

PROPOSAL FOR LEGISLATIVE CHANGES TO  
SECTION 45 OF THE COMPETITION ACT

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## PROPOSAL FOR LEGISLATIVE CHANGES TO SECTION 45 OF THE COMPETITION ACT

### Introduction

The authors were retained by the Commissioner of Competition (the “Commissioner”) to consider proposals for amending the conspiracy provision found in section 45 of the *Competition Act* (the “Act”). The results of our considerations are set out in a report dated April 11, 2001 and entitled “Legislative Framework for Amending Section 45 of the Competition Act” (the “Report”).<sup>1</sup> As noted in the Report, various commentators have criticized section 45 on the basis that it is both underinclusive, because it can allow manifestly anti-competitive arrangements to escape condemnation, and overinclusive, because it subjects all horizontal arrangements to criminal prohibitions, even where these may potentially increase welfare.

To address the above concerns, as well as other shortcomings of section 45 identified in the Report, the authors proposed various amendments to this provision. The main objective of such amendments is to create a system that efficiently and effectively proscribes hard-core cartel behaviour, while encouraging strategic alliances and collaborations among competitors that produce pro-competitive benefits. Ancillary to this objective is the desire to harmonize Canada’s laws with that of its major trading partners and, to the extent possible, provide a similar policy framework for competitor collaborations and mergers. The principal proposals for an amended section 45 as outlined in the Report are as follows:

- the section should prohibit hard-core cartel behaviour through a *per se* criminal provision;
- the section should precisely enumerate the types of arrangements that are subject to the *per se* prohibition;
- arrangements that do not fall within the *per se* prohibitions would be subject to a full rule of reason analysis pursuant to a civil provision; and

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<sup>1</sup> Available online at: <http://strategis.ic.gc.ca/pics/ct/russellrep2.pdf>.

- parties would be able to seek an exemption from the *per se* criminal provisions on the basis that the pro-competitive benefits of the potentially criminal arrangement outweigh its anti-competitive effects.

Subsequent to the publication of the Report, the authors were requested by the Commissioner to propose statutory language for an amended section 45. In the sections that follow, we have provided statutory language for draft “dual track” criminal and civil provisions. In addition to the proposed statutory language for an amended section 45, we have also included discussion and analysis of certain aspects of the draft provisions in a series of endnotes.

The draft criminal provision set out below provides *per se* condemnation of agreements, arrangements or understandings between competitors or potential competitors to fix prices, allocate markets or limit the supply of a product, subject to certain defences and exemptions. Among the defences discussed in detail below is a proposed “ancillary restraints” defence. Broadly speaking, an “ancillary” restraint is one that is functionally incidental or subordinate to the main objective of some other legitimate agreement or venture. In contrast, a “naked” restraint is an agreement which in substance has no other purpose than the mutual restraint of the parties. As discussed in detail below, the rationale for distinguishing “naked” from “ancillary” restraints, and shielding the latter from *per se* condemnation has several aspects. Namely, it is commonly recognized that certain desirable business transactions or integrations require restraints to make them either efficient or possible. For example, parties may refuse to purchase a business without an express agreement from the vendor not to compete. An ancillary restraints defence is also intended to respond to the inflexibility of *per se* prohibitions and the difficulty of limiting the domain of these rules to avoid condemning competitor collaborations that may literally or technically violate a *per se* prohibition, but which are not truly “hard-core cartels”. It may also be argued that an ancillary restraints defence is required to ensure that beneficial competitor collaborations are not subject to summary, criminal condemnation, so as to offend the principles of fundamental justice.

While, for the reasons described in further detail below, there is a great deal of support for an ancillary restraints defence, the precise scope and substance of this defence raises several

important questions. For example, assuming that the impugned restraint is considered to be merely ancillary to a broader principal agreement, what standard should be applied in determining the legality of the principal agreement? Namely, to avoid criminal condemnation, is it sufficient to establish that the principal agreement does not contravene the proposed *per se* prohibitions, or should there be a broader consideration of whether the overall agreement prevents or lessens competition substantially? Additionally, who should apply that standard: the Competition Tribunal or the courts? These issues and other aspects of the proposed ancillary restraints defence are discussed below.

In addition to the ancillary restraints defence, the legislation proposed by the authors includes a notification regime that permits parties to request that the Commissioner exempt an agreement, arrangement or understanding from prosecution under the criminal and civil provisions, similar to the advance ruling certificate procedure applicable to mergers. In addition, we have recommended that the Commissioner be empowered to issue “block exemptions” in respect of certain classes or types of agreements, arrangements or understandings. Among other benefits discussed below, determinations by the Commissioner in response to notifications by the parties will provide legal certainty that is critical to effective business planning. A number of commentators have opposed the adoption of a notification or pre-clearance system, based largely on a concern over the administrative burden resulting from such notifications and the European Community’s intention to abandon the notification system applicable to Article 81 of the EC Treaty. These issues have been reviewed in our Report and other earlier papers.<sup>2</sup> As we noted therein, the administrative burden arising from the European notification regime is not the result of any weakness inherent to notification and clearance systems *per se*, but rather is the product of the broad interpretation given to Article 81(1) of the EC Treaty by the European Commission. To address this issue, we continue to advocate a criminal provision that is significantly narrower than the prohibition found in Article 81(1) of the EC Treaty; namely, one corresponding to the proposed enumerated *per se* prohibitions.

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<sup>2</sup> See: “Amending Section 45 of the Competition Act: A Review of Models for Reform” presented at the 2002 Invitational Forum on Competition Law and “Implementing Canada’s New Conspiracy Law”, presented at the 2002 Canadian Bar Association Annual Fall Conference on Competition Law.

Under the proposed civil provision, an agreement may be prohibited where the Competition Tribunal finds that the agreement prevents or lessens, or is likely to prevent or lessen competition in a market. To encourage compliance and effective enforcement, the draft provisions provide the Tribunal with the power to issue administrative monetary penalties or to make other orders necessary to remedy the anticompetitive effects of impugned conduct. We have also recommended certain consequential amendments to section 36 of the Act to provide for a civil cause of action in circumstances where the Competition Tribunal finds that an agreement has resulted in a substantial lessening of competition.

The draft civil provision outlines a number of factors that may be considered by the Competition Tribunal in determining whether an agreement prevents or lessens competition. Among the factors that may be considered is whether the agreement has brought about or is likely to bring about gains in efficiency that will provide benefits to consumers, including competitive prices or products choices. The treatment of efficiencies in the draft provision is consistent both with the view that efficiencies should constitute a factor, rather than an absolute override, in the Competition Tribunal's review of agreements and that any claimed efficiencies must benefit consumers.

Each of the elements of the draft provisions is discussed in greater detail below.

## **The Draft Provisions**

### **45 (1) Conspiracy –**

Every person<sup>1</sup> who enters into an agreement or arrangement or arrives at<sup>2</sup> an understanding<sup>3</sup> with one or more competitors or potential competitors<sup>4</sup> of that person that has the purpose,<sup>5</sup> or has or is likely to have the effect,<sup>6</sup> of:<sup>7</sup>

(a) fixing, establishing, controlling, or maintaining the price at which they supply or offer to supply a product,

(b) allocating markets, customers, sales or territories for the supply of a product, or

(c) preventing, eliminating or lessening the production or supply of a product,

is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years or to a fine in the discretion of the court, or to both.<sup>8</sup>

### **45 (2) Evidence of conspiracy<sup>9</sup> –**

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

### **45 (3) Proof of intent –**

In a prosecution under subsection (1), in respect of:

(a) an agreement, arrangement or understanding alleged to have a purpose described in paragraphs (1)(a) through (c), it is necessary only to prove that the accused intended to and did enter into an agreement or arrangement or arrive at an understanding with that purpose; or

(b) an agreement, arrangement or understanding which is alleged to have, or is likely to have, an effect described in paragraphs (1)(a) through (c), it is necessary only to prove that the accused intended to and did enter into an agreement or arrangement or arrive at an understanding, and that the

accused knew or ought reasonably to have known that the agreement, arrangement or understanding would likely have that effect.

**45 (4) Defence**<sup>10</sup> –

Subject to subsection (5), no person shall be convicted of an offence under subsection (1) if that person establishes,<sup>11</sup> on a balance of probabilities,<sup>12</sup> that the agreement, arrangement or understanding or proposed agreement, arrangement or understanding is merely ancillary<sup>13</sup> to, and reasonably necessary for,<sup>14</sup> a principal agreement, arrangement or understanding involving the same participants, and the principal agreement, arrangement or understanding would not contravene subsection 45(1), when considered on a separate basis, or prevent or lessen, or be likely to prevent or lessen, competition substantially in a market, when considered together with the ancillary agreement, arrangement or understanding.<sup>15</sup>

**45 (5) Restrictions**<sup>16</sup> –

For the purposes of subsection (4),

(a) an agreement, arrangement or understanding is “merely ancillary” to a principal agreement, arrangement or understanding only where it is functionally incidental and subordinate or collateral to that principal agreement, arrangement or understanding, and

(b) an agreement, arrangement or understanding is “reasonably necessary” for a principal agreement, arrangement or understanding only where obvious and less restrictive alternatives to the agreement, arrangement or understanding are infeasible and inadequate.

**45 (6) Duplicate proceedings** –

No proceedings may be commenced under subsection 45(1) against a person against whom an order is sought under section 79, 79.1 or 92 on the basis of the same or substantially the same facts as would be alleged in the proceedings under that subsection.

**45 (7) Non-application of subsection 45(1)<sup>17</sup> –**

No proceedings may be commenced under subsection 45(1)

(a) in respect of an agreement, arrangement or understanding exempted from section 45 by a certificate issued by the Commissioner pursuant to subsection 79.2(2),

(i) without conditions or an expiry date,

(ii) with one or more conditions and the conditions are met, or

(iii) with an expiry date and the period specified in the certificate has not expired,

solely on the basis of information that is the same or substantially the same as the information on the basis of which the certificate was issued,

(b) in respect of an agreement, arrangement or understanding which falls within a class or type of agreement, arrangement or understanding exempted from section 45 by the Commissioner pursuant to subsection 79.2(3),

(c) in respect of an agreement or arrangement between federal financial institutions that is described in subsection 49(1),

(d) in respect of an agreement, arrangement or understanding that is entered into or arrived at only by companies each of which is, in respect of every one of the others, an affiliate,<sup>18</sup>

(e) subject to section 103, in respect of an agreement, arrangement or understanding for which the Commissioner has issued an advance ruling certificate pursuant to subsection 102(1), or

(f) subject to subsection 106(1), in respect of an agreement, arrangement or understanding that is the subject of a consent agreement registered with the Tribunal pursuant to subsection 105(3).

