SPECIAL SECTION ON PROPOSED AMENDMENTS TO THE *COMPETITION ACT*

THE PRIVATE MEMBERS' BILLS – AN OVERVIEW: CONTEXT AND CONTENT

By: Tim Kennish
Osler, Hoskin & Harcourt

Introduction

On April 6, 2000, in a move which caught most competition law observers by surprise, two private members' bills proposing significant reforms to the *Competition Act* (the "CA") were given first reading in the House of Commons (the "House"). Bill C-471 provides for amendments to facilitate international mutual assistance with foreign competition law authorities in civil matters and provides for references of specific questions to the Competition Tribunal through proposed amendments to the *Competition Tribunal Act* (the "CTA"). Bill C-472 proposes amendments to the CA in relation to section 45 and provides for private parties a limited right to make applications for relief under certain of the CA's civil remedial authorities. It also proposes amendments to the CTA to permit the Tribunal to award costs and to summarily dispose of certain matters.

Earlier, two other private members bills similarly proposing amendments to the CA had also received first reading in the House. Bill C-402, which received first reading on December 13, 1999, proposes an expansion of the list of "anti-competitive acts" contained in section 78 of the CA. Bill C-438 received first reading on February 25, 2000 and proposes the amendment of the CA to prohibit the mailing or other delivery of material inviting persons to participate in certain deceptive contests.

Subsequently, on April 17, 2000, through a discussion paper prepared by the Competition Bureau entitled "Amending the Competition Act – A Discussion Paper on Meeting the Challenges of the Global Economy" (the "April Discussion Paper"), it was announced that a public consultation process to be managed by the Public Policy Forum (the "PPF") was being constituted with a view to soliciting stakeholder advice and to report on the desirability or otherwise of proceeding with the amendments to the CA and CTA proposed in Bills C-402, C-438, C-471 and C-472 (collectively, the "Private Members' Bills").

The original timetable for this consultation contemplated interested members of the public being invited to provide their comments and submissions on the proposed legislative amendments contained in the Private Members' Bills by May 17, 2000. As a result of overtures and submissions made both to

the Commissioner of Competition and the PPF by the National Competition Law Section of the Canadian Bar Association and many others, the Bureau, on May 9, 2000, announced that, in order to give interested parties sufficient time for comment, that PPF has had extended the deadline for written comments from May 17 to June 30, 2000 with the PPF now being requested to provide its final report to the Commissioner by September 30, 2000.

As mentioned, this entire development came largely as a surprise to interested observers. While more regular competition law reform had been promised by the Commissioner and, for this purpose, a special permanent Amendments Unit had been established at the Bureau for the purpose of managing the amendment process going forward and there were a number of proposed reforms under active consideration by the Bureau (some of which were left over from the Discussion Paper which preceded the passage of Bill C-20), nothing specific was expected to be brought forward this year. Moreover, most interested parties probably expected the process would again (as was the case in the run-up to Bill C-20) commence with the release of a discussion paper or white paper seeking input in principle on the desirability of any proposed reforms. Instead, we have full-text legislative proposals now out for comment with the possibility that some or all of these initiatives, depending on the outcome of the PPF consultation process, may simply be rolled up into a comprehensive government bill to amend the CA which would then be introduced into the House in that form.

Notwithstanding the surprise nature of these developments, the involvement of Federal backbencher parliamentarians in earlier proposed reforms of the CA was already in evidence. Federal private members had a hand in expanding the scope of Bill C-20 itself through the inclusion in the Bill, in the final stages of its passage, of a special "whistleblower" provision. In addition, a number of earlier proposed enactments (most notably Bills C-235 and Bill C-393) were previously brought forward and are, at this stage, still pending, although the latter bill (prohibiting negative option marketing in certain circumstances) appears to be poised to become law in the near future. Bill C-235 sought to compel vertically integrated suppliers to charge "fair" prices for wholesale products to customers with whom the suppliers compete at retail through the enactment of an amendment which would make it a criminal offence for a vertically-integrated supplier not to do so. This proposal was widely criticized, including by the Bureau, with the result that, following its reference to the Standing Committee on Industry of the House of Commons (the "Industry Committee"), it was not recommended to be proceeded with by that body. However, in the course of its debate and discussion before the Industry Committee, the Commissioner undertook to report to the Committee on the sufficiency and efficacy of the CA's provisions concerning pricing practices. Ultimately, the Commissioner retained Professors VanDuzer and Paquet of the University of Ottawa Law School to undertake a study of, and to report on, this subject. That report (popularly referred to as the "VanDuzer Report") was provided to the Bureau in October, 1999 and released publicly somewhat later. As well, the debate and discussion concerning Bill C-235 appears to have prompted the Industry Committee to undertake a review of certain aspects of competition law more generally (discussed in greater detail below).

As well, an earlier private members' bill (also sponsored by Mr. McTeague), which has a somewhat confusingly similar identification (Bill C-472), received first reading in February 1999, containing proposals comparable to what is currently included in Bill C-402.

It is obvious that amendments to the CA and related statutes have become highly popular with certain Federal parliamentarians and have demonstrated potential for receiving support from the Liberal Caucus more generally. It appears that such legislation, which has a particularly consumerist appeal, is seen as providing a good opportunity for individual members of Parliament, by becoming identified with such initiatives, to gain public recognition and profile.

To some degree, recent legislative changes to the process by which private members' bills are dealt with in the House have contributed to the greater success of such initiatives ultimately seeing the light of day as enacted legislation. While there is a complex culling process which limits the numbers of such bills that ultimately emerge for parliamentary consideration, those that survive that process have a greater chance of being enacted than was the case with private members' bills historically.

At the same time, there was clearly also some unfinished business, in terms of proposed and desired reforms of the CA and the CTA, left over from Bill C-20 which the Bureau was clearly interested in proceeding with. Principal among these were the private rights of access to certain of the civil provisions of the CA which had initially been discussed in the context of the Discussion Paper issued as part of the consultation process leading to Bill C-20 and providing authority to allow the Commissioner/Bureau to enter into arrangements with competition law authorities in other jurisdictions to facilitate the provision of mutual assistance in relation to the civil matters in the competition law field. Also, a number of other initiatives had been identified in the course of 1999 by the Commissioner as being desirable.

In retrospect, it may seem inevitable that these twin forces, namely the desire of private members to put forward legislative initiatives to amend the CA and CTA, on the one hand, and the Bureau's own desire to proceed with its agenda for reform on the other, should converge in a process something like what has come about. Notwithstanding this, the current Private Members' Bills initiative was unexpected.

Subject Matter of Private Members' Bills

In summary, the principal subject matters of the four Private Members' Bills, listed in numeric order, are as follows:

(i) *Bill C-402 (Sponsored by Mr. Dan McTeague, M.P., Pickering-Ajax-Uxbridge)*

Bill C-402 provides specific examples of anti-competitive acts of particular relevance to the grocery and other retail markets to be added to the illustrative list of anti-competitive acts in the abuse of dominance provisions of the CA. This legislation is apparently intended to respond to concerns of

consumers and small businesses as market restructuring results in a few large players dominating the grocery business and other retail markets.

(ii) *Bill C-438 (Sponsored by Mrs. Karen Redman, M.P., Kitchener Centre)*

Bill C-438 is intended to address concerns about deceptive contests and imposes an enforcement approach similar to the CA's provisions dealing with deceptive telemarketing. It has the avowed purpose of improving information to consumers as the basis of informed market decision-making but clearly has a consumer protection focus designed (as was the case with the telemarketing provisions) to protect vulnerable segments of the public from exploitation through invitations to participate in deceptive contests sent through the mail or otherwise delivered to members of the public.

(iii) *Bill C-471 (Sponsored by Mrs. Marlene Jennings, M.P., Notre-Dame-de-Grace-Lachine)*

Bill C-471 proposes an amendment to the CA which would facilitate the Bureau's ability to co-operate with other international competition law authorities in connection with both civil and criminal competition law matters in a manner comparable to what is currently permitted in regard to its criminal provisions under Canada's Mutual Legal Assistance Treaty entered into with the United States. In addition, it contemplates amendments to both the CA and the CTA to provide for references to the Tribunal so as to allow key issues to be considered by it at an early stage, possibly thereby avoiding the need for a full review.

(iv) *Bill C-472 (Sponsored by Mr. Dan McTeague)*

Bill C-472 contains the most comprehensive and significant of the proposed reforms. These include proposals to:

(i) modernize the CA's conspiracy provisions to improve their effectiveness against anticompetitive agreements while at the same time seeking to avoid discouraging legitimate strategic alliances;

(ii) introduce private access to the remedies contained in section 75 (refusal to deal) and section 77 (exclusive dealing, tied selling and market restriction) of the CA, subject to safeguards designed to deter strategic behaviour;

(iii) broaden the powers of the Tribunal to award costs and to effect summary dispositions of matters; and

(iv) provide for specific cease and desist powers exercisable directly by the Commissioner to deal with abuse of dominance.

It is a fair inference that the content of virtually all of these Private Members' Bills is supported by the Bureau and by the Commissioner, subject to their receiving input through the PPF process. In this connection, it is understood that there has been considerable dialogue between the sponsors of these

individual bills and the Bureau and that the Bureau has provided legislative drafting support for this purpose. A further point to be borne in mind is that a successor to Bill C-235 (currently retitled Bill C-201 but otherwise identical to Bill C-235 as originally proposed) continues in the legislative system although it currently has a low priority in terms of its potential for parliamentary consideration.

Competition Law Reforms not Included in the Private Members' Bills

As extensive as the amendments proposed by the Private Members' Bills are, the bills do not include all of the possible reforms that have been up for discussion in recent times. Principal omissions in this regard include the following:

(a) *Merger Reform*: There has been extensive discussion in the past several years about the desirability of elevating the financial thresholds for the application of the CA's mandatory merger prenotification requirement to reduce the number of mergers which are being drawn in to the review process. Indeed, the Commissioner has gone on record saying that he wishes to reach a final conclusion this year on the desirability or otherwise of proceeding with such reform. As well, there have been suggestions that additional exempting provisions, which would eliminate specific types of cases from the review process, should be considered. None of this is dealt with in the current bills.

(b) *Pricing Provisions*: Although the VanDuzer Report (discussed more extensively below) recommends significant amendments to the present law respecting price discrimination, predatory pricing and price maintenance, no legislative changes in this regard are proposed in the Private Members' Bills. In speaking to the Industry Committee on April 13, 2000, the Commissioner said that although there is a problem with the pricing provisions due to their complexity, he does not believe that specific amendments are needed. He acknowledges, however, that a better explanation of how they work would be helpful. In this regard, he indicated that the Bureau is revising its *Predatory Pricing Guidelines* and is developing guidelines for its abuse of dominance provisions (these Guidelines have since been released).

(c) *Confidential Information*: The Private Members' Bills do not contain any expansion of the protection for confidential information currently provided by section 29 which is essentially limited to the protection of confidential information where it is required to be provided under the CA (as for example, pursuant to the merger prenotification process) or by compulsory process (such as pursuant to a section 11 order). Over the years, there has been considerable agitation for an expansion of the protection provided by section 29 to extend its coverage to all confidential information received by the Bureau in connection with its work and, in particular, voluntarily-supplied information which is not currently covered by the provision. No change in this regard is proposed by any of the Private Members' Bills notwithstanding the expanded scope of international co-operation which is contemplated and, in particular, the greater ability

that the Bureau will have in the future to exchange confidential information with foreign antitrust authorities.

(d) *Efficiency Defence*: From time to time there have been suggestions that clarification of the operation of the efficiency defence in section 96 of the CA is required in light of certain observations which have been made in the past concerning it by a former Chair of the Tribunal and, more recently, as a consequence of statements by Bureau officials outlining its approach towards applying this defence in difficult merger cases. Perhaps it is expected that there will be sufficient clarification on this score forthcoming from the Tribunal when it issues its decision in the *Superior Propane* case, but there is nothing in this amendments package dealing with merger efficiencies as such.

(e) *Interface of Intellectual Property and Competition Law*: Again, suggestions have been periodically made that there needs to be greater clarity concerning the degree to which the exercise of intellectual property rights conferred by statutes dealing with patents, trademarks, copyrights, etc. either overrides, or is qualified by, the provisions of the CA. This is not something addressed in the Private Members' Bills, although the current draft *Intellectual Property Guidelines*, as recently revised for public consideration and comment, address these matters from an enforcement policy perspective.

Pending completion of the PPF consultative process and the determination by the government as to whether some or all of this legislation should be proceeded with as a government bill, each of the four Private Members' Bills is currently suspended in its operation from further progress in the legislative process.

Public Consultation Process

In its April Discussion Paper, the Bureau makes a statement in reference to the Private Members' Bills that they "propose a number of changes that are consistent with the kind of changes the Competition Bureau has advocated over the last two years and which it intended to put forward in the next round of consultations." The April Discussion Paper goes on to state that the Bureau supports the principles set out in the proposed legislation but that, because competition legislation is complicated and the proposals have not yet been the subject of public discussion through formal consultation, the Commissioner, at the request of the Minister of Industry, launched the consultation process with a view to hearing from interested stakeholders. The April Discussion Paper continues by stating that if "there is broad public support for the principles behind these proposals, the Minister will consider the scope for developing government legislation which meets the spirit of the proposed improvements." According to the statement, the Minister is not ready to move ahead with the proposals for legislative change until he has heard from stakeholders, namely: "consumers, the small, medium and large business communities, the legal and academic community and any other group or individual who wishes to contribute to the discussion."

While the invitation to engage in these consultations is primarily with reference to the proposals contained in the Private Members' Bills, the April Discussion Paper concludes by inviting stakeholders to make suggestions concerning housekeeping amendments that may be required relating to the new provisions of the CA brought about by Bill C-20, specifically mentioning in this regard the new merger provisions, the civil track for misleading advertising and the new criminal provisions against deceptive telemarketing.

