

## CANADIAN COMPETITION RECORD

**THE FIRST SECTION:  
COMPETITION ACT REFORM****DAMAGES AND ADMINISTRATIVE PENALTIES UNDER THE  
COMPETITION ACT: THE CASE PRO AND CON**

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**Updating Note:** Since this article was written, the Government has responded to the Industry Committee's Report. The Government agreed in principle with the Industry Committee's proposal regarding administrative monetary penalties. With respect to damages, the Government stated that it would be inappropriate to consider both damages and administrative penalties at the same time, and that it would revisit the issue of damages once it gains some experience with administrative monetary penalties. See the Hutton and McKenna article in this issue of the *Record*.

In April 2002, the Standing Committee on Industry, Science and Technology ("Industry Committee") released its report entitled "A Plan to Modernize Canada's Competition Regime" ("Report"). Among the Industry Committee's recommendations was a proposal that the Competition Tribunal be given the right to impose administrative monetary penalties ("AMPs") in the discretion of the Tribunal with respect to certain of the civil reviewable practices under the *Competition Act*<sup>1</sup>. The Report also recommended that the private right of action recently introduced under Bill C-23 be extended to the abuse of dominance provisions of the Act and that the Tribunal be given the ability to award damages in private actions brought under sections 75, 77, and 79 of the Act.<sup>2</sup>

The Industry Committee outlined several reasons why it believes that the Tribunal should be granted the power to award damages and assess AMPs. Certain of the reasons cited by the Industry Committee are quite compelling. However, there are also a variety of reasons why awarding monetary penalties, and more particularly private damage awards, in respect of the reviewable practice provisions is undesirable. This article will highlight some of the arguments both for and against allowing AMPs and damages.

**The Case for Administrative Monetary Penalties/Damages**

Deterrence is among the primary reasons cited by the Industry Committee for allowing fines and damages. Currently, with the exception of the unique remedy available in respect of airlines, the Tribunal is not authorized to impose a monetary penalty or award damages in respect of a breach of the civil provisions of the Act. Damages can only be awarded upon a breach of an order of the Tribunal. The Report asserts that absent financial penalties there is little disincentive to dominant industry participants abusing their market power knowing that they will not face any monetary penalties even if their conduct is the subject of successful enforcement action. The conventional wisdom suggests that the possibility of incurring damages or fines will cause firms to think twice before engaging in

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anti-competitive behaviour. If a firm is aware that it could be financially penalized, the incentives for engaging in anti-competitive behaviour are thought to be reduced accordingly.

The availability of damages is also thought to be necessary to encourage private plaintiffs to utilize the new private right of action. Given the high costs of litigation before the Tribunal, some believe that potential plaintiffs will be unwilling to bring cases if there is no financial incentive to do so. As the Industry Committee put it “the absence of any remedy of damages is the most obvious incentive against litigating cases”.<sup>3</sup>

Encouraging private enforcement is thought to be desirable not only because it will create a disincentive to engaging in anti-competitive behaviour, but also because it will allow for the development of a more substantial body of case law. The dearth of jurisprudence under many provisions of the Act may contribute to uncertainty about when aggressive commercial practices are likely to be found to be anti-competitive. This uncertainty can contribute to firms’ reluctance to engage in innovative and potentially pro-competitive activities. Increasing the body of jurisprudence will help to provide businesses (and their legal counsel) with guidance as to the circumstances in which certain activities are likely to be found to be anti-competitive, thereby reducing uncertainty.

The introduction of AMPs and damages is also seen as a way to deal with some of the budgetary constraints facing the Commissioner of Competition. Due to limited resources, the Commissioner is not able to investigate and litigate all cases in which anti-competitive behaviour is alleged to occur. This lack of resources may result in meritorious cases not being pursued. If the Bureau is entitled to retain a portion of the revenue generated from the introduction of AMPs, the Bureau may have the ability to be a more vigorous and effective enforcement agency. In addition, the strain on the Bureau’s limited existing resources can be reduced if more cases are brought to the Tribunal by private parties. As noted above, the Industry Committee suggests that the likelihood that parties will bring more cases to the Tribunal will increase if private litigants are entitled to recover monetary damages.

Finally, the Industry Committee expresses the view that the right of plaintiffs to sue for damages is a “fundamental right accorded to plaintiffs in civil proceedings throughout the world” and that it is an “injustice” that applicants in Tribunal proceedings should be denied this fundamental right. It is suggested that adding damages to the already available private right of action will allow private parties to be better able to enforce their rights without the aid of the Commissioner. As the courts regularly award damages for a variety of common law business torts, why shouldn’t the Tribunal also be authorized to award damages? The Industry Committee dismisses the notion that introducing a damages remedy would result in a “rash of litigation”.

### **The Case Against Administrative Monetary Penalties/Damages**

While several of the foregoing considerations have some merit, there are also compelling reasons for resisting the introduction, in particular, of private damage awards, as well as AMPs.

In assessing the reasons for not allowing recovery of damages and AMPs, it is helpful to consider the purpose of the Act and why the reviewable practice provisions were introduced into the Act in their current form. The Act is broad framework legislation which is intended, among other objectives, to maintain and encourage a competitive

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business environment in Canada, to encourage Canadian participation in world markets and to ensure that small and medium-sized businesses have an equitable opportunity to compete. Consistent with these objectives, one might argue that the remedies available under the Act should facilitate the creation of a competitive business environment by providing incentives to engage in competitive activities and disincentives to discourage anti-competitive behaviour rather than to compensate individual parties for past behaviour. With few exceptions, the Act is concerned with the preservation and protection of competition for the common good, and not with protecting the interests of, or compensating, individual parties.

Allowing private parties to recover damages and providing for monetary penalties in respect of reviewable practices may also undermine one of the basic principles behind the civil reviewable provisions in the Act. Implicit in Part VIII of the Act is the notion that the enumerated practices may be pro-competitive and ought not to be discouraged or prohibited unless they have been proven to be likely to prevent or lessen competition to the requisite degree. Exposing parties to the threat of damages or administrative fines may have the effect of discouraging risk-taking and innovation and place a chill on potentially pro-competitive, efficiency enhancing behaviour. For example, a manufacturer contemplating the rationalization of its dealer network in order to reduce duplication and distribution costs may be discouraged from doing so if it runs the risk of facing a damages award payable to terminated distributors or an administrative penalty in an amount in the Tribunal's discretion. It is interesting that the Industry Committee has proposed these changes at the same time that amendments to section 45 are being considered to address a concern that that provision is discouraging parties from pursuing potentially pro-competitive strategic alliances and joint ventures.<sup>4</sup>

Given the broad public policy goals underlying the Act, there is also merit in the view that the penalty for engaging in anti-competitive behaviour should be the same regardless of whether the applicant in proceedings under the Act is a private party or the Commissioner. If the goal of the Act is to preserve and encourage competition for the benefit of society generally, shouldn't the penalties be equivalent regardless of who is responsible for commencing proceedings? It is also worth noting that pursuant to section 7 of the Act, it is the Commissioner who is given responsibility for the administration and enforcement of the Act (which prior to Bill C-23 was an exclusive power). It seems somewhat anomalous that the Tribunal would have the ability to award a damages remedy to private litigants where the Commissioner is not entitled to seek the same relief.

Convincing arguments can be made both for and against allowing the recovery of damages and monetary penalties. Concerns about strategic litigation may be tempered by awarding costs. Concerns over insufficient case law must be balanced against the necessity of providing an environment where innovation is encouraged without a fear of frivolous litigation. The desire to allow parties to privately resolve disputes without relying on public enforcement agencies should be balanced against the public policy implications of turning over much of the enforcement activity under the Act to private parties motivated by economic self-interest and not the broader public policy considerations that the Commissioner is supposed to take into account in the administration of the Act.

Before the Act is amended to address the Industry Committee's recommendations, careful consideration of the issues outlined above and the experience of other jurisdictions with similar legislation will be necessary. Currently, the case for accepting the Industry Committee's proposals is not convincing.

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## Notes

<sup>1</sup> See Recommendation 3 of the Report.

<sup>2</sup> See Recommendation 8 of the Report.

<sup>3</sup> It is interesting to note that the experience in Australia suggests that even when damages are available, in the majority of cases parties seek injunctions. (See *International Comparative Analysis of Private Rights of Access* (Study commissioned by Industry Canada, Competition Bureau) by R.J. Roberts (2000) at 13 (available on the Competition Bureau's website at <http://strategis.ic.gc.ca/SSG/ct01713e.html>.) Thus, contrary to the view expressed by the Industry Committee, the private access granted under Bill C-23 may be sufficient to increase the number of cases going to the Tribunal without the need to allow the awarding of damages/fines. In fact, at least one application for leave has already been made to the Tribunal. (See *Gauthier v. Milliken* (CT2002/005))

<sup>4</sup> Interestingly, the Industry Committee indicated that "damage awards and fines may chill rivals from engaging in aggressive but pro-competitive pricing strategies"

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## REFORM OF SECTION 45 IS UNNECESSARY

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### Introduction

The essential proposal for reform is that Canada should follow the U.S. in making certain types of arrangements among competitors (naked price fixing and market/customer allocation agreements at a minimum) *per se* unlawful but, unlike the U.S., the characterization of such agreements would be removed from the courts, at least in part, by specific statutory provision. This is unsettling because generally courts can more easily correct judicial error than Parliament can amend legislation. Of greater concern is that such reform is being proposed during the twilight years of the *per se* rule as the U.S. courts continue to steadily diminish the circumstances in which the rule is applied, including some instances of overt price fixing; a process that has taken more than 100 years.

This paper argues that reform of section 45 is unnecessary because Parliament got it right the first time in 1889<sup>1</sup> by inserting a competitive effects test which the courts have concluded cannot be ignored. In 1992, the Supreme Court of Canada in *R. v. Nova Scotia Pharmaceutical Society*<sup>2</sup> stated that the undueness test could not be split into criteria of a *per se* rule for pernicious agreements and a rule of reason for possibly benign agreements; that section 45's partial rule of reason analysis lies somewhere on the continuum between the two. As a result, few if any agreements have been condemned by Canadian courts due to economic ignorance. Some will quibble that since these legislative and judicial developments were likely the product of accident rather than design, they should be ignored for lack of intellectual merit. These points will strike those who understand the importance of being right the first time as nitpicking.

Also, the paper states some thoughts on the proposal to amend section 45 to expressly allow consideration of efficiency gains concluding, on balance, that such a revision may not be desirable. And throughout, indirect issue is taken with those who still believe that economic analysis complicates rather than clarifies competition law issues, section 45 matters in particular.

### The Case for Reform<sup>3</sup>

The principal reason advanced to reform section 45 is the belief that it is ineffective and has been so for a considerable period of time. It is said to be over-inclusive in that it chills potential efficiency enhancing or procompetitive agreements among competitors, such as joint ventures and strategic alliances, which do not want to risk violating criminal law. It is also said to be under-inclusive in that the government is unable to win many contested cases (guilty pleas and fines are apparently not relevant), resulting in hard core cartel activity eluding prosecution.

As to the latter concern, the proponents for reform point out that the government's recent successes with section 45 have been primarily accomplished through an effective immunity program and guilty pleas. Since 1980, 17 out of the 20 cases contested in the courts have resulted in acquittals or dismissals. Furthermore, since 1975 the

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Crown has lost every litigated case if those involving monopoly or virtual monopoly are excluded.<sup>4</sup> A recent article has examined the argument that section 45 is under-inclusive and concludes that the concern is unwarranted:

...a consideration of contested cases tells us very little, except perhaps that the lack of contested cases may mean the law is actually not that uncertain.

What might be more relevant in examining the efficacy of section 45 is to consider all conspiracy cases...within a time frame during which the law has been relatively constant). Thus, the fact that since 1980, 17 of the 20 contested conspiracy cases resulted in acquittals or dismissals also tells us very little. The law has changed over that time frame. It has been made easier to prosecute. Subsection 45(2.1)...was enacted in the 1986 amendments to provide that...the court could rely on circumstantial evidence even without direct evidence of communication.... Similarly.... subsection 45(2.2)...was added...regarding the intent component of section 45.... The *PANs* decision, released in 1992, provides greater certainty as to the applicability of section 45 – although in practice it makes convictions tougher for cases that are not hard core cartel cases.

Thus, using a more relevant time frame..., and including all matters under section 45..., the government has in fact secured a record number of convictions and record fines under section 45. Specifically, from 1993 (post *PANs*) to October of 2001, there have been two acquittals, one discharge and 28 convictions – including fines of over \$148 million...