**79.1 (1) Anti-competitive agreements –**

Where, on application by the Commissioner, the Tribunal finds that an agreement, arrangement or understanding or proposed agreement, arrangement or understanding prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may

(a) in the case of an agreement or arrangement that has been entered into or understanding that has been arrived at, make an order directed against any party to the agreement, arrangement or understanding or any other person,

(i) prohibiting the agreement, arrangement or understanding, or

(ii) in addition to the order referred to in subparagraph (i), ordering all or any of those persons to pay, in such manner as the Tribunal may specify, an administrative monetary penalty in an amount not greater than \$15 million,<sup>19</sup> or

(b) in the case of a proposed agreement, arrangement or understanding, make an order directed against any party to the proposed agreement, arrangement or understanding or any other person, prohibiting all or any of those persons from entering into the proposed agreement or arrangement, or arriving at the proposed understanding.

**79.1 (2) Idem –**

For the purpose of subsection (1), the Tribunal shall not find that an agreement, arrangement or understanding or proposed agreement, arrangement or understanding prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

**79.1 (3) Additional or alternative order<sup>20</sup>** – Where, on an application under subsection (1), the Tribunal finds that an agreement, arrangement or understanding has had or is having the effect of preventing or lessening competition substantially in a market and that the order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as

are reasonable and as are necessary to overcome the effects of the agreement, arrangement or understanding in that market.

**79.1 (4) Factors to be considered regarding prevention or lessening of competition –**

In determining, for the purpose of section 79.1, whether or not an agreement, arrangement or understanding or proposed agreement, arrangement or understanding prevents or lessens, or is likely to prevent or lessen competition substantially, the Tribunal may have regard to the following factors:

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the agreement, arrangement or understanding or proposed agreement, arrangement or understanding;

(b) whether the business, or a part of the business, of a party to the agreement, arrangement or understanding or proposed agreement, arrangement or understanding has failed or is likely to fail;

(c) the extent to which acceptable substitutes for products supplied by the parties to the agreement, arrangement or understanding or proposed agreement, arrangement or understanding are or are likely to be available;

(d) any barriers to entry into a market, including

(i) tariff and non-tariff barriers to international trade,

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry,

and any effect of the agreement, arrangement or understanding or proposed agreement, arrangement or understanding on such barriers;

(e) the extent to which effective competition remains or would remain in a market that is or would be affected by the agreement, arrangement or understanding or proposed agreement, arrangement or understanding;

(f) the nature and extent of change and innovation in a relevant market;

(g) whether the agreement, arrangement or understanding or proposed agreement, arrangement or understanding has brought about or is likely to bring about gains in efficiency that will provide benefits to consumers, including competitive prices or product choices, that would not likely be attained in the absence of the agreement, arrangement or understanding;<sup>21</sup> and

(h) any other factor that is relevant to competition in a market that is or would be affected by the agreement, arrangement or understanding or proposed agreement, arrangement or understanding.

**79.1 (5) Restriction –**

For the purposes of paragraph 79.1(4)(g), the Tribunal shall not find that an agreement, arrangement or understanding or proposed agreement, arrangement or understanding has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

**79.1 (6) Duplicate proceedings –**

No application may be made under section 79.1 against a person against whom proceedings have been commenced under section 45 or against whom an order is sought under section 79 or 92 on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45, 79 or 92, as the case may be.<sup>22</sup>

**79.2 (1) Exemption certificate<sup>23</sup> –**

Any person that is, or may become, a party to an agreement, arrangement or understanding or proposed agreement, arrangement or understanding may apply to the Commissioner for a certificate exempting the agreement, arrangement or understanding or proposed agreement, arrangement or understanding from section 45 or 79.1, or both.

**79.2 (2) Idem –**

Where an application has been made for a certificate under subsection (1), and the Commissioner is satisfied by a party or parties to an agreement, arrangement or understanding or proposed agreement, arrangement or understanding that he would not have sufficient grounds to refer the matter to the Attorney General of Canada for prosecution under section 45 or to apply to the Tribunal under section 79.1, or both, the Commissioner may

(a) issue a certificate exempting the agreement, arrangement or understanding or proposed agreement, arrangement or understanding from section 45 or 79.1, or both, without conditions or an expiry date, or

(b) issue a certificate exempting the agreement, arrangement or understanding or proposed agreement, arrangement or understanding from section 45 or 79.1, or both, subject to one or more conditions or an expiry date, or to both.

**79.2 (3) Block exemptions<sup>24</sup> –**

The Commissioner may issue exemptions from section 45 or 79.1, or both, in respect of any classes or types of agreements, arrangements or understandings.

**79.2 (4) Non-application of section 45 and section 79.1 –**

Where,

(a) pursuant to subsection (2), the Commissioner issues a certificate exempting an agreement, arrangement or understanding or proposed agreement, arrangement or understanding from section 45 or 79.1, or both,

(i) without conditions or an expiry date,

(ii) with one or more conditions and the conditions are met, or

(iii) with an expiry date and the period specified in the certificate has not expired,

proceedings shall not be commenced under section 45 or 79.1, as the case may be, in respect of that agreement, arrangement or understanding or proposed agreement,

arrangement or understanding solely on the basis of information that is the same or substantially the same as the information on the basis of which the certificate was issued,

(b) pursuant to subsection (3), the Commissioner issues an exemption from section 45 or 79.1, or both, in respect of a class or type of agreement, arrangement or understanding, proceedings shall not be commenced under section 45 or 79.1, as the case may be, in respect of an agreement, arrangement or understanding which falls within the exempt class or type of agreement, arrangement or understanding,

(c) the agreement or arrangement is an agreement or arrangement between federal financial institutions as described in subsection 49(1), proceedings shall not be commenced under section 45 or 79.1 in respect of that agreement or arrangement,

(d) the agreement, arrangement or understanding is entered into or arrived at only by companies each of which is, in respect of every one of the others, an affiliate, proceedings shall not be commenced under section 45 or 79.1 in respect of that agreement, arrangement or understanding,

(e) subject to section 103, where the Commissioner issues an advance ruling certificate under section 102(1), proceedings shall not be commenced under section 45 or 79.1 in respect of an agreement, arrangement or understanding that is the subject of that advance ruling certificate, or

(f) subject to subsection 106(1), where a consent agreement is registered with the Tribunal pursuant to subsection 105(3), proceedings shall not be commenced under section 45 or 79.1 in respect of an agreement, arrangement or understanding that is the subject of that order.

#### **79.2 (5) Regulations –**

The Governor in Council may make regulations prescribing the procedure to be followed in respect of an application under subsection (1), including the information to be supplied to the Commissioner.

Proposed consequential amendment to section 36 of the *Competition Act*:

**36. (1) Recovery of damages –**

Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI,

**(b) conduct reviewable under section 79.1 in respect of which an order has been made by the Tribunal,<sup>25</sup> or**

(c) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

**36 (2) Evidence of prior proceedings –**

In any action under subsection (1) against a person, the record of proceedings in **the Tribunal or** any court in which that person was convicted of an offence under Part VI, **was the subject of an order in respect of conduct reviewable under section 79.1**, or convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI or **reviewable under section 79.1**, or failed to comply with an order of the Tribunal or another court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in the action.

**36 (3) Jurisdiction of Federal Court –**

For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.

**36 (4) Limitation –**

No action may be brought under subsection (1),

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

(i) a day on which the conduct was engaged in, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later;

**(b) in the case of an action based on conduct in respect of which an order has been made pursuant to section 79.1, after two years from**

**(i) a day on which the order of the Tribunal was made, or**

**(ii) the day on which any appeals from such order were finally disposed of,**

**whichever is the later; and**

(c) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from

(i) a day on which the order of the Tribunal or court was contravened, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later.

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<sup>1</sup> We note that by virtue of subsection 21(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, as am. (the “*Criminal Code*”), a person may be a party to the offence of conspiracy under subsection 45(1) as a (co-)principal, aider or abettor.

<sup>2</sup> The phrase “arrives at” an understanding appears in the conspiracy provisions of both the Australian *Trade Practices Act 1974* (section 45) and the New Zealand *Commerce Act 1986* (section 27). We believe that inclusion of the words “arrives at” usefully serves to confirm both the informality of the “understandings” contemplated by subsection 45(1) (*see* note 3, *infra*) and that the method of achieving such “understandings” is immaterial for the purposes of this provision. In *Trade Practices Commission v. Nicholas Enterprises Pty. Ltd. (No. 2)*, [1979] 40 F.L.R. 83 at para. 40 (F.C.A.), a case under section 45 of the *Trade Practices Act*, the Federal Court of Australia commented that whereas the notion of “entering into an understanding” may be taken as requiring that the understanding occur at a particular moment in time, between two or more persons in each other’s presence, the phrase “arrived at an understanding” suggests that that the understanding may occur over a period of time, such as where a proposal for concerted action is adopted by the other party through a series of acts. For case law interpreting and applying the terms “arrangement” and “understanding” under the *Trade Practices Act* and the *Commerce Act* see: *CC v. Wellington Branch NZ Institute of Driving Instructors* (1990), 4 TCLR 19 (H.C.); *CC v. Caltex New Zealand Ltd.*, [1998] 2 NZLR 78 (H.C. (Commercial List)); *Top Performance Motors Pty. Ltd. v. Ira Berk (Queensland) Pty. Ltd.* (1975), 5 A.L.R. 465 (Aust. Industrial Court); *New Zealand Apple and Pear Marketing Board v. Apple Fields Ltd.*, [1991] 1 NZLR 257 (P.C.); *CC v. Caltex NZ Ltd.* (1999), 9 TCLR 305 (H.C.); see more generally Russell V. Miller, *Miller’s Annotated Trade Practices Act 1974*, 23<sup>rd</sup> ed. (2002). Notably, “arrived at” is defined in subsections 2(1) and 4(1) of the *Commerce Act* and the *Trade Practices Act*, respectively, as follows: “arrive at in relation to an understanding, includes reach or enter into”. [emphasis added]

<sup>3</sup> The proposed language (*i.e.*, “Every person who enters into an **agreement or arrangement or arrives at an understanding**”) represents a codification of the jurisprudence interpreting the present language of subsection 45(1) of the *Competition Act* (the “*Act*”) – as detailed below, the term “understanding” is found in the jurisprudence interpreting section 45 – as well as an effort to ensure, as far as possible, that the amended conspiracy provision is interpreted by the judiciary as

encompassing all forms of cooperation or concerted action, regardless of how informal. The need to provide precision in the language is underscored by the *per se* nature of the offence.

The prevailing view in the case law is that the words “conspires, combines, agrees or arranges” express a single functional concept (typically referred to as an “agreement”); namely a consensus, tacit or explicit, to effect a purpose proscribed by section 45: see, e.g., *Papalia v. The Queen; The Queen v. Cotroni*, [1979] 2 S.C.R. 256 at 277 and 276, Dickson J.; *The King v. Gage (No. 2)* (1908), 13 C.C.C. 428 at 449-50 (Man. C.A.) [“The words ‘conspires, combines, agrees, or arranges’ are used synonymously in the first part of sec. 498 [of the *Criminal Code*] ... These four words, when found in an indictment, are used collectively or cumulatively to denote the single idea of conspiracy ... These words, taken either collectively or individually, or any one of them, express the act of agreeing to do the unlawful thing”]; *R. v. Cominco Ltd.*, [1980] A.J. No. 524 at para. 35 (Alta. S.C.T.D.); *R. v. McGavin Bakeries* (1951), 101 C.C.C. 22 at 44, 50 (Alta. S.C.); *R. v. Canadian General Electric Co. Ltd.* (1976), 15 O.R. (2d) 360 at 375 (H.C.J.) [“In short, there is an onus on the Crown to prove that an agreement or arrangement, explicit or tacit, that was in violation of the Act, was in fact concluded”].