The consultation process contemplated in connection with the Private Members' Bills is very different from the process which has preceded other significant amendments to the CA. For example, the significant amendments to the CA effected in 1975 and 1985, respectively, were preceded in each case by approximately a decade's discussion of the appropriate content of reforms needed to the legislation, including specially commissioned studies and position papers. Again, in connection with the proposed reforms which ultimately emerged in the form of Bill C-20, it was a several stage (and multi-year) process involving, initially, the release of a discussion paper for public comment, the engagement of a consultative panel of experts to provide a report on input received concerning the proposed reforms set forth in the discussion paper, further public input from the report of that consultative panel and comments received during the legislative process once the bill was presented for consideration in Parliament. While a similar process involving the initial issuance of a discussion paper, or at least a white paper, on the proposed amendments was anticipated (rather than full-text legislative proposals), to be fair, a number of the proposed significant amendments (such as those relating to international co-operation in civil matters and private access to the Tribunal) had already been extensively discussed in connection with the earlier stages of the Bill C-20 process. On the other hand, there has been no significant public discussion concerning either the proposed reforms of the law relating to horizontal agreements amongst competitors or the temporary order process, both of which are contained in Bill C-472.

As previously mentioned, the original timetable for the consultation process has been significantly adjusted, most particularly in connection with the time allowed for submission of comments by interested stakeholders (with the deadline being extended from May 17th to June 30th). In this connection, the contemplated procedure involves summaries of the submissions received by the PPF being placed on its website (presumably so that other interested members of the public may become aware of submissions which have been presented to date). In addition to written submissions, it is intended that there will be some discussion fora established to air the views of interested parties regionally in some seven different cities. These meetings will apparently be by invitation to representatives of specific stakeholder groups such as academics, consumers, small business, etc. and are understood as likely being limited to approximately 15 persons per session. In addition to these regional meetings, it is contemplated that there would be two gatherings for individuals such as lawyers and economists who have expertise in the competition law field to discuss their views. Originally, it was proposed that these fora would commence in the latter part of May. As a result of the changed deadline for submissions, these sessions will now be held in July and will continue into August.

The PPF has no avowed competition law expertise and appears to have been selected for this assignment because of its experience in handling other public consultations. The PPF is understood to have successfully managed assignments from both Industry Canada and the Privy Council Office and has particular experience in relation to matters which involve interacting between public and private interests. Oddly, one of the more recent assignments performed by the PPF was its consultation on the issue of whether the government ought to financially support National Hockey League teams' continued presence in Canada through government assistance. In that regard, it will be recalled that the initial government proposals to do so appear to have misread public sentiments in this regard with the result that those proposals were withdrawn amidst a volley of public criticism.

Given that the PPF has no specific competition law expertise, what seems likely to emerge from its report is essentially a reading on the volume and direction of the public responses concerning each of the specific issues raised by the Private Members' Bills. This suggests that the frequency with which particular points of view are presented as part of the input process may be important to the prospects of any particular provision ultimately surviving (or not) to form part of a government-sponsored bill that might emerge from this process. It is less clear how the quality of the comments received will (if at all) be weighted in this process.

Overall, the process is expected to consume approximately 5½ months from its initiation in about mid-April to the end of September, 2000 by which time the PPF is directed to provide its report to the Minister.

While it remains to be seen what will ultimately influence the course of future events in this regard, there is a concern that the volume of comments, pro or con, with respect to a particular proposed enactment, as opposed to the specific analysis contained in those comments, may be largely determinative of their prospects for going forward into the next stage of the legislative process. In this connection, it may be recalled that when, in the discussion paper preceding what became Bill C-20, it was proposed that price discrimination be repealed, there was a write-in campaign from representatives of small business and, in particular, members of the retail grocery trade to the effect that that particular matter not be proceeded with. Notwithstanding the Bureau's agreement that the price discrimination provisions of the CA are not consistent either with contemporary economic thinking or with the approach reflected in the CA's other provisions, this proposal was withdrawn. One hopes that that is not the approach which will be taken here.

Although the PPF has invited comment on the principles reflected in the proposed legislation, in fact what is being commented upon is not a discussion paper but rather full-text draft legislation. Prior experience has indicated that there is difficulty in making headway in presenting specific comments of a technical nature on legislation (in particular legislation such as the CA which can have complex economic effects) when the parliamentary committees which are charged with considering such submissions do not have the necessary expertise or experience to guide them in dealing with such comments. Given this fact, it would seem prudent, in presenting comments on the legislation, not merely to include points of principle but also to provide comments (particularly where the principle of

the proposed amendment is supported) on the specific wording proposed as there may not be an effective opportunity to present those views at a later date.

Context

Consideration of the proposals contained in the Private Members' Bills is occurring in a broad and dynamic context. Simply put, there are many other developments in the field which are concurrently evolving and which have some relevance, directly or indirectly, to issues under consideration in connection with this legislation. In addition, there is some relevant recent history which is to be borne in mind with regard to a number of these provisions. Some of this has already been reviewed in the prior portions of this paper. The following is a brief overview of certain of this context:

(i) *Industry Committee Consideration of CA*

Undoubtedly spurred on by the debate and discussion which was engendered by the Industry Committee's consideration of Bill C-235, that committee, in April of this year, commenced a series of hearings into the content, operation and enforcement of the CA. Specifically, it sought input on the CA's provisions respecting anticompetitive pricing and mergers, including its enforcement record and guidelines, its management and administrative considerations and issues relating to third-party access to the Tribunal. Reference was also made, in the committee's overall mandate on this subject, to the recommendations contained in the VanDuzer Report. As well, the committee expressed interest in the application of the CA's merger provisions to future mergers in Canada's newspaper industry and in the legal and other implications of the temporary cease and desist powers proposed to be exercisable by the Commissioner. It is understood that the Industry Committee's intent is to conclude its deliberations and to produce a report on these topics in June of this year.

It is not known what conclusions reached by the Industry Committee as a result of its deliberations in this regard will be influential in terms of the Minister of Industry's decision concerning what is to be included in a possible government bill to amend the CA. However, since it is the Industry Committee that will be engaged in undertaking a detailed review of any legislation which is brought forward, presumably its views will be given serious consideration, in addition to the other input which emerges from the PPF's consultation process.

A variety of witnesses, including the Commissioner as well as lawyers and economists who are known to be active in the competition law field, have appeared before the Industry Committee during the past several weeks to make known their views in this regard and in regard to the other matters falling within its terms of reference and to answer questions.

(ii) *VanDuzer Report*

As previously mentioned, arising out of the Industry Committee's consideration of Bill C-235 and in response to inquiries concerning the effectiveness of the pricing provisions of the CA, the Commissioner appointed Professors VanDuzer and Paquet to review both the law, and its

enforcement, with respect to price discrimination, predatory pricing and price maintenance and to make recommendations in regard to the retention, modification or repeal of such provisions. Essentially, the authors of the VanDuzer Report concluded that, in each case, there would be a significant advantage in decriminalizing these provisions and requiring that the legality of such pricing practices be assessed in terms of their effects on competition. The authors also suggest, particularly in regard to predatory pricing, that increased enforcement is desirable in that area. The authors also considered the operation of section 61 (price maintenance) not only in terms of its control of vertical price-fixing but also its potential for use as a method of controlling horizontal pricing arrangements and concluded that there were advantages to utilizing the provision for this latter purpose, although they acknowledged that this was somewhat inconsistent with the approach taken in section 45.

(iii) *Bill C-26*

Bill C-26 is industry-specific legislation. Indeed, insofar as its proposed amendments to the CA and the CTA are concerned, it probably has application to only one company (Air Canada). This legislation proposes amendments to the *Canada Transportation Act*, the CA, the CTA and the *Air Canada Public Participation Act*. The Bill implements the Federal Government's policy concerning the restructuring of Canada's air transportation industry arising out of Air Canada's acquisition of Canadian Airlines International Limited. While there are several provisions impacting on the CA, Bill C-26 contains one proposed amendment which is particularly relevant to the amendments proposed in the Private Members' Bills. In this connection, the proposed legislation would grant the Commissioner new powers to make temporary orders in relation to anti-competitive acts affecting domestic airline services. As these provisions of Bill C-26 are similar to counterpart provisions of Bill C-472 (which are discussed more fully below), no useful purpose will be served in detailing them here. However, it appears quite likely that these provisions may be enacted as part of the law in relation to airlines even before they have been fully considered in the context of Bill C-472, given the apparent anxiety to proceed with the passage into law of Bill C-26.

The National Competition Law Section of the Canadian Bar Association took objection to the temporary order-making authority provided under Bill C-26 in its appearance before the Transport Committee of the House of Commons in April 2000, but it would appear that its concerns regarding the potential infringement of due process and the possibility of these provisions contravening the Canadian Charter of Rights and Freedoms are regarded by the Transport Committee members as being of less importance than the need to control potential anti-competitive behaviour by Air Canada.

(iv) *Immunity Bulletin*

In February 2000, the Bureau recirculated for public comment a revision of its previous guidelines on the enforcement position it would take in terms of providing immunity or preferential treatment to co-operating parties. The new draft Bulletin is significantly entitled "Immunity Information Bulletin", in contrast to the earlier draft which was entitled "Co-operating Parties Bulletin". While this

development does not have immediate direct relevance to the legislative package now under consideration, the enforcement approach (which is significantly different from the predecessor draft and which involves providing immunity or preferential treatment essentially only to the first party to provide disclosure of cartel or other illegal activity) should be borne in mind when considering the implications of modifying section 45 so as to limit its operation to hard-core criminal cartel activity. This Bulletin has not yet been finalized.

(v) *Intellectual Property Guidelines*

Again, the Bureau has recently (April 2000) issued a second draft of its proposed *Intellectual Property Enforcement Guidelines* on the interface between intellectual property and competition law. The initially drafted Guidelines attracted significant critical comment which the new draft attempts to address. Again, the Guidelines as such do not have a direct bearing on the proposed amendment except to the extent that they indicate the Bureau's intention to deal with any necessary clarification of the law through the publication of enforcement guidelines.

(vi) *Enforcement Guidelines on the Abuse of Dominance Provisions*

Very recently (May 19, 2000), the Bureau released in draft form for public comment its "Enforcement Guidelines on Abuse of Dominance Provisions." Although there have been a number of decided cases under the CA's abuse of dominance provisions, heretofore the Bureau had not issued any specific guidelines concerning its enforcement criteria in regard to that particular provision. Without attempting to review those draft Guidelines in any detail, it should be noted, in passing, that they comment on the application of the abuse of dominance provisions in the context of vertically-integrated suppliers and customers and specifically to margin-squeezing tactics which are the focus of Bill C-402. As well, the draft Guidelines make good on the Commissioner's commitment to the Industry Committee to clarify the application of existing law to pricing practices on the civil side under the market dominance provisions. Specifically, the draft Guidelines contain an extensive discussion concerning predatory conduct (see section 4.3 of the Guidelines).

(vii) *Merger Thresholds and Exemptions*

Bill C-20 contained a significant number of provisions amending the CA's provisions with respect to merger prenotification but none of them dealt with the question of merger thresholds or, except in regard to securitization transactions, greatly expanded the categories of exemptions from the CA's merger prenotification filing requirements. None of the four Private Members' Bills has any provisions dealing with either the substantive or procedural aspects of merger law. However, as mentioned above, in the April Discussion Paper which was circulated in connection with the Private Members' Bills, an invitation was extended to interested parties to bring forward any suggestions for technical (or housekeeping) revisions to the legislation, including the merger provisions, resulting from the experience since the coming into force of the amendments brought about by Bill C-20. Whether this constituted an invitation to revisit issues such as thresholds and exemptions is not clear although

they would hardly constitute "housekeeping" matters in normal parlance. However, the Commissioner has indicated that during this year he wishes to finally consider (and deal with one way or the other), the issue of merger thresholds. In addition, the Senior Deputy Commissioner with responsibility for mergers, Gaston Jorré, has invited members of firms with known experience in the area to help identify possible classes or types of transactions that could be exempted from the notifiable transaction provisions of Part IX of the CA. For this purpose, three criteria are to be borne in mind. The first is that industry-specific exemptions cannot be considered. Secondly, any proposed exemptions must capture a clearly-defined class of transactions that have not raised competitive issues in the past. Thirdly, the class of transactions proposed to be exempted must account for a meaningful number of notifications received by the Bureau. While this is not the time to get into this, there is no question that, currently, there are significant constraints on the Bureau's ability to apply its resources to other areas as a consequence of the degree to which it is being called upon to review a steadily increasing number of mergers under the CA's mandatory merger prenotification process.

The increased volume of merger cases being reviewed (which is very much the dominant activity of the Bureau today) is in part a function of the merger wave currently being experienced. It is also a consequence of the fact that the monetary thresholds which determine which mergers are required to be prenotified to, and reviewed by, the Bureau, have not been adjusted for inflation since their establishment some 12 years ago. During the intervening time, inflation has, on an accumulated basis, eroded the real value of the Canadian dollar by approximately one third, meaning that many mergers (perhaps as many as 50% or more) that would have been below the review thresholds in 1988 are now required to be reported.

At a minimum, these thresholds should be restored to their original 1988 real dollar value levels and should be indexed for further inflation going forward. This would eliminate a significant number of smaller cases which now clog the system and arguably impair the Bureau's ability, by reason of its over-allocation of resources to merger review, to handle its other important responsibilities. If the Bureau received low marks in the survey recently conducted by *Global Competition Review*, it seems likely that that was related to the experience people have had in connection with the merger review process (which is the area of most frequent public contact with the Bureau) and due to the fact that, as a result of the flood of cases coming in under the system of merger prenotification, the Bureau's ability to handle such cases on a timely basis is stretched to the limit.