Moreover, it is important to examine the three cases that were litigated and lost by the Crown. In *PANs*, on redetermination, the trial court expressly found that that case did not involve a “hard core cartel”. *Bayda*<sup>[5]</sup> and *Clarke Transport*<sup>[6]</sup> were each lost based on a lack of evidence. On the facts in *Bayda*, the Crown would have lost even on a *per se* standard, as there was insufficient evidence of an agreement.... In *Clarke Transport*, the Court noted that that it wanted “to make it perfectly clear that [its] decision [was] dependent solely upon the evidence adduced” ...and that its decision may have been different if the evidence put forward by the Crown had not been “unreliable and inconclusive”.

Our point is simply that, in light of the above, section 45 appears to be effective – particularly for hard core cartel cases. If defendants thought they had a chance for acquittal, because of a weak law, one would not expect to see firms consistently entering guilty pleas. Given the record size of fines, one would have thought it would have been worth the fight in some of those cases if the law were ineffective....<sup>7</sup> [some citations omitted]

With respect to over-inclusiveness, the concern is that uncertainty as to whether a joint venture or strategic alliance involving competitors will be assessed under the section 45 criminal provisions or under the civil merger or abuse of dominance provisions discourages initiatives which may be beneficial:

...it is evident (from what is stated elsewhere in the [Bureau’s bulletin on strategic alliances]<sup>8</sup>) that the [Commissioner] is continuing to reserve to himself the right to elect to proceed against a strategic alliance under *any* of the potentially applicable provisions.... Even if the Bureau’s enforcement posture were to reflect an approach more tolerant of strategic alliances than is indicated in the [bulletin], the inherent uncertainty affecting the legal status of such arrangements may nevertheless deter business parties from pursuing them....<sup>9</sup>

I find this concern somewhat puzzling as it is inconsistent with my own experience. As the section 92 definition of a merger is very broad (includes the acquisition or establishment of a significant interest in the whole or a part of a

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business of another person), many overt arrangements among competitors can and should be dealt with as mergers. Both the government and the parties should prefer this alternative; the government because proof is on a balance of probabilities and the parties because violation of the criminal law is avoided. Moreover, the parties can preempt, to some extent, government characterization under section 45 by submitting a proposed arrangement for review under the merger provisions. Covert arrangements, on the other hand, deserve to be dealt with under section 45, both before (if submitted for government review) and after implementation.

It seems to me that the burden of justifying reform of section 45 is properly placed on its proponents and has not been carried.

### **The *Per se* Rule**

The real issue in the debate of whether a *per se* rule is preferable to a competitive effects test is who should bear the burden of proving characterization of a challenged agreement. In the U.S. this issue was resolved in favour of the government by the wording of section 1 of the *Sherman Act*<sup>10</sup> which, in 1890, flat out condemned all agreements which restrain trade. It provides in part:

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.

In its early history the courts recognized that an overly broad interpretation of the provision would invalidate many ordinary business transactions and so held that it prohibited only "unreasonable" restraints of trade.<sup>11</sup> In the absence of any legislative guidance courts developed rules of interpretation to simplify and expedite administration of the antitrust laws. The rationale for the *per se* rule has been stated by the U.S. Supreme Court in the following terms:

The elaborate inquiry into the reasonableness of a challenged business practice entails significant costs. Litigation of the effect or purpose of a practice often is extensive and complex.

The costs of judging business practices under the rule of reason, however, have been reduced by the recognition of *per se* rules. Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable. As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a full blown inquiry might have proved to be reasonable.<sup>12</sup> [emphasis added, citations omitted]

The effect of the *per se* rule in shifting the burden of proof to defendants to show that their agreement involves something more than simple price fixing or customer/market allocation in order to invoke judicial review under the rule of reason was not lost upon the Supreme Court of Canada in *PANS*:

In the United States, the nature of the impugned restraints will determine whether they are assessed according to a *per se* rule or a rule of reason. This operation has diverted much attention away from the substance of section 1 of the *Sherman Act* and, to correct this, the Supreme Court has to a certain extent blurred the distinction between the two approaches.... The

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possibility of *per se* rules allows for a presumption of unreasonableness (Canadian law does not offer this possibility, since the word “undue” appears in section [45] of the Act) but otherwise some showing of market power is necessary to evidence a genuine adverse effect on competition<sup>13</sup> [emphasis added, citations omitted]

The *per se* rule presumption of unlawfulness has resulted in serious judicial errors over the history of U.S. antitrust law enforcement:

....When the defendant lacks a powerful explanation for its conduct...a judge is likely to conclude: “Why not prohibit this practice? If it is anticompetitive, the prohibition will be beneficial. If it is not anticompetitive, the prohibition will be harmless; the defendant cannot tell me why the practice is essential to efficiency.”

Reasoning of this sort has led to the condemnation – often under a *per se* rule – of horizontal agreements by the dozen as well as tie-ins, resale price maintenance, vertical territorial and customer restrictions, patent pools, block booking and a host of other business practices....But it is not true. Economists have developed procompetitive explanations for all of these practices...Then, too, practices that were deleterious yesterday may yield benefits today, as the balance of advantage between contractual and market organization changes...<sup>14</sup>

As time goes by, fewer and fewer things seem appropriate for *per se* condemnation. We see competitive benefits in practices that once were thought uniformly pernicious. Ten years ago tying arrangements, boycotts, territorial allocations, and resale price maintenance were unlawful *per se*. Since then the Supreme Court has removed territorial allocations from the *per se* category, removed tying arrangements in all but name, stood by while the lower courts quietly abrogated the *per se* treatment of boycotts, and invited reconsideration of the rule about resale price maintenance.<sup>15</sup> It declined to apply the *per se* rule to a horizontal arrangement involving almost 100% of the composers of music, on the ground that this arrangement produced competitive benefits.<sup>16</sup> In the process, the Court announced that the *per se* rule may be applied only after evaluation of the possible competitive consequences of an arrangement – thus undercutting the simplicity that is the principal justification for the rule.

These changes in the structure of antitrust analysis follow ineluctably from changes in our understanding of the economic consequences of the practices involved. If condemnation *per se* depends on a conclusion that almost all examples of some practice are deleterious, then discoveries of possible benefits lead to new legal rules. We cannot condemn so quickly anymore....<sup>17</sup>

....Small wonder that the history of antitrust is filled with decisions that now seem blunders.<sup>18</sup>

In 1911, the U.S. Supreme Court decided an important case, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*<sup>19</sup>, which was the fountainhead for *per se* unlawfulness of resale price maintenance and laid the groundwork for subsequent decisions declaring all vertical non-price restrictions (tied selling, territorial allocations, exclusive dealing and the like) *per se* unlawful. It took until 1977 for the Supreme Court to conclude that rule of reason rather than *per se* treatment was more appropriate for non-price vertical restraints<sup>20</sup> and 1997 to reach a similar conclusion in respect of maximum resale price maintenance<sup>21</sup>; the judicial debate continues over the analytical standard to be applied to tied selling, evident in the proceedings against Microsoft.<sup>22</sup> In 1999 the Supreme Court backed further away from applying the *per se* rule to arrangements among competitors in *California Dental*

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*Association v. FTC*<sup>23</sup> (a trade association of dentists promulgated “ethical” guidelines effectively forbidding advertisement of across-the-board discounts, superior quality or lower prices), although its decision on the merits of the particular arrangement was probably incorrect.

Finally, it is important to be aware of the incentive which the *per se* rule provides for the encouragement of judicial error:

A recurrent problem in the administration of the antitrust laws has been how to decide when a practice amounts to price fixing, or is sufficiently like it to be forbidden for the same reasons that price fixing is forbidden. Because price fixing is a *per se* offense, meaning that the only issue to be decided is whether the defendant engaged in the practice, the government and other antitrust plaintiffs are constantly pressing the courts to place practices in the *per se* category on the ground that they are the equivalent of price fixing. This pressure has resulted in some serious deformities in antitrust policy....In seeking an explanation for the poor (though improving) showing of the courts in these areas, we shall encounter vestiges of the judicial tendency to botch or ignore economic analysis.<sup>24</sup>

While use of a *per se* unlawfulness standard is appealing in concept (the benefit of the rule is that it permits condemnation of naked price fixing and market/customer allocation agreements without complex analysis), it has proven difficult to apply in practice (the difficulty with the rule is its inflexibility since not all price fixing and allocation agreements are anticompetitive). For the reasons noted, the U.S. Supreme Court has struggled with the characterization of agreements as *per se* illegal. As innovation and technology create new products and services that involve various forms of competitor cooperation, there is increasing uneasiness in applying the rule because it is difficult to characterize an agreement without examining its surrounding circumstances.

This dilemma is illustrated in the *Maricopa*<sup>25</sup> case where competing physicians organized through a foundation to promote fee-for-service medicine and to provide a competitive alternative to existing health insurance plans. The foundation, by agreement of its member doctors, established maximum fees the doctors could claim in full payment for health services provided to policyholders of specified insurance plans. Approximately 70% of the doctors in Maricopa County participated in the arrangement and 85-95% billed at or above the maximum reimbursement levels set by the foundation. The State of Arizona contended that the periodic upward revisions of the fee schedules served to stabilize and enhance the level of actual charges by physicians and that the increasing level of their fees in turn increased insurance premiums. The foundation argued that the schedules imposed a meaningful limit on doctors' charges and that their advance agreement to accept the maximum enabled insurance carriers to limit and calculate more efficiently the risks underwritten, serving as an effective cost containment mechanism that saved patients and insurers millions of dollars.

By a 4 to 3 majority the U.S. Supreme Court held that the maximum fee arrangement constituted *per se* unlawful price fixing under section 1 of the *Sherman Act*. The majority opinion stated:

In this case the rule is violated by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases. Such a restraint may also discourage entry into the market and may deter experimentation and new developments by

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individual entrepreneurs. It may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character.

Even when the respondents are given every benefit of the doubt, the limited record in this case is not inconsistent with the presumption that the respondents' agreements will not significantly enhance competition.<sup>26</sup>

The dissenting opinion delivered some stinging criticism of the majority conclusion:

The Court acknowledges that the *per se* ban against price fixing is not to be invoked every time potential competitors *literally* fix prices... One also would have expected it to acknowledge that *per se* characterization is inappropriate if the challenged agreement or plan achieves for the public procompetitive benefits that otherwise are not attainable. The Court does not do this... It is content to simply brand this type of agreement as "price fixing" and describe the agreement in *Broadcast Music* – which also literally involved the fixing of prices – as "fundamentally different"....

...I believe the Court's action today loses sight of the basic purposes of the *Sherman Act*. As we have noted, the antitrust laws are a "consumer welfare prescription". In its rush to condemn a novel plan about which it knows very little, the Court suggests that this end is achieved only by invalidating activities that *may* have some potential for harm. But the little that the record does show about the effect of the plan suggests that it is a means of providing medical services that in fact benefits rather than injures persons who need them.

In a complex economy, complex economic arrangements are commonplace. It is unwise for the Court, in a case as novel and important as this one, to make a final judgment in the absence of a complete record and where mandatory inferences create critical issues of fact.<sup>27</sup> [citations omitted]

The arrangement in *Broadcast Music, Inc. v. Columbia Broadcasting System*<sup>28</sup>, referred to in *Maricopa*, survived *per se* condemnation even though it involved price setting by a joint venture (a horizontal arrangement among almost 100% of the composers of music) for a blanket license for copyrighted music. It was eventually upheld under a rule of reason analysis<sup>29</sup>. Blanket licensing by music copyright pools as employed in the television industry was held not to be an unreasonable price fixing practice because it had no restraining effect on competition. Since direct licensing from copyright owners was available as an alternative to the blanket license, there was no restraint of trade. The setting of a price was necessary for offering a blanket license "which created tremendous transaction cost efficiencies in view of the numerousness of copyright holders and potential licensees."<sup>30</sup> The agreement in this instance was so efficient that it increased sellers' aggregate output and was thus procompetitive. The Supreme Court stated:

The blanket license, as we see it, is not a "naked restraint of trade with no purpose except stifling of competition", but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use... ASCAP and the blanket license developed together out of the practical situation in the market place: thousands of users, thousands of copyright owners, and millions of compositions... Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed, ...the costs are prohibitive for licenses with individual radio stations, night clubs, and restaurants and it was in that milieu that the blanket license arose.

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ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands, of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for... Moreover, a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established.

Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product... [T]o the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material. ASCAP, in short, made a market in which individual composers are inherently unable to fully effectively compete.<sup>31</sup> [citations omitted, emphasis added]

As was noted by the Supreme Court of Canada in *PANS*, the problem of characterization has led the U.S. Supreme Court to blur the distinction between *per se* illegal agreements and arrangements which attract rule of reason review. This occurred in *NCAA v. Bd. Of Regents of the University of Oklahoma*<sup>32</sup> which involved a plan for the televising of university football games that limited the total of televised games and the number of games that any one university could televise. No NCAA member was permitted to make any sale of television rights except in accordance with the plan. The Court condemned the arrangement as horizontal price fixing and output limitation (under the rule of reason on the basis it was not essential to the market for the product) but refused to apply the *per se* rule because the case involved an industry in which horizontal restraints on competition were essential if the product was to be available at all. In the course of its decision, in a footnote, the Court declared:

Indeed, there is often no bright line separating *per se* from Rule of Reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive product. For example, while the Court has spoken of a “*per se*” rule against tying agreements, it has also recognized that tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis.<sup>33</sup> [citations omitted]

The Court reaffirmed its movement away from the *per se* illegality rule in its decision in *California Dental* in 1999:

...The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like “*per se*”, “quick look”, and “rule of reason” tend to make them appear. We have recognized, for example, that “there is often no bright line separating *per se* from Rule of Reason analysis, “since” considerable inquiry into market conditions” may be required before the application of any so-called “*per se*” condemnation is justified. “[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same – whether or not the challenged restraint enhances competition.”<sup>34</sup> [citations omitted]

It is now time to superimpose on the above quote the inquiry called for by section 45 as stated by the Supreme Court of Canada in *PANS*:

Section [45]...lies somewhere on the continuum between a *per se* rule and a rule of reason. It does allow for discussion of the anti-competitive effects of the agreement, unlike a *per se* rule, which might dictate that all agreements that lessen competition attract liability. On the other hand, it does not permit a full-blown discussion of the economic advantages and disadvantages

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of the agreement, like a rule of reason would. Since “unduly” in s.[45] leads to a discussion of the seriousness of the competitive effects, but not all relevant economic matters, one may say that this section creates a partial rule of reason.<sup>35</sup>

Comparing the two quoted statements, their content is more alike than different. But to conclude that the Canadian and U.S. approaches are the same would be an overstatement. It is sufficient to know that the blurring of the distinction between the *per se* rule and the rule of reason has been an ongoing process that brings the U.S. standard of review continuously closer to the analytical approach applied under section 45.

The reason that the approaches are different is that the *per se* rule requires the defendants to prove that the challenged arrangement should not be characterized as one which has no redeeming social value; that it in fact is something more than a naked price fixing or allocation agreement. Legislation containing a competitive effects test, however, places the burden of proving the arrangement seriously impairs competition squarely on the government or plaintiff, where it belongs.

### Efficiencies and Section 45

Although probably not required to do so, the Supreme Court of Canada expressed the view in *PANS* that efficiency gains are irrelevant in a section 45 analysis:

This Court has made numerous remarks on the public policy interests underlying section [45] of the Act. These remarks, found in *Weidman*, *Stinson-Reeb*, *Container Materials*, and *Aetna Insurance*, *supra*, are perhaps best summarized in this passage from the majority judgment in *Howard Smith*, *supra*, at p.411:

“The statute proceeds upon the footing that the preventing or lessening of competition is in itself an injury to the public. It is not concerned with public injury or public benefit from any other standpoint.”

Considerations such as private gains by the parties to the agreement or counterbalancing efficiency gains by the public lie therefore outside of the inquiry under s.[45]. Competition is presumed by the Act to be in the public benefit. The only issue is whether the agreement impairs competition to the extent that it will attract liability.<sup>36</sup>

The Court stated this view based upon prior Supreme Court case law, decided before the 1986 amendments, which implicitly assumed that the goal of competition law is rivalry rather than efficient resource allocation. In commenting upon an argument raised in the *NCAA* case that financial disparities among athletic teams can undermine the quality of the product (athletic competition), Posner states:

...the...argument should have resonated with those members of the Court who still believed that the proper meaning of competition is rivalry rather than the most efficient possible allocation of resources. Rivalry buffs would prefer an inefficient market containing five firms to an efficient market containing one firm. The economist prefers one firm in that situation but does not believe that an athletic league in which one team wins all the games is the most efficient league. A league is not a market but an entertainment company, and it requires balance among its members in order to maximize the value of its product.<sup>37</sup>

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Given the flexibility built into the *Competition Act*, this oversight may not be too serious in the short run. As mentioned earlier in this paper, most overt joint ventures and strategic alliances can and should be dealt with under the merger provisions which contain an efficiency defence; upon the expiration of 3 years such arrangements, where applicable, can and should be dealt with under the abuse of dominance provisions which contain a superior competitive performance defence, particularly so in respect to network arrangements where the value of the network increases with the number of its users. Subsection 45(3) contains a list of “permissible fields” which relate to cost and information efficiencies; although the government may consider “them to be unavailable in any circumstance where s.45(1) would otherwise be contravened”<sup>38</sup>, such an argument may be difficult to sustain because it requires a court to conclude that subsection 45(3) has no purpose whatsoever. The *PANS* decision makes it clear that section 45 requires “some behaviour likely to injure competition”<sup>39</sup> which should absolve the benign cartel which creates a new product or service as in the *Broadcast Music* case. Finally, even without an efficiencies justification, the undueness competitive effects test will provide an effective screen against condemnation of most agreements which are beneficial.

As the Court’s statement on efficiencies is likely *obiter dictum*, it is not binding upon lower courts and this issue should be judicially reconsidered at the earliest opportunity within the context of the section 1.1 purpose clause of the Act, added by the 1986 amendments (“The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy...and in order to provide consumers with competitive prices and product choices.”). This would be preferable to amendment; as the Act is framework legislation, it is not appropriate to amend it every time a decision goes the wrong way or a particular industry (caught up in political controversy) is perceived to be beyond the reach of the Act as then constituted.

### Conclusion

Incorrect judicial decisions on competition law matters occur largely because of economic ignorance at the relevant moment in time. A *per se* unlawfulness standard exacerbates this problem because it allows, even encourages, courts to condemn price fixing and allocation agreements among competitors with little or no forethought. As economic analysis clarifies which arrangements are beneficial and those which are not, the mistakes are corrected, though usually much later and after staggering costs have been incurred in the meantime.

In hindsight, Parliament and the Supreme Court of Canada were mostly correct in the choices that were made in view of the experience and evolution of U.S. antitrust law. Not surprisingly, the U.S. approach has been steadily gravitating (as if drawn by an invisible hand) toward the Canadian partial rule of reason standard. For these reasons, the current proposals to reform section 45 would be a policy error of serious proportion. The benefit of being right in the first instance has increased exponentially over time.

### Notes

<sup>1</sup> An Act for the Prevention and Suppression of Combinations formed in restraint of Trade, S.C. 1889, c.41.

<sup>2</sup> [1992] 2 S.C.R. 606; the subsequent trial decision is reported as *R. v. Nova Scotia Pharmaceutical Society* (No. 3) (1993), 120 N.S.R. (2d) 304 (N.S.S.C., T.D.) [hereinafter *PANS*].

<sup>3</sup> See following three studies commissioned by the Competition Bureau and released September 28, 2001 on its web site at [www.competition.ic.gc.ca](http://www.competition.ic.gc.ca) under Publications – R.S. Russell, A.F. Fanaki & D.D. Akman, *Legislative Framework for Amending*

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*Section 45 Of The Competition Act*; A. Gourley, *A Report On Canada's Conspiracy Law: 1889-2001 And Beyond*; and McCarthy Tétrault, *Proposed Amendments To Section 45 Of The Competition Act*. See also "Section 45 at the Crossroads", Statement by the Commissioner of Competition to the 2001 Invitational Forum On Competition Law, 12 October 2001, available on the Bureau's web site; P. Warner & M. Trebilcock, "Rethinking Price-Fixing Law" (1993), 38 McGill L.J. 679; T. Kennish & T.W. Ross, "Toward A New Canadian Approach To Agreements Between Competitors" (1997), 28 Canadian Business Law Journal 22; H. Chandler & R. Jackson, "Beyond Merriment and Diversion: The Treatment of Conspiracies under Canada's Competition Act", paper presented at the Roundtable on Competition Act Amendments, Insight Conferences, Toronto, Ontario, 25 May 2000; C. Goldman, M. Katz & D. Fruitman, "The Internationalization of Anti-Cartel Enforcement: A Canadian Perspective", paper presented at the 2001 Invitational Forum On Competition Law, Atlas Information, Toronto, Ontario, 12 October 2001.

<sup>4</sup> *Ibid.*, see studies by Chandler/Jackson and Gourley.

<sup>5</sup> *R. v. Bayda and Associates Surveys Inc.* (1997), 78 C.P.R.(3d) 203 (Alta. Q.B.).

<sup>6</sup> *R. v. Clarke Transport Canada Inc.* (1995), 64 C.P.R.(3d) 290 (Ont. Ct. Gen. Div.).

<sup>7</sup> B.A. Facey & D.H. Assaf, "Innovation, Growth And Prosperity: A Framework For Amending Canada's Conspiracy Laws" (2001-2002) 20:4 Can. Comp. Rec. 61 at 62-63.

<sup>8</sup> Competition Bureau Information Bulletin, *Strategic Alliances Under the Competition Act*, 12 September 1995.

<sup>9</sup> Kennish & Ross, *supra* note 3 at 52.

<sup>10</sup> c.647, 26 Stat. 209 (1890), codified as amended at 15 U.S.C. sections 1-7.

<sup>11</sup> *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1 (1911), at 58.

<sup>12</sup> *Arizona v. Maricopa County Medical Society*, [1982-2] Trade Cases 64, 792 (U.S.S.C.) at 71, 895-6 [hereinafter *Maricopa*].

<sup>13</sup> *Supra* note 2 at 654-5.

<sup>14</sup> F. Easterbrook, "The Limits of Antitrust" (1984), 63 Texas Law Review 1 at 6.

<sup>15</sup> *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (territorial allocations); *United States Steel Corp. v. Fortner Enters.*, 429 U.S. 610 (1977) (applying a market power test to tie-ins thus deviating from usual *per se* approach); *Jefferson Parish Hosp. Dist. No.2 v. Hyde*, 104 S. Ct. 1551 (1984) (maintaining a nominal *per se* rule for tying, but requiring an inquiry into effect on competition to determine whether something is a tie-in; four justices wrote in favor of abandoning *per se* treatment altogether); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 104 C. Ct. 1464, 1469 n.7 (1984) (implicitly inviting further litigation about status of resale price maintenance). On the lower courts' abrogation of the *per se* rule against boycotts, see, for example, *NCAA v. Board of Regents of the Univ. of Okla.*, 104 S. Ct. 2948, 2959-62 (1984) (the Supreme Court set aside a finding of *per se* liability without even mentioning the plaintiff's boycott argument, which the plaintiff had offered as an alternative ground of support of the judgment). See also *id.* At 2962 n.26 (suggesting that there is no longer a clear line between *per se* and Rule of Reason analysis, and that the status of tie-ins is uncertain); *United States Trotting Ass'n v. Chicago Downs Ass'n*, 665 F.2d 781 (7th Cir. 1981) (en banc).

<sup>16</sup> *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979).

<sup>17</sup> *Supra* note 14 at 10.

<sup>18</sup> *Ibid.* at 3.

<sup>19</sup> 220 U.S. 373 (1911).

<sup>20</sup> *Continental T.V., Inc. v. GTE Sylvania Inc.*, 443 U.S. 36 (1977).

<sup>21</sup> *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

<sup>22</sup> S. Calkins, "Antitrust 2001-02: The Year of the Baseball Bat" (2002), January theantitrustsource 1 at 7 (available at [www.antitrustsource.com](http://www.antitrustsource.com)).

<sup>23</sup> 526 U.S. 756 (1999) [hereinafter *California Dental*].

<sup>24</sup> R.A. Posner, *Antitrust Law (Second Edition)* (Chicago: The University Of Chicago Press, 2001) at 159.

<sup>25</sup> *Supra* note 12.

<sup>26</sup> *Ibid.* at 71,897 and 71,898-9.

<sup>27</sup> *Ibid.* at 71,904-5.

<sup>28</sup> [1979-1] Trade Cases 62,558 (U.S.S.C.) [hereinafter *Broadcast Music*].

<sup>29</sup> *CBS v. ASCAP*, [1980-2] Trade Cases 63,289 (U.S.C>A., Second Circuit).

<sup>30</sup> J. Kattan & D. Batto, "Analyzing Joint Ventures' Ancillary Restraints" (1993), 8:1 Antitrust 13 at 14.