Accordingly, in applying section 45, the courts have not attempted to classify the concerted action as a “conspiracy”, “combination”, “agreement” or “arrangement”. More significantly, for present purposes, Canadian courts have, in numerous cases, employed the term “understanding”, in place of or in combination with the words “conspire, combine, agree or arrange”, to describe the requisite act of agreeing. See, for example:

- *R. v. Armco Canada Ltd. et al.* (1976), 70 D.L.R. (3d) 287 (Ont. C.A.), aff’g (1975), 6 O.R. (2d) 521 (H.C.J. ), where the Court of Appeal for Ontario stated (at 296): “... all four words [*i.e.*, “conspire, combine, agree or arrange”] contemplate a **mutual arriving at an understanding or agreement** between the accused and some other person to do the acts forbidden by paras. (a), (b), (c) or (d) of s. 32 [of the *Combines Investigation Act* . . . for s. 32(1)(c) there must be a **mutual arriving at an understanding** or agreement”. [emphasis added] In this case, convictions were entered at first instance and affirmed on appeal;
- *R. v. Abitibi Power & Paper Co. Ltd.* (1960), 131 C.C.C. 201 (Que. Q.B.), where Batshaw J. stated (at 215, 228): “I shall first consider the evidence relating to the nature of the **understandings arrived at...**” and, later, “The firm nature of the **understanding** is also demonstrated by the considerable trouble taken to run down rumours of violations...”. [emphasis added] Convictions were entered by Justice Batshaw;
- *R. v. Singer et al.*, [1931] O.R. 202 (H.C.J.), where the Court endorsed the following definition of “combine” (at 215): “a combination, contract, **understanding**, or agreement,

expressed or implied, between two or more persons, corporations, or firms and associations of persons”. [emphasis added] A “combine” was found within the meaning of section 498 of the *Criminal Code*;

- *R. v. Canadian General Electric Co. Ltd.*, *supra*, where the Court stated (at 378): “The Crown argues that the sum of the whole of the evidence warrants the inference that there was a **tacit understanding** that if C.G.E. put out a plan it would be followed...”. [emphasis added] Pennell J. convicted the accused;
- *R. v. J.J. Beamish Construction Co. Ltd.*, [1966] 2 O.R. 867-903 (H.C.J.), *aff’d* (1968) 2 C.C.C. 5 (Ont. C.A.), a case involving an alleged conspiracy to divide territorial markets as well as collusive tendering schemes, where the Court of Appeal found (at 15) “an **understanding** [under subsection 32(1)(c) of the *Combines Investigation Act*] among the accused that certain members of the group were eligible for the award of contracts for specified municipalities, and some of the other members co-operated by presenting higher bids so as to ensure that the contract would be given to the party thus predetermined”. The accused were acquitted on other grounds;
- *R. v. Clarke Transport Canada Inc.*, [1995] O.J. No. 3395 (Gen. Div.), where Moldaver J. found as follows (at paras. 3, 55-56, and 59) in respect of an alleged customer allocation agreement (or “customer protection scheme”) among named and unnamed providers of pool car freight forwarding services:

the most significant [means employed to implement and maintain the scheme] was the exchange of documents referred to as Special Rate Notices (SRN’s). The SRN’s, prepared by the member-operators, contained, *inter alia*, the name of a particular shipper/customer, the product to be shipped and the rate being charged by the incumbent carrier. The regular exchange of these SRN’s enable the participants to keep abreast of the rates being charged by member incumbent carriers. Armed with this information, it was **understood** that the others would not undercut those rates when quoting to such customers. [emphasis added]

While Moldaver J. found an agreement within the meaning of section 45 of the *Competition Act*, undue influence was not established.

- *R. v. Anthes Business Forms Ltd. and 11 Other Corporations* (1975), 26 C.C.C. (2d) 349 (Ont. C.A.), where the Court of Appeal for Ontario stated (at para. 104): “To succeed the Crown is obliged to prove the existence of an agreement or **understanding**, outside of or collateral to, the Institute agreement, the purpose of which was to prevent or lessen competition referred to in the indictment”. [emphasis added] An agreement or understanding was not found by the Court.

Further, Canadian courts have, in principle, if not (always) in practice, defined the boundaries of the “requisite act of agreeing” broadly, inferring agreement “by proof of a course of conduct” (see *R. v. Northern Electric Company, Limited et al.*, [1955] O.R. 431 at 434 (H.C.)) “several isolated

doing” (see *Paradis v. The King*, [1934] S.C.R. 165 at 168) or other circumstantial evidence, to condemn agreements that fall short of a contract in detail or commitment; see, for example:

- *R. v. Canadian General Electric Co. Ltd.*, *supra* at 375, where the Court said “In short, there is an onus on the Crown to prove that an agreement or arrangement, **explicit or tacit**, that was in violation of the [*Combines Investigation Act*], was in fact concluded”. [emphasis added] As noted above, the accused were convicted in this case;
- *R. v. Eddy Match Co. Ltd. et al.* (1951), 17 C.P.R. 17 at 23 (Que. K.B.), *aff’d* (1953), 109 C.C.C. 1 (Que. K.B., Appeal Side), where the Court stated:

There is no cause for surprise that one does not find in the minute books the text of the agreements or arrangements which could have been made by the defendant. In the case of such offences, one seldom finds, if ever, concrete, clear-cut evidence of agreement the purpose of which is to create a monopoly or operate it.

It cannot be expected, especially, that such evidence will be found in the minute books of a company. Neither can one be expected to be in a position to establish that the officers of commercial corporations met and agreed in an explicit manner to organize a trust or a monopoly with a view to brush aside all competition.

It is sufficient, as for any other criminal matter, to be in a position to draw from the whole of the evidence that an agreement, even tacit, was in fact concluded, that a common plan was conceived and set in operation to violate the [*Combines Investigation Act*], regardless of the results obtained.

The accused were convicted in this case;

- *R. v. Northern Electric Co. Ltd. et al.*, *supra* (at 434, 451 and 452):

A conspiracy may be proved by proof that the parties accused actually met together and entered into an alleged agreement, or it maybe inferred by proof of a course of conduct.

The agreement **arrived at was not set out in any formal way**. In fact, great care was taken to conceal all evidence of any agreement...

... Notwithstanding that there was no formal type of association, the evidence demonstrates quite clearly that each one of the accused expected the others to adhere rigidly to the agreement with respect to all matters decided, and they all agreed that they

would do so. The method of secrecy followed was designed to leave as little written record as possible.

...

The method of communication was principally what can be most appropriately referred to as “circulating memoranda”. A particular form of memorandum and code of letter were adopted and used. [emphasis added]

The accused were convicted under paragraph 32(1)(c) of the *Combines Investigation Act*; and

- *R. v. McGavin Bakeries, supra* (at 36):

... the Crown ... admits that it has no evidence that any formal agreement was actually signed. The Crown has, however, adduced in evidence a massive amount of factual material in which are to be found a number of informal signed agreements ... from all of which its says that the inescapable inference to be drawn by [the Court] is that there was the conspiracy charged. [emphasis added]

The accused were convicted in this case.

The significance of the preceding statements of principle (and convictions) must be appreciated in light of the government’s overall prosecutorial track record under section 45 (and its predecessors). The enforcement record under section 45 has been examined by Robert Jackson and Harry Chandler (“Beyond Merriment and Diversion: The Treatment of Conspiracies under Canada’s Competition Act” (2000)), W.T. Stanbury (“Legislation to Control Agreements in Restraint of Trade in Canada: Review of the Historical Record and Proposals for Reform” in R.S. Khemani and W.T. Stanbury, eds., *Canadian Competition Law and Policy at the Centenary* (1991) [discussed in Al Gourley *et al.*, “A Report of Canada’s Conspiracy Law: 1889 – 2001 And Beyond” (2001) (the “Gourley Proposal”)] and C. Green (*Canadian Industrial Organisation and Policy*, 3<sup>rd</sup> ed (1990) [discussed in the Gourley Proposal, *supra*]). In pertinent part, the Gourley Proposal summarizes the findings of the Stanbury and Green studies, which review the period from 1889 to 1990 – the period in which almost all of the cases referred to above were decided – as follows:

- “the Crown’s threshold for commencing actions against conspirators has been very high and most prosecutions have ‘cried out’ for action”. In this regard, Gourley *et al.* note Stanbury’s conclusion that “the Crown [may be] failing to test the *limits* of the law by bringing cases that

require more imaginative approaches” and Green’s view that “Most price-fixing cases that have come before the courts involve all or almost all of the important firms in the industry”. The authors also observe that “[t]o be fair, the Crown has not received much support from the judiciary when it has prosecuted ‘tough cases’: see, for example, *R. v. Bayda and Associates Surveys Inc.* (1997), 78 C.P.R. (3d) 203 (Alta. Q.B.)”; and

- “The Canadian record in the enforcement of conspiracies [between 1889 and 1990] is not impressive ... [Since 1889,] [t]he total number of cases in which the Crown has *successfully* litigated a conspiracy case is less than 30. Of those successful cases, the vast majority of them have involved monopoly or “virtual monopoly” aggregate market share levels. We suspect that Stanbury’s conclusion that ‘[t]he conspiracy provisions of the *Competition Act* and its predecessors have been a *failure* in terms of protecting the public interest . . .’ has more than a grain of truth”. [emphasis in the original; citations omitted]

Similarly, Jackson *et al.*’s review of the record of enforcement of section 45 between 1980 and 2000 reveals that of 22 contested cases under section 45 in that time frame, the Crown has succeeded in only three. Of the 17 cases involving acquittals or discharges, the authors report that 6 were due to a failure to establish the existence of an agreement. These findings are of significant concern considering that all of these prosecutions involved hard-core cartel behaviour, such as agreements to fix prices or share markets. In this regard, Jackson *et al.* observe:

A review of all the cases listed in Appendix I reveals that every single case involved blatant hard-core anticompetitive behaviour - primarily price-fixing, market-sharing or bid-rigging. None involved what are sometimes called strategic alliances, for example, competing firms entering into partnerships to facilitate the transfer of knowledge, skills and technologies; to enter new markets at a lower cost and with less risk; to enhance innovation and growth; to bring products to the market more quickly; to overcome legal or trade barriers; to realize economies of scale and scope; or to be more competitive against larger rivals with wider product lines.