It appears that the U.S. is also moving in this direction. There are several bills presently before Congress proposing significant reforms to the merger thresholds under their counterpart Hart-Scott-Rodino legislation which would, if enacted, see their merger review thresholds moving at least to the level ours would be if we adjusted them for inflation.

(viii) *Historical Cost Study*

In January 2000, the Bureau released a study of the historical cost of proceedings before the Tribunal in six representative cases since 1977. The purpose of the exercise was to determine whether the cost

of bringing an action (if civil proceedings before the Tribunal were to be opened up to private parties) would be prohibitive. In this connection, the Bureau retained an independent chartered accounting firm, Wise, Blackman, to report on the costs which have been incurred by the Bureau in investigating and pursuing these matters before the Tribunal. The study did not consider the costs borne by the respondents or other parties involved in the proceedings or the costs of the Tribunal itself. In the result, it was determined that the average cost incurred by the Bureau in each of these cases were slightly in excess of $1 million per case. The costs ranged from a low of just over $200,000 (presumably one of the earlier cases the review included consideration of the *BBM*, *Chrysler, NutraSweet* and *Xerox* cases) to a high of $2.7 million (presumably one of the more recent cases the other two cases were *Tele-Direct* and *Warner*). Given that four of the cases studied were dealt with by the Tribunal upwards of 15 years ago, I suspect the average costs of a case conducted today would have been more at the top end of that range. This suggests two things: (i) that the costs involved in private parties bringing such an action could well be considered prohibitive; and (ii) that, in view of the financial resources which are absorbed by such cases, the Bureau's attention should be focused on those cases which have significant competitive implications or public importance.

(ix) *Study of Canadian Gasoline Markets*

Canadian competition law enforcement has historically been pre-occupied with a concern that major oil companies have engaged in cartel activity. The Bureau has done many reviews of specific allegations of collusion in the supply of motor gasoline over the years and, in the past year alone, has released a number of reports of investigations undertaken by it. On March 20, 2000, a study of Canadian gasoline markets was commissioned by the Federal Government to provide a better understanding of how domestic retail and wholesale gasoline markets work. This project was funded jointly by Industry Canada and Natural Resources Canada and is being conducted by the Conference Board of Canada. The study commenced on April 1st and is to be completed by the year-end. In connection with this study, consultations, on a regional basis, are planned with industry participants, consumer groups and the public generally.

(x) *Byers Casgrain Study*

On February 1, 2000, the Bureau published a study undertaken by the legal firm of Byers Casgrain which examined existing mechanisms for the exchange of information and mutual assistance between the governments of Canada and the United States in regard to antitrust, securities and income tax law. The conclusion of the study was that arrangements between Canada and the U.S. generally contained definitions and safeguards with respect to confidential information and the disclosure of such information to third parties. However, with very limited exceptions, judicial authorization, either to request or provide information, has not been a pre-requisite for mutual assistance or exchange of information between Canada and the U.S. in either the securities or income tax fields. The firm further concluded that judicial authorization should not be a requirement for non-criminal assistance and information exchanges in antitrust matters. This study obviously is relevant to the proposed

provisions of Bill C-472 providing for international co-operation and information exchanges in connection with civil antitrust matters.

(xi) *Comparative Law Study of Private Rights of Access*

In April 2000, the Bureau released a study which it had commissioned Professor R. Jack Roberts, of the University of Western Ontario Faculty of Law, to undertake to assess, on a comparative law basis, private rights of access in five other jurisdictions (Australia, New Zealand, United Kingdom, Ireland and United States). Although the report involves a detailed examination of a variety of different legislative regimes, on the whole it concludes that private actions have been an effective supplement to public law enforcement of antitrust laws in all of the jurisdictions studied and have been particularly valuable in matters of detection, compliance and business guidance. The author also concluded that these jurisdictions recognize that measures to improve antitrust enforcement through private actions must not coincidentally permit the private sector to use antitrust actions strategically for anticompetitive or unmeritorious purposes.

The Four Private Members' Bills in Greater Detail

(i) *Bill C-402 (Anticompetitive Acts of Vertically Integrated Parties)*

As mentioned above, Bill C-402 provides specific further examples of anticompetitive behaviour having particular reference to the grocery and other retail markets. In the April Discussion Paper circulated by the Bureau, it is stated that "small businesses are increasingly concerned about current trends in the structure of the retail and distribution marketplace and the potential for the abuse of market power when markets, both domestic and international, are dominated by a few large firms." The April Discussion Paper further indicates that the amendments would be of "direct benefit to small businesses and would help protect consumers from higher prices which tend to follow abuse of dominance in the market."

This proposed legislation had a precursor in the form of Bill C-393 which was originally introduced in the House and received first reading on February 10, 1999. Its original provisions have been modestly revised in their present incarnation as Bill C-402. Bill C-402 effectively proposes to add three additional paragraphs, (j to l), to section 78 of the CA. Each of these provisions focuses on the potential for abuse by a dominant retailer. In the first of these, paragraph (j), the identified anticompetitive behaviour consists of such a retailer requiring the supplier to pay a fee to the retailer as a condition for selling the product which is unrelated to, or in excess of, actual costs incurred by the retailer with respect to the product for the purpose of impeding or preventing a supplier's entry into or expansion in a market. Although it is not a pre-condition to the application of that paragraph that the retailer be a vertically integrated supplier/retailer, it does appear likely that the principal circumstance in which such a paragraph would be operative is one in which a supplier who is disadvantaged by such a listing fee being exacted is a competitor of the retailer who is also a supplier of the product. Otherwise, it is difficult to understand why the retailer would seek to prevent such a supplier from serving the marketplace, including the retailer.

Paragraph (k) specifically refers to margin-squeezing by a vertically integrated retailer. In fact, margin-squeezing is already specifically dealt with (from the supplier's side) in paragraph (a) of section 78. Exclusionary vertical margin-squeezing is the subject of extended commentary in Appendix III of the draft Enforcement Guidelines on Abuse of Dominance Provisions. However, in line with the focus of paragraph (a) of section 78 which specifically deals with margin-squeezing from a supplier's perspective, that commentary would seem to be primarily directed at that situation and would not appear to comprehend margin-squeezing which is engaged in by a vertically integrated supplier/retailer from the buyer's side.

The third new anticompetitive act (listed in proposed paragraph (l)) speaks of a party (presumably a retailer) unilaterally withholding amounts owing to a supplier for some purported reason, without the prior agreement of the supplier, for the purposes of disciplining the supplier. It is hard to know what the experiential background of that proposed provision is, but it would certainly seem to be more a candidate for judicial development (if appropriate) than specific mention in a now lengthening laundry list of anticompetitive acts being grown under section 78.

While there may be some logic in further expansion of the examples intended to be covered by the legislation, the Tribunal has indicated in several of its decisions on abuse of dominant position that the categories of anti-competitive behaviour are not exhausted or limited by the particular acts enumerated in the existing paragraphs of section 78 but, rather, may be expanded by judicial interpretation to embrace other activities of similar anticompetitive character.

In any event, the case for the specific inclusion of these particular practices as examples of anti-competitive acts would not appear to be sufficiently persuasive to warrant their specific mention in the statute, particularly given that the category of anticompetitive acts reached by this section is not limited by whether the particular conduct has been specifically mentioned in section 78.

(ii) *Bill C-438 (Deceptive Contests Promoted Through the Mail, etc.)*

Bill C-438 would make it an offence for any person, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, to cause to be delivered by mail or otherwise any printed material conveying the general impression that the recipient of the printed material has won a prize but that in order to receive the prize the recipient must first make a payment of a sum of money or pay specific telephone charges. This legislation has apparently already been endorsed in principle by the Industry Committee and is viewed as being in the same vein as telemarketing provisions added to the CA by Bill C-20. The proposed provisions, essentially set forth in proposed new section 52.2, also contemplate an enforcement approach similar to that which applies in regard to deceptive telemarketing.

While it is hard to sympathize with those who prey on the gullibility of the more vulnerable segments of the population to deceive or defraud them in this manner, the legislation appears to be cast in relatively broad terms. For example, the section speaks of "a prize or advantage." The term

"advantage" is undefined in the CA. In addition, the counterpart provision of the CA dealing with telemarketing (section 52.1(3)(b)(i)) speaks of "a prize or other benefit" rather than "advantage." It may also be observed, although this is not an argument against proceeding with this legislation, that the kind of mail solicitations which appear to be targeted by this legislation are fairly widespread and have in the past, if not currently, been routinely used to promote the sale of magazine subscriptions.

(iii) *Bill C-471 (International Mutual Assistance)*

Bill C-471 contains two principal provisions (the second, providing a new reference mechanism to the Tribunal, is dealt with separately below), the more significant of which provides for an authority enabling the Minister of Industry to enter into agreements relating to international mutual legal assistance in civil competition matters. This is provided for in a proposed new Part III comprising proposed new sections 30.1 through 30.8 (both inclusive).

The *Mutual Legal Assistance in Criminal Matters Act* is enabling legislation which allows Canada to enter into mutual legal assistance treaties ("MLAT") with foreign countries to co-operate on criminal matters, including criminal matters under the CA. However, there are no counterpart measures in place providing for agreements to be entered into for the exchange of evidence in regard to civil competition or antitrust law matters. In the view of the Bureau, international co-operation among competition agencies, especially between Canada and its main trading partner, the United States, is needed to strengthen the tools to promote competition in an integrated North American marketplace. The United States has enabling legislation for mutual co-operation on all competition matters, both civil and criminal, in its *International Antitrust Enforcement Assistance Act* (the "IAEAA" or so-called "Vowel Act"). However, its powers are limited to its co-operating with foreign authorities having reciprocal arrangements. As mentioned, Canada does not now have this in their civil area which effectively limits the U.S. and other foreign antitrust agencies in their ability to provide corresponding assistance to us.

It would appear that this legislative authority is desirable in principle. Business is increasingly international in scope and effective law enforcement should not stop at the border. In addition, in the spirit of mutuality, it is recognized that states have to be in a position to provide assistance to governmental authorities in other states to obtain assistance from them. This principle has recently been upheld by the Supreme Court of Canada in the context of international securities law enforcement in the *Global Securities Corp.* v. *B.C. Securities Commission* case.

When one looks at proposed new Part III created by Bill C-471, it is clear that what is being authorized is assistance to be provided by Canadian competition law authorities to their foreign counterparts to assist the latter in the enforcement of their competition laws.

The new provisions are not explicit concerning the outside limit of the assistance which may be provided under their authority, although the only specific assistance referred to is the provision of information and evidence. It does appear, however, that the language is broad enough to support

recourse to section 11 to collect information for the purpose of turning it over to the foreign authority and would not limit the Bureau to only disclosing, or turning over, information already in its possession.

A consideration which has given rise to concerns in the past has been the limiting scope of protection provided by the CA's provisions respecting the treatment of confidential information. Section 29 of the CA (the existing provision dealing with confidentiality) is simply not broad enough in its protection of confidential information that might be exchanged by competition law authorities, in particular with respect to confidential information voluntarily supplied to the Bureau. That deficiency is not remedied by the proposed amendments or any of the other provisions of the Private Members' Bills. While the provisions contained in Bill C-471 do require that any international co-operation agreement entered into with a foreign antitrust authority must contain provisions respecting the confidentiality of information sent by Canada to the foreign authority, those provisions do not state what the restrictions are to be. Other limitations require the receiving foreign jurisdiction to undertake that the information or evidence obtained from a person and provided to the foreign state will be used only for the purpose of the enforcement and administration of the competition laws of the foreign state and will not be used for the purposes of criminal proceedings against the person. However, there is a theory that private antitrust damage actions, including even claims for treble damages, constitute a constituent element of the overall enforcement of a state's antitrust laws. If that is correct, such restrictions would not necessarily prevent a foreign antitrust authority from turning over the information to a private party for such purpose. There is also a question as to whether the information might not be permitted to be turned over to U.S. states attorneys general to enforce the antitrust laws of those states on the basis that those state antitrust laws form part of the antitrust laws of the United States. It would therefore seem that, at a minimum, there needs to be a positive requirement that the information not be further disclosed by the recipient, such as to a private damage action claimant or a state attorney general.

A protection or safeguard which is not contemplated by these provisions is a requirement that the affected party be given notice of a request to disclose its confidential information. Again, this was an issue that was much discussed in the context of the earlier consideration of this matter in the run-up to the enactment of Bill C-20. As mentioned above, the Byers Casgrain study suggests that in matters of co-operation in regard to securities and income tax as between states such as Canada and the U.S., no such notice is typically provided and that, as a legal matter, none is required to be given.

The concern about the limited scope of protection currently provided by section 29 is further exacerbated by proposed section 30.8 which specifically states that nothing in section 29 limits the ability of the Commissioner to communicate information to a foreign state in accordance with the terms of an agreement entered into under the authority of proposed new Part III.

(iv) *Bill C-471 (References to the Tribunal)*

Proposed new section 124.1 contemplates the Commissioner and the respondent in regard to a civil matter agreeing in writing to refer a question of law, fact or mixed law and fact to the Tribunal for its determination. In addition, under proposed new section 124.2 the Commissioner may refer any question arising as to the interpretation or application of any of the CA's civil provisions to the Tribunal for hearing and determination. There is a counterpart revision proposed to the CTA to enable the Tribunal to hear and dispose of any questions so referred to it.

It is stated in the April Discussion Paper that cases before the Tribunal require substantial preparation and resources for parties on both sides and that the outcome of a case may depend on a single key issue such as the appropriate definition of a relevant market. These provisions would facilitate an early ruling on such an issue and thereby save the parties considerable time and expense by avoiding the need for a full review. The Historical Cost Study and virtually all experience involving the Tribunal to date would suggest that it may be a significant advantage in particular cases to be able to have an early determination of such key issues. However, one question which comes to mind is whether the authority under section 124.2 pursuant to which the Commissioner may himself refer a question to the Tribunal for interpretation would give rise to any right on the part of interested parties to appear and be heard on such a reference, or if it did not, whether the Tribunal's ruling would be binding upon such a party.

