse of dominance provisions in respect of price discrimination involving services. While the CBA Section sees no reason to limit the application of section 79 to price discrimination involving articles, the inherent difficulty in assessing the comparability of services provided to different customers suggests that it would normally be very difficult to meet the criteria of section 79 with respect to an allegation of anticompetitive price discrimination for the provision of services.

Question 49.

Is the existing abuse of dominant position provision sufficient to respond to anticompetitive price discrimination and promotional allowances? Why or why not? If not, please provide alternatives.

Yes. Please see the answer to Question 47 above.

Question 50.

Do you agree that the abuse of dominant position provision would provide sufficient deterrence against price discrimination if AMPs were available and with the lower burden of proof of a civil setting?

The government proposes to grant the Competition Tribunal the right to impose AMPs for violations of section 79, an amendment that impacts the proposed repeal of subsection 50(1)(a) and section 51 given the proposal to move the subject matter of those provisions to section 79. For the reasons expressed in the answer to Question 1, the CBA Section is strongly opposed to the availability of AMPs in respect of reviewable conduct, including conduct contemplated under section 79. As explained in the answer to Question 47, the CBA Section agrees that discriminatory pricing and promotional allowances should be treated as a reviewable practice under section 79. Such conduct is no more, and perhaps less, obviously anticompetitive than the conduct currently treated as reviewable practices in Part VIII of the Act. For this reason, the CBA Section believes that the availability of AMPs in respect of discriminatory pricing or promotional allowances is not appropriate in general or specifically for deterrence purposes. There is no need to increase deterrence in respect of this conduct.

Question 51.

Do you have additional comments?

The rationale provided in the Discussion Paper for the proposal to de-criminalize conduct falling under paragraph 50(1)(a) and section 51 of the Act applies equally to resale price maintenance. Why is there no proposed amendment to also repeal section 61 and treat price maintenance under section 79? This is a serious shortcoming to the proposals in the Discussion Paper to amend the Act's pricing provisions.

In addition, for consistency, if the price discrimination offence in paragraph 50(1)(a) is repealed from the Act, then paragraph 76(1)(b) should also be repealed. Paragraph 76(1)(b) deals with consignment selling practices introduced for the purpose of discriminating between consignees or between consignees and dealers. This provision was added to the Act specifically to address consignment selling to which a supplier deliberately resorts for the purpose of circumventing the criminal prohibition on price discrimination.[33] If the price discrimination offence is repealed, then the CBA Section submits that the rationale for paragraph 76(1)(b) would disappear. In any event, anticompetitive conduct within the scope of paragraph 76(1)(b) could be addressed under the abuse of dominance provisions in section 79.

B. Predatory Pricing Behaviour

Question 52.

Should the criminal provisions dealing with geographic price discrimination and predatory pricing be repealed?

The CBA Section supports the proposals in the Discussion Paper to repeal the criminal provisions dealing with geographic price discrimination and predatory pricing (paragraphs 50(1)(b) and 50(1)(c) of the Act).

What should be recognized in considering whether to repeal paragraph 50(1)(c) and include it as an anticompetitive act under section 78 is that predation already has a notable history under the existing abuse provisions. Indeed, some predatory conduct is specifically contemplated under section 78. For example, that section defines as "anti-competitive acts" the "use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor" (78(1)(d)) and "selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor" (78(1)(i)). Predatory pricing also falls under the basket clause in section 78 and has been brought before the

33 See Proposals for a New Competition Policy for Canada, First Stage, Bill C-227, (Ottawa, November 1973) at 68.

Tribunal as an alleged abuse of dominance on more than one occasion (*e.g.*, *Nutrasweet* and *Air Canada*).

The CBA Section believes that low pricing is perhaps the quintessential example of conduct that should be presumed lawful and encouraged until demonstrated to be anticompetitive after careful analysis by the Tribunal. The immediate consumer benefit of low prices is evident, whereas the potential long run harm to competition is uncertain and subject to assessment of a number of market related factors that require careful evaluation on a case-by-case basis. The CBA Section believes that predatory pricing should be treated solely as a reviewable matter and the criminal offence in paragraph 50(1)(c) should be repealed.