<sup>31</sup> *Supra* note 28 at 77,242-3.

<sup>32</sup> [1984-2] Trade Cases 66,139 (U.S.S.C.) [hereinafter *NCAA*].

<sup>33</sup> *Ibid.* at 66,389, footnote 26.

<sup>34</sup> *Supra* note 23 at 779-80.

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<sup>35</sup> *Supra* note 2 at 650.

<sup>36</sup> *Supra* note 2 at 649-50.

<sup>37</sup> *Supra* note 24 at 31-2.

<sup>38</sup> *Supra* note 3, Kennish & Ross, at 39.

<sup>39</sup> *Supra* note 2 at 657.

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## **COMPETITION ACT REFORM AGENDA: GOVERNMENT RESPONDS TO PARLIAMENTARY COMMITTEE REPORT**

By: Susan M. Hutton and Catherine McKenna<sup>1</sup>  
Stikeman Elliott

### **Introduction**

On October 1, 2002, the Government of Canada responded to the Eighth Report of the House of Commons Standing Committee on Industry, Science and Technology (the "Industry Committee"), entitled *A Plan to Modernize Canada's Competition Regime*.<sup>2</sup> In its response,<sup>3</sup> the Government identified the recommendations that will be the focus of the next round of consultations on amendments to the *Competition Act* and to the *Competition Tribunal Act*. As expected, this includes the initiative of the Commissioner of Competition, Konrad von Finckenstein, Q.C., to amend the section 45 conspiracy provision to make certain agreements among competitors *per se* illegal. Of significant policy consequence as well, however, is the Government's intention in the next round of amendments to empower the Competition Tribunal to issue "administrative monetary penalties" (i.e., fines) in respect of civil "offences" under the Act. Less controversial, but still of note, is the Government's intention to consider decriminalizing predatory pricing, price discrimination and disproportional promotional allowances, making these aspects of potential abuse of dominance and therefore subject to the "substantial lessening or prevention of competition" standard. As expected, the Government declined to consider rescinding the recently-enacted provisions targeting domestic airlines, or to make them consistent with treatment of other industries as recommended by the Industry Committee. It has also rejected the Committee's recommendation to expand the rights of private parties to bring cases before the Tribunal to include abuse of dominance, and to make Tribunal cost awards subject to a means test. The Government has, however, supported the call for non-judicial members of the Tribunal to participate in deciding questions of law, for further study of the role of efficiencies in mergers and other civil provisions of the Act, and for an increase in merger notification thresholds and filing fees.

We first consider in some detail what we see as being the more controversial of the proposed amendments, being those related to the conspiracy provisions and the introduction of fines for civil offences, before briefly commenting on other aspects of the Government Response to the Industry Committee Report.

### **Conspiracy**

It will come as no surprise to many that the Government Response indicates that the main priority in the upcoming consultations will be to amend section 45, the "conspiracy" provision of the Act. The Commissioner and other senior members of the Competition Bureau have stated many times their belief that there is a need for reform, and their expectation that section 45 will be the centrepiece of the next round of amendments to the Act.<sup>4</sup>

Section 45 of the Act has indeed been the subject of considerable scrutiny over the past few years. A Private Member's Bill that included proposed reforms to section 45 was introduced into Parliament in 2000,<sup>5</sup> and the topic featured prominently in the Public Policy Forum ("PPF") Consultation Process established at the behest of the

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Minister of Industry between April and December 2000.<sup>6</sup> As a result of the PPF recommendation that further study be undertaken before amending section 45, the Commissioner commissioned three studies that supported his view that reform is required.<sup>7</sup>

Why all the attention in Canada to section 45? Prosecuting hard-core cartels (such as price-fixing and market allocation) goes to the heart of any competition regime as hard-core cartel behaviour is considered by many to be the most egregious form of competition law violation, typically having no pro-competitive purpose and whose main effect is to hurt consumers and distort the economy. The recent prosecutions in various jurisdictions of the companies involved in the bulk vitamin conspiracy, for example, have reinforced the importance of these provisions and the ability of competition authorities to take effective enforcement action in respect of such conduct.<sup>8</sup> That said, in Canada, such convictions have not prevented the rise of a perception within the Bureau that section 45 is ineffective. The Commissioner has stated that one of the problems with section 45 is that it is very difficult to prove beyond a reasonable doubt that the agreement in question has the effect of an "undue lessening of competition".<sup>9</sup> The Commissioner supports this conclusion by referring both to the study of Harry Chandler and Robert Jackson,<sup>10</sup> which found that since 1980, 17 out of the 20 contested conspiracy cases had resulted in acquittals or dismissals, and to the Gourley Report,<sup>11</sup> which states that "since 1975, of the 7 litigated cases that did not involve a monopoly or 'virtual monopoly', the Crown lost *every* case".<sup>12</sup>

Interestingly, proponents for amending section 45 also argue that it provides an inflexible approach that ignores potential efficiencies which may justify agreements regarding pricing and other aspects of competition in a non-hard core cartel situation. In particular, some have suggested that the broad scope of the conspiracy provision has the potential to subject pro-competitive horizontal arrangements, such as strategic alliances, to the possibility of criminal sanctions. Although it is not clear the extent to which this is an actual as opposed to a theoretical problem, it is argued that the result is a chilling effect on legitimate business.<sup>13</sup>

The Industry Committee summarised these rationales with its statement that:

(i)n some cases, the *Competition Act* captures too many business practices, which leads to a 'chilling effect' on perfectly legitimate, pro-competitive behaviour on the part of the Canada's most productive firms. At the same time, and in other cases, both competition Acts (i.e., the Competition and Competition Tribunal Acts) fail to capture and properly address many business practices that at least appear to be anticompetitive and may even constitute egregious anti-social behaviour.<sup>14</sup>

In addition to the domestic focus on the topic of conspiracies, there has of late also been a great deal of international discussion of conspiracies, and cartels in particular. In the OECD's 1998 *Recommendation of the Counsel Concerning Effective Action against Hard-Core Cartels*, member countries were advised to ensure that their domestic sanctions were adequate to deter firms and individuals from participating in cartels.<sup>15</sup> Since the date of the OECD Recommendation, the United Kingdom has created *per se* criminal offences for individuals involved in hard-core cartel activity.<sup>16</sup> Australia is moving in this direction and is also considering increased fines for companies involved in these activities.<sup>17</sup> At the same time, however, and as is discussed further below, the United States is moving away from a strict *per se* analysis for alleged conspiratorial behaviour.

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In its Response, the Government has endorsed the Industry Committee's suggestion that a new two-track approach be adopted. Hard-core cartels would remain on the criminal track but without either a test for competitive effects or an efficiency defence. They would therefore be prosecuted as *per se* offences in that the Crown would no longer be required to demonstrate, among other things, that the agreement would lessen competition "unduly". A new civil track would apply to other types of agreements between competitors<sup>18</sup>.

The Commissioner's plan to reform section 45 in this manner is not without controversy, however, reversing as it does one hundred years of experience with the current "undue lessening of competition" test for criminal cartel behaviour.<sup>19</sup> As will be seen below, it is not clear to the authors that the move to this sort of two-track approach to agreements among competitors will necessarily improve the Government's already strong enforcement record, particularly in recent years, or that the current undue lessening of competition standard is wrong from a policy perspective. Moreover, not only has there been no strong evidence of a supposed chilling effect from the current provisions, but with the proposal to revise the *Strategic Alliances Bulletin*, it is not clear that reform is necessary in order to provide additional clarity for businesses as to the bounds of potentially criminal behaviour.<sup>20</sup> Indeed, with heightened risks due to the creation of a *per se* criminal offence, such reform may actually exacerbate any problem in this regard.

Turning to the first point, in our view, a convincing case has not been made from a policy perspective that criminal sanctions should apply without the Crown proving that an agreement has had, or would reasonably be expected to have, significant anti-competitive effects. Such effects are the very reason why certain agreements are prohibited. Moreover, since 1992, the meaning of "unduly" has been relatively more clear than at any prior time in the long history of section 45. In its 1992 decision in *R. v. Nova Scotia Pharmaceutical Society*,<sup>21</sup> the Supreme Court of Canada set out a two-pronged approach for determining whether an agreement restrains or injures competition "unduly". The first prong looks at the market power of the parties to the agreement; that is, the collective power of the parties to behave relatively independently of competitive market forces when determining their own competitive behaviour. The reasoning behind requiring that there be some degree of market power on the part of the "conspirators" is evident: if there is no prospect of actually affecting prices or other aspects of competition in a market, then the agreement can lead to no social harm. The second prong looks at the behaviour of the accused, including both the manner in which the agreement has been entered into as well as the object and the likely effect of the agreement. The Court made it clear in its decision that it is a combination of both market power and anti-competitive behaviour that renders an agreement to restrain or injure competition "undue". Since *PANS*, this combination of market power and behaviour has been the standard for evaluating whether an agreement among competitors is in violation of section 45 of the Act.

Interpreting or amending the Act to prosecute persons who agree to raise prices but who lack market power could result in the conviction, for example, of parties with 5% market share between them, and who face strong competition from competitors. This point was made by Gonthier J. in *PANS*: "It can be presumed that Parliament did not wish s. 32(1)(c) [now s. 45(1)(c)] to apply in the absence of market power. Absent such power, agreements to restrict competition would either benefit the public by allowing small firms to consolidate their power and be more competitive, or dissolve under competitive pressures."<sup>22</sup>

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In our view, criminalising conduct that has no competitively adverse impact could in itself result in a chilling effect on non-harmful business agreements if there is some doubt as to whether the criminal or the civil track will be applied to an agreement. While proponents of reform would argue that this is precisely why we need the two tracks, the draft language so-far proposed for defining the *per se* offence, and the exception for agreements with potentially benign or beneficial effects, appears to suffer from similar ambiguity to that which applies to the current section 45.

Although the Commissioner has proposed no draft language as yet, the Gourley Report<sup>23</sup> proposed the following draft language for a new subsection 45(1), as well as an exception for potentially harmless agreements under a proposed paragraph 45(4)(c):

45.(1) Every one who enters into an agreement or arrangement with one or more other persons for the purpose or having the effect of:

- (a) fixing, stabilizing or otherwise affecting prices in or of a market,
- (b) eliminating or restricting capacity, output or supply in, of or to a market,
- (c) impeding expansion or entry in, of or into a market,
- (d) allocating, ceasing to supply or purchase, or otherwise affecting relations of either or any of them with one or more of any of their customers in , or suppliers to, a market,

where those persons or their affiliates, or two or more of them, compete in the market, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding [x] or to both.

45.(4) Subsection (1) does not apply in respect of an agreement or arrangement:

...

- (c) or an effect that is ancillary (“ancillary agreement or effect”) to another agreement or arrangement (“principal agreement”), including an agreement to acquire or lease assets, that was not entered into for a principal purpose of having an effect set forth in paragraph (1)(a), (b), (c) or (d), where:
  - (i) the ancillary agreement or effect is reasonably necessary to give effect to, or an integral part of, the principal agreement; and
  - (ii) it was not reasonably foreseeable, at the time the principal agreement was entered into, that competition would be substantially lessened or prevented as a result of the ancillary agreement or effect,

provided, however, that where the predominant purpose of the principal agreement is to achieve gains in efficiency the parties shall be deemed to have not entered into such agreement for a principal purpose of having an effect set forth in paragraph (1)(a), (b), (c) or (d)...

While the Commissioner has not explicitly endorsed this language, this type of provision appears to be a plausible example of what a new conspiracy provision may look like based on discussions regarding the proposed amendments.

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As one can see, it is not difficult to imagine agreements that would be captured by this provision, including an agreement between two competitors who have a very small share of the market and whose agreement will not lessen competition to any appreciable degree, but may well involve, for example, allocation of customers between them. It may well be that the agreement forms part of another agreement, or it may constitute the very heart of their “strategic alliance”. Regardless, in order to come under the exception, the parties would have to be sure that in respect of any aspects of the agreement regarding prices, capacity, entry, customers or suppliers, among other things, “it was not reasonably foreseeable, at the time the principal agreement was entered into, that competition would be substantially lessened or prevented as a result of the ancillary agreement or effect” In practice, therefore, this condition for qualifying for the exception in turn amounts essentially to the accused fulfilling the objective component of the test for *mens rea* outlined by the Supreme Court of Canada in the *PANS* case.<sup>24</sup> Indeed, seen in this light, the proposed new provision seems more, rather than less, likely to have a “chilling effect” on innovative business arrangements, as (1) the danger to the parties of being wrong in thinking that their agreement is benign is significantly greater, and (2) it is the parties who would now have to prove that their agreement is not anti-competitive, rather than the Crown having to prove the opposite as is currently the case.<sup>25</sup>

Further, while the inclusion of efficiency considerations in a section 45 analysis is likely desirable, it seems to the authors that treatment of strategic alliances under the civil abuse provisions (as clarified in a revised Strategic Alliances Bulletin) could accomplish this goal – or an efficiencies defence could be written into section 45 without doing away with the notion that agreements should be proven to have significant anti-competitive effects before being labelled as “criminal”.