(v) *Bill C-472 (Proposed Restructuring Of The Law Relating To Horizontal Agreements Amongst Competitors)*

The provision of the proposed legislative package of greatest personal interest to me (and in respect of which Professor Tom Ross and I have had an involvement) is contained in revised section 45 and as well the related additional new civil provisions (sections 79.1 and 79.2). The proposed changes in this regard would restructure the CA's existing section 45 (the CA's principal provision dealing with horizontal agreements amongst competitors) to confine its operation to a limited number of so-called "naked" or "hard-core" cartel criminal offences, such as price-fixing agreements, market and customer allocation agreements and agreements limiting or reducing output. The present provision potentially covers all types of agreements amongst competitors, whether or not they are of this naked or hard-core cartel variety, although it only prohibits them where they prevent or lessen competition unduly.

The judicial history concerning the interpretation and application of section 45 and, in particular, the meaning of the expression "unduly" has been fraught with difficulty. The Supreme Court of Canada's decision in the so-called "*PANS*"[1] case in 1992 has not materially clarified this. Mr. Justice Gonthier's judgment in that case is an elegant statement of the law, but its application in practice continues to be a major challenge.

A companion proposal (contained in Bill C-472) would create a new civil provision (section 79.1) under which all other horizontal agreements which are not of this naked or hard-core variety could be

examined to determine whether they prevent or lessen competition substantially and, if they do, to authorize the Tribunal to prohibit or enjoin them. There are two principal differences between these criminal and civil provisions. These are that: (i) the civil provision would not expose the parties to the agreement or arrangement to the possible imposition of fines or imprisonment (as the present criminal provision does and the restructured section 45 would continue to do); and (ii) the new civil provision would apply a rule of reason standard under which any efficiencies or other pro-competitive benefits of an agreement would be evaluated in determining the overall competitive effect of the agreement. By contrast, the presumptively harmful hard-core agreements would be banned outright on a *per se* basis. Full criminal consequences (i.e., fines, etc.) would result from a violation. However, as presently drafted, these provisions also contain a safe harbour exemption for agreements or arrangements affecting less than 25% of the relevant market.

As mentioned, under the law presently, all horizontal agreements are potentially subject to criminal prosecution where they have an "undue" effect on competition. The prevailing legal standard is neither *per se* (which would offer enforcement simplicity) or full rule of reason (which would permit the taking into account of any efficiencies or pro-competitive benefits). It is somewhere in between. One thing which is clear, following the decision of the Supreme Court of Canada in the *PANS* case, is that no account is taken in this context of any efficiencies or innovation-enhancing or other pro-competitive benefits resulting from such an agreement. Any such efficiencies or benefits may not be considered to offset or mitigate the competition-limiting or restricting effects of an agreement if they are otherwise seen to be undue.

That is significantly different from how mergers are assessed which is solely on a civil law basis under which a full rule of reason approach is applied. This difference is particularly significant in that mergers are typically much more effective in eliminating competition (on a permanent basis) between the merging parties. Contractual arrangements between competitors typically do not extinguish competition between parties to that degree.

In joining forces in a business venture, parties have choices as to the legal structure they may use for this purpose. They may merge or they may instead enter into more limited arrangements, such as contractual joint ventures or "strategic alliances". Under the law currently, the choices they make in this regard also have a bearing on what legal standards will then apply to those business arrangements.

As the recently published "Antitrust Guidelines for Collaboration Among Competitors"[2] states, collaborations or strategic alliances have the potential to generate efficiencies that benefit consumers, such as lower prices, improved quality and new products. Indeed, the Guidelines were published to reverse the perception that U.S. antitrust laws are opposed to agreements amongst competitors and out of a concern that such perceptions might deter the development of pro-competitive collaborations.

We have this problem in Canada, only more so. The law in the United States already distinguishes between naked or hard-core criminal offences which are prohibited on a *per se* basis and other

horizontal agreements which are evaluated on a full rule of reason basis. In Canada, we have instead only a single criminal provision that applies, on a partial rule of reason basis, to all conduct and does not consider efficiencies or other pro-competitive benefits of an agreement in assessing its legality. This circumstance is likely having a chilling effect on parties entering into contractual joint venture arrangements and strategic alliances. This is entirely unnecessary in my view, since such arrangements are seldom of the hard-core criminal variety, but understandable given the possible severity of the consequences which may flow from transgressing the criminal standard.

The proposed changes would, in my opinion, largely resolve these difficulties, without sacrificing anything significant from an enforcement perspective. These provisions are not, I would acknowledge, easy to draft and they are, undoubtedly, not perfect. However, in my view, their adoption would, on the whole, represent a significant and important improvement in the law.

In this regard, notwithstanding that the proposed provisions of Bill C-472 follow fairly closely the wording which Professor Tom Ross and I had originally suggested in a paper entitled *"Toward a New Canadian Approach to Agreements Between Competitors"*[3], there are, on reflection, a number of comments that should be made with reference to the wording of the proposed legislation. While we had suggested the possible inclusion in the revised section 45 of a 25% safe harbour exemption, we have to recognize that many of the efficiencies that would be gained from making these hard-core crimes *per se* offences, would be lost to the extent it is necessary to determine the dimensions of the relevant market affected by the agreement and the respective shares of the parties in that market. Such an exemption is also difficult to reconcile with the theory that such hard-core crimes are invariably harmful without any need to consider their actual effect in any market. On balance, I guess that I would have a preference for leaving the criminal provision entirely on a *per se* basis and relying on the enforcement discretion of the prosecutors to weed out those cases which do not appear to pose any significant competitive harm.

A second point relates to the new civil provision. Professor Ross and I had contemplated that some efficiency provision or defence should be incorporated in what is now section 79.1 in order to permit consideration of any efficiencies likely to be created by a proposed arrangement. If I could be persuaded that efficiencies, innovations and other pro-competitive benefits would be taken into account in the application of a rule of reason approach to proposed new section 79.1 without any need for any explicit reference to efficiencies, I would not be concerned about the omission from the proposed section of the efficiencies defence which we had suggested since, at least at the present time, such defences appear to be problematic.

The provisions of the proposed new section 79.2 which would facilitate parties obtaining clearance certificates from the Commissioner, both in regard to section 45 and section 79.1, is not something that Professor Ross or I originally suggested but are, in my view, welcome additions. The proposed section contemplates the certificate being effective for three years from the date of its issuance or for such shorter period a time as the Commissioner specifies in the certificate. It would have been my preference to provide for the certificate continuing in effect so long as the relevant facts on which it is

based remain substantially unchanged, comparable to the provisions of subsection 37(3) of the *Investment Canada Act* governing the endurance of ministerial opinions given under that Act.

I would also note that there appears to be a discontinuity between the basis upon which the clearance certificate may be obtained in regard to a matter otherwise potentially subject to section 45 (i.e., where the agreement is unlikely to substantially lessen competition) and the fact that section 45 otherwise operates on a *per se* basis. However, perhaps I misunderstand how these provisions are intended to operate. Finally, I would mention that I believe the drafting of proposed paragraph 45(7)(a) appears to be defective in providing the benefit of the exemption simply on the basis of notice being given to the Commissioner under subsection 79.2(1), rather than only where a certificate has been granted by the Commissioner.

(vi) *Bill C-472 (Private Access to the Competition Tribunal)*

One of the most controversial issues which was raised by the discussion paper which preceded the legislative amendments which were ultimately incorporated in Bill C-20 was the proposal to provide access to private parties to the Tribunal for the purpose of securing civil remedies (which are currently exclusively obtainable only by the Commissioner). Much of the concern expressed by those who were opposed had to do with the possibility of such parties abusing such rights through engaging in strategic litigious behaviour.

What is currently proposed is that private parties be given the right to apply for remedies under section 75 (refusal to deal) and section 77 (exclusive dealing, tied selling and market restriction), subject to various built-in safeguards against strategic behaviour which include:

- the Tribunal acting as gatekeeper (requiring private party applicants to obtain leave of the Tribunal to commence a proceeding before it);
- the fact that largely only prohibitory orders may be obtained (no monetary compensation awards will be available and no pecuniary penalties may be imposed);
- the fact that there would be no accessibility to the Tribunal by private parties for the purpose of challenging a merger;
- the inclusion of a power (also in Bill C-472) on the part of the Tribunal to award costs against unsuccessful parties; and
- the Commissioner's power to intervene and take over carriage of such a proceeding whenever he considers that important issues are raised by the proposed proceedings.

Given these protections, I have come around to the view that what is now proposed is largely unobjectionable.

While I understand the practical, and political, reasons for limiting private party access to these particular remedies (which do not extend to the remedy of abuse of dominant position) and I agree with them, the logic of distinguishing between the two situations may be difficult to sustain over time.

One suggestion which has been made by a number of people is that if private party access is to be conferred in regard to refusals to deal, then section 75 should itself be amended to provide for the inclusion of a competitive effects test which it currently does not now have. At the present time, it is understood that the Bureau has declined to bring cases under section 75 where there is not a competitive effect warranting intervention, but that attitude can hardly be expected to be adopted by private parties.

It should be noted that simply opening up access to the Tribunal for private parties should not be seen as a panacea. The procedures before the Tribunal are cumbersome and costly. Providing private parties with access to the Tribunal will not, on its own, change that. Some of the other procedural reforms proposed in the Private Members' Bills will be helpful but the situation, in regard to Tribunal (where cases typically take a better part of a year to be resolved) will still be far from ideal.

The limitation on Bureau resources is a problem (the Bureau cannot afford to take every meritorious case to the Tribunal, given its financial and personnel resource limitations). This proposal therefore goes some of the way to addressing that concern.

It is to be noted that under proposed section 104 as amended, not only the Commissioner, but also any private party having applied under section 75 or 77, would be entitled to obtain, where appropriate, an interim order.

(vii) *Bill C-472 (Temporary Orders)*

Based on the early reaction, this appears to be the most controversial of all of the proposed reforms contained in the present package. The proposed legislation (section 104.1) would confer upon the Commissioner an extreme set of powers constituting, at its worst, an unwarranted interference with due process, while at the same time raising serious questions concerning their legality and constitutionality. The existence of such questions would seem likely to lead to lengthy court challenges even if the Commissioner's powers are ultimately upheld. The proposed provisions would give the Commissioner the power to issue temporary orders requiring a party to "cease and desist" from continuing to engage in what the Commissioner believes to be an anticompetitive act (in the context of an inquiry or proceeding relating to a suspected abuse of dominant position).

The CA now contains authority under section 104 for the Tribunal to issue interim orders but, in that case, such orders are made by the Tribunal upon application of the Commissioner and on prior notice to the party whose conduct is being restrained by the order (the respondent) who also has the right to make representations to the Tribunal as to why it is not appropriate for the order to be issued.

The proposed provisions would now permit the Commissioner himself to issue such orders, without the necessity for him to apply to the Tribunal or other court body, without prior notice to the respondent and without giving the respondent the right to object and make representations. Such orders when issued run for an initial period of 20 days (but may be extended by the Commissioner twice, for up to 30 days in each case, meaning that they could be in effect on this basis for up to 80 days on a unilateral basis). The respondent is not even permitted to apply to a superior court to review or nullify the order (a privitive clause purports to prevent this). The respondent's only option is to appeal to the Tribunal to set aside the order (which means that the order will continue in effect until the Tribunal has determined the matter, potentially well beyond the initial 80 day period). A temporary order is enforceable in the same manner as an order of the Tribunal, which is to say that failure to comply with it is punishable by fine or by imprisonment for up to five years.

The key problem posed by having the Commissioner himself be able to issue such orders (rather than him having to persuade an impartial third party such as a judge that this should happen) is, as Chief Justice Dickson stated in the Supreme Court of Canada's decision in *Hunter* v. *Southam*[4], that it is obviously inappropriate for a law enforcement official also to be acting in a judicial capacity in relation to the same matter.

I would make a few other observations concerning this new power:

(a) The provision is presumably intended to control the sort of behaviour against which the Tribunal would have power to issue a remedial order under section 79. However, unlike section 79 orders, there is no requirement that the party against whom the order is made must control the business – either substantially or completely, throughout Canada or any area thereof. There is also no requirement that the party have engaged in a practice of anticompetitive acts or that the practice have or be likely to have the effect of preventing or lessening competition substantially in the market. Indeed, it appears that the Commissioner is authorized to act under the section to prevent harm to a competitor or other person irrespective of whether any of these other requirements has been satisfied. In other words, the Commissioner would appear to be authorized to make temporary orders in circumstances where the Tribunal would not have the jurisdiction to make an order under section 79.

(b) The second concern about the temporary order power is that temporary orders of the Commissioner are not reviewable by the courts (proposed section 104.1(11)). A party challenging the legislation could argue that it runs afoul of section of section 96 of the *Constitution Act, 1867* which protects superior court review of administrative tribunals.

(c) There appears to be something of a conflict between the provisions of proposed section 104.1(11)(a) which provides that "a temporary order made by the Commissioner shall not be questioned or reviewed in any court" and section 13 of the CTA which provides that an appeal lies to the Federal Court from "any order" of the Tribunal.

(d) The person against whom a temporary order is made has the burden of applying to the Tribunal to have the order varied or set aside. In doing so, that person is required to demonstrate that none of the conditions set out in paragraph (1)(e) existed or were likely to exist, failing which the Tribunal is obliged to continue the temporary order in effect for such duration as it determines up to a maximum of 60 days.

(e) Unlike the circumstances in which the Commissioner may issue a temporary order, the appeal of that order by the affected party must be on notice to the Commissioner and other persons who receive notice of the order in the first instance. This includes providing a full opportunity to present evidence and make representations before the Tribunal makes any order. These rights are in fact much broader than those given to any intervenor in other Tribunal proceedings.