However, in the event that predatory pricing remains a criminal offence, paragraph 50(1)(c) should be amended because, while the effect or likely effect of substantially lessening competition is a necessary condition under section 79 before predation is found, it is not necessarily the case under paragraph 50(1)(c). More specifically, under paragraph 50(1)(c), predation can also be found if the unreasonably low pricing policy of a firm has the "effect or tendency of… eliminating a competitor". Since even prices that are below marginal cost may not be "unreasonable", and since legitimately low prices may result in the elimination of a competitor, "unreasonably low" and "eliminating a competitor" cannot be correctly interpreted as being anticompetitive without also including the criterion of a substantial lessening of competition. Consequently, paragraph 50(1)(c) should be amended to resemble the language proposed to be used with respect to predation in subsection 78(1), *i.e.* "engages in a policy of selling products at a price below avoidable cost for the purpose of disciplining or eliminating a competitor or impeding or preventing a competitor's entry into, or expansion in, a market".

The CBA Section believes that, if it were necessary to retain a criminal offence for predatory pricing, the above amendment would likely achieve a better balance between deterrence and minimizing price chilling effects.

For many of the same reasons that the CBA Section believes paragraph 50(1)(c) should be repealed, the CBA Section also believes that paragraph 50(1)(b) should be repealed.

Question 53.

Is the existing abuse of dominant position provision sufficient to respond to anticompetitive predatory pricing? Why or why not? If not, please provide alternatives.

Please see the answer to Question 52 above.

Question 54.

Do you agree that the abuse of dominant position provision would provide sufficient deterrence against predatory pricing if AMPs were available and with the lower burden of proof in the civil setting?

As discussed in detail in Part II of this response, the CBA Section does not support the introduction of AMPs for civil reviewable matters under Part VIII of the Act, including predatory pricing. In the CBA Section's view, and as described above in the answer to Question 52, low pricing behaviour lies at the very core of conduct that properly should be considered "reviewable" under the Act and thus lawful until found by the Tribunal to be anticompetitive. The availability of AMPs in respect of predatory pricing would amount to over deterrence and would risk chilling low pricing conduct that is the most obvious and tangible consumer benefit of competitive markets.

Question 55.

Do you agree with the House of Commons Standing Committee on Industry, Science and Technology's recommendation that paragraph 79(1)(a), which requires establishing that "one or more persons substantially or completely control" a market, should be repealed? Why or why not?

While not strictly part of the proposed amendments to the pricing provisions, the government seeks views as to the appropriateness of repealing paragraph 79(1)(a) of the Act, as recommended by the House Standing Committee on Industry, Science and Technology. This would impact not only section 79 directly but also the discrimination and predatory pricing sections of the Act should they be moved to section 79.

Paragraph 79(1)(a) requires for a finding of abuse that "one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business". The Competition Bureau's *Enforcement Guidelines on the Abuse of Dominance Provisions* properly interpret "substantially or completely control" to be synonymous with market power. This is also the interpretation made by the Competition Tribunal. Since market power is necessary in order for competition to be lessened substantially, it is reasonable that a provision such as paragraph 79(1)(a) be included in the Act. An abuse of dominance provision absent some concept of dominance would be peculiar and not in line with similar laws of our major trading partners. This paragraph should not be repealed.

If paragraph 79(1)(a) is believed to be potentially confusing despite the interpretation contained in the Abuse Guidelines and in case decisions, we suggest that it be amended to replace "substantially or completely control" with "have market power over" or some similar language. However, there is nothing to suggest that there is in fact any confusion that would warrant such an amendment.

Question 56.

Do you have additional comments?

Not at this time.

V. INQUIRIES INTO THE STATE OF COMPETITION

A. Market References

Question 57.