One must question, as well, not only the policy basis for creating a *per se* offence, and the manner in which benign agreements should be identified (if not on the basis of competitive effects),<sup>26</sup> but also the efficacy of the proposed reforms in achieving the Commissioner’s desired goal of a greater number of convictions. Although one of the stated rationales for the new approach is to ensure that hard-core cartel behaviour is successfully prosecuted, some have suggested that it is not only the difficulty in proving “undueness” that hinders successful prosecutions; rather, it is often the difficulty in demonstrating that an agreement in fact exists.<sup>27</sup> From this perspective, the proposed reforms would not necessarily have the intended effect of increasing the success rate for section 45 prosecutions. In any event, amending the *Competition Act* on the basis that it will increase the number of convictions does not appear to be a valid justification in and of itself if the behaviour thus prohibited could, potentially, be without social harm.

Further, although the Commissioner and a few other reform proponents argue that section 45 is not effective (pointing to the Jackson and Chandler Study and the Gourley Report), the success of section 45 since *PANS*, the seminal case that clarified the standard for evaluating alleged section 45 violations, has in fact been rather impressive. Of the 24 cases examined in the Jackson and Chandler Study<sup>28</sup> that occurred after the *PANS* decision, there were nineteen guilty pleas, two convictions, two acquittals and one discharge, or a success rate of 90%. This compares with the Study’s finding of ten guilty pleas, one conviction, eleven acquittals, three discharges, and two stays in the period between 1980 and the *PANS* decision, or a success rate of a little more than 40%.

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The fact that section 45 has been extremely effective in the past ten years is not highlighted when the Commissioner and others refer to the statistics in the Gourley Report and the Jackson and Chandler Study regarding the large number of acquittals in contested conspiracy cases in recent decades. Nor is the fact that there have been a large number of guilty pleas in recent years which have resulted in very large fines.<sup>29</sup> These results suggest that the conspiracy provision, contrary to the view espoused by proponents of reform, is in fact very effective.

Finally, whatever benefits a *per se* conspiracy offence would bring in increased convictions, such benefits must be weighed against the resulting loss of flexibility to the Canadian economy. To be effective, a competition regime should reflect the priorities and goals of the society that it serves. This is particularly true in our increasingly complicated and interconnected business environment.<sup>30</sup> We are concerned that adopting a categorical approach to agreements among competitors in the pursuit of certainty may prove to be short-sighted.

Indeed, as noted above, adopting a more rigid approach to conspiracies runs contrary to the trend in the United States where courts appear to be moving away from *per se* interpretations of section 1 of the *Sherman Act* in many instances.<sup>31</sup> Recent American decisions have looked at the impact of the arrangement on competition, even in cases which would historically have been subject to a *per se* approach.<sup>32</sup> These cases seem to indicate that U.S. judges are increasingly of the view that a rigid *per se* approach to agreement among competitors is not always either possible or desirable.

Indeed, U.S. courts appear to have been blurring the distinction between the *per se* and so called "rule of reason" tests for agreements in restraint of trade. In *NCAA v. Board of Regents*,<sup>33</sup> the Court stated that "there is often no bright line separating *per se* from Rule of Reason analysis".<sup>34</sup> U.S. courts have also recently subjected group boycotts and tying arrangements, traditionally subject to *per se* analysis, to an analysis that looks beyond the agreement itself. In a recent case, *Continental Airlines Inc. v. United Air Lines, Inc.*,<sup>35</sup> the court tried to explain the distinction, stating that the "abbreviated" or "quick look" form of Rule of Reason analysis "... skips the inquiry into anticompetitive effects because those effects are manifest from the nature of the restraint."<sup>36</sup> The result is a new hybrid approach whereby a "quick look" as to the market effect may be applied, even in cases where traditionally there has been a *per se* analysis. In other cases where there are reasonable competing claims about whether or not the restraint has anticompetitive effects, the court may be required to embark on a more detailed analysis of the effect on the relevant market.<sup>37</sup>

In summary, the authors are not convinced that a two-track approach to agreements among competitors is either wise or necessary. The reforms as we currently understand them to be proposed appear to increase the risks of entering into strategic alliances and of exacerbating potential chilling effects on benign behaviour. Further, a desire to win more contested cases is both a hollow justification for changing the legal standard for criminal behaviour and one which ignores recent successes in addressing cartel behaviour. Finally, while consistent with recent trends in the UK and Australia, the creation of a *per se* conspiracy provision appears to be at odds with recent trends in the application of U.S. law.

In the Government Response to the Industry Committee Report, the Government stated that it will release a discussion paper containing specific proposals to amend section 45 and will undertake extensive consultations

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before putting forward the proposals in a Government Bill. It is hoped that these consultations will examine many of the points raised above.

### **Administrative Monetary Penalties (Fines) for Civil Matters**

The Industry Committee recommended introducing both administrative monetary penalties and damages for civilly reviewable conduct (i.e., refusal to deal, exclusive dealing, tied selling, market restriction and abuse of dominance). The rationale given by the Industry Committee for these new remedies was that they are important deterrents to anti-competitive behaviour and will encourage meritorious cases to come forward.<sup>38</sup>

In its Response, the Government agreed in principle with the Industry Committee's recommendation that the Tribunal should be empowered to impose administrative monetary penalties for civilly reviewable conduct and indicated that it will address this issue in a discussion paper.<sup>39</sup> However, it did not endorse the recommendation to also make damages available for private action proceedings involving these offences, on the basis that it would be inappropriate to consider both damages and administrative monetary penalties at the same time. The Government indicated that it will re-examine the issue of damages once it gains some experience with administrative monetary penalties.<sup>40</sup>

In our view, administrative monetary penalties, or fines, are also likely to be among the more controversial of the Government's proposed reforms. The Tribunal has already been empowered to penalize domestic airlines that abuse a dominant position with fines of up to \$15 million.<sup>41</sup> While the Commissioner argued at the time<sup>42</sup> that this was necessary in order to deter abusive behaviour in the unique circumstances applicable to airlines in Canada, he now appears to advocate their extension to civilly reviewable practices generally.<sup>43</sup>

While it is true that civil competition regimes in other jurisdictions, for example Europe and the United States, can impose monetary penalties for abuse of dominance or monopoly behaviour,<sup>44</sup> the legislative history of the provisions in Canada makes it clear that fines, damages and other forms of retroactive punishment (for this is what "administrative monetary penalties" really are, despite official protestations to the contrary) are at odds with the philosophy underlying the creation of the Competition Tribunal and the largely prospective way in which civilly reviewable practices are dealt with. Several judges have noted that the Act does not require the Tribunal to determine retrospectively whether conduct has been "in restraint of trade".<sup>45</sup> In other words, consistent with the nature of civilly reviewable conduct, the conduct is not condemned as having been unlawful (as would be the case with a criminal offence). Rather, the conduct is prohibited by the Tribunal on a going-forward basis after a finding that it has substantially lessened or prevented competition or will do so in the future.<sup>46</sup> Indeed, the reasoning behind the creation of the civilly reviewable practices provisions including "abuse of dominance" mitigates against any retroactive punishment. The Economic Council of Canada in its 1969 *Interim Report on Competition Policy* discussed the purpose of the reviewable practices provisions as follows:

Unlike the five instances where criminal law still appears to be a valid approach, most of the practices referred to the tribunal are capable in some circumstances of working to the public advantage, but the distinction between likely good and bad effects may require a difficult weighing of relevant economic circumstances and probabilities, and therefore a kind of expertise that only a body of mixed professional disciplines could provide.

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Moreover, if deterrence is the policy reason behind imposing potentially massive fines,<sup>47</sup> it must also be noted that the most recent amendments to the Act provided the Commissioner with a very broad power to obtain an injunction in respect of behaviour that could be the subject of orders under the civilly reviewable practices sections, merely by showing that, among other things, a person is likely to suffer a significant loss of revenue or market share or other harm that cannot be adequately remedied by the Tribunal. Since the Tribunal is powerless to award damages, by definition, all loss of revenue caused by a reviewable practice must be irremediable. The Commissioner thus has the direct power, on an *ex parte* basis, to stop any reviewable conduct to which he objects, during the course of the inquiry. We question, therefore, whether it is really necessary to impose fines in the millions of dollars retrospectively in order to prevent serious harm to competitors from reviewable conduct, and whether any benefits in terms of deterrence might be outweighed by deterrence of legitimate behaviour (i.e., a chilling effect). Again, we hope these issues will be fully aired in the consultations concerning the next round of reforms.

### Other Reform Proposals

#### *Pricing Provisions*

The Government seems to support the recommendation of both the Industry Committee and the VanDuzer Report<sup>48</sup> by indicating that it will consider the repeal of paragraphs 50(1)(a) (price discrimination), 50(1)(b) (regional predatory pricing), and 50(1)(c) (predatory pricing), as well as section 51 concerning disproportional promotional allowances, having such conduct fall instead under the abuse of dominance provisions. This would have the positive effect of subjecting them to a requirement that the impugned behaviour cause or be likely to cause a substantial lessening or prevention of competition. Interestingly, however, in the meantime, the Competition Bureau has issued, in draft, Guidelines on “Illegal Trade Practices: Unreasonably Low Pricing Policies” which depart from the Bureau’s previous enforcement policy in a number of ways, including most notably, their ambiguous treatment of market power as a required element in predatory pricing cases.<sup>49</sup> We understand the draft new Guidelines are being revised. In the meantime, amending the Act to conform with modern economics and enforcement practices is the preferred approach.

Despite the Industry Committee’s suggestions that horizontal price maintenance be added to a new criminal section 45 and that vertical price maintenance be decriminalized and added to revised abuse of dominance provisions, the Government has indicated that it will wait to assess the impact of the above-noted changes to the conspiracy provisions of the Act before changing the price maintenance provisions.

The fact that the Government has decided to defer looking at decriminalising vertical price maintenance is perhaps surprising. A strong case was made in the VanDuzer Report for the decriminalisation of vertical price maintenance. The Report states that the current section 61 “is not an accurate tool for taking enforcement action and likely imposes excessive compliance and monitoring costs on business. This chilling effect is exacerbated by the criminal nature of the offence of price maintenance.”<sup>50</sup> Perhaps the status of section 61 will also be clarified in the upcoming debate on section 45 after all.

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### *Airlines*

Although the Industry Committee recommended the repeal of all special provisions in the *Competition Act* that single out the airline industry for harsher penalties and stricter standards than those applied to other industries, the Government has not endorsed this position. The Government's view is that special provisions for airlines need to be maintained because of regulatory barriers to foreign competition, highly mobile assets which facilitate targeting, transparent pricing, and a low variable cost structure which is favourable for predatory pricing. As a result, the Government has indicated that a review of the airline provisions will take place in June 2004, two years after Bill C-23 (which provided for some of the provisions in question) came into force. We note that certain of the provisions in question are currently being challenged before the courts, so this response is not perhaps surprising.<sup>51</sup>

### *Competition Tribunal Procedures*

In Bill C-23, enacted June 21, 2002, private parties were granted the right to bring cases before the Tribunal in respect of the civilly reviewable practices of refusal to deal (section 75), and tied selling, market restriction and exclusive dealing (section 77). The Industry Committee recommended that private access be permitted as well in respect of abuse of dominance (section 79). According to the Government Response, a review of whether private access should be extended to abuse of dominance cases generally will take place in two years, after some experience has been gained with respect to private access under the more specific provisions.

The Government also did not feel that it was necessary to consider allowing the Tribunal to develop specific rules for awarding costs based on the ability of a party to proceedings to pay costs. It stated that the amendment made in Bill C-23, allowing the Tribunal to award costs in accordance with Federal Court Rules, should continue to apply. Given the role that potential cost awards play in deterring frivolous applications to the Tribunal, the Government's position is welcome.

The Government Response does endorse the recommendation that section 12 of the *Competition Tribunal Act* be amended to permit all the members to a proceeding to consider questions of law. Currently, only the judicial member of the panel hearing a case (usually of three Tribunal members, including one Federal Court judge<sup>52</sup>) may rule on such issues. An amendment as supported by the Government raises the spectre of economists, accountants, and other lay persons overruling a Federal Court judge on a point of law.