(f) Subsection 104.1(15) purports to confer complete immunity on the government, the Minister, the Commissioner and any other person employed in the public service of Canada acting under the direction of the Commissioner for anything done in connection with proceeding under this section "in good faith." This provision, when taken with the privitive clause in subsection (11), provides significant latitude to the Commissioner to issue orders under section 104.1 without concern regarding liability for any violation of the rights of parties.

In summary, this provision would appear to be excessive and to represent undesirable over-reaching. If a more expeditious procedure for the issuance of interim orders is needed, then that is where the necessary changes should be made. One such revision might be to remove the present requirement of section 104 that an applicant for an interim order must first have brought an application for relief under one of the reviewable trade practice provisions.

(viii) *Bill C-472 (Cost Awards and Summary Dispositions)*

The Tribunal does not currently have the power to award costs. There is thus a limited ability on the part of the Tribunal to discipline parties appearing before it who may be inclined to initiate frivolous proceedings or unnecessarily protract the time taken in proceedings before the Tribunal. Proposed subsection 9(4) of the CTA authorizes the Tribunal, at its discretion, to award costs of a proceeding or a step of a proceeding and for this purpose to determine by whom and to what extent those costs shall be paid. This could apply to any party including intervenors and the Commissioner. The utility of having such an authority, particularly in the context of private party access to remedies available from the Tribunal, is difficult to argue against.

A further proposed amendment to the Tribunal process (proposed section 9(5)) would provide for summary dispositions being made by a single judicial member of the Tribunal for the purposes of bringing a case to an early close if there appears to be no merit in the application or no genuine defence. Again, it is hard to argue that such provision should not be included in the statute, more particularly if private access is granted.

Conclusion

The Private Members' Bills propose significant reform and it appears that public input into this process may be significantly time-constrained. It therefore behooves interested parties to move quickly to become familiar with these proposals and to weigh in with their comments in the public consultation process. It appears that this train is already leaving the station.

Notes

1 *Regina* v. *Nova Scotia Pharmaceutical Society*, [1992], 2 S.C.R. 606.
2 Jointly released by the Department of Justice and Federal Trade Commission of the United States in April, 2000.
3 [1997] Canadian Business Law Journal, 22.
4 [1984] 2 S.C.R. 145.

REFORMING THE CONSPIRACY PROVISIONS OF THE *COMPETITION ACT*: AN ANALYSIS OF BILL C-472 AND NEW PROPOSALS[1]

By: W. T. Stanbury
UPS Foundation Professor of Regulation and Competition Policy
Faculty of Commerce & Business Administration
University of British Columbia

1.0 Introduction

The provisions dealing with agreements to lessen competition are the heart of every nation's competition law,[2] but those in Canada have long been flawed by the requirement that even "naked" price-fixing agreements lessen competition "unduly."

Efforts to improve section 45 of the *Competition Act* to make it more effective and more relevant are long overdue. I have been trying to make "garden variety" agreements among competitors illegal *per se* for a quarter century.[3]

The last time the federal government proposed major reforms for the conspiracy provisions was in Bill C-256 in 1971.[4] That bill met with extraordinary hostility from business interests and was dropped. Reforms were split into two stages (see Stanbury, 1977). The Stage I amendments to the *Combines Investigation Act*, effective in 1976, added what is now section 45(2), made bid-rigging (now section 47) illegal *per se*, added what is now section 46 (re foreign directives), and made a few other small changes to the conspiracy provisions.[5]

In 1981, the Hon. Andre Ouellet (Minister of Consumer and Corporate Affairs) offered a series of proposals for amending competition legislation, including making certain agreements to lessen competition illegal *per se*, and establishing a market share test for other types of agreements in restraint of trade (see Stanbury & Reschenthaler, 1981). These proposals did not result in a bill, however. Bill C-29, introduced in 1984, proposed only minor amendments to the conspiracy provisions (Stanbury, 1984, 1985). It was not enacted.

The Stage II amendments were embodied in Bill C-91 in 1985 and enacted in the present Act in mid-1986 (Stanbury, 1986c). Only minor amendments were made to the present section 45, notably (2.2). Note, however, that Andre Ouellet, then in Opposition, proposed an amendment to eliminate "unduly" when Bill C-91 was before the Commons legislative committee studying the bill. It was defeated by a vote of three to two (see Stanbury, 1991, p. 86).

The 1999 amendments to the Act did not alter the conspiracy provisions. See Hutton & Gudofsky (1998-1999).

Recently, four private member's bills to make major changes in the Act have been introduced and been studied by the House of Commons Standing Committee on Industry.[6] They are Bill C-402

(Mr. McTeague), C-438 (Ms. Redman), C-471 (Ms. Jennings), and C-472 (Mr. McTeague.)[7] In his appearance before the Committee, the Commissioner of Competition stated that the Minister of Industry "agrees with the principles behind these bills and that he is contemplating rolling them into a government bill" (von Finckenstein, 2000b, p. 3).[8]

The purpose of this paper is two-fold. First, to offer a critique of sections 45, 79.1 and 79.2 of Bill C-472, introduced by Mr. Daniel McTeague, the Liberal member for Pickering-Ajax-Uxbridge[9] Second, in light of my critique, I offer another draft of the three sections: Section 45, a *per se* approach to four types of agreements to lessen competition (Appendix 1); section 79.1, provisions to make other agreements among competitors a civil reviewable matter (Appendix 2); and section 79.2, provisions for an advance clearance process for proposed agreements among competitors (Appendix 3).

In offering my own draft of sections 45, 79.1 and 79.2 of the Act, I have tried to adhere to two principles: first, remedy what I believe are the defects or omissions in Bill C-472 as described below; and second, use as much of the language of Bill C-472 and/or the current law as possible.

The paper is organized as follows. Section 2 contains my critique of section 45 of Bill C-472. Section 3 contains my critique of section 79.1 and section 4 contains my critique of section 79.2 of Bill C-472. Section 5 contains my brief conclusions.

2.0 Critique of Section 45 of Bill C-472

While I offer a number of criticisms of Bill C-472, I support its three key principles relating to agreements among competitors:

- the intention to create a *per se* approach to certain types of agreements to lessen competition;
- the creation of a new civil law provision to deal with all other types of agreements among competitors; and
- the creation of an "advance clearance" provision with respect to proposed agreements that would be covered by the new civil conspiracy provisions.

2.1 Background

In simple terms, section 45 in Bill C-472 bans participation in "collusion," where collusion is defined as an agreement among competitors in relation to the production or supply of a product, where the person knew or ought reasonably to have known that the agreement would have the effect of fixing a minimum price, allocating markets, boycotting ..., or lessening supply.

There are two notable exceptions, however: first, agreements in which the parties account for less than 25% of the relevant market are not to be considered to be collusion; and second, export cartels (if they meet certain conditions).

The proposed section 45 and its civil law counterpart (section 79.1) appear to draw heavily on Kennish and Ross (1997).[10]

The Competition Bureau (2000, p. 8) contends that the new section 45 will "create a *per se* prohibition against arrangements to fix prices, allocate markets, restrict production or supply, or engage in boycotts targeted at competitors." In my view, it is not clear that this will be so. Before explaining why, it is useful to develop further the background to Bill C-472 in this and the next section.

Amendments to Canadian law to make "garden variety" agreements among competitors to fix prices, divide-up markets or restrict supply, illegal *per se* are very long overdue. The U.S. adopted this approach in 1890 in section 1 of the *Sherman Act.*[11] Removal of the qualifying word "unduly"—part of Canadian law since 1889[12] —will improve both the logic of the basic conspiracy provisions and their effectiveness. My own research indicates that 14 of 25 substantive acquittals[13] in these conspiracy cases between 1889 and 1995/96 occurred because the trial judge concluded that, while an agreement to lessen competition existed, it did not lessen competition unduly.[14] This suggests that if such agreements had been illegal *per se*, a conviction would have been obtained by the Crown.

Concerns about possible judicial interpretations of unduly, and the high costs of a fully contested case, have led the Crown to negotiate settlements in almost every conspiracy case (sections 45, 46, 47) since 1981.[15] Thus it must be emphasized that the big fines in recent years[16] have all come from cases where the accused firms (or individuals) have pleaded guilty. In effect, the Crown, in the context of plea bargaining, negotiates the proposed fine which will be recommended to the court as part of the guilty plea. In all such cases, the court has accepted the Crown's proposed penalty. Note, however, that dozens of guilty pleas (and negotiated fines) do not help to establish the case law. That requires contested cases, and those are costly for the Crown and for the accused. But such cases might result in even stronger penalties upon conviction, although the present section 45 has limited fines to a maximum of $10 million since 1986 (Stanbury, 1986c).

2.2 *Requisites for a Per Se Approach*

The essence of a *per se* offence is that some actions are so repugnant to society that once it is proved beyond a reasonable doubt that the accused engaged in the prohibited act, a conviction follows. The classic statement of the concept of *per se* illegality was made by the U.S. Supreme Court in *Northern Pacific Railway* v. *United States*:[17] "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." The Court went on to list the following "practices" which have been "deemed to be unlawful in and of themselves": price-fixing, division of markets, and group boycotts. In fact, the list of restraints deemed by the U.S. courts to be illegal *per se* includes vertical price fixing, tying agreements, vertical and horizontal boycotts, and reciprocal dealing. But note that some of these involve agreements other than those among competitors, e.g., tying involves a vertical rather than a horizontal agreement. Bill C-472 proposes to address only agreements among competitors, i.e., horizontal agreements.

In my view, the key elements of a *per se* approach to agreements among competitors are the following:

(1) the section would prohibit participation by two or more competitors[18] in certain types of agreements to lessen competition which would be listed in the statute. The provision should also include agreements with potential competitors, i.e., potential entrants;

(2) the prohibited agreements to lessen competition would be those that seek to

- fix or control prices in any fashion,[19]
- allocate markets, territories, customers or sales among competitors,
- boycott a competitor, or its suppliers or customers, or
- restrict supply by any means;[20]

(3) the section would clearly indicate that the issue of the extent to which such an agreement actually lessened competition[21] would be irrelevant. Thus there would be no "safe harbour" exempting agreements accounting for less than a certain percentage of the relevant market (see 2.5 below); and

(4) the section would indicate that the element of *mens rea* (intent) necessary in criminal law would be established once the court found (on the basis of proof beyond a reasonable doubt) that the accused was, in fact, party to a prohibited agreement. That is, the court would rely on the well-established principle that the accused is deemed to have intended the logical consequences of his acts. Thus proof that the accused did enter into a prohibited agreement is conclusive evidence that he intended to enter into that agreement.

All of these elements are embodied in my own draft of section 45 contained in Appendix 1.

2.3 The Problem of Intent

The first major problem with the section 45 in Bill C-472 comes with the words "knew, or ought reasonably to have known, that the agreement ..." These words, which appear to have been put in to make the *mens rea* requirement for criminal offences explicit, could severely weaken the proposed section 45.

The words may have been included in light of the "double intent" requirement established by the Supreme Court of Canada in the PANS case.[22] There the Court ruled that the Crown had to prove (a) that the accused intended to enter the impugned agreement,[23] and (b) that the accused intended to lessen competition unduly. The first intent requirement had always been part of the conspiracy provisions and was always inferred if the court found that an agreement to lessen competition existed.[24] Thus the first intent requirement was not changed by the PANS decision—and it is the only one relevant to a *per se* approach.

Hughes and Sanderson (1998, p. 158) state that the second or "objective" intent element "requires the Crown to prove that on an objective view of the evidence, the accused was aware or ought to be aware that the effect of the agreement would be to prevent or lessen competition unduly." The Supreme

Court of Canada in PANS said that this could be established if the Crown could show that a reasonable business person ought to be aware that the agreement was likely to prevent or lessen competition unduly.

The "knew or ought reasonably to have known..." language in Bill C-472 is not necessary if the real point of the section is to make participation in certain types of agreements illegal *per se*. The language from PANS is to be applied to the objective intent element concerning "unduly," but that word has been eliminated in the proposed section 45. If the trial judge finds that the accused was party to one of the types of prohibited agreements, surely intent can properly be inferred from the trial judge's finding of fact that the accused was party to such an agreement. This approach to intent to enter into an agreement has not been changed by the Supreme Court of Canada in a competition law case as far as I know. If Parliament believes it necessary to clarify this point, why not state in the new section 45 that evidence of intent to enter into the agreement shall be inferred from the finding of fact by the court that the accused was a party to one or more of the types of agreements specified in the law. See section 45(4) in Appendix 1.

2.4 The Problem of "Effect"

The problem of intent appears to be compounded by the word "effect" in the proposed section 45(1) of Bill C-472 that follows the intent element, i.e., "the person knew, or ought reasonably to have known, that the agreement or arrangement, if implemented, would or would likely have the effect of" (in simpler language): fixing a minimum price, allocating markets among competitors, boycotting a competitor etc, or limiting the supply of a product.

The problem is that the word "effect" refers to what seems to be a list of the types of agreements which are to be illegal *per se*. Recall that the essence of a *per se* approach to agreements among competitors is that certain types of agreements to restrain trade are condemned regardless of their effects in the specific case or the justification offered by the accused. They are so condemned because the legislature has very good reason to believe that only very rarely do they have beneficial consequences for society.

It appears that the section 45(1) of Bill C-472 will not, in fact, result in a *per se* approach to certain types of agreements among competitors. Legal counsel for defendants could well argue that the language (as drafted) should be interpreted as referring to the effects or consequences of the agreement in question. But that would negate the central idea of a *per se* ban on certain types of agreements among competitors regardless of the degree to which they lessen competition.

My approach (set out in Appendix 1) is to make participation in any of four specified types of agreements to lessen competition illegal in section 45(1). The types of agreements are listed in section 45(2). Thus the crime lies in being a party to an agreement or arrangement to lessen competition of a certain type.