Should the Act be amended to allow the Commissioner to ask an independent and impartial body such as the CITT, with the approval of the Minister of Industry, to inquire into the state of competition and the functioning of markets in any sector of the Canadian economy? Why or why not? Are there other bodies that could conduct such inquiries?

The Discussion Paper proposes that the Commissioner, with the approval of the Minister of Industry, be allowed to request that an impartial body such as the Canadian International Trade Tribunal (the "CITT") inquire into the state of competition and the functioning of markets in any sector of the Canadian economy (the "Market Reference Proposal"). A report based on the findings of the inquiry would be tabled in Parliament. If passed, the Market Reference Proposal would permit inquiries into any Canadian sector or industry in the absence of any alleged anticompetitive conduct.

The CBA Section submits that it has not been demonstrated why market inquiries are needed or what benefits they would provide. There are a number of significant concerns associated with such inquiries, including due process and the significant costs that would be imposed on both a targeted industry and the public purse. The Market Reference Proposal does not specify the type or scope of investigative powers that the inquiring body would have, or the types of protection that might be available for firms and/or individuals in an industry

subject to an inquiry. There are also questions regarding: whether compelled testimony could be used in subsequent proceedings whether by the Attorney General with respect to criminal offences, by the Commissioner with respect to reviewable matters, or by private parties with respect to civil litigation; the circumstances under which inquiries would be requested; how inquiries would be conducted; and how the inquiries or their output would relate to (or be utilized in) the enforcement of the Act or other statutes. In addition, the use or threatened use of this power - and the reports themselves - could be subject to abuse. In short, the Market Reference Proposal appears to be an unnecessary and costly mechanism with no clear purpose or benefit.

As noted above, there are a number of serious issues raised by the proposal. These issues are elaborated below.

i. Why are market references needed?

It is not clear what purpose the Market Reference Proposal would serve. The Market Reference Proposal is redundant because the CITT already has broad investigative powers at the discretion of the Governor-in-Council.[34] Moreover, under section 125 of the Act, the Commissioner has the power as of right to "make representations to and call evidence before any board, commission or other tribunal in respect of competition . . ." The CITT's reference power is rarely used, but could be invoked easily to examine the state of competition in any market for goods or services if the Governor-in-Council considered the matter to be of sufficient national importance. Given the potential cost of such inquiries to both industry participants and government, as well as the potential intrusiveness of the use of compulsory powers, the CBA Section submits that a single Minister (the Minister of Industry in the Market Reference Proposal) should not have the power to unilaterally initiate such an inquiry.

It is not necessary to provide for market references under the Act. Rather, such

34 Section 18 of the *Canadian International Trade Tribunal Act* reads as follows: "The Tribunal shall inquire into and report to the Governor-in-Council on any matter in relation to the economic, trade or commercial interests of Canada with respect to any goods or services or any class thereof that the Governor in Council refers to the Tribunal for inquiry."

inquiries are best left to an *ad hoc* instrument, such as public inquiries (the Governor-in-Council retains the discretion under the *Inquiries Act* to initiate a public inquiry[35]) or, as noted above, to the CITT, where there is a Governor-in-Council resolution. This would tend to confine market inquiries to matters of substantial importance. The CBA Section submits that the preferable option would be to leave things as they stand and to recommend that, where appropriate, the Commissioner seek the Minister of Industry's support to have cabinet invoke the existing reference power.

Further, such inquiries need not be limited to issues of competition policy, as they may raise broader questions of economic and social policy. Looking to the experience of other Canadian and non-Canadian institutions with respect to similar powers could be of assistance in this regard.[36]

Alternatively, if the Commissioner wishes to obtain information on the state of competition in an industry, he already has the ability simply to commission a consultant to do this on the basis of information that has been obtained in the course of a normal investigation or provided voluntarily (subject in each case to confidentiality protections). The Commissioner has had such research conducted on a number of occasions. Such reviews are likely to be as effective and less expensive for all concerned, including the Government, than a comprehensive inquiry conducted in the manner proposed in the Discussion Paper.