In our view, use of the terms “agreement”, “arrangement” and “understanding” (in combination) is desirable as a means of ensuring that all forms of cooperation or concerted action, regardless of how informal, are encompassed within the scope of the amended provision. While an agreement is ordinarily but not necessarily formal and legally enforceable, understandings, and perhaps also arrangements, are often informal and may be unenforceable -- “binding in honour only” (see *R. v. Abitibi Power & Paper Co. Ltd.*, *supra* at 224-25, 226 and 228) -- so that the parties may be free to withdraw from their understanding or to act inconsistently with it. Further, the juxtaposition of these terms, and use of the phrase “arrives at an understanding” in particular, is meant as a clear

indication to the courts that subsection 45(1) is to be interpreted broadly as prohibiting informal, tacit agreements or “conscious parallelism plus”, that is, conscious parallelism coupled with “specific avoidable acts”, “facilitating practices”, enforcement activities or conduct otherwise inconsistent with the practices of genuine competitors. For a discussion of “facilitating practices” and “specific avoidable acts” see George Hay, “Oligopoly, Shared Monopoly and Antitrust Law” (1982), 67 Cornell L.R. 439 at 453-56 and Davies, Ward & Beck, *Competition Law of Canada*, vol. 1 (1988+) at 8-46, 47. See also, e.g., *R. v. Armco Canada Ltd. et al.*, *supra*; *R. v. Canadian General Electric Co. Ltd.*, *supra*; cf. *R. v. Anthes Business Forms Ltd.*, *supra*.

Notably, both the criminal and civil provisions advocated by Tim Kennish and Tom Ross in “Toward a New Canadian Approach to Agreements between Competitors” (1997) 28 Can. Bus. L.J. 22” (the “Kennish-Ross Proposal”), employ the words “agreement”, “arrangement”, and “understanding”. Similarly, the criminal prohibition recommended by Presley Warner and Michael Trebilcock in “Rethinking Price Fixing Law” (1993) 38 McGill L.J. 679 (the “Warner–Trebilcock Proposal”) uses the terms “contract”, “agreement” and “understanding”.

<sup>4</sup> We believe that it is preferable to apply the *per se* criminal prohibition to “competitors or potential competitors”, as opposed to “persons” or simply “actual competitors”. We do not favour use of the term “persons” on the basis that this would extend the *per se* prohibition to vertical agreements.

In our view, designation as a “hard-core cartel” and *per se* condemnation is appropriate only where the category of restraint at issue in substance has no other purpose or effect, whether actual or likely, and no consideration on either side other than the mutual restraint of trade, viz. increasing prices or decreasing output: see Phillip Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application*, vol. XI (1998) at 210; Organization for Economic Cooperation and Development (“OECD”), *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels under National Competition Laws* (April 2002) at 5-6; Paul G. Scott, “Price Fixing and the Doctrine of Ancillary Restraints”, (1999) 7 *Canterbury Law Review* 403 at 407-408; *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979). There is substantial support for the conclusion that vertical, maximum price-fixing agreements and vertical, non-price restraints do not satisfy this standard. As Areeda and Hovenkamp observe (at 199):

Unlike agreements among rivals, vertical agreements are customary and even an indispensable part of the market system. They are not even presumptively “suspect”. First of all, by definition, vertically related firms exist in a buyer-seller relationship, and agreements are essential to buying and selling. Thus any rational antitrust complaint cannot be to the mere fact of a buyer-seller agreement, but must be to some other provision contained in the agreement.

Second, although vertical agreements may restrict the freedom of action of one or more contracting parties, in a purely vertical contract the parties to the agreement are not competitors. Although a firm may be able to enlarge its market power by restraining the behavior of its buyers or suppliers, anticompetitive effects are thought to be the exception rather than the rule.

Even when vertical agreements have potentially anticompetitive consequences aimed at rivals, the overall effect resembles that of a unilateral act more than that of a concerted arrangement among competitors ...

In sum, even “exclusionary” vertical agreements do not present the same threat *as a class* that horizontal agreements present. The majority of vertical agreements either are procompetitive or have no competitive consequences whatsoever.

See also *Green Paper on Vertical Restraints in EU Competition Policy* (1997) at p. iii-iv, 17-19 and 26 (“Green Paper on Vertical Restraints”); *Guidelines on Vertical Restraints* (2000/C 291/01) (“EC Guidelines on Vertical Restraints”); and Commission Regulation (EC) No. 2790/1999 (“EC Block Exemption Regulation on Vertical Restraints”).

Consistent with the foregoing, US jurisprudence establishes that, apart from minimum resale price maintenance which is *per se* illegal, vertical restraints are to be reviewed under the rule of reason: see *State Oil v. Khan*, 522 U.S. 3 (1997); see generally *Brief of the United States and the Federal Trade Commission in State Oil v. Khan*; “Remarks of Commissioner Sheila F. Anthony” (March 19, 1998): Presented at the 13<sup>th</sup> Annual Advanced ALI-ABA Course of Study on Vertical Issues in Federal Antitrust Law. In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), the US Supreme Court:

canvassed the “substantial scholarly and judicial authority supporting th[e] economic utility” of vertical non-price restraints ... That authority showed that although such restrictions (and, in particular, territorial restraints) reduced *intra*brand competition, they had significant “redeeming virtues” in promoting *inter*brand competition by allowing a manufacturer to achieve more efficient distribution of its products....

Likewise, the criminal cartel offences in the UK *Enterprise Act* and the Irish *Competition Act 2002* do not apply to vertical agreements. In Australia, where amendments to Part IV (anti-competitive conduct) of the *Trade Practices Act* are being considered, including the creation of *per se* criminal offences for hard-core cartels, the Australian Competition & Consumer Commission (“ACCC”) has opposed the criminalization of vertical agreements: see ACCC, “Submission to the **Trade Practices Act** Review” (June 2002) at 11, 38. Finally, it is notable that there is no support in recent proposals for reform for including vertical agreements within the ambit of an amended criminal provision: see Warner-Trebilcock Proposal, *supra* note 3; Kennish-Ross Proposal, *supra* note 4; 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 consequence*, 2<sup>nd</sup> Session, 36<sup>th</sup> Parl., 1999-2000 (1<sup>st</sup> reading 6 April 2000); Gourley Proposal, *supra* note 3; Yves Beriault *et al.*, “Proposed Amendments to Section 45 of the Competition Act” (2001) (“Beriault Proposal”); Robert S. Russell, Adam F. Fanaki and Davit D. Akman, “Legislative Framework for Amending Section 45 of the *Competition Act*” (2001) (“Russell Proposal”); Robert S. Russell, Adam F. Fanaki and Davit D. Akman, “Implementing Canada’s New Conspiracy Law” (October 2002) (collectively, the “Proposals”).

As for vertical, minimum price restraints, these are already subject to the *per se* prohibition against price maintenance under section 61 of the *Act*.

We are also of the view that limiting the proscription to “actual competitors” would ignore the reality that agreements among potential competitors to allocate markets, for example, are as egregious as agreements of this kind between actual competitors; both deprive consumers of the benefits of competition. We recognize that the phrase “competitors or potential competitors” invites (if not requires) a market definition analysis, with its attendant cost in decreasing the ease with which the *per se* rules may be applied. That being said, experience in Australia and New Zealand under those countries’ respective anti-cartel statutes suggests that this cost will be *de minimis* in the vast majority of cases. The approach adopted by Australian and New Zealand

courts on this issue is usefully described in *Gault on Commercial Law*, looseleaf (1994) as follows:

*Is a market definition exercise required to determine whether two or more parties are “in competition with each other”?*

... a limited market identification exercise is likely to be called for. But as Heerey J observed in *ACCC v J McPhee & Son (Australia) Pty Ltd* (1997) ATPR 41-570, at p43,921, the requirement of competition in a market does not mean that in a price fixing case “exhaustive market definition, in the sense of pleading and proof of the full nature and extent of the market, is required”. As long as the parties compete with each other for existing or potential customers within the market, the requirement will be satisfied. Under his Honour’s approach, the central question is whether the parties are offering, or contemplating the offer of, the supply (or acquisition) of the same goods or services to (or from) the same existing or potential customers. Once this is established, the market issue is likely to be settled as it is open to a Court to conclude that the parties are in competition with each other in a market for at least the supply (or acquisition) of such goods or services.

In any event, in view of our preceding comments indicating the undesirability of summarily condemning vertical, maximum price and non-price restraints, this cost may be considered necessary.

<sup>5</sup> The prohibition of agreements, arrangements and understandings with a “purpose” described in paragraphs 45(1)(a), (b) or (c) will permit the prosecution and condemnation of agreements, arrangements and understandings with anti-competitive and, hence, unlawful purposes, without proof as to their effects. We favour this enlargement of the current effects-based prohibition on several grounds. Principally, the proposed amendment promises to enhance the efficacy of Canada’s conspiracy law by broadening the ambit of the prohibition, consistent with the general law of criminal conspiracy (see section 465 of the *Criminal Code*), to capture agreements, arrangements and understandings between two or more competitors or potential competitors to do an unlawful act (as described in paragraph 45(1)(a), (b) or (c)): see, e.g., *United States of America v. Dynar*, [1997] 2 S.C.R. 462 at paras 86, 98 [“It is the agreement that is the *actus*, and the intention to do the act that is unlawful (the *mens rea*) that turns the agreement into an *actus reus*, or a ‘guilty act’”]; *DPP v. Nock and Alford* (1978), 67 Cr. App. R. 116 at 126-27 (H.L.) [“the offence of conspiracy is committed when an agreement to commit, or to try to commit, a crime is

reached, whether or not anything is, or can be, done to perform it”] quoted in *R. v. Dungey* (1979), 51 C.C.C. (2d) 86 at 94 (Ont. C.A.).

<sup>6</sup> The proscription of agreements, arrangements or understandings based on their unlawful “effects” is consistent with both US and European law: see Russell Proposal, *supra* note 4 at 9. Further, concerns about overbreadth (*i.e.*, the possibility that the morally innocent may be punished), may be met by the proposed paragraph 45(3)(b) which, consistent with *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 (“PANS”), establishes a dual *mens rea* requirement for the effects-based prohibition: see Gourley Proposal, *supra* note 3 at 13-15, 25.

Some maintain, however, that effects-based *per se* prohibitions are likely to be overbroad and that, accordingly, it may be preferable to restrict the ambit of subsection 45(1) by referring exclusively to the “nature” or “object” of agreements, arrangements or understandings, rather than to their effect (or purpose): see Beriault Proposal, *supra* note 4 at 17-18 [“The *per se* criminal prohibition should only apply to cartels which are aimed specifically at fixing prices ... not to agreements which might indirectly influence prices...”]; see also Canadian Bar Association, National Competition Law Section (“CBA”), “Submission on the Public Policy Forum Consultation Concerning Amendments to the *Competition Act* and *Competition Tribunal Act*” (July 2000) at 44-45; *but cf.* Kennish-Ross Proposal, *supra* note 3 at 65; Gourley Proposal, *supra* note 3 at 13-15, 25; Bill C-472, *supra* note 4. An analysis of the cases under section 45 indicates that limiting the new provision to a purpose-based prohibition with a subjective *mens rea* test could severely limit the scope of the *per se* prohibitions and may, ultimately, impair the effectiveness of the amended criminal conspiracy provision. Also, we do not find the arguments regarding overbreadth to be supported by the jurisprudence.