The inference that Bill C-472 is not proposing a true *per se* approach is reinforced by the inclusion of section 45(7)(e) which I now discuss.

2.5 The "Safe Harbour" of Section 45(7)(e)

The proposed new section 45(7)(e) contains what might be called a "safe harbour" provision. It effectively exempts agreements to fix prices etc. where the participants jointly account for less than 25% of the relevant market.

This provision should be removed for several reasons. First, it is a direct contradiction of the idea that we are making certain agreements among competitors illegal *per se*, i.e., regardless of their scope or effects.[25] Second, it will invite much effort by defendants to show that, if the market is properly defined, the accused account for under 25% of total sales. This too is utterly inconsistent with a *per se* approach to certain agreements to lessen competition. Third, section 45(7)(e) undermines the moral logic of a true *per se* approach. Why is it acceptable to allow an agreement where the parties have less than 25% of the relevant market? True, such an agreement <u>may</u> not have the effect of raising prices, but the only plausible reason for the parties to enter into any one of these "garden variety" agreements is to <u>try</u> to restrict competition in <u>some</u> fashion.[26] Such agreements almost never have any socially redeeming value. Finally, the provision appears to implicitly drag "unduly" back into section 45, albeit in a weaker form. The case law strongly suggests that an agreement to fix prices etc. in which the accused accounted for less than one-half the market would not be held to be "undue."[27]

Thus, there is no such provision in section 45 in Appendix 1.

2.6 Potential Competitors

It is not clear that section 45 in Bill C-472 will cover <u>potential</u> competitors: The definition of collusion in section 45(1) refers only to two or more "competitors" who participate in an impugned agreement. Thus the language seems to refer only to firms who are at present competing with each other.

In general, the effect of new entry into an oligopoly is to put pressure on prices as the entrant adds to industry supply. It is essential, therefore, that the new section 45 be able to reach agreements between existing competitors and potential entrants who may well strengthen competition in the industry.

If agreements to forestall or limit the scale of entry are <u>not</u> covered by section 45(1)(d), which refers to "limiting the ... supply of the product," then the proposed new section contains a serious loophole. Therefore, the proposed section 45 should be amended to make it clear that potential competitors who participate in any of the types of agreements listed will violate the section. This has been done in my proposed section 45 in Appendix 1 by using the term "every one" from the present section.

2.7 Export Cartels

I am troubled that Canada (and other countries) will continue to permit export cartels so long as their effects on the domestic market are limited, for example, they will not result in a reduction in the real value of exports. Thus section 45(4) and (5) in Bill C-472 proposes to retain the present exemption for export cartels.

Section 46 of the Act properly condemns agreements among foreigners which have the effect of fixing prices etc. in Canada.[28] What is the logic of permitting export cartels among Canadian firms while condemning them among foreign ones selling products in Canada, particularly in the "age of globalization"?

Canada should seek an agreement with its major trading partners (the U.S., Japan, and the EU) under which each country will cease to exempt export cartels under their competition legislation. Until then, I too have included the exemption as it is in the present section 45 in my own version in Appendix 1. See section 45(5) and (6).

2.8 Penalties

Proposed section 45(2) retains the same penalties as in the present conspiracy provisions. Note that the limit of $10 million in section 45[29] is inconsistent with other conspiracy sections. There is no limit in section 46 (foreign directives), section 47 (bid-rigging) and section 48 (re professional sports). The limit is $5 million with respect to agreements among banks in section 49.

The limit on the level of fines imposed following a conviction ($10 million) should be removed if Parliament is to send a clear and strong signal to businesses that these agreements among competitors will not be tolerated.

It is true that the Crown has negotiated fines of well over $10 million as part of a plea of guilty in several section 45 cases,[30] but the largest fine in the two contested conspiracy cases since 1981 was but a fraction of the limit. In 1985 in *R.* v. *Manigo et al*, 11 Quebec fishermen were each fined $1000. In the *Quebec Driving Schools* case tried in 1996 and in 1997, one individual (Mr. Perreault), who pleaded not guilty, was convicted and jailed for one year.[31] All the others pleaded guilty and the fines totalled $55,000 ($10,000 for an individual and $45,000 for two companies). But note that this was for violations of three other sections[32] as well as section 45.

Why should crime pay? Price-fixing, market sharing and supply restricting agreements are the archtype "economic crime"—the whole point of participating in such an agreement is to improve the bottom line of the company.[33] Thus, the courts should be strongly urged to impose a fine of not less than the estimated amount of ill-gotten gains from the agreement. If the effect of a price-fixing agreement was found to increase a company's revenues by, say, $75 million, then the minimum fine should be $75 million. If the fine was only $10 million, the shareholders still benefit from the agreement by $65 million less the costs of defending the case.

In two conspiracy cases since 1990 the Crown has negotiated restitution, and in one of these cases it also obtained a large fine.[34] Thus, the fine should recognize restitution as part of the penalty—see section 45(9) and (10) in Appendix 1.

My own analysis of rising fines in conspiracy cases (section 45, 46, 47) in the period 1990 to 1996 is that even the largest fines (all negotiated) usually did not eliminate the estimated ill-gotten gains

(Stanbury, 1996).[35] If Parliament made it clear in the Act that it believes that deterrence is the key goal in sentencing and that deterrence requires fines and/or restitution that remove all of the ill-gotten gains, the courts will be far more likely to be receptive to the idea that agreements among competitors should not pay.

Note that since the probability of getting investigated, prosecuted and convicted is far less than one, true deterrence would require a fine of far more than the ill-gotten gains (if we assume that price fixers are risk-neutral). [36]

I turn now to the penalties for the individuals who make and implement agreements in restraint of trade. Until very recently, this has been an area of notable weakness in the enforcement of section 45. See Stanbury (1993) (1995b). I agree with Deputy Commissioner of Competition, Harry Chandler (1998, p. 6), who states that "the personal liability of individuals is as important as the financial penalties imposed on corporations in terms of effective enforcement of the [Competition] Act." The Commissioner states that it is his policy "to pursue the most senior culpable individuals" involved in conspiracy cases (von Finckenstein, 1999b, p. 7).

The largest penalties imposed on an individual have been one year in jail in *R.* v. *Perreault* (Quebec driving schools case) in 1996, and a fine of $550,000 in 1997 on the man who organized an agreement to fix prices among commercial garbage collection firms in Quebec.[37]

Despite the increase in number of individuals convicted in conspiracy cases, Canada is far softer on such offenders than is the U.S. There individuals are more frequently prosecuted, and the U.S. Sentencing Commission's "Guidelines" effectively require much tougher sentences, notably longer prison terms. Further, these "Guidelines" significantly reduce the discretion of judges in penalizing individuals. I understand that there are legal reasons why such an approach could not be adopted in Canada.

I believe that at this stage, the problem in dealing with individuals in conspiracy cases is less one of appropriate penalties, and more one of seeing that the Crown lays charges against all of the individuals who were the "directing minds" in forming the agreement to lessen competition. I suggest that Parliament pass a resolution indicating that in conspiracy cases it expects the Crown to charge the individuals who were the "directing minds" in forming and implementing the agreement. If this approach works, then Parliament can later examine the penalties imposed on these individuals to see if they were sufficient to ensure deterrence.

2.9 Rationalizing Section 45 to Other Conspiracy Provisions

When "garden variety" agreements are declared to be illegal *per se* (as proposed in Appendix 1), Parliament should rationalize the other conspiracy provisions in the Act. Bid-rigging (in section 47) is already illegal *per se*. But section 46 (re foreign directives) and section 48 (re professional sports) contain the word unduly.

I suggest that section 48 should be dropped from the criminal law, but such agreements would then be covered by the new civil conspiracy provisions (section 79.1). However, the agreements addressed in section 46 should be made illegal *per se*, either by including them in the revised section 45 or in a separate section.

In Appendix 1, I offer my attempt to redraft section 45 to reflect all of the changes I have proposed in this submission (except for those with respect to export cartels). Note that I have included the present section 45(2.1) and section 45(7) as section 45(3) and section 45(7), respectively, in Appendix 1. Section 45(8) is the same as section 45(7)(a), (b), (c) of Bill C-472.

3.0 Critique of Section 79.1 in Bill C-472

All agreements among competitors, other than those addressed by the criminal law in the new section 45, would be a civil reviewable matter. As noted above, I support section 79.1 in principle, but offer some suggestions for improving it.

3.1 The Test

The test in section 79.1(1)(b) of Bill C-472 is whether the agreement "had, is having or is likely to have the effect of preventing or lessening competition substantially in the market affected by the agreement or arrangement." This is often referred to as the SLC test.

The advantage of using the SLC test is that it is being used elsewhere in the Act, for example, mergers,[38] and the abuse of dominant position provisions. Thus there is a body of interpretations that should help in applying the new provision. It should be noted that section 93 in the merger provisions contains a list of seven factors plus a "basket clause" to aid the Competition Tribunal in determining if the merger has resulted in a substantial lessening of competition. There is no counterpart in section 79.1 of Bill C-472.

Rather than a "multiple factors" approach, section 79.1 should specify that the lessening of competition is best assessed by the extent to which the agreement is able to generate economic benefits for the participants, notably the ability to increase prices above the level that would otherwise prevail in the absence of the agreement. This is the approach I adopt in section 79.1(5) in Appendix 2.

Note that I intend this formulation to cover cases where the agreement is designed to prevent a decline in prices that would otherwise occur. In this instance, the parties do not earn supra-competitive profits, rather they avoid reduced profits or losses. But this is an economic benefit to the parties (earned at the expense of buyers) and so should be covered by the provision.

The great virtue of section 79.1(1) of Bill C-472 lies in its simplicity. It indicates that the Tribunal is to focus only on one issue—whether or not the agreement lessens competition substantially. This point will be reinforced if two changes are made—see 3.3 and 3.4 below.

3.2 Rule of Reason?

As noted above, the U.S. courts have adopted a "rule of reason" approach in dealing with all agreements that it does not condemn as illegal *per se*. The essence of the "rule of reason" approach is that the court seeks to balance the adverse effects flowing from the agreement against its beneficial effects. Thus the court must determine "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[39] This requires a detailed examination of the facts related to the firms and industry involved, as well as the history, purpose and effect of the agreement. Note, however, that the U.S. "rule of reason" does not include a discussion of efficiency gains, although they may come in indirectly when the court considers the legitimate business justifications for the agreement in question.

It should be clear that section 79.1 of Bill C-472 does not create a U.S.-type "rule of reason" in statutory form. For example, the courts are not told what factors are to be balanced against the adverse effects on competition. Section 79.1 focuses only on whether or not the agreement in question lessens competition substantially. Also, there is no efficiency defence as there is in merger cases (see section 96).

The record in merger cases indicates that the SLC test is difficult for the Crown to meet—even where the standard of proof is on the balance of probabilities (McFetridge, 1998). If an efficiency defence was to be included in section 79.1 and/or the Tribunal was permitted to consider other socially redeeming aspects of the agreement, the simplicity, clarity and focus of the new provision would be greatly reduced.

I endorse a "pure SLC approach" to forestall long, expensive and contentious cases that benefit primarily lawyers and expert witnesses. Business executives rightly emphasize the need for rapid decision making in a dynamic economic environment.

In my view, section 79.1 should make it clear that the focus of the Tribunal should be solely on whether or not the agreement meets the SLC test. Thus, there is no efficiency defence, nor can the Tribunal consider any other benefits to society flowing from the impugned agreement. Thus it is also necessary to drop section 79.1(3)—see section 3.4 below. See my draft in Appendix 2.

3.3 "May" Make an Order

In Bill C-472, even if the Tribunal finds that an agreement does lessen competition substantially, it is not required to make an order against the continuation of the agreement, or other action to overcome the adverse effects of the agreement. Section 79.1(1) states that the Tribunal may order these remedies.

What possible reason is there to give the Competition Tribunal this huge amount of discretion? The use of "may" in section 79.1 of Bill C-472 opens up the possibility of respondents arguing that while the Tribunal might find that an agreement substantially lessens competition, it also confers benefits

on society and so the Tribunal should exercise its discretion not to impose an order. This would seem to allow the Tribunal complete discretion as to what types of possible benefits it might consider and how to make the trade-off against the SLC. Is this what Parliament wants?

I propose that "may" be replaced with "shall" in section 79.1(1) of Bill C-472. See Appendix 2.

3.4 Exception re Section 79.1(3)

Section 79.1(3) of Bill C-472 states that the Tribunal is barred from making an order if the duration of the agreement is limited to "the reasonable time needed to facilitate the entry of a new product, or a new supplier of a product, into a market."

Why should an agreement between two or more firms in an industry to facilitate entry of a new supplier—even of limited duration—be sufficient to effectively exempt the agreement from section 79.1 where the Tribunal would otherwise find that there is a substantial lessening of competition? In any event, such an agreement is a strange beast: why would competitors want to facilitate entry of another firm and so help to create another rival?

The answer may lie in the fact that an agreement to facilitate entry of a new supplier could be anti-competitive where it helps to coordinate the responses of existing firms to the entrant's output so as to limit the adverse effect on price which usually follows new entry. Such agreements can also be used to reinforce or even improve the coordination among oligopolistic rivals in the future in ways that are unlikely to violate competition law.[40] That is an important matter given the oligopolistic structure of most markets in Canada.

Further, agreements among rivals to "facilitate the entry of a new product" are hardly likely to be harmless. They may be used in lieu of independent efforts by rivals to each bring a new product into the market. This would very likely increase competition.

By focusing the Tribunal's attention on the duration of such agreements, section 79.1(3) fails to address the expected overall effect of the agreement on competition. Thus there is no such provision in my version of section 79.1 in Appendix 2.