The Government has also said it would recommend that the Chairperson of a panel be permitted unilaterally to dispose of interlocutory proceedings, motions for summary dispositions and similar rulings. Such amendments would likely speed the disposition of cases before the Tribunal, but at the expense of input from non-judicial experts on the Tribunal, especially in the case of motions for summary judgement.

### *Merger Review Process*

With respect to mergers, the Government supported the Industry Committee's recommendation that the "size of transaction" threshold for merger notification be increased, with a coinciding rise in application fees.<sup>53</sup> However, it indicated that this change should be implemented through new regulations rather than with an amendment to the

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*Competition Act* itself (thus facilitating the regular updating of thresholds). The Competition Bureau has held public consultations in this regard and is proposing a regulation that would raise the current size-of-transaction threshold from \$35 million to \$50 million and increase the fee for pre-merger notification and advance ruling certificates from \$25,000 to \$50,000.<sup>54</sup> This regulation could come into effect as early as April 1, 2003.

The Government also accepted the proposal by the Industry Committee that the role of efficiencies in the civil review provisions of the Act be further studied. The Government indicated that it will commission a study on how efficiencies are treated in merger review internationally and then submit the findings to a Parliamentary Committee.

Given the long, tortured and continuing history of the efficiencies defence in the *Superior Propane* case,<sup>55</sup> deferral of this matter and further study on the topic is obviously required.

### Conclusion

The Government Response to the Industry Committee's recommendations for competition law reform raises some interesting issues. In particular, the proposal to amend the conspiracy provisions of the Act will likely continue to be controversial and will require more analysis before enacting a change that, as it stands, does not seem to be adequately justified. In this regard, Canadian competition policy observers will look with interest to the Government's White Paper, expected to be issued shortly.

Administrative monetary penalties for civilly reviewable practices also will, if enacted, represent a rather significant policy and enforcement shift, and one that could well lead to enabling the Tribunal to award damages to private parties down the road. Enabling the Tribunal to issue fines for civil practices is at odds with Canada's own legislative history and the policy rationale for de-criminalizing such behaviour, but is in keeping with civil regimes in at least some other jurisdictions. Again, it is hoped that prior to putting forth any such amendments, the policy rationale will be more clearly enunciated and empirically supported, and the experience with the limited ability to impose fines against domestic airlines will be taken into account.

The Government Response also indicates support for a broad range of amendments, including not only increases to the merger notification thresholds and filing fees, but also changes to Tribunal procedures, and decriminalization of the oft-criticized pricing provisions of the Act, which themselves will no doubt be the subject of much discussion and debate prior to the enactment of the next round of *Competition Act* amendments.

### Notes

<sup>1</sup> The authors practice with Stikeman Elliott's Competition Law Group, in Ottawa. The views expressed herein are those of the authors alone.

<sup>2</sup> See "A Plan to Modernize Canada's Competition Regime" Report of the Standing Committee on Industry, Science and Technology (April 2002) ("Industry Committee Report") (available online at [www.parl.ca/InfoComDoc/37/1/INST/Studies/Reports/indurp06/03-cov-e.htm](http://www.parl.ca/InfoComDoc/37/1/INST/Studies/Reports/indurp06/03-cov-e.htm)).

<sup>3</sup> The "Government Response to the Report of the House of Commons Standing Committee on Industry, Science and Technology 'A Plan to Modernize Canada's Competition Regime'" (October 1, 2002) (the "Government Response") (available online at: [http://www.ic.gc.ca/cmb/welcomeic.nsf/vRTF/SpecialReport/\\$file/GovtResponse.pdf](http://www.ic.gc.ca/cmb/welcomeic.nsf/vRTF/SpecialReport/$file/GovtResponse.pdf)).

<sup>4</sup> See "Section 45 at the Crossroads" (Remarks by the Commissioner of Competition to the 2001 Invitational Forum on Competition Law, 12 October 2001) (available online at <http://strategis.ic.gc.ca/SSG/ct02285e.html>); "Remarks by Commissioner of Competition"

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(2002 Invitational Forum on Competition Law, 9 May 2002) (available online at: [http://strategis.ic.gc.ca/pics/ct/legaultmercer\\_e.pdf](http://strategis.ic.gc.ca/pics/ct/legaultmercer_e.pdf)); and "Reform of Section 45 – The Bureau's Perspective" (Statement by the Deputy Commissioner of Competition to the 2002 Competition Law Invitational Forum on Competition Law, 8-10 May 2002) (available online at: [http://strategis.ic.gc.ca/pics/ct/reform\\_e.pdf](http://strategis.ic.gc.ca/pics/ct/reform_e.pdf)).

<sup>5</sup> Bill C-472, *An Act to Amend the Competition Act (conspiracy agreements and right to make private applications), the Competition Tribunal Act (costs and summary dispositions) and the Criminal Code as a consequence*, 2nd Sess., 36th Parl., 1999-2000, ss. 1 and 7; Bill C-472 died on the Order Paper with the dissolution of Parliament on 22 October 2000.

<sup>6</sup> A copy of the PPF report can be found at <http://www.ppforum.com/english/competitionact/finalreport.PDF>.

<sup>7</sup> See R.S. Russell, A.F. Fanaki & D.D. Akman, *Legislative Framework for Amending Section 45 of the Competition Act* (April 11, 2001) ("Russell Report"); A. Gourley, *A Report on Canada's Conspiracy Law: 1889-2001 and Beyond* (August 2001) ("Gourley Report"); and McCarthy Tétrault, *Proposed Amendments to Section 45 of the Competition Act* (August 2001) ("McCarthy Report").

<sup>8</sup> See, for example, Competition Bureau News Release, "Competition Bureau investigation leads to over \$4-million in fines for international bulk vitamin conspiracies", (16 October 2002, available at: [http://strategis.ic.gc.ca/SSG/ct02437\\_e.html](http://strategis.ic.gc.ca/SSG/ct02437_e.html)).

<sup>9</sup> See "Section 45 at the Crossroads", *supra* note 4.

<sup>10</sup> R. Jackson & H. Chandler, "Beyond Merriment and Diversion: The Treatment of Conspiracies under Canada's *Competition Act*", Roundtable on *Competition Act* Amendments (25 May 2002) ("Jackson and Chandler Study") (available online at: <http://strategis.ic.gc.ca>).

<sup>11</sup> *Supra* note 7.

<sup>12</sup> Gourley Report, *supra* note 7 at 5. The Commissioner made this point in his speech, "Section 45 at the Crossroads", *supra* note 4.

<sup>13</sup> See McCarthy Report, *supra* note 7 at 9-11. The authors are of the view that the ability of parties to seek an advisory opinion from the Competition Bureau would seem to mitigate against any real chilling effect.

<sup>14</sup> *Supra* note 2 at 2 (Chair's Foreword).

<sup>15</sup> See *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, Organisation for Economic Cooperation and Development, 25 March 1998, C(98)35/FINAL.

<sup>16</sup> The *Enterprise Act* received Royal Assent on 2 November 2002.

<sup>17</sup> See Australian Competition & Consumer Commission, "Submission to the *Trade Practices Act* Review" (June 2002).

<sup>18</sup> The Government did not indicate in its Response whether an efficiency defence of some sort or a pre-clearance of proposed agreements would be available in relation to the civil track.

<sup>19</sup> The Commissioner has also indicated that until section 45 is amended (presumably in the manner described above), the Bureau will interpret section 45(1)(b) of the Act, which prohibits agreements or arrangements that 'enhance unreasonably the price of a product', as not requiring a demonstration of undue effect. There seems to be little, if any, judicial authority for this interpretation of section 45(1)(b). See S. Neylan, "Bad fix for price-fixing", *The National Post* (September 6, 2002). See also *Competition Act and Commentary* (Markham, Butterworths, 2002) at 36-37.

<sup>20</sup> The Commissioner issued an Information Bulletin on September 4, 2002 stating that: "Strategic alliances take on a variety of forms and can include agreements between competitors or would-be competitors. These alliances can be harmless, even pro-competitive, but occasionally they can also contravene provisions of the *Competition Act*. Despite the Bureau's current bulletin, some have suggested that provisions in the *Competition Act* continue to discourage strategic alliances and have a chilling effect on agreements that are either harmless or beneficial." The Information Bulletin requested comments on the potential amendment of the Strategic Alliances Bulletin as an "interim measure", pending amendment to the conspiracy provisions to create a two-track approach to agreements between competitors.

<sup>21</sup> *R. v. Pharmaceutical Society (Nova Scotia)*, [1992] S.C.R. 606 ("PANS").

<sup>22</sup> *PANS*, *supra* note 20 at 653-654.

<sup>23</sup> *Supra* note 7 in Appendix 2 thereto (the "Draft Code").

<sup>24</sup> The Supreme Court in *PANS* essentially required the Crown to prove that at the time the agreement was entered into, the parties to it should reasonably have known that the agreement would be likely to lessen or prevent competition unduly.

<sup>25</sup> Another example of possible language for a revised section 45 is found in P. Warner & M. Trebilcock, "Rethinking Price-Fixing Law" (1993) 38 McGill L.J. 679. Their language provides for a criminal prohibition which removes reference to "unduly lessening competition", instead focussing on the covertness of the arrangement. A notification mechanism would be included to allow parties that might fall under this provision the ability to avoid criminal liability. As with the draft provision in the Gourley Report, it appears to the authors that this provision is also too broad and has the potential to trap many agreements that have no prospect of substantially affecting prices or other aspects of competition. The covert/overt distinction does have the merit, however, of certainty and is thus less likely to have the undesirable "chilling" effect on business.

<sup>26</sup> *Supra* note 25.

<sup>27</sup> Lawson Hunter, former Director of the Competition Bureau, is quoted in Chapter 4 of the Industry Committee Report, *supra* note 2: "[W]hen we analysed the cases back in the early 1980s, ... we found that the government lost as many if not more of the cases because

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they couldn't prove agreement. It wasn't that they couldn't prove undue ness; they couldn't actually prove there was actually an agreement. That is the cornerstone of a conspiracy provision."

<sup>28</sup> The Jackson and Chandler Study, *supra* note 10, looked at section 45 cases occurring between 1980 and April 2000. The summaries of section 45 cases can be found in Appendix 1 of the Jackson and Chandler study.

<sup>29</sup> See, for example, the "Annual Report of the Commissioner of Competition for the year ending March 31, 2001", at 30-32 where it lists two domestic examples in which companies were found guilty of conspiracy and five examples of companies pleading guilty in Canada to participating in an international conspiracy. See also B. Facey & D.H. Assaf, "Innovation, Growth and Prosperity: A Framework for Amending Canada's Conspiracy Laws" (2001-2002) 20:4 Can. Comp. Rec. 61 at 62-63.

<sup>30</sup> See L. Hunter & D. Royal, "Section 45 Amendments: A cure worse than the disease?" (Paper presented at 2002 Competition Law Invitational Forum, Langdon Hall, 9 May 2002) at 4.

<sup>31</sup> In the United States, conspiracies are dealt with under Section 1 of the *Sherman Act*. This section prohibits "every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade". Although this provision is very broad, U.S. courts have narrowed the scope of Section 1 by prohibiting only unreasonable restraints. The U.S. Supreme Court has used a *per se* analysis for agreements that are so likely to harm competition and to have no significant pro-competitive effect that there is no need to conduct a detailed inquiry into their effects. So-called "naked" price fixing, bid rigging, and market allocation have traditionally been found by courts to constitute a *per se* violation of Section 1, with no competitive effects test. For other types of agreements falling under Section 1, the courts have applied a rule of reason analysis to determine if the prohibition is violated. See generally the discussion in the ABA Section of Antitrust Law, *Antitrust Law Developments* (5th ed., 2002) at 50-58, from which the discussion of U.S. legal trends was drawn. See also the article by Bruce Graham, "Reform of Section 45 is Unnecessary", in this issue of the *Record*.

<sup>32</sup> See *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986) (group boycott), *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 593 n.2 (1st Cir. 1993) (tying).

<sup>33</sup> 468 U.S. 85, 100 (1984).

<sup>34</sup> *Ibid.* at 104 n.26.

<sup>35</sup> *Continental Airlines Inc., v. United Airlines, Inc.*, 126 F. Supp. 3d 962 (E.D. Va. 2001).

<sup>36</sup> *Ibid.* at 972-973.

<sup>37</sup> *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999) at 778.