<sup>7</sup> It is widely accepted that, with rare exceptions (of which more will be said below in the context of our discussion of ancillary restraints), agreements to fix prices, rig bids or allocate markets and customers are appropriately designated as “hard-core cartels”. Indeed, the Proposals (the Warner-Trebilcock Proposal excepted) recommend that the preceding categories of agreements, apart from bid rigging which is already *per se* illegal under section 47 of the *Act*, should be subject to a new *per se* criminal prohibition. Likewise, the “Government Response to the Report of the House of Commons Standing Committee on Industry, Science and Technology” proposes enumerated *per se* prohibitions limited to agreements to fix prices, allocate markets and restrict supply. The OECD (see, *e.g.*, OECD, *Hard Core Cartels*, Meeting of the OECD Council at the

Ministerial Level, 2000 (“OECD 2000”)) and various national competition law regimes also reserve the “hard-core” label and criminal (*per se*) treatment for some or all of those categories of agreements. For example:

- in the United States, absent, *inter alia*, novel issues of law or fact or an “ancillary restraint”, agreements to rig bids, fix prices or output, allocate customers, suppliers, or markets are typically treated as criminal and *per se* illegal under section 1 of the *Sherman Act*: see Federal Trade Commission and US Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (April 2000) at 8 (“Joint Guidelines”) [in the Russell Proposal, *supra* note 4]; ACCC, *supra* note 4 at 22;
- in the United Kingdom, the *Enterprise Act* creates a *per se* criminal offence for agreements to rig bids, fix prices, share markets or customers or restrict output;
- in Ireland, the *Competition Act 2002* imposes criminal and *per se* liability for price fixing, bid rigging and market sharing; and
- in Australia, price fixing agreements (see section 45 of the *Trade Practices Act*), as well as, bid rigging, output restriction, primary boycotts and market sharing agreements (see sections 4D and 45 of the *Trade Practices Act*) are already *per se* civil offences: see ACCC, *supra* note 4 at 22. Apart from primary boycotts, the ACCC has proposed *per se* criminal liability for each of these categories of agreements.

Notably, there remains some difference of opinion, at least among the Proposals, as to whether boycotts should also be subject to criminal prohibition. Both Bill C-472 and the Gourley Proposal recommend their inclusion in an amended criminal provision. It is arguable, however, that agreements of this nature, where supported by legitimate business justifications, are often on balance beneficial and, as such, are more appropriately dealt with civilly, under a rule of reason analysis: see Beriault Proposal, *supra* note 4 at 21-22. Unlike price fixing and other “hard-core” restraints, there is no consensus that boycotts are inherently anti-competitive such that they should be presumed to be illegal without inquiry as to the precise harm they have caused or the defendants’ justification for their use. Indeed, the federal government does not propose to make boycotts *per se* illegal: see Government Response, *supra* note 7. Similarly, the OECD’s definition of hard-core cartels does not include boycotts: see OECD (2000), *supra* note 7.

In the United States, the (categorical) *per se* illegality of all boycotts has been squarely rejected by the Supreme Court: see *Rothery Storage & Van Co., et al. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 216 (DC Cir. 1986); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985); see more generally, William E. Cohen, “*Per Se Illegality and Truncated Rule of Reason: The Search for a Foreshortened Antitrust Analysis*” (1997). US

courts apply the *per se* rule only where the defendants possess market power or have “exclusive access to an element essential to effective competition” or where the boycott implements or enforces price-fixing or market division conspiracies: see *Northwest Wholesale Stationers*, 472 U.S. at 295-97; see, e.g. *Federal Trade Commission v. Superior Trial Lawyers Association et al.*, 493 U.S. 411 at 432-36 (esp. 436 n. 19) (1990); *Re Bascom Food Products Corporation et al.*, 715 F. Supp. 616, 632-34 (D.C. Cir. 1989). Citing, *inter alia*, *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1579-80 (11<sup>th</sup> Cir. 1991), Cohen (*supra*) asserts that lower courts have “included an absence of plausible justifications as an additional requirement for *per se* condemnation of some group boycotts”. [emphasis added]

In the UK, boycotts are not proscribed by the newly created cartel offence under the *Enterprise Act*. In Australia, the *per se* criminal prohibitions proposed by the ACCC would not apply to group boycotts.

In summary, our review of cartel legislation in other jurisdictions, as well as judicial opinion and academic analysis supports the proposed criminalization of the following categories of agreements:

- agreements to fix prices;
- agreements to limit output; and
- agreements to allocate markets or customers.

<sup>8</sup> Section 47 (Bid-rigging) of the *Act* supports a fine in the discretion of the court, as do amendments to the *Act* pursuant to Bill C-23. For example, on conviction on indictment under the newly enacted section 53 (Deceptive notice of winning a prize) an accused is liable to a fine in the discretion of the court (as well as or instead of imprisonment). Also, the administrative monetary penalty of up to \$15 million which may now be imposed by the Competition Tribunal (the “Tribunal”) pursuant to section 79.3 of the *Act* is 50% higher than the maximum fine that a court may currently impose under section 45, a provision which, as the Supreme Court recognized in *PANS*, *supra* note 6, lies “at the core of the criminal part of the *Act*” and constitutes arguably the most serious offence under that statute.

<sup>9</sup> This subsection reproduces subsection (2.1) of the current section 45. Subsection (2.1) was enacted as part of the 1986 amendments in response to the judgment of the Supreme Court of Canada in *Atlantic Sugar Refineries Co. v. A.G. Can.*, [1980] 2 S.C.R. 644 which was interpreted by some as holding that “tacit agreements” fall outside the ambit of the conspiracy provision (then section 32 of the *Combines Investigation Act*, R.S.C. 1985, Chap. C-34). As Robert Nozick explains, subsection (2.1) was intended to make clear that tacit agreements, in the sense of agreements proved by circumstantial evidence alone, fall within the scope of section 45: see *The 2003 Annotated Competition Act* (2002) at 88.

<sup>10</sup> With the exception of the Warner-Trebilcock Proposal - as described below, this Proposal relies on an optional notification system providing for “immediate and permanent immunity from criminal liability” to moderate the overbreadth of its proposed *per se* prohibition against price fixing: see Warner-Trebilcock Proposal, *supra* note 3 at 717-18 – each of the Proposals recommend a “defence” to the proposed *per se* criminal prohibitions which relies on the distinction between “naked” and “ancillary” restraints.

Broadly speaking, an “ancillary” restraint is one that is “functionally incidental to [*i.e.*, subordinate and collateral to and promotes or facilitates the main objective of] some other legitimate productive transaction or venture involving the parties”: Peter C. Carstensen *et al.*, “The Per Se Illegality of Some Naked Restraints: A [Re]conceptualization of the Antitrust Analysis of Cartelistic Organizations” (2000) *The Antitrust Bulletin* 349 at 355-56; see also Gary R. Roberts, “The Evolving Confusion of Professional Sports Antitrust, The Rule of Reason, and the Doctrine of Ancillary Restraints” (1988) 61 S. Cal. L. Rev. 945 at 998 (quoting Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978)) [“To be ancillary, and hence lawful, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction ... in the sense that it makes the main transaction more effective in accomplishing legitimate purposes”]; *United States v. Addyston Pipe & Steel Co. et al.*, 85 F. 271, 279 and 280-83 [“[a] restriction on competition [embodied in an agreement between actual or potential competitors] attached to an otherwise lawful ... transaction and reasonably related to effecting or protecting the fruits of that transaction”]. In contrast, a “naked” restraint is an agreement which in substance has no other purpose and no other consideration on either side than the mutual restraint of the parties; it is an “agreement furthering no lawful business transaction or enterprise”: Roberts, *supra* at 992-93. As Carstensen *et al.* explain (at 354): “[t]he distinction

between naked and ancillary restraints relates to the functional relationship or lack thereof between the restraint and [the principal] transaction involving the parties to the restraint”.

The rationale for distinguishing “naked” from “ancillary” restraints, and shielding the latter from *per se* condemnation has several aspects. First, it is commonly recognized, as Martin B. Louis explains (“Restraints Ancillary to Joint Ventures and Licensing Agreements: Do *Sealy* and *Topco* Logically Survive *Sylvania* and *Broadcast Music*?” (1980) 66 Virginia L.R. 879 at 882-83), that:

Some desirable business transactions or integrations are inherently restrictive or require explicit restraints to make them either efficient or possible. Partnerships, mergers, and joint sales agencies of necessity may restrain competition. Similarly, the new competition made possible by a joint venture, the sale of a business, or a licensing agreement might so threaten one or more of the parties involved in that transaction that without an explicit restraint they might not complete the transaction.

See also *ibid* at 903:

The sale of a business or of a professional practice involving personal relationships with customers or clients provides an obvious example [of circumstances where parties may not enter into a transaction without an express agreement not to compete]. Another arises from the danger that a partner might seek to compete with the partnership or a venture by using its contacts or information to his private advantage.

Both of these examples present classic circumstances for the use of ancillary restraints. In the former, a restraint reasonably limited in duration or to a particular territory will ordinarily suffice. In the latter, however, one lasting for the life of the agreement is required and normally will be allowed. [citations omitted]

See also *Addyston*, 85 F. at 280:

[W]hen two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members, with a view to securing the entire effort in the common enterprise, were, of course, only

ancillary to the main end of the union, and were to be encouraged.

The public interest in the realization of the benefits flowing from agreements that include restraints of this kind supports their removal from the category of “hard-core cartel activity”. Further, as Robert Bork has observed: “to allow [a] partnership to be formed in the interests of increased efficiency, but to disallow the ancillary agreement which makes the integration more stable, and hence further increases efficiency, would be a pointless contradiction in policy”: Robert Bork, “The Rule of Reason and the *Per Se* Concept: Price Fixing and Market Division II”, (1966) 75 Yale L.J. 373 at 382 quoted in Roberts, *supra* at 1001-2.

An “ancillary” restraints defence is also intended to respond to the inflexibility of *per se* prohibitions and the difficulty of limiting the domain of these rules to avoid condemning competitor collaborations that may literally or technically violate a *per se* prohibition, but which are not truly “hard-core cartels”. Notably, there is also an argument, as discussed at greater length below, that section 7 of the *Charter of Rights and Freedoms* (the “*Charter*”) dictates that an ancillary restraints defence, or some equivalent mechanism, be put in place to ensure that beneficial competitor collaborations are not subject to summary, criminal condemnation, so as to offend the principles of fundamental justice. It could be argued, for example, that, in the absence of an ancillary restraints defence (or some equivalent mechanism) in section 45, the proposed *per se* prohibitions go beyond what is needed to accomplish the governmental objective of efficiently and effectively proscribing, deterring and punishing hard-core cartel activity, because they condemn competitor collaborations which, due to their ancillary relationship to a principal lawful agreement, are pro-competitive or competitively neutral and hence in the public interest: see, *e.g.*, *R. v. Heywood*, [1994] 3 S.C.R. 761 at 792-93; *Canadian Pacific Ltd. v. The Queen* (1995), 125 D.L.R. (4<sup>th</sup>) 385 (S.C.C.). It is commonly acknowledged in the United States that *per se* rules necessitate “accept[ance] [of] some possibility of error through over-inclusiveness” as the price for being able to make determinations of legality quickly and cost-effectively: see, *e.g.*, Cohen, *supra* note 7; see also *Arizona v. Maricopa County Medical Soc’y*, 457 U.S. 332, 344 (1982) [“For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable”]; Areeda and Hovenkamp, *supra* note 4 at 252-53 [“To the extent that *per se* rules fail to evaluate competitive consequences in a particular case, some efficient and procompetitive practices that would have been identified and exonerated under a more elaborate inquiry are condemned under the *per se*

rule”]. Areeda and Hovenkamp identify *Maricopa County*, 457 U.S. [applying per se rule to a prepaid medical plan involving maximum price fixing among 1750 physicians acting in a nonexclusive arrangement] and *United States v. Topco Assocs.*, 405 U.S. 596 (1972) [applying per se rule to a joint purchasing and retail branding joint venture among grocers lacking market power in their assigned territories] as “likely examples”.