3.5 Remedies

Section 79.1(1) of C-472 provides only for the traditional remedies in a civil reviewable matters, principally an Order prohibiting the firms from putting the agreement into effect or continuing with the agreement. This is not enough, in my view, to deter future anti-competitive agreements [41] among the parties or to deter other firms which might be tempted to form anti-competitive agreements (other than those made illegal *per se*).

I propose that section 79.1 be modified to give the Tribunal authority to impose an administrative monetary penalty ("AMP") as it can do under section 74.1 of the Act with respect to a number of deceptive marketing practices.[42] Further, the new provision should specify that the size of the AMP

should be sufficient to remove all of the estimated ill-gotten gains from the agreement analogous to my recommendation with respect to section 45 above. See section 79.1(3) and (4) in Appendix 2.

4.0 Critique of Section 79.2 of Bill C-472

The "advance clearance" process embodied in section 79.2 of Bill C-472, for proposed agreements among competitors, is analogous to the advance ruling certificate process with respect to proposed mergers in section 102 of the Act.

The Bureau suggests that the new provision will be used to deal with proposed strategic alliances. The Commissioner stated in May 1999 that "stakeholders" had frequently expressed concerns that section 45 was having a chilling effect on "legitimate, pro-competitive business arrangements such as strategic alliances" (von Finckenstein, 1999a, pp. 6-7). The Bureau (2000, p. 8) indicates that prospective strategic alliances could apply to the Commissioner for a clearance certificate under section 79.2. According to the Bureau (2000, p. 8), such alliances involve gaining access to technologies, cooperation in R&D, achieving economies in marketing and supplier arrangements. They are said to "allow small and medium-sized firms to compete more effectively in global markets" (Competition Bureau, 2000, p. 8).

The central issue for competition policy with respect to strategic alliances is how to "separate the sheep from the goats." This may be difficult because the same proposed strategic alliance may have both socially beneficial aspects and also lessen competition. It is not clear from section 79.2 whether the Commissioner is implicitly permitted to trade-off the former against the latter. Also, unlike the merger provisions, there is no list of factors the Commissioner should take into account in determining if an SLC is likely to occur.

This advance clearing process puts the Commissioner into the role of adjudicator, as well as investigator. This may be unavoidable in practical terms, but it does violate the traditional separation of the investigative and adjudicative functions.[43]

As in section 102 of the Act, the Commissioner is required under section 79.2(4) to consider any request for a clearance certificate "as expeditiously as possible." If he is to do the job properly, the Bureau must have adequate resources which it does not now have (see Stanbury, 1998). If section 79.1 and 79.2 are enacted, it is reasonable to expect that there will be a "burst" of applications for a clearance certificate because firms (and their legal counsel) will want to find out where the Commissioner will "draw the line." Knowing that, the Bureau will want to develop and publish "guidelines" to set out how the Commissioner applies section 79.2. All of this means that the Bureau's budget should be increased to cover the expected increase in costs.

Section 79.2(5) wisely limits the duration of "clearance certificates" to three years. I retain that provision in section 79.2(5) in Appendix 3.

There is a strong case for making section 79.2 closely analogous to the present section 102 as I have done in section 79.2(1) in Appendix 3. The key difference between my approach and that in Bill C-472 is that under mine if the parties disagree with the Commissioner's negative decision and go ahead with the proposed agreement, they can force the Commissioner to make an application under section 79.1. Then the Tribunal can provide an authoritative interpretation rather than the Commissioner.

Section 79.2 should allow the Commissioner to apply to the Tribunal for an order to rescind a clearance certificate under two conditions: [44] (a) where the circumstances prevailing at the time the clearance was issued have changed so much that, had they prevailed when the application was made to the Commissioner, the certificate would not have been issued; (b) where the Commissioner finds that representations made to him at the time of the application were not correct. See section 79.2(6) in Appendix 3.

Finally, there is a need to record the clearance certificates in a convenient public place in order to facilitate enforcement. I refer to the important role that complaints by private sector actors have in investigations that result in enforcement actions. See section 79.2(7) in Appendix 3.

5.0 Conclusions

Extensive changes to the core conspiracy provisions in the Act are long overdue.

Bill C-472 embodies the important principles for reforming competition law in Canada dealing with agreements among competitors to lessen competition:

- "garden variety" agreements should be made illegal *per se*;
- all other agreements among competitors should be a civil reviewable matter subject to an order by the Tribunal where it finds the agreement lessens competition substantially; and
- proposed agreements that would not be illegal *per se* would be subject to an advance clearance process by the Commissioner.

Sections 45, 79.1 and 79.2 in Bill C-472 need to be strengthened and clarified if they are to be effective. Further, the penalty provisions in section 45 and the remedies in section 79.1 need to be improved with the objective of ensuring that agreements to lessen competition do not result in economic benefits for the participants if they violate the criminal law or are the object of an order under the civil law.

Sections 45, 79.1 and 79.2 have been redrafted (in Appendices 1 to 3) to overcome the problems and limitations identified in my critique of Bill C-472. I expect that they will produce howls of outrage from some business executives and from some lawyers. Let the debate be joined.

Notes

1 I am indebted to Margot Priest and Jennifer Trent for helpful comments. The usual caveat applies of course.

2 The original competition legislation of 1889 dealt only with conspiracies in restraint of trade – see Gorecki & Stanbury (1984), and Stanbury (1981).

[3] See, for example, Stanbury (1976) (1984) (1986a) (1986b) (1989) (1991) (1993) 1995a) 1996); Reschenthaler & Stanbury (1981a) (1983); Howard & Stanbury (1990); Stanbury & Reschenthaler (1977); Stanbury, MacCrimmon & Reschenthaler (1984).

[4] See Stanbury (1977), Department of Consumer and Corporate Affairs (1971). Bill C-256 was given first reading on June 29, 1971.

[5] Generally, see Kaiser (1979). The changes are listed in Stanbury (1991, p. 148).

[6] The hearings took place in May 2000.

[7] The date of the first reading was December 13, 1999; February 25, 2000; April 6, 2000; and April 6, 2000, respectively.

[8] The Competition Bureau has contracted with the Public Policy Forum to undertake consultations on proposed amendments to the *Competition Act* and *Competition Tribunal Act.* See Kennish (2000).

[9] Note that Bill C-472 contains other important amendments to the *Competition Act*, e.g., it would give private parties access to the Competition Tribunal with respect to sections 75 and 77. These are not addressed here. See Ross (2000).

[10] For another proposal to reform the conspiracy provisions, see Warner & Trebilcock (1993).

[11] Section 1 states that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is declared to be illegal." However, it was the courts that developed the "rule of reason" under which only certain types of agreements were held to be illegal *per se*. The others were to be examined in considerable detail to determine whether or not they resulted in an unreasonable restraint on competition. Generally, see Ross (1993).

[12] For a short period, "unduly" was dropped, apparently by mistake. See Gorecki and Stanbury (1984), Stanbury (1981).

[13] These exclude cases where the charges were dropped, the Crown's case was dismissed at a preliminary hearing, etc.

[14] See Stanbury (1996). Note that 12 of the 14 acquittals occurred since the mid-1970s.

[15] Since the *Albany Felt* case [(1981) 52 C.P.R. (2d) 189 (Trial); Sentence at p. 204.], the Crown has obtained a conviction in only two contested cases. See section 2.8 below.

[16] For a listing of fines, see the Competition Bureau's website, www.strategis.ic.gc.ca/SSG/ct01709e.html.

[17] (1958) 78 S.Ct. 514 at p. 518.

[18] If the section is to deal with vertical as well as horizontal agreements, it would simply refer to "persons" rather than competitors.

[19] Thus there would be no reference to "fixing the minimum price" as in Bill C-472.

[20] Note that it is not possible to increase prices without restricting the total amount supplied. This language should cover agreements to bar entry as new entrants increase supply to an industry.

[21] To simplify, I consider only agreements that were implemented. The provision would also include agreements made, but not yet put into effect.

[22] *R.* v. *Nova Scotia Pharmaceutical Society* (1992) S.C.R. 606; 43 C.P.R. (3d) 1. This case addressed the intent issue in the context of dealing with a constitutional challenge to the *Competition Act* which argued that the legislation was void for vagueness arising from the use of the term "unduly", and that the single intent requirement in section 45 violated section 7 of the Charter re notions of fundamental justice. The case was returned to the trial court for a decision on its merits. In 1993, the trial court acquitted on the grounds that the second or objective intent element had not been proven in light of the special circumstances of the case, i.e., there was an agreement but it did not result in an undue lessening of competition. See Hughes & Sanderson (1998).

[23] This is now referred to as "subjective" intent.

[24] In 1986, section 45(2.2) was added to the *Competition Act* in response to the Supreme Court of Canada's decisions in two cases: *Aetna Insurance*, (1978) 1 S.C.R. 731, and *Atlantic Sugar*, (1980) 2.S.C.R. 644. In these cases, the Court wavered in the application of this long established principle. Section 45 (2.2) makes it clear that the Crown need only prove (beyond a reasonable doubt) that the accused intended to and did enter into the impugned agreement, but not that the accused intended that the agreement lessen competition unduly. See Stanbury (1991).

[25] This does raise the matter of de minimus agreements – those which involve only a tiny share of the market. By having the provision refer to agreements to lessen competition, this problem should be solved. See section 45(1) in Appendix 1. As a practical matter, it is hard to believe that the Department of Justice would approve any prosecution of a de minimus agreement. The section could specifically exempt de minimus agreements, but I understand that the term itself could not be used in the statute – yet it is hard to find the equivalent in English.

[26] Even if the parties have less than 25% of the market, the agreement may help facilitate coordination among oligopolists who are always trying to avoid price warfare. See Howard and Stanbury (1990).

[27] See the 1979 *Quebec Insurance Agents* case in Stanbury (1991, p. 77).

[28] See Competition Bureau, News Release, "Record $30 Million Fine and Restitution by UCAR Inc. for Price Fixing Affecting the Steel Industry," (Ottawa, March 18, 1999). A senior official of the Bureau noted that "enforcement of the *Competition Act* cannot be thwarted by those who initiate illegal conduct outside the country."

[29] For many years, there was no limit on the size of a fine under section 45 or its predecessor (see Stanbury, 1991). In 1986, the maximum was increased from $1 million (set in 1976) to $10 million (see Stanbury, 1986c, p. 23).

[30] For example, a $48 million fine against F. Hoffmann-LaRoche Ltd. (re bulk vitamins, September 22, 1999) and $18 million and $14 million against two other firms in the same case. It also obtained a fine of $14 million from Archer Daniels Midland on May 27, 1998 re lysine. See Competition Bureau, News Releases on the dates indicated.

[31] See Competition Bureau, News Release, "Prison Term Imposed Under the Competition Act Following Jury Trial," September 9, 1996.

[32] These were section 61, section 50(1)(b) and section 50(1)(c). See the 1996/97 Annual Report of the Director of Investigation and Research.

[33] These agreements may well confer another economic benefit – a reduction in the variability of the firm's net income over time. People routinely trade-off some expected profits to reduce their risk. See Stanbury (1991).

[34] (1) Abbott Laboratories paid restitution of $2,122,000 in November 1992. It was not fined in light of its cooperation under the Witness Immunity Program; (2) UCAR Inc. paid a fine of $11 million under section 46 plus over $19 million in restitution in March 1999.

[35] See Stanbury (1996).

[36] If the probability of being convicted is 0.33, then the fine needs to be three times the estimated ill-gotten gains. Generally, see Stanbury (1976).

[37] See Competition Bureau, News Release, "Record Fine of $550,000 Imposed on Individual for Conspiracy Offence Under the Competition Act," January 29, 1997. This person pleaded guilty.

[38] Generally, see McFetridge (1998).

[39] Justice Brandeis in *Chicago Board of Trade* v. *United States* (1918) 246 U.S. 231 at p. 238.

[40] For an extensive discussion of coordination among oligopolists and the role of competition law, see Howard & Stanbury (1990); Stanbury & Reschenthaler (1977); Salop (1986); Holt & Scheffman (1987).

[41] Of course, violation of a Tribunal order (in a civil law case) is a criminal offence.

[42] This is a new provision enacted in 1999.

[43] In the U.S., the Federal Trade Commission combines both functions, but the Antitrust Division of the Department of Justice focuses only on investigation and prosecution.

[44] Alternatively, the section could state that the Commissioner could apply to a judicial member of the Tribunal to rescind a clearance certificate.

REFERENCES

Chandler, Harry (1998) "Criminal Investigations: Process and Procedure" (Paper presented to the Canadian Bar Association, Competition Law Annual Fall Conference, Ottawa, September 24).

Chandler, Harry (2000) "Cartels and Amnesty: The State of Play in Canada" (Presentation to the ABA Section of Antitrust Law Spring Meeting, Washington, DC, April 5).

Chen, Zhiqi, Thomas Ross, and W.T. Stanbury (1998) 'Refusals to Deal and Aftermarkets,' *Review of Industrial Organization*, Vol. 13(1&2), pp. 131-151.

Church, Jeffrey and Roger Ware (1998) 'Abuse of Dominance under the 1986 Canadian Act,' *Review of Industrial Organization*, Vol. 13(1&2), pp. 85-129.

Competition Bureau (2000) "Amending the Competition Act: A Discussion Paper on Meeting the Challenges of the Global Economy" (Ottawa: Competition Bureau, April).

Department of Consumer and Corporate Affairs (1971) "The Competition Act—Explanatory Notes" (Ottawa: DCCA, June, mimeo).

Gorecki, P.K. and W.T. Stanbury (1984) *The Objectives of Canadian Competition Policy, 1888-1983* (Montreal: The Institute for Research on Public Policy).

Holt, Charles A. and David T. Scheffman (1987) 'Facilitating Practices: The Effects of Advance Notice and Best-Price Policies,' *Rand Journal of Economics*, Vol. 18, pp. 187-197.