Current Role of the Commissioner

35 See section 2 of the *Inquiries Act*, R.S.C. 1985, c. I-11, which gives the Governor-in-Council discretion to initiate a public inquiry or even informal consultations by the Commissioner with other sector-specific regulatory bodies.

36 For example, the U.S. International Trade Commission – the U.S. body that most closely parallels the functions of the CITT – does conduct general "fact-finding" investigations under section 332 of the *U.S. Tariff Act* of 1930. But these inquiries are generally designed to examine matters involving tariffs and international trade or competitive conditions between U.S. and foreign industries.

The CBA Section believes that it is not appropriate for the Commissioner to initiate public inquiries, even where approval of the Minister of Industry is required. In particular, the CBA Section submits that such a role would not be consistent with the Commissioner's other functions under the Act, which for the most part involve investigations or inquiries in respect of specific matters (*e.g.*, mergers, complaints, etc.). What role, if any, would the Commissioner play in the inquiry that he has requested? Assuming a market reference were requested and completed, what would be the practical implications of the report for the Commissioner? Would it be held in reserve pending a future matter, such as a merger, arising in the industry? Or would the Commissioner use it pro-actively to initiate an investigation or application under the Act?

The Commissioner does not need a report to initiate an investigation, as he already has the necessary tools to administer and enforce the Act (see below). If complaints regarding an industry have been made, but the Commissioner does not consider that a competitive problem exists and does not wish to initiate an investigation, this mechanism should not be provided simply as a way of transferring a political accountability to some other institution, such as the CITT. As well, care must be taken that market references do not create an incentive for the Commissioner to attempt to engineer competition in ways that surpass the enforcement role created for the Commissioner pursuant to the Act.

iii. Commissioner Has Tools to Investigate

If there is a genuine issue regarding anticompetitive conduct in an industry, the Commissioner already has all of the tools necessary to properly investigate such conduct, including the ability to commence an inquiry "into all such matters as [he or she] considers necessary to inquire into with the view of determining the facts" (subsection 10(1) of the Act), to obtain an order for oral examination, production or written return of evidence and testimony (section 11 of the Act) and to obtain a warrant for entry of premises and to seize evidence (sections 15-16 of the Act).

Moreover, the Commissioner can require Statistics Canada to provide information on any industry or sector.[37]

iv. Time and Cost

A broad-ranging reference into the state of competition in an industry could be expensive and time-consuming. In fact, we understand that the general power to have the Restrictive Trade Practices Commission ("RTPC") conduct research inquiries was removed from the Act due, in part, to concerns expressed by the business community about the enormous expense and questionable utility of the petroleum inquiry conducted in the early 1980s. This inquiry led to a report entitled "Competition in the Canadian Petroleum Industry" which took almost five years for the RTPC to complete.[38] In total, the RTPC held over 200 days of hearings, heard evidence from over 200 witnesses, received over 1,800 exhibits and produced a transcript of more than 50,000 pages. It finally issued its report in 1986. The inquiry cost millions of dollars, both to government and to the private sector (in terms, for example, of hiring counsel and diverting management time).

The power under section 47 was rescinded when the Tribunal was established in place of the RTPC in 1986, partly because the Supreme Court of Canada had held that it was constitutionally suspect for the RTPC to mix investigative and adjudicative functions.[39] The Market Reference Proposal sidesteps that issue by referring matters to the CITT, but we should still be concerned about how this power will be used and the type of burden it could impose on parties based on the RTPC precedent.

v. Implications of a Market Reference

The fact that a comprehensive study into a particular sector is requested by the Commissioner and approved by the Minister of Industry may imply that there is

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37 See subsection 70(2) of the Act.

38 The Director of Investigation and Research commenced an inquiry in 1973 based on a complaint from the Consumers' Association of Canada. This investigation lasted until 1981. The Director then referred the matter to the RTPC under section 47 of the *Combines Investigation Act* to conduct a general inquiry into the industry. The RTPC held hearings across the country in 1981 and 1982 and then returned to Ottawa for further hearings.