The principles of fundamental justice are violated if a law is overbroad. Overbreadth arises where the ambit or scope of the law exceeds its purpose with the result that the impugned “legislation infringes life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective” in question: *Heywood, supra*. A section 45 which absolutely proscribes the enumerated categories of agreements, without an ancillary restraints defence (or, alternatively, consideration of ancillarity in the proposed notification regime), may be contrary to the principles of fundamental justice. Such a provision would arguably exceed its purpose (*i.e.*, the deterrence and punishment of hard-core cartels) and work against the overriding objective of reform (*i.e.*, the creation of a conspiracy regime which efficiently and effectively proscribes, deters and punishes hard-core cartel behaviour, while encouraging strategic alliances and other beneficial competitor collaborations) by criminally condemning beneficial (or competitively neutral) competitor collaborations. The foregoing suggests that a rule of reason analysis should be available in respect of such agreements.

A review of the relevant case law does not yield a clear indication of what the principles of fundamental justice require in this context to overcome a challenge based on overbreadth. *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.), for example, provides an indication of what in the context of an impairment of section 7 of the *Charter* based on “medical necessity” will not pass *Charter* muster, but does not purport to define the procedural conditions precedent for constitutional validity. In that case, the Court of Appeal for Ontario was asked to consider whether the availability of exemptions under section 56 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (the “*Controlled Drugs Act*”) was sufficient to save the *prima facie* violation of section 7 resulting from the absolute prohibition, without an exception for medical use, against the possession and cultivation of marijuana under the *Narcotics Control Act*, R.S.C. 1985, c. N-1. Section 56 states:

The Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest. [emphasis added]

The Court of Appeal interpreted this provision as vesting in the Minister an “absolute discretion” to grant or refuse an exemption. It noted that the phrase “necessary for a medical ... purpose” was not defined in the *Controlled Drugs Act* and, further, that while section 56 had been supplemented by administrative guidelines, these did not have the force of law and the Minister was not bound to consider the factors set out therein in exercising his discretion to issue or refuse an exemption. More critically, the Court found that the Minister was not required under section 56 to grant an exemption, even where he had formed the opinion that the medical necessity criterion had been met. Despite the availability of judicial review should an application for an exemption be refused, and acknowledgment that the “the Minister would have to comply with the dictates of the *Charter* in considering such applications”, the Court of Appeal found (at paras. 183-84) that:

**the limit on the right [did not] contain sufficient safeguards to ensure that as the law is applied the right will not be infringed more than necessary.** This latter danger may occur “if too much discretion is granted to administrators charged with applying the limit or law in question”.

In view of the lack of an adequate legislated standard for medical necessity and the vesting of an unfettered discretion in the Minister, the deprivation of Parker’s right to security of the person does not accord with the principles of fundamental justice. [emphasis added]

See also *R. v. Jones*, [1986] 2 S.C.R. 284; *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

It is possible to distinguish cases such as *Parker*, *Morgentaler* and *Jones* on the basis that the prohibition in those cases violated a right protected by section 7 of the *Charter* – in *Parker* the context of the right of “medical necessity” – quite apart from any violation based solely on the “the possibility of imprisonment upon conviction”. In *Parker*, the Court of Appeal expressly

distinguished its companion decision in *R. v. Clay* (2000), 49 O.R. (3d) 577 (C.A.), wherein the same panel upheld a conviction, stating as follows (at paras. 77 and 81-83):

In the companion case of *R. v. Clay*, I have already dealt with the submission that, broadly speaking, the marijuana prohibition violates s. 7 because it criminalizes people who have done nothing wrong. This case raises the narrower issue of the impact upon individuals claiming a need for marijuana as a matter of medical necessity, not recreational use.

...

The trial judge identified a number of ways in which Parker's liberty and security interests were affected by the marijuana prohibition. In one sense, it would have been sufficient to identify the clearest of those infringements, the possibility of imprisonment upon conviction for the offence. This interference with Parker's liberty interest would conceivably be sufficient to require a determination of whether the deprivation was in accordance with the principles of fundamental justice.

However, in my view, this would not adequately capture the defects in the legislation and would fail to come to grips with the context in which the issue arises. As Wilson J. said in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at pp. 1355-56, 64 D.L.R. (4th) 577 a right or freedom may have different meanings in different contexts. "The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it". Thus, the importance of the right or freedom must be assessed in context rather than in the abstract and its purpose must be ascertained in context.

Although Wilson J. was particularly concerned about the importance of context for the s. 1 analysis, context is important for analyzing a right, such as s. 7, that to some extent contains its own balancing test and which may or may not be amenable to further balancing under s. 1. The dominant aspect of the context in this case is the claim by Parker and other patients that they require access to marijuana for medical reasons. They do not, like the appellant in the Clay case, assert a desire for marijuana for recreational use. Parker does not claim a right to use marijuana on the basis of some kind of abstract notion of personal autonomy. **The validity of the marijuana prohibition must be assessed in that particular context. The context here is not simply that the marijuana prohibition exposes Parker, like all other users and growers, to criminal prosecution and**

**possible loss of liberty. Rather, Parker alleges that the prohibition interferes with his health and therefore his security interest as well as his liberty interest.** [emphasis added]

The Court contextually focused on the impairment of the right protected under section 7 of the *Charter* “to make choices concerning one’s own body”. The statutory scheme to provide an exemption which would “nurture, not inhibit” (see *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 at 214) this right was in issue in *Parker*. Therefore, the circumstances of *Parker* are distinguishable from the amended conspiracy provision where the context is comparably that of commercial restraints which do not impact security of the person and the impairment of the right to liberty is solely at issue.

As noted, the analysis of a right protected by section 7 of the *Charter* to some extent “contains its own balancing test”. In the commercial context, the balancing of consumer welfare as expressed in section 1.1 of the *Act* must be balanced against any overbreadth of the *per se* prohibitions and its effect on the commercial interests of the participants. We believe that, on balance, an ancillary restraints defence or exemption would meet the test as expressed in *Parker*.

While, for all of the preceding reasons, there is a great deal of support for an ancillary restraints defence, a consideration of the precise scope and substance of this defence raise several important questions. Each of these questions is directed at defining the circumstances in which a rule of reason analysis is justified in respect of suspect and otherwise *per se* illegal conduct; specifically, we believe that the following issues require further consideration and discussion:

- What connection must exist between the impugned restraint and a principal agreement for that restraint to qualify as “ancillary”? Is it sufficient to establish that the restraint be functionally incidental and subordinate (*i.e.*, “ancillary”) as well as “reasonably necessary” to a principal agreement?;
- To what extent must an impugned restraint be ancillary? There is some debate as to whether it is sufficient for the restraint to be ancillary and reasonably necessary for a principal agreement or, alternatively, whether the restraint must be reasonably necessary for the efficiencies generated by that agreement; and
- Assuming that the impugned restraint is considered to be ancillary to a principal agreement, what standard should be applied to determining the legality of that principal agreement? Additionally, who should apply that standard: the Tribunal or the courts?

Each of these issues is considered below.

<sup>11</sup> We note that the proposed “reverse onus” in subsection 45(5) is likely to be found to violate the presumption of innocence, as guaranteed by section 11(d) of the *Charter of Rights and Freedoms*: see, e.g., *R. v. Whyte*, [1988] 2 S.C.R. 3; *R. v. Keegstra*, [1990] 3 S.C.R. 697; Peter W. Hogg, *Constitutional Law of Canada*, looseleaf vol. 2 (1992) at 48-15, 48-16 (re Reverse Onus Clauses). We believe, however, that, for the reasons set out below, a court is likely to find that the reverse onus clause is justified under section 1 of the *Charter* as a reasonable limit.

<sup>12</sup> We believe that it is appropriate to require an accused to establish the requisite elements of the defence in subsection 45(5) on a balance of probabilities on the ground that any less onerous burden (e.g., that the accused raise only a reasonable doubt as to the existence of the elements of the defence) would permit hard core cartel behaviour to escape conviction too easily. See Dickson C.J.’s comments in *Keegstra*, *supra* note 11 (at para. 148) with reference to the defence of truth (under section 319 of the *Criminal Code*):

... to require only that the accused raise a reasonable doubt as to the truthfulness of the statements, would excessively compromise the effectiveness of the offence in achieving its purpose ... where a reasonable doubt existed as to the falsity of an accused’s statements an acquittal would be entered. To accept such a result it would have to be agreed that this relatively small possibility of truthfulness outweighs the harm caused through the wilful promotion of hatred. Yet to my mind the crucial objective of Parliament in this appeal justifies requiring a more convincing demonstration that a hate-monger’s statements may be true ... Having the accused prove the truthfulness on the balance of probabilities is an understandable and valid precaution against too easily justifying [the] harm [caused by hate speech] ...

<sup>13</sup> **What is a Sufficient Connection to Yield “Ancillary” Status (Part I)?** Apart from the Berault Proposal, the Proposals require, as the first of two conditions precedent for “ancillary” status, that impugned restraint be “ancillary” (see Gourley Proposal, *supra* note 3; Kennish-Ross Proposal, *supra* note 3) or “merely ancillary” (see Selected Text from Proposed New S. 45” in the Kennish-Ross Proposal, *supra* note 3) to a principal agreement.

We believe that in establishing that a restraint is ancillary, defendants should be required to prove that the challenged restraint does not represent the object of their cooperation, but rather constitutes a matter functionally incidental and subordinate or collateral to the main purpose or end of their collaboration: see, *e.g.*, *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 964 and 970 (10th Cir. 1994):

[The United States Supreme Court] directs us ... to look at the challenged agreement to judge whether it represents the essential reason for the competitors' cooperation or reflects a matter merely ancillary to the venture's operation....