Howard, John L. and W.T. Stanbury (1990) 'Oligopoly, Coordination and Conscious Parallelism,' in G.F. Mathewson, M.J. Trebilcock and M. Walker (eds.), *The Law and Economics of Competition Policy*. (Vancouver: The Fraser Institute), pp. 219-294.

Hughes, Patrick and Margaret Sanderson (1998) 'Conspiracy Law and Jurisprudence in Canada: Towards an Economic Approach,' *Review of Industrial Organization*, Vol. 13(1&2), pp. 153-176.

Hutton, Susan M. & Jason L. Gudofsky (1998-99) "The Commissioner is "In": An Overview of the March 1999 Amendments to the Competition Act and Draft New Merger Pre-Notification Regulations," (1998-99) 19:3 Can. Comp. Rec. 72.

Kaiser, G.E. (1979) "The Stage 1 Amendments: An Overview" in J.R.S. Prichard, W.T. Stanbury and T.A. Wilson (eds.) *Canadian Competition Policy: Essays in Law and Economics* (Toronto: Butterworths).

Kennish, Tim (2000) "The Private Members' Bills – An Overview: Context and Content" in this issue of the *Record*.

Kennish, Tim and Thomas Ross (1997) 'Toward a New Canadian Approach to Agreements Between Competitors,' *Canadian Business Law Journal*, Vol. 28, pp. 22-68.

McFetridge, D.G. (1998) "Merger Enforcement under the Competition Act after Ten Years," *Review of Industrial Organization*, Vol. 13(1&2), pp. 25-56.

Priest, Margot D. & W.T. Stanbury (1998) "Accountability for Antitrust Enforcement: The Case of the Competition Bureau in Canada," *Antitrust Report*, July, pp. 14-37.

Reschenthaler, G.B. and W.T. Stanbury (1981a) "Price Fixing, Market Sharing and the Public Interest: The Atlantic Sugar Case," (1981) 2:1 C.C.P.R. 1.

Reschenthaler, G.B. and W.T. Stanbury (1981b) "Recent Conspiracy Decisions: New Legislation Needed," *Antitrust Bulletin*, Vol. 26, No. 4, Winter, pp. 839-869.

Roach, Kent and Michael Trebilcock (1996) *Private Party Access to the Competition Tribunal*. (Hull, Quebec, Amendments Unit, Competition Bureau, May).

Ross, Stephen (1993) Principles of Antitrust Law (Westbury, N.Y.: The Foundation Press).

Ross, Thomas (1991) 'Proposals For a New Canadian Competition Law on Conspiracy,' *Antitrust Bulletin*, Winter, 851-882.

Ross, Thomas (2000) "Competition Policy in Canada: Views on the Law and its Enforcement: Notes for Remarks Made Before the House of Commons Standing Committee on Industry" (Ottawa May 4).

Salop, Steven C. (1986) 'Practices that (Credibly) Facilitate Oligopoly Co-ordination,' in Joseph E. Stiglitz and G. Frank Mathewson, eds, *New Developments in the Analysis of Market Structure*, (Cambridge: The MIT Press), Ch. 7.

Stanbury, W.T. (1976) 'Penalties and Remedies Under the *Combines Investigation Act*,' *Osgoode Hall Law Journal*, Vol. 14, pp. 571-631.

Stanbury, W.T. (1977) *Business Interests and the Reform of Canadian Competition Policy*, 1971-1975 (Toronto: Carswell Methuen).

Stanbury, W.T. (1981) "The Legislative Development of Canadian Competition Policy, 1888-1981," (1981) 2:2 C.C.P.R. 1.

Stanbury, W.T. (1984) "Amendments to the Conspiracy Provisions in Bill C-29" in *Canadian Competition Law* (Vancouver: Continuing Legal Education Society of British Columbia), Ch.3.

Stanbury, W.T. (1985) "Half a Loaf: Bill C-29 Proposed Amendments to the *Combines Investigation Act*," *Canadian Business Law Journal*, Vol. 10(1), February, pp. 1-34.

Stanbury, W.T. (1986a) "Testimony on Bill C-91," *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91*, Issue No. 3, April 29, pp. 4-32.

Stanbury, W.T. (1986b) "Horizontal Agreements, Delivered Pricing, Specialization Agreements and Crown Corporations in The New *Competition Act*," (Vancouver: Continuing Legal Education Society of B.C., September).

Stanbury, W.T. (1986c) 'The New Competition Act and Competition Tribunal Act: Not With a Bang But a Whimper,' *Canadian Business Law Journal*, Vol. 12, pp. 2-42.

Stanbury, W.T. (1989) "A Review of Conspiracy Cases in Canada, 1965/66 to 1987/88," (1989) 10:1 C.C.P.R. 33.

Stanbury, W.T. (1991) 'Legislation to Control Agreements in Restraint of Trade in Canada: Review of the Historical Record and Proposals for Reform,' in R.S. Khemani and W.T. Stanbury, eds, *Canadian Competition Law and Policy at the Centenary*, Montreal: The Institute for Research on Public Policy, pp. 61-148.

Stanbury, W.T. (1993) 'Prosecuting Individuals Under Canadian Competition Law,' (1993) 14:2 Can. Comp. Rec. 57.

Stanbury, W.T. (1995a) 'The Merger Review Process in Canada: Information and the Structure of Incentives,' (1995) 16:3 Can. Comp. Rec. 73.

Stanbury, W.T. (1995b) "Public Policy Towards Individuals Involved in Competition-Law Offences in Canada" in Frank Pearce & Laureen Snider (eds.) *Corporate Crime: Contemporary Debates* (Toronto: University of Toronto Press 1995), pp. 214-243.

Stanbury, W.T. (1996) "Sentencing in Conspiracy Cases in Canada" (Paper prepared for the Competition Bureau, Ottawa, November mimeo) [Protected].

Stanbury, W.T. (1998) 'Expanding Responsibilities and Declining Resources: The Strategic Responses of the Competition Bureau, 1986-1996,' *Review of Industrial Organization*, Vol. 13(1&2), pp. 205-241.

Stanbury, W.T. and G.B. Reschenthaler (1977) 'Oligopoly and Conscious Parallelism: Theory, Policy and the Canadian Cases,' *Osgoode Hall Law Journal*, Vol. 15, pp. 617-700.

Stanbury, W.T. and G.B. Reschenthaler, (1981) "Reforming Canadian Competition Policy: Once More Unto the Breach," *Canadian Business Law Journal*, Vol. 5(4), pp. 381-437.

Stanbury, W.T., M.T. MacCrimmon and G.B. Reschenthaler (1984) "The Enforceability of Section 32 of the *Combines Investigation Act*" in *Canadian Competition Law* (Vancouver: Continuing Legal Education Society of British Columbia), Ch. 3.

Van Duzer, J. Anthony & Gilles Paquet (1999) *Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice* (Ottawa: November) [see Competition Bureau website: www.strategis.ic.gc.ca].

von Finckenstein, Konrad (1999a) Statement to the "Meet the Competition Bureau" Forum, Insight Conference, Toronto, May 3.

von Finckenstein, Konrad (1999b) Speaking Notes for an Address to the Canadian Bar Association, Competition Law Section Annual Meeting, Ottawa, September 30.

von Finckenstein, Konrad (2000a) "Opening Remarks to the Standing Committee on Transport re Canada's Airline Restructuring Legislation" (Ottawa, April 12).

von Finckenstein, Konrad (2000b) Statement to the House of Commons Standing Committee on Industry (Ottawa, April 13).

Warner, Presley L. & M.J. Trebilcock (1993) "Rethinking Price-Fixing Law," *McGill Law Journal*, Vol. 38, pp. 679-723.

Appendix 1

Proposed Draft of a New Section 45 of the Competition Act

45. (1) Every one who participates in any of the agreements to lessen competition listed in subsection (2) is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years or to a fine in accordance with the principles established in subsection (9), but no less than $25,000 for a corporation or $5,000 for an individual, or to both.

(2) For the purposes of this section, agreement means any agreement or arrangement that involves:

(a) fixing, establishing, controlling or maintaining the price of a product;
(b) allocating any markets, territories, customers or sales for a product either among the participants in an agreement or between a participant and another person;
(c) boycotting a competitor or a competitor's suppliers or customers; or
(d) preventing, eliminating, lessening or otherwise limiting the production or supply of a product.

(3) In any prosecution under subsection (1), the court may infer the existence of an agreement from circumstantial evidence with or without direct evidence of communication between or among the alleged participants to the agreement but, for greater certainty, the existence of an agreement or arrangement must be proved beyond a reasonable doubt.

(4) For greater certainty, the intent of the person to enter into an agreement shall be deemed to have been established by proof that the person was a participant in an agreement listed in subsection (2).

(5) Subject to subsection (6), in a prosecution under subsection (1), the court shall not convict the accused if the agreement relates only to the export of products from Canada.

(6) Subsection (5) does not apply if the agreement

(a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;
(b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or
(c) has prevented or lessened or is likely to prevent or lessen competition in the supply of services facilitating the export of products from Canada.

(7) In a prosecution under subsection (1), the court shall not convict the accused if it finds that the agreement relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public

(a) in the practice of a trade or profession relating to the service, or
(b) in the collection and dissemination of information relating to the service.

(8) In a prosecution under subsection (1), the court shall not convict the accused if it finds that

(a) the agreement is between or among only federal financial institutions as described in subsection 49(1);
(b) the agreement is made only among companies each of which is, in respect of every one of the others, an affiliate; or
(c) notice of a proposed agreement was given to the Commissioner pursuant to subsection 79.2(1).

(9) In determining the fine to be imposed on a person convicted under subsection (1), the court shall ensure that the amount of the fine is at least equal to the estimated economic benefits of the agreement to the accused; additional punitive sentencing objectives may also be considered.

(10) For the purpose of subsection (9), the court shall interpret the term fine to include any restitution agreed to by the person convicted.

(11) For the purpose of subsection (9), economic benefits refer to the increase in prices above the level that would otherwise prevail in the absence of the agreement or arrangement.

Appendix 2

Proposed Draft of a New Section 79.1 of the Competition Act

79.1(1) Where, on application by the Commissioner, the Tribunal finds that

(a) a person has entered into an agreement or arrangement with one or more competitors or potential competitors of the person with respect to the production, supply or acquisition of a product; and
(b) the agreement or arrangement has had, is having or is likely to have the effect of preventing or lessening competition substantially in the market affected by the agreement or arrangement;

The Tribunal shall make an order directed against any person who is a participant in the agreement or arrangement,

(a) prohibiting the person from carrying into effect or continuing the agreement or arrangement or part of it;
(b) in addition to or in lieu of making an order under paragraph (c), ordering the person to take such actions as the Tribunal considers reasonable and necessary to overcome any of the anti-competitive effects of the agreement or arrangement or to restore competition in the market including, without limitation, directing modifications to the agreement or arrangement.

(2) In addition to or in lieu of making an order under subsections (1)(c) or (1)(d), the Tribunal may order the person to pay an administrative monetary penalty determined in accordance with subsection (3).

(3) In determining the administrative monetary penalty to be imposed pursuant to subsection (2), the Tribunal shall ensure that the amount of the administrative monetary penalty is at least equal to the estimated economic benefits of the agreement or arrangement to the person. Further, the Tribunal in setting the AMP shall take into account any restitution that the person has agreed to pay.

(4) In making an order under subsection (1), the Tribunal shall make the order in such terms and conditions as will, in its opinion, interfere with the rights of affected persons only to the extent necessary to achieve the purpose of the order.

(5) In determining whether or not an agreement or arrangement in subsection (1) has had, is having or is likely to have the effect of preventing or lessening competition substantially, the Tribunal shall give the greatest weight to the extent to which the agreement has had, is having or is likely to increase prices above the level that would otherwise prevail in the absence of the agreement.

(6) For greater certainty, for the purposes of subsection (3), economic benefits to the participants refers to the increase in prices above the level that would otherwise prevail in the absence of the agreement or arrangement.

(7) In any application under subsection (1), the Tribunal may infer the existence of an agreement from circumstantial evidence with or without direct evidence of communication between or among the participants to the agreement.

(8) No application may be made under this section in respect of an agreement or arrangement that is entered into only by companies, partnerships or sole proprietorships each of which is, in respect of every one of the others, an affiliate within the meaning of subsection 77(5).

(9) No application may be made under this section against a person

(a) against whom proceedings have been commenced under section 45, or
(b) against whom an order is sought under section 79 or 92 on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45, 79 or 92, as the case may be.

Appendix 3

Proposed Draft of a New Section 79.2 of the Competition Act

79.2(1) Where the Commissioner is satisfied by a party or parties to a proposed agreement among competitors that he would not have sufficient grounds on which to apply to the Tribunal under section 79.1, he may issue a clearance certificate to the effect that he is so satisfied.

(2) No proceedings may be commenced under section 45 or 79.1 in respect of an agreement or arrangement for which a clearance certificate is in effect solely on the basis of information that is the same or substantially the same as the information on the basis of which the certificate was issued.

(3) The Commissioner shall not issue a clearance certificate under subsection (1) if an attempt has been made by any of the persons who are about to enter into the agreement or arrangement to coerce any person to become a participant in the agreement or arrangement.

(4) The Commissioner shall consider any request for a clearance certificate under this section as expeditiously as possible.

(5) A clearance certificate issued by the Commissioner under this section is valid for a period of three years from the date on which it was issued, or for such shorter period as the Commissioner may specify in the certificate.

(6) The Commissioner may make an application to the Tribunal to rescind a clearance certificate if he finds that the circumstances have changed such that had they existed at the time of the application, he would not have issued a clearance certificate, or where he has evidence that the representations made to him by the parties to the proposed agreement were not correct.

(7) All clearance certificates issued by the Commissioner shall be listed in the Commissioner's annual report to Parliament for the period for which they are valid.