<sup>38</sup> See Chapter 3 of the Industry Committee Report, *supra* note 2.

<sup>39</sup> The Government Response did not clearly indicate whether or not administrative monetary penalties would apply only to matters brought by the Commissioner.

<sup>40</sup> See "Government Response", *supra* note 3 at 5.

<sup>41</sup> Subsections 79(3.1), (3.2) and (3.3) of the Act, dealing with administrative monetary penalties for domestic airlines, were part of Bill C-23, and came into force on June 21, 2002.

<sup>42</sup> See the evidence given by the Commissioner of Competition to the Senate Standing Committee on Banking, Trade and Commerce, April 25, 2002.

<sup>43</sup> It is also interesting to note that the Commissioner has advocated gaining at least two years of experience with other provisions uniquely applicable to airlines before examining whether airlines ought not to be subject to the same rules as apply to the rest of the economy. However, in this case, he is in favour of expanding legislative reforms (first applied "uniquely" to airlines) to the rest of the economy without benefit of such experience.

<sup>44</sup> In the United States, fines are not an available remedy for civil violations of section 2 of the *Sherman Act*, 15 U.S.C., excluding the possibility of fines for violating a court injunction or an order of the Federal Trade Commission. However, parties are authorised under the *Clayton Act*, 15 U.S.C., to bring civil actions under section 2 of the *Sherman Act* for treble damages. That said, the remedy most commonly used in section 2 enforcement is the injunction that prohibits or requires specific conduct (see R.W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, Working Paper 01/05 (AEI-Brookings Joint Center for Regulatory Studies, 2001) at 8). By contrast, in the European Union, the primary remedy available to the European Commission where a company has violated Article 82 (Abuse of Dominance) is the imposition of a fine. These fines can be up to 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement (See Regulation 17, §2, 1962R0017 - EN - 18.06.1999).

<sup>45</sup> For example, *Belsat Video Marketing Inc. v. Astral Communications Inc. et al* (1998), 81 C.P.R. (3d) 1 (Ont. Ct. Gen. Div.).

<sup>46</sup> *Chadha v. Bayer Inc.* (1998), 82 C.P.R. (3d) 202 (Ont. Ct. Gen. Div.).

<sup>47</sup> We note that the current maximum fines under subsection 79(3.1) are 150% greater than the maximum fine for participation in a domestic price-fixing cartel under section 45.

<sup>48</sup> J.A. VanDuzer, "Anticompetitive Pricing Practices and the *Competition Act*: Theory, Law and Practice", (22 October 1999) (available online at: <http://strategis.ic.gc.ca/pics/ct/vdreport.pdf>).

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<sup>49</sup> The Bureau's prior enforcement policy is explained in the *Predatory Pricing Enforcement Guidelines*, Consumer and Corporate Affairs (Ottawa, 1992). For an analysis supporting that policy, but pointing out the tension between economic theory and the statute as drafted, see L. Hunter & S. Hutton, "Commentary on the Price Discrimination Enforcement Guidelines" (1992) 13:4 Can. Comp. Rec. 31. For a critique of the new draft Unreasonably Low Pricing Guidelines, see L. Hunter & J. Brown, "Paradigm Shift: The Competition Bureau's Draft 'Enforcement Guidelines for Illegal Trade Practices: Unreasonably Low Pricing Policies'" (2002) 21:1 Can. Comp. Rec. 86.

<sup>50</sup> *Supra* note 48 at xxiii.

<sup>51</sup> In October 2000, Air Canada launched a legal challenge to the Commissioner's authority, under section 104.1 of the *Competition Act*, to issue temporary injunctions to firms in the airline industry himself, without court approval. In July 2001, the Quebec Superior Court upheld the Bureau's authority. Air Canada then appealed the decision to the Quebec Court of Appeal. This appeal was heard in October 2002. Stikeman Elliott is counsel to Air Canada in that case.

<sup>52</sup> Section 10(1) of the *Competition Tribunal Act* states that: "Subject to section 11, every application to the Tribunal shall be heard before not less than three or more than five members sitting together, at least one of whom is a judicial member and at least one of whom is a lay member."

<sup>53</sup> The Industry Committee Report focussed in particular on the transaction size threshold of \$35 million as being too low, noting in Chapter 7 that the Bureau had found that this threshold was capturing many more mergers than had originally been intended.

<sup>54</sup> See the article by Tim Kennish, "'One for You - Two for Me' The Competition Bureau Proposes Raising Merger Prenotification Thresholds - and Fees", in this issue of the *Record*.

<sup>55</sup> *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2000), 7 C.P.R. (4th) 385 (Com. Trib.); rev'd. *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2001) 11 C.P.R. (4th) 289 (F.C.A.); (leave to appeal to S.C.C. refused 14 C.P.R. (4th) vii, 202 D.L.R. (4th) vi, 278 N.R. 196n); reconsidered *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2002), 18 C.P.R. (4th) 417 (Comp. Trib.), appeal filed by Commissioner of Competition on 23 April 2002.

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### **“ONE FOR YOU – TWO FOR ME” THE COMPETITION BUREAU PROPOSES RAISING MERGER PRENOTIFICATION THRESHOLDS – AND FEES**

By: Tim Kennish  
Osler, Hoskin & Harcourt LLP

**Updating Note:** Since this article was written, the Competition Bureau released a draft revised *Fee and Service Standards Handbook* in November 2002 and held stakeholder consultations during the month of December in Vancouver, Toronto and Montreal. In response to comments received, the draft *Handbook* reflects lower proposed fees for certain types of advisory opinions. The proposed fee for opinions on sections 45 to 51 and 79 remains unchanged at \$15,000. The current proposed fee for opinions on sections 52 to 55.1, 74.01(1)(a), 74.01(1)(c), 74.01(2), 74.01(3), 74.02, 74.04 and 74.06 is \$1,000 (the previous proposal was to raise the fee for all of these sections except 74.06 to \$10,000). The current proposed fee for opinions on other sections of the *Competition Act* is \$5,000 (the previous proposal was \$10,000). The draft *Handbook* also contains new service standard periods for non-merger opinions, which in many cases are longer than the current standards in recognition that the Bureau's Fair Business Practices Branch has struggled with meeting the current standards. The draft *Handbook* also contains a detailed list of the information the Bureau will generally require in connection with requests for written opinions.

At the stakeholder consultation in Toronto on December 11, 2002, Bureau staff indicated they would consider whether the transaction size threshold should be indexed to inflation and whether the threshold for amalgamations should be changed. Bureau staff also indicated that the Merger Notification Unit will continue its current practice of providing informal advice on notification questions at no charge, even if the provision of such advice goes beyond a “10 to 15 minute telephone call” as described in the draft *Handbook*. Bureau staff indicated that only in rare circumstances, such as when the facts are very complex, would the MNU decline to provide informal advice at no charge.

Bureau staff have indicated their target is to have the revised fees and thresholds implemented for the beginning of the next fiscal year, on April 1, 2003.

#### **Introduction**

If you have been holding your breath in anticipation of the Commissioner of Competition making good on his promise, announced with considerable fanfare in September 2000, to increase the “transaction-size” merger prenotification threshold from \$35 million to \$50 million, it appears that your long wait may be about to end. However, revision to the merger filing fee structure, which was also hinted at at that time as possibly being necessary, is likely to become a reality as well, along with fee increases for various other services under the *Competition Act*.

The elevation of applicable merger prenotification thresholds (including the “parties-size” threshold as well as the transaction-size threshold) has been a long sought-after reform by organizations such as the Canadian Bar Association

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and the Canadian Chamber of Commerce, since well before the introduction of merger prenotification filing fees in 1997. The principal rationale for this requested change was that since the introduction of merger prenotification in 1987, inflation had diminished the real value of the dollar by over 40%.

### **Proposed Change in Threshold**

On August 19, 2002, the Bureau issued an Information Notice indicating that it is proposing to increase the transaction-size merger prenotification threshold from the present \$35 million minimum to \$50 million, effective as of January 2003. The proposed change would be effected by regulation as contemplated under the Act. No corresponding increases in the existing "parties-size" threshold of \$400 million, or in the amalgamation size of transaction threshold of \$70 million, are contemplated.

What is proposed in regard to the transaction-size threshold is a one-time change, effectively catching up the real monetary value of today's dollar with what it was in 1987. No inflation-indexed, self-adjusting mechanism for the automatic annual adjustment of this amount for future years, such as is provided for under the *Investment Canada Act*, is proposed.

It is anticipated that, when the increased threshold comes into effect, the volume of merger filings will decline by approximately 10%, thereby diminishing the revenues expected to be derived from merger filings by a corresponding 10%, since such filings are charged for on a uniform flat-fee basis. It is expected that the great bulk of mergers which will thereby be exempted from the filing requirement will be cases which, under the Bureau's present procedures, are classified as non-complex.

### **Proposed Increased Fee Structure**

To offset these expected lost revenues and to cope with substantially increased costs of merger review since filing fees were first introduced, it is proposed that the applicable merger filing fees (which would also apply to applications for advance ruling certificates) would be doubled from \$25,000 to \$50,000. Merger filings would continue to be charged for on a single flat-fee basis for all merger transactions exceeding the threshold, irrespective of the size of the transaction. Given that merger filing fees will rise by 100% while the revenue derived from merger filings will decline only by 10% as a result of the threshold change, this proposal is likely to be characterized by some as an opportunistic "revenue grab".

Fees for advisory opinions under the Act (which now, by virtue of Bill C-23, are to be legally binding on the Commissioner) are also proposed to be increased. Fees for opinions in regard to sections 45 to 51 (covering such matters as conspiracy, bid-rigging, price discrimination, predatory pricing and promotional allowances) and section 79 (abuse of dominant position) would increase to \$15,000 (generally from the current level of \$4,000 – a 375% increase). Fees for advisory opinions on all other sections of the Act (except section 74.06 in regard to promotional contests where the applicable fee would be \$1,000) would be increased to \$10,000, again generally from the present level of \$4,000. Up to now at least, the revenue generated from advisory opinion fees has been comparatively negligible in contrast to revenues derived from merger filings which represent about 99% of the Bureau's total fee revenue. It seems likely that if the very substantial increases in fees proposed to be charged for advisory opinions

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are implemented, revenues from this source will further decline as a proportion of the Bureau's total fee revenue, since the securing of such opinions is optional. The principal rationale given for these increases relates to the now binding character of the opinions being provided.

### **Cost/Benefit Analysis**

*A Discussion Paper* (on the proposal to increase fees and revise the Bureau's Fee and Service Standards Policy), which was issued concurrently with the Bureau's announcement of these proposed changes, details how filing fees received to date have been applied to offset the Bureau's increased costs of undertaking merger review and to further enhance the service being provided in this regard. There is no doubt that Bureau costs have escalated since merger filing fees were first introduced nearly five years ago. However, it is difficult to correlate those increased costs with the planned merger fee increases. It is also not clear why there needs to be any direct connection between the merger fee thresholds and the fees charged for merger review.

The most compelling rationale for increasing merger thresholds is that, in the intervening 15 years since mandatory merger filings were first required, inflation has diminished the value of the dollar by nearly 45%. If the threshold as originally established was set at what was then an appropriate level, it is clearly necessary to adjust for this devaluation over time by restoring the threshold to the level of its real economic value in 1987, which is very close to \$50 million today. However, this same logic is also applicable to the parties-size threshold (currently \$400 million, but on this basis should be in the neighbourhood of \$575 million) and the threshold which applies in the case of mergers effected by amalgamation (now \$70 million but which would be, if comparably adjusted, \$100 million).

Similarly, if adjusting for inflation is the primary reason for effecting such change, then a self-adjusting inflation indexed revision mechanism is the preferred and most efficient method of dealing with monetary devaluation over time. That, however, as mentioned above, is not what is proposed. The timing of future adjustments in these thresholds, if any, is thus uncertain. One of the reasons given for this is the need to relate the fees charged to fees derived from merger filings. The Bureau's thesis in this regard is that the elimination of a proportion of merger filings through increasing the transaction-size merger threshold requires a fee increase to offset the lost fee revenue but that the cost of its ongoing merger review work (the bulk of which is taken up with larger cases which are classified "complex" and "very complex") is not much affected by the elimination of some of the smaller cases which are currently notifiable but would be below the proposed higher threshold (i.e., the Merger Branch's merger review workload will not be much changed by the removal of these now to be exempted cases from the system). Those cases are typically non-complex and thus not, relatively speaking, as time-consuming or costly to review.