What we ask under section 1 is whether ... Bylaw 2.06 [is] ancillary, 'subordinate and collateral ... [making] the main transaction more effective in accomplishing its purpose,' which is to provide credit card service to its members? [citations omitted]

See also *Addyston*, 85 F. 271 at 280-83 (note 10); *Rothery Storage*, 792 F.2d at 224 (note 7); Carstensen et al., *supra* note 10 at 355-56; Roberts, *supra* note 10; Gregory J. Werden, "Antitrust Analysis of Joint Ventures: An Overview" (1998) 66 ANTITRUST L.J. 701 at 706. With regard to European law, see *Notice on Ancillary Restraints to Concentrations*, OJ [1990] C203/5 ["subordinate in importance to the main object of the concentration"].

In our view, the word "ancillary", if given its ordinary and popular meaning, accurately and usefully describes the (first element of) the relationship (*i.e.*, the subordinate or accessory status of the suspect restraint) that should have to be shown to exist between an impugned agreement and a principal agreement in order to trigger the proposed defence. The *Concise Oxford Dictionary* (10<sup>th</sup> ed. (1999) at 48) defines "ancillary", in pertinent part, as "providing support to the primary activities of an organization ... additional; subsidiary". Similarly, that term is defined in *Black's Law Dictionary* (6<sup>th</sup> ed. (1990) at 85), in relevant part, as "Aiding; attendant upon; describing a proceeding attendant upon or which aids another proceeding considered principal. Auxiliary or subordinate". But see *infra*, note 16.

<sup>14</sup> **What is a Sufficient Connection to Yield "Ancillary" Status (Part II)?** The Proposals unanimously endorse a "reasonable necessity" standard to describe the second aspect of the connection between an impugned restraint and a principal agreement required to render that restraint "ancillary". The "reasonable necessity" formulation finds support in economic theory

(see Roberts, *supra* note 10 at 1008-1010), the policy underlying the *per se* rules (see Cohen, *supra* note 7), the antitrust decisions of US and European courts (see, e.g., *Addyston*, 85 F. at 280-83 (note 10); *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381, 1396-98 (9<sup>th</sup> Cir. 1984); *Reuter/BASF* O.J. L54/40, [1976] 2 C.M.L.R. at D56-57; *but see Maricopa Country Med. Soc’y*, 457 U.S. at 352 (note 10); *Broadcast Music, Inc.*, 441 U.S. at 20-23 (note 4) and *Louis*, *supra* (note 10 at 883) wherein ancillarity is said to be contingent on the challenged restraint being “necessary” or “essential”), the enforcement guidelines and notices of competition regulators in the United States (see Joint Guidelines, *supra* note 7) and Europe (see *Notice on Ancillary Restraints to Concentrations*, *supra* note 13 at ss. 5-6; *but see* the EC Block Exemption Regulation on Vertical Restraints, *supra* note 4, and the *Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements* (2001/C 3/02) (see paras. 31 and 35) which apply an “indispensability” standard), as well as various articles and papers (see, e.g., Roberts, *supra* note 10 at 995; Jeffrey L. Harrison, “Price Fixing, The Professions, and Ancillary Restraints: Coping with *Maricopa County*” (1982) U. Ill. L. Rev. 925 at 931; Jon J. Miles, “Joint Venture Analysis and Provider-Controlled Health Care Networks” (1997) 66 Antitrust L.J. 127 at 147; Kevin J. Arquit and Joseph Kattan, “Efficiency considerations and horizontal restraints” (1991) *The Antitrust Bulletin* 717 at 727).

Alternative standards, whether more or less onerous, may not provide an appropriate threshold. Requiring that the impugned restraint be “necessary” to the principal agreement, for example, “would [arguably] run counter to the precept that *per se* rules should be clear and readily applied” as it “may often be difficult to determine whether suspect conduct is necessary without a potentially complex inquiry into less anticompetitive alternatives”: Cohen, *supra* note 7. Likewise, a more relaxed standard such as a mere “relationship” test might be too easily satisfied, undermining the effectiveness of the *per se* rules in proscribing and punishing hard-core cartel behaviour. For the same reason, Areeda and Hovenkamp (*supra* note 4 at 228-29) suggest that an “accompanies” or “part of” test would also be problematic. The authors assert that the adoption of either of these standards would license the insulation of hard-core cartels from criminal prosecution “through the simple device of attaching the cartel agreement to some other, independently lawful transaction”. Consider the following example: “a research joint venture among automobile manufacturers to develop improved hub caps and an agreement allocating markets for their automobiles, thereby better aligning the incentives of the joint venturers” might

be considered to be “related” despite the extremely tenuous connection between these agreements: see Cohen, *supra* note 7.

Under the proposed standard, the main purpose of the parties’ collaboration, that is, their principal agreement, objectively ascertained from all the relevant circumstances, including the market context and the economic reality of particular business behaviour, could provide the measure against which courts would assess the permissibility, both in scope and duration, of restraints allegedly required (*i.e.*, “reasonably necessary”) to effect or protect the fruits of that agreement: see *Addyston*, 85 F. at 282 (note 10); see also Werden, *supra* note 13, wherein the author lists (at 707) a variety of ways in which a restraint may be reasonably necessary:

A collateral restraint may make the venture itself operate more efficiently, as might a requirement that joint venture participants buy exclusively from a manufacturing joint venture, in order to facilitate the realization of economies of scale. A collateral restraint may prevent a participant in a joint venture from appropriating an undue share of the venture’s benefits, as might exclusive distribution territories for a brand created and promoted by a joint venture. A collateral restraint may prevent nonparticipants from appropriating joint venture benefits for which they have not shared the costs, as might restrictions on resale of a joint venture’s output to nonparticipants. A collateral restraint may also prevent unintended competitive consequences that might make the venture uneconomic. For example, by supplying participants with certain products, a joint venture could induce some participants to sell complementary products that only some participants had previously sold, and this effect could be forestalled by exclusive distribution territories for participants’ products not supplied by the joint venture.

Further, the proposed standard arguably contemplates an inquiry into “the possibility of less restrictive alternatives” which, having regard to the scope and duration of the challenged restraint relative to the purpose or objective of the main transaction or venture, could serve the stated purpose of the impugned restraint: see *Los Angeles Memorial Coliseum Commission*, 726 F.2d at 1396-98; *Palmer v. BRG of Georgia*, 498 U.S. 46 (1990), discussed in Areeda and Hovenkamp, *supra* note 4 at 243. However, it is arguable that the “reasonable necessity” criterion should not be taken as an invitation to the courts to engage in second-guessing with reference to “some other restraint [that] might have been less restrictive in some insignificant way”: *Arquit et al.*, *supra* at 728, n. 33. As Werden (*supra* note 13 at 721) comments with reference to the American doctrine: “There is no requirement that a restraint be the least restrictive alternative, but obvious and far

less restrictive alternatives must be shown either infeasible or inadequate”. See also Thomas C. Arthur, “Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act” (1986) 74 Calif. L. Rev. 266 at 334; see the Joint Guidelines (*supra* note 7 at 9):

An agreement may be “reasonably necessary” without being essential. However, if the participants could achieve an equivalent or comparable efficiency-enhancing integration, through practical, less restrictive means, then the Agencies conclude that the agreement is not reasonably necessary. In making this assessment ... the Agencies consider whether practical, significantly less restrictive means were reasonably available when the agreement was entered into, but do not search for a theoretically less restrictive alternative that was not practical given the business realities.

**To What Must the Restraint be Ancillary?** The issue is whether it is sufficient for the restraint to be merely ancillary and reasonably necessary to a principal agreement or, alternatively, whether the impugned restraint must be reasonably necessary to achieve the pro-competitive benefits of that agreement. There is US authority suggesting that a court need only ask whether the challenged restraint is ancillary to “some lawful contract or joint activity or some legitimate commercial objective or lawful purpose, *i.e.*, something other than price formation or restraining competition”: see, *e.g.*, Cohen, *supra* note 7 citing, *inter alia*, *General Leaseways, Inc. v. National Truck Leasing Ass’n.*, 744 F.2d 588, 595 (7<sup>th</sup> Cir. 1984) [restraint not ancillary to “the reciprocal provision of service or any other lawful activity”] and *National Bancard Corporation (NaBanco) v. Visa U.S.A., Inc.*, 779 F.2d 592, 599 (11<sup>th</sup> Cir. 1986) [“the issue is whether the price fixing ‘achieve[s] purposes unrelated to price formation’”] [emphasis in the original; citations omitted]; see also *Addyston*, 85 F. (note 10). Bill C-472 (note 4) and the Kennish-Ross Proposal (note 3) also appear to support such an approach.

Alternatively, the Joint Guidelines (note 7) and certain US courts and commentators require both an “efficiency-enhancing integration” and that the impugned agreement be reasonably necessary to achieve the procompetitive benefits of this integration. See the Joint Guidelines (*supra* note 7 at 8) wherein “efficiency-enhancing integration” is defined as follows:

In an efficiency-enhancing integration, participants collaborate to perform or cause to be performed (by a joint venture entirely created by the collaboration or by one or more participants or third parties acting on behalf of other participants) one or more

business functions, such as production, distribution, marketing, purchasing or R&D, and thereby benefit, or potentially benefit, consumers by **expanding output, reducing price, or enhancing quality, service, or innovation**. Participants in an efficiency-enhancing integration typically combine, by contract or otherwise, significant capital, technology, or other complementary assets to achieve procompetitive benefits that participants could not achieve separately ... The integration must be of a type that **plausibly would generate procompetitive benefits cognizable under the efficiencies analysis**. [emphasis added]

More generally, Cohen (*supra* note 7) explains that the term “integration”:

has been applied [by the US courts] in three general senses. Sometimes usage has focused on a combination of productive assets. For example, one analyst speaks in terms of the “integration of resources” that follows when collaborating firms “contribute assets such as capital, technology, or production facilities to a common endeavor.” Other times the emphasis has centered on a coordination of functions and operations without necessarily combining assets. Such arrangements sometimes are referred to as “contract integration.” On still other occasions, particularly in the context of physician networks, the inquiry has centered on shared financial risk. For instance, the Court’s opinion in *Maricopa* viewed physicians in an HMO as “functionally integrated” in light of their sharing of economic risk as to the amount of medical treatment that the subscribers might need. [citations omitted]

The Beriault Proposal recommends restricting eligible principal agreements as well as prescribing an inquiry into the connection between a suspect restraint and efficiencies. Beriault *et al.* (*supra* note 4 at 24-25) write:

[A]n inherently anti-competitive restraint should not be exempted merely because it is part of a broader agreement of any nature. There has to be some evidence that this arrangement generates or is likely to generate some pro-competitive benefits....

[Further] [i]t is not sufficient that the parties have accompanied their cartel by legitimate beneficial joint activities: there must be a reasonable relationship between the restraint and the efficiencies, otherwise the parties to a hard-core cartel could avoid criminal liability by merely adding unrelated features to their anti-competitive restraints.