39 *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145.

something anticompetitive about the industry being examined. Yet, this implication could be entirely baseless. The simple fact that a broad investigation in an industry is undertaken may be enough to encourage strategic private litigation in that industry.

vi. Due Process and Procedural Issues

The procedural aspects of the Market Reference Proposal are entirely open-ended. For a market reference to be conducted, confidential information would have to be obtained from market participants. There is no provision in the Market Reference Proposal for either compulsory or voluntary production of evidence, or protection of the confidentiality of evidence or witnesses. It is not clear whether the CITT would have access to the Bureau's confidential case files or on what basis such information would be protected under section 29 of the Act. It is also not clear whether the Market Reference Proposal would involve oral hearings, the ability to submit, review and challenge evidence or whether the inquiring body would have the ability to compel persons to testify or to provide documents and/or written returns. There is no proposed procedure suggested, nor is there any administrative or constitutional protection for those who may be required to give evidence. If evidence of wrongdoing is uncovered, then how will that information be used? Could such evidence be used by the Commissioner in an inquiry under the Act?

If hearings are contemplated by the Market Reference Proposal (such as those that were conducted by the RTPC), costs will be extremely high, which raises obvious concerns about the source and allocation of valuable government resources. However, if the inquiries are entirely internal and no hearings are held, questions might arise concerning the quality of the CITT's report and the fairness of the process, particularly if the report was subsequently used by the Commissioner in an investigation or application under the Act.

Furthermore, the implications of concurrent market references and Bureau investigations (*i.e.*, a market reference when an investigation or inquiry is

ongoing), or a market reference after an investigation has been discontinued, are unclear. It does not appear that an ongoing inquiry would preclude the Commissioner from taking action until the report is issued.

The Market Reference Proposal raises serious due process and procedural issues. At a minimum, more information regarding procedural safeguards is needed in order to fully evaluate the Market Reference Proposal.

vii. Politicization of the Inquiry Process

It is unclear what events or circumstances might trigger an inquiry. If the Bureau has received complaints or other information to suggest that there is ongoing anticompetitive conduct occurring within an industry, as mentioned above, the Bureau could investigate such allegations under the relevant provisions of the Act.

Conversely, if there are no such complaints, or no information to suggest that there is anticompetitive behaviour ongoing in a particular industry, one wonders on what basis the Commissioner would request an in-depth examination of the state of competition in that industry. A costly investigation by the CITT that confirms that an industry is operating competitively is a waste of resources and could raise concerns that the inquiry is in the nature of a targeted "witch hunt" or that the Bureau is on a "fishing expedition".

It appears that the Market Reference Proposal may be designed to defuse political and popular pressure on the Bureau to act in response to popular (though possibly misinformed) notions that there is little competition in certain industries. While it may be frustrating for the Bureau to repeatedly receive complaints about industries it has recently investigated, the Commissioner has discretion with regard to the extent of resources devoted to respond to such complaints. If the complaint is frivolous and vexatious, then the investigation could be quickly terminated.

In any event, certain sectors are often subject to this form of pressure, and the Market Reference Proposal is unlikely to change this (as illustrated by the numerous occasions on which the Bureau and other Canadian competition authorities have examined the petroleum industry, and found no evidence of the subject matter of the complaint). As such, the Market Reference Proposal could lead to certain sectors being exposed to significant costs in order to satisfy what is essentially a political exercise.

viii. Outcome of an Investigation

A study into the state of competition is likely to create unreasonable expectations that at the end of the process something constructive will be done with the report. The Market Reference Proposal does not propose what will occur upon completion of an inquiry. An inquiry might conclude that a particular market, perhaps one dominated by a single large competitor, is not competitive, but unless that state of non-competitiveness came about as the result of some transgression of the Act, there is no violation of the law which arises and no basis for doing anything about it, short of introducing regulatory controls.