### **Claimed Improvements in Merger Review Process**

The *Discussion Paper* also purports to review "improvements" which have been made to the merger review process through funding provided through merger filing fee revenues. It appears that a significant proportion of these so-called improvements have gone into the payment of salaries and related expenses for increased Merger Branch personnel. Merger turnaround time statistics are cited which, although ostensibly impressive, are actually

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suspect since the time measurement period is only considered to commence when the Bureau deems itself to be in possession of sufficient information to undertake its review – which can often be a date several months after the initial filing.

### **Input Sought by Bureau**

In connection with these planned reforms, the Bureau has invited “stakeholder” comments on the proposed fee increases, the current service standards as set out in its Fee and Service Standards Policy, merger complexity classification levels and definitions, feedback mechanisms and the proposed new threshold. The deadline for interested parties to provide such comments is October 18, 2002. The Bureau proposes to constitute a series of public forums in a number of locations across the country during the month of November to discuss the proposed initiatives in light of the public comments which will by then have been received. For this purpose, it is intended that a revenue proposal and *Fee and Service Standards Handbook* (revised to give effect to input which has been received) will be published on the Bureau’s website to form the basis for discussion at the forums. It appears to be contemplated that, unless there are substantive issues necessitating a further round of consultation, a final proposal (revised if necessary to give effect to further input received at the forum sessions) would then be submitted to the Industry Minister for approval.

Although this is not entirely clear, one subject which may not be on the table for discussion is the proposed new threshold level itself. In summarizing the input which the Bureau expresses itself interested in receiving in this process (at the conclusion of the *Discussion Paper*), there is specific mention of the proposed fee levels, service standards, complexity level definitions and required information and feedback cards, but significantly not the merger threshold level itself. That may well be an oversight in that portion of the document, but since the amount of the proposed increase (from \$35 million to \$50 million) was first announced over two years ago, it may be questioned just how much of an open mind the government is likely to have on that one issue at least.

### **Comparative Merger Filing Fees**

The proposed new merger prenotification fees look fairly modest by comparison with counterpart fees payable under the U.S. *Hart-Scott-Rodino* process where the lowest-tier fee is in the neighbourhood of CDN\$70,000 and filing fees (which are determined on a sliding scale referable to the size of the proposed merger transaction) can range as high as CDN\$430,000. But the picture is quite different elsewhere. The fees range from CDN\$11,000 to CDN\$69,000 in the United Kingdom; CDN\$15,000 in Australia (where the filings are in any event voluntary) and from CDN\$11,000 to CDN\$150,000 in Germany and there are still no fees payable at all in the European Union for merger filings. In a number of these jurisdictions, fees are differentiated (typically on a sliding scale) depending on the size and/or complexity of the transaction. It is not clear how much consideration was given to adopting a similar approach here. While the *Discussion Paper* states that a size of assets fee is not justifiable under the principles of cost recovery, since size of assets in a merger may have little or no relationship to the cost of conducting a review of it. While that is to a degree true, it is also an arguable proposition in that there does seem, on the basis of experience to date, to be a positive correlation between review time expended on a merger transaction and its overall size.

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### **Conclusion**

It appears that participants in some smaller-sized merger transactions are due for some relief through an increase in the transaction-size merger threshold, but that there will be a price to pay for this relaxation of present merger filing requirements in terms of significantly higher filing fees payable in regard to transactions which are in excess of the new thresholds and also in terms of higher fees for advisory opinions. Concurrently, the Bureau is committed to reviewing its merger review service standards and inviting public comment on that particular aspect of its merger review process.

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## REFORMING SECTION 45: DEFINING THE CRITICAL ISSUES

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### The Case for Reform

On one side of debates over this fundamental threshold issue are those who take the view: "If it ain't broke, don't fix it", as articulated most recently in the *National Post* by Shawn Neylan (December 17, 2002). On the other side of the debate are those who argue that the sweeping criminalization of horizontal arrangements amongst competitors or potential competitors reflects an anachronistic approach to antitrust policy, which we have progressively redressed by decriminalizing merger review, monopolization (abuse of dominance) and, following recommendations by the VanDuzer report and the recent report of the Industry Committee of Parliament, may pursue with respect to many of the pricing offences that are presently criminalized under the *Competition Act*, in particular predatory pricing, price discrimination, and discriminatory advertising allowances.

In terms of empirical evidence – typically highly anecdotal – some commentators argue that the relative lack of success by the Crown in prosecuting contested conspiracy cases suggests that the criminal burden of proof combined with the nebulous standard of liability (undue lessening of competition) make it excessively difficult to secure convictions in meritorious cases. Other commentators claim that the very same factors inappropriately deter or "chill" benign or efficiency enhancing arrangements between competitors or potential competitors in the form of various kinds of joint ventures, strategic alliances, cooperative marketing, research or standard setting arrangements, etc. Yet other commentators argue that there is no strong empirical evidence of either of these two effects. Given that the empirical evidence on these issues is so fragmentary and inconclusive, I believe that the appropriate way of proceeding is on the basis of principle as we did in decriminalizing merger and monopolization policy.

At present, our laws on horizontal arrangements are a crazy quilt of ad hoc provisions that reflect no systematic or coherent set of principled rationales. For example, the *Competition Act* exempts certain kinds of joint ventures from merger review, but apparently not from the conspiracy provisions (section 95). Other provisions exempt specialization agreements between competitors if registered and approved by the Competition Tribunal applying a total welfare standard (section 86). Section 45 itself provides a qualified exemption for certain horizontal arrangements amongst competitors in section 45(3), but then seems to take away this exemption in section 45(4), which renders such arrangements subject to the general prohibition in section 45(1). Yet other provisions render bid-rigging (section 47) and agreements between or among financial institutions with respect to interest rates on deposits or loans (section 49) subject to *per se* illegality (excluding any undue or substantial lessening of competition tests).

As a matter of principle, I believe the case for reforming section 45 can be relatively simply stated. Every informed commentator acknowledges that many horizontal arrangements amongst competitors or would-be competitors are benign or socially beneficial, while some sub-set of such arrangements are not. Every informed commentator also acknowledges that drawing a distinction between these two sub-sets of horizontal arrangements

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*ex ante* is extraordinarily difficult. But note that both these propositions equally hold true for mergers, many pricing practices, and practices of dominant firms. With respect to the latter, the great policy breakthrough achieved by the *Competition Act* of 1986 was to remove large areas of Canadian competition policy from the straightjacket of the criminal law and to subject large classes of practices and arrangements to rule of reason review by the Competition Bureau and an expert tribunal, the Competition Tribunal, on a non-criminal basis. Ideally we would apply the same standard of review to all of these practices and arrangements, i.e., a substantial lessening of competition standard, and ideally we would consistently apply the same kind of efficiencies justification to all these practices and arrangements (if we can resolve what this means first of all in a merger context). Applying more stringent standards to horizontal arrangements amongst competitors or potential competitors than to mergers penalizes less complete and often more efficient forms of economic integration by contract relative to more complete and sometimes less efficient forms of economic integration by ownership (mergers), and indeed creates incentives for parties to pursue the latter strategy when it may be neither privately nor socially desirable.

This said, we then need to acknowledge that a sub-set of horizontal arrangements, however difficult to define, are likely to be unambiguously social welfare reducing and, because of low probabilities of detection, properly justify criminal sanctions to deter their occurrence. This sub-set of horizontal arrangements are often referred to as naked or hardcore cartels. I find these terms unhelpful and misleading. The arrangements that criminal sanctions need to focus on in the horizontal arrangement context are covert, rather than overt arrangements amongst competitors, that are likely to have the effect of maintaining or increasing prices in the market but because they are typically concealed require severe sanctions on discovery and conviction – quintessentially the role of the criminal law. It must be acknowledged that distinguishing this sub-set of malign horizontal arrangements from the larger set of benign or beneficial horizontal arrangements still represents a major legal and conceptual challenge which has largely eluded policy makers, courts, and tribunals in most jurisdictions to date.<sup>1</sup> I now turn to the critical issues that must be addressed in order to resolve, or at least mitigate, this conundrum.

### **Designing Reforms to Section 45**

As initially proposed by Presley Warner and myself, then elaborated and refined by Kennish and Ross<sup>2</sup>, and more recently refined further by commentators such as Quinn et al.<sup>3</sup>, we would largely abandon the effort to define and differentiate with complete precision *a priori* malign horizontal arrangements and benign or beneficial horizontal arrangements. Rather, we would create incentives for the parties or prospective parties to such arrangements to sort themselves into these two categories. The simplest version of such a proposal would envisage a criminal prohibition against horizontal arrangements amongst competitors or potential competitors that are likely to have the effect of maintaining or increasing prices in a market. However, parties voluntarily notifying an arrangement that may fall within this prohibition to the Competition Bureau, e.g., 42 days before it comes into effect (adopting by analogy the long-form merger filing timeline), would be immune from criminal liability and any form of civil liability that attaches under section 36 of the Act to criminal violations of the Act. The Commissioner of Competition, on receipt of a notification that is complete and accurate in its description of the terms of such arrangements, in the event that he or she concludes that it may substantially lessen competition in a relevant market, would be restricted to applying to the Competition Tribunal for interim and permanent relief. An amendment to the *Competition Act*

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would add to the list of reviewable practices under the Act horizontal arrangements amongst competitors or potential competitors that are likely to substantially lessen competition, rendering them subject to civil review by the Tribunal on the same basis as other reviewable practices under Part VIII of the Act, applying a consistent "substantial lessening of competition" test and subject to a consistent efficiencies justification.

While this proposal can and probably should be refined in various ways, the essence of it is that it assumes that only covert arrangements that have no social benefits will not be notified, because notification destroys, by definition, the private advantages of concealment from not only the competition authorities but from consumers and other affected parties, leaving them subject to appropriate criminal sanctions. The ability of the Commissioner to seek interim relief from the Tribunal prior to implementation of a notified arrangement provides him or her with adequate means of pre-empting unimplemented arrangements that have no redeeming social virtues. I would not permit the Commissioner to make any application to the Tribunal more than four months after notification unless there has been a material change to an agreement, which would require a fresh notification.

Thus, the reform proposals, despite second-order disagreements amongst the proponents on issues such as the extent of the required notification and its public nature, are in their essence quite simple. They would put Canadian competition law on horizontal arrangements on the same footing, for the most part, as all other practices and arrangements that are subject to civil review by the Competition Tribunal, but subject to a self-sorting mechanism that will ensure that covert and socially undesirable arrangements amongst competitors are left in the criminal law domain. For non-notified arrangements, the Commissioner could elect between proceeding criminally or civilly.

One last and difficult issue needs to be resolved under these proposals: what should be done about existing horizontal arrangements amongst competitors or potential competitors at the time that the new regime is proclaimed in force? The simplest solution would be to adopt a short grace period, e.g., six months, within which such arrangements may be notified to the Bureau, upon which the same consequences would follow as for new arrangements. This may mean that some arrangements that have no redeeming social virtues and would otherwise attract criminal liability will receive immunity from criminal liability and be subject only to civil review and remedies (although I would except from the immunity agreements with respect to which formal charges or investigations have been initiated prior to notification). This, while at one level undesirable, at another level may ensure the discovery of some arrangements that would otherwise be concealed and at least civil sanctions applied to them. With respect to existing arrangements that are not notified within the grace period, they should probably be subject to the existing criminal prohibitions (not the proposed *per se* criminal liability for non-notified new arrangements), in order to avoid the retrospective application of potentially more stringent new laws to them.

### **Conclusion**

I believe that the case, in principle, for reforming competition laws on horizontal arrangements amongst competitors or potential competitors is straightforward, and that the desirable direction of reform is equally straightforward. Undoubtedly, many useful refinements can be developed to these essential proposals upon further reflection and debate, and it is to this enterprise that we should be devoting our energies, rather than debating whether section 45 is or isn't broke, or what the essential direction of reform should take. Over the past two decades, we have

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radically reformed two of the three pillars of any nation's competition laws: mergers and abuse of dominance. However, our law on conspiracies contained in section 45 remains almost literally as it was enacted in 1889. Were the original framers so infinitely wise in this one domain? After 113 years, surely it is time to close the circle on the reform enterprise.

### Notes

- <sup>1</sup> P. Warner & M. Trebilcock, "Re-thinking Price Fixing Law" (1993) 38 McGill L.J. 679.
  - <sup>2</sup> T. Kennish & T. Ross, "Toward a New Canadian Approach to Agreements Between Competitors" (1997) 28 Canadian Business Law Journal 22.
  - <sup>3</sup> J. Quinn et al., "Section 45 Reform" (Paper presented at the Competition Law Roundtable, University of Toronto Faculty of Law, 13 December 2002).
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