Moreover, there will always be concerns about the relevance and validity of any findings made in a report that are used as a basis for a Bureau investigation. This is especially true if an investigation is initiated after any appreciable amount of time has elapsed since the completion of a report. In such cases, the market findings in the report may be outdated.

ix. Role of the CITT

While the CITT has economic expertise, its expertise is not necessarily appropriate to deal with matters addressed by the Market Reference Proposal. The CITT's statutory mandate does not include the determination of whether an industry is competitive or whether any parties' actions or practices are anticompetitive. Typically, the CITT examines issues of competition from the trade law protection standpoint, by determining whether dumping or subsidizing of imports, or surges of imports, are causing material injury to domestic

production of like goods. The tests used in this type of analysis differ from the tests used in competition law analysis to determine, for example, market definition or whether a transaction or conduct is likely to substantially prevent or lessen competition. The CITT does not have the experience or expertise to analyze markets and competitive injury in a competition law context. Furthermore, there does not appear to be any discernible reason, benefit, or need to formally link the Bureau with the CITT in the manner proposed.

Arguably, the Bureau is the best placed agency in Canada to conduct a market study as it possesses the requisite expertise to conduct such inquiries. The Bureau has developed the expertise to distinguish between real antitrust problems and the normal (and appropriate) turbulence of the marketplace, in which the failure and exit of firms from time to time, is both normal and appropriate. If the Bureau lacks sufficient independent data to fulfill this mandate, this deficiency could be resolved in more effective ways. For example, the Commissioner could commission Statistics Canada to undertake a specific survey or project related to an industry or sector that could then be regularly updated to ensure timeliness of the data. If the Bureau lacks sufficient resources to conduct industry analysis, such concern would presumably be better addressed by allocating more resources to the Bureau, rather than by having another body, which lacks the relevant experience, conduct competition-related investigations that more appropriately fall within the Bureau's mandate.

Question 58.

If inquiries into the state of competition were allowed, should the proposed provisions include specific criteria to determine under which circumstances the Commissioner of Competition would be allowed to ask for an inquiry? If so, which criteria should be considered? Please explain.

Since the costs associated with market references, both to the Government of Canada and affected private parties, would likely be significant, there should be criteria limiting when the Commissioner may ask for a market reference.

Such criteria should include a prior determination that the inquiry is necessary to the enforcement and administration of the Act and the Commissioner has been unable adequately, or has been substantially impeded in his ability, to fulfill his statutory obligations in the absence of an inquiry. The Commissioner should not be permitted to request a reference in respect of a matter before him or her or with a view to determining whether enforcement proceedings should be commenced against certain specific persons. References should be permitted only to facilitate the Commissioner's understanding of an industry.[40]

Consideration should also be given to the potential for conflict between market references and the jurisdiction of other statutory bodies or ministries that oversee aspects of the economy, such as the CRTC, and the Ministry of Finance.

Question 59.

Do you have additional comments?

Not at this time.

40 If the proposed inquiry is in furtherance of the administration and enforcement of the Act (*i.e.*, the Commissioner has a reason to believe that grounds for an inquiry under the Act exist or the sectoral information will be useful for the purposes of a targeted investigation), then, as noted above, the Act already contains all of the investigative tools necessary for the Commissioner. If the Commissioner does not believe that grounds for an inquiry under the Act exist, then the Minister of Industry already has the power to direct the Commissioner to utilize his investigative powers to determine if there has been such a contravention. In other words, if the CITT inquiry is further to the administration and enforcement of Act, it is duplicative and unnecessary. If the purpose of the CITT inquiry is not in furtherance of the administration and enforcement of the Act, then the Commissioner should not have the power to initiate a costly and intrusive sectoral inquiry.

VI. CONCLUSION

The CBA Section appreciates the opportunity to comment on the Discussion Paper's proposals to reform the Act. The CBA Section looks forward to participating actively in the ongoing consultative process organized by the Public Policy Forum.