The exception should be designed to exempt from criminal liability all arrangements that are not hard-core cartels. The burden should therefore be to establish more than a mere contemporaneity between the restraint and the efficiencies, but less than showing that the restraint is essential to achieving the efficiencies or that no less restrictive alternative exists to achieve them. [emphasis in the original]

The debate between requiring that the restraint be ancillary to “some lawful contract or joint activity”, without directing an inquiry into the pro-competitive benefits of those contracts or activities, and an approach that would require a court to characterize the principal agreement as efficiency-enhancing or pro-competitive is primarily procedural in nature and a question of policy. As we observe below, a weighing of anti-competitive harm and pro-competitive benefits flowing from the defendants’ collaboration (*i.e.*, the net competitive effect of the impugned restraint plus the principal agreement) arguably constitutes a condition precedent to antitrust immunity under the proposed defence and must take place at some point in the analysis. Accordingly, the debate on this issue is largely a question of when, as opposed to if, the pro-competitive benefits of the principal agreements will be taken into account by a court.

The more interesting and difficult question, in our view, is the desirability of requiring defendants to establish, as a threshold issue under the ancillary restraints defence, that the restraint is reasonably necessary to achieve the pro-competitive benefits of their principal agreement. It is arguable that this may be too stringent, potentially resulting in the condemnation of beneficial collaborations. One could argue that restrictions on competition are not typically or practically anything more than indirectly connected or related to the pro-competitive benefits generated by the venture or agreement that they facilitate. For example, the rules established and enforced by the participants in an R&D joint venture, such as restraints on outside R&D efforts or outside sales, are likely to be reasonably necessary to the efficiencies generated by that venture only to the extent that they permit it to function effectively by, *inter alia*, deterring opportunistic conduct that would otherwise prevent the realization of the venture’s promised efficiencies: see Joint Guidelines, *supra* note 7 at Section 3.36(b) (Example 10); see also Areeda and Hovenkamp, *supra* note 4 at 264. Various US courts, including the United States Supreme Court, have recognized, for example, that the control of free riding may serve to justify an otherwise *per se* illegal restraint: see, *e.g.*, *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 190 (7<sup>th</sup> Cir. 1985); *Sylvania*, 433 U.S. at 55-57 (note 4) [“Because of market imperfections such as the so-called ‘free-rider’ effect, [certain] services might not be provided ... in a purely competitive

situation]; *Rothery*, 792 F.2d at 212-13, 223 and 238 (note 7) [“the Supreme Court made it clear [in *Sylvania*] that elimination of the free ride is an **efficiency justification** available to horizontal restraints that are ancillary to a contract integration”]. [emphasis added]

The approach eventually adopted will be based on policy considerations. We believe that this is an area that clearly requires further discussion and debate.

<sup>15</sup> **Lawfulness of the Principal Agreement.** The final issue deals with the fora and appropriate standard for determining the lawfulness of the principal agreement. As Roberts (*supra* note 10 at 1002) observes, and as suggested above, “[r]estraints are not ancillary unless they attach to a lawful venture, which itself assumes that the venture does not have unacceptable anticompetitive effects or purposes”. [emphasis added] Accordingly, there must be an assessment of the legality of the principal agreement. The ancillary restraints defence advocated in Bill C-472, as well as the Kennish-Ross and Beriault Proposals require that the defendants establish that the principal agreement (to which the suspect restraint is alleged to be ancillary) would not contravene the *per se* criminal prohibitions, when considered on a separate basis. It is arguable, however, in light of Roberts’ comment, that the legality of the principal or main agreement, and hence the ancillarity of the impugned restraint, cannot be fully assessed with reference only to whether the dominant agreement contravenes the *per se* prohibitions in the proposed subsection 45(1). An agreement which does not fix prices, allocate markets, or curtail output may nevertheless prevent or lessen competition substantially, by creating or increasing market power or facilitating its exercise (and without generating offsetting/compensating efficiencies). Likewise, regard must also be had to the overall or combined effect of the principal agreement and the impugned restraint. To allow price fixing, or other hard-core cartel behaviour, in circumstances where the efficiencies generated by the principal agreement do not offset the harm flowing from the fixing of prices would seem to be inconsistent with the policy rationale for permitting ancillary restraints, as expressed by Robert Bork: “to allow [a] partnership to be formed in the interests of increased efficiency, but to disallow the ancillary agreement which makes the integration more stable, and hence further increases efficiency, would be a pointless contradiction in policy”: see Roberts, *supra* at 1001-2. [emphasis added] Consequently, in our view, it is not apparent that an ancillary restraints defence should be drafted so as to permit defendants to avoid antitrust liability without a weighing of anti-competitive harm and pro-competitive benefits flowing from their overall collaboration, including the impugned restraint. Assuming that this is correct, there appears to be

two ways in which the weighing of anti-competitive harm and pro-competitive benefits of the principal agreement could be operationalized:

- successful invocation of the ancillary restraints defence would remove the principal agreement from the ambit of section 45 leaving it to be considered, together with the impugned restraint, under the civil provision by the Tribunal using a rule of reason analysis to determine whether the principal agreement, together with the restraint, will prevent or lessen competition substantially; or
- upon the successful invocation of the ancillary restraints defence, the criminal court would determine through a rule of reason analysis whether the principal agreement, when considered together with the impugned restraint, will prevent or lessen competition substantially.

Under the first scenario, recommended in both the Beriault and Kennish-Ross Proposals, the ancillary restraints defence would serve only to remove the *per se* label from a restraint otherwise falling within subsection 45(1), following a court's determination that: (i) the requisite functionally incidental and "reasonably necessary" connection to a principal agreement between the same defendants had been established; and, (ii) the principal agreement does not contravene the *per se* prohibitions when considered on a separate basis. Thereafter, the case would be moved to the Tribunal for consideration under the rule of reason standard. This approach holds an important advantage; namely, it respects both the relative institutional competence of "all-purpose criminal courts" as compared to the Tribunal and, more fundamentally, the scheme of the *Act* which is premised on the comparative expertise of the Tribunal in economic matters.

The first scenario is not without shortcomings, however. For example, it creates the possibility, should the proposed ancillary restraints defence be too readily or too loosely applied by the courts, that defendants could succeed in bifurcating proceedings between the criminal courts and the Tribunal as a matter of course. As such, this scenario invites an unknown, and potentially significant, cost arising from the duplication of proceedings. Also, the cost and inefficiency associated with the duplication of proceedings may be untenable, so as to render the first scenario a non-starter.

Under the second scenario, the criminal courts would determine the legality of the principal agreement with reference to a full rule of reason analysis. While the disadvantages associated with the bifurcation of proceedings would be avoided, this approach would have at least one obviously undesirable implication: it would require the criminal courts, in applying the full rule

of reason analysis, to engage in a competitive effects analysis better suited to a specialized tribunal.

Under either scenario, the proposed ancillary restraints defence may invite a complex efficiency analysis, similar in scope and substance to the defence under section 96 of the *Act*, in an unknown number of cases, thereby threatening the hoped for simplicity and clarity of the proposed *per se* prohibitions.

In view of the concerns raised by the scenarios described above, we considered removing the ancillary restraints defence from section 45 and, instead, embedding consideration of ancillarity in the proposed notification system. As a further alternative, we considered a block exemption for ancillary restraints. There are precedents for the latter two approaches in other jurisdictions. In the UK, for example, the *per se* criminal prohibitions introduced by the *Enterprise Act* are to be supplemented by block exemptions: see Department of Trade and Industry, “A World Class Competition Regime” (July 2001) at 41-42. Similarly, the ACCC has recommended that the proposed *per se* criminal offences under the Australian *Trade Practices Act* should, like the current *per se* civil offences under that statute, be supplemented by an authorization system for joint ventures combined with an exemption for price fixing between joint venture partners: see ACCC, *supra* note 4 at 48-49, 207-208.

However, as noted above, there is an argument that section 7 of the *Charter* dictates that an ancillary restraints defence, or some equivalent mechanism, be included within the criminal prohibition to ensure that beneficial competitor collaborations are not subject to summary, criminal condemnation, so as to offend the principles of fundamental justice. It could be argued, for example, that, in the absence of an ancillary restraints defence (or some equivalent mechanism) in section 45, the proposed *per se* prohibitions go beyond what is needed to accomplish the governmental objective of efficiently and effectively proscribing, deterring and punishing hard-core cartel activity, because they condemn competitor collaborations which, due to their ancillary relationship to a principal lawful agreement, are pro-competitive or competitively neutral and hence in the public interest [*see* Note 10]. A section 45 which absolutely proscribes the enumerated categories of agreements, without an ancillary restraints defence (or, alternatively, consideration of ancillarity in the proposed notification regime), may

be contrary to the principles of fundamental justice. We believe that this is an area that requires further discussion and debate.

<sup>16</sup> We believe that it may be desirable, if only out of an abundance of caution (see note 13, *supra*), to codify the definition proposed in paragraph 45(5)(a). In our view, it may also be prudent and desirable to prescribe the restriction set out in paragraph 45(5)(b) in order to preclude the application of an insufficiently stringent “reasonable necessity” standard.

<sup>17</sup> We believe that the defence for export cartels (see the existing subsection 45(5)) may be more appropriately dealt with as a block exemption issued under subsection 79.2(3), if at all. As a matter of principle and policy, a blanket defence for export cartels is difficult to justify. Such a defence may be inconsistent with the intent and spirit of international antitrust cooperation. Further, such cartels arguably hold adverse consequences for allocative efficiency and productive efficiency in this country.

<sup>18</sup> We are relying on the existing definition of “affiliates” in subsection 2(2) of the *Act*.

<sup>19</sup> In an earlier paper (see Russell Proposal, *supra* note 4 at 67-68) we commented that:

Arrangements that are not *per se* illegal may still warrant deterrence and censure if, pursuant to a rule of reason analysis, they are found to cause significant anti-competitive harm which is not compensated for by pro-competitive benefits. In this light, there is a strong argument that the Tribunal should have the power to impose administrative monetary penalties in appropriate circumstances. As part of the amendments introduced in 1999, the Tribunal was given remedial powers of this kind under Part VII.1 of the Act [see paragraph 74.10(1)(c)].

See also subsection 79(3.1) of the *Act*.

The administrative monetary penalties proposed in subparagraph 79.1(1)(a)(i) find strong support internationally. For example, in the EU, violations of Article 81 of the EC Treaty may result in the imposition of significant fines of up to 10% of the previous year’s turnover of the firms involved: see Russell Proposal, *supra* note 4 at 8. In Australia, the *Trade Practices Act*, which at this time is a wholly civil statute, authorizes the imposition of fines (referred to as “pecuniary penalties”) against a corporation of up to AUS\$10 million (approximately C\$8 million) for conduct contrary to section 45 (Contracts, arrangements or understandings that restrict dealings or

affect competition) of that statute. In addition, individuals may be fined up to \$500,000 in respect of any conduct contrary to that provision. Notably, citing the insufficient deterrent effect of the existing \$10 million maximum penalty, the ACCC has proposed (see ACCC, *supra* note 4 at 11, 21) amending the *Trade Practices Act* to permit the imposition of pecuniary penalties of “up to three times the value of any commercial gain from the contravention, or, if no estimate of gain can be made, 10 per cent of the corporation’s Australian turnover”. In New Zealand, the *Commerce Act 1986* was amended in 2001 with the effect of increasing the maximum allowable pecuniary penalty for a body corporate from NZD\$5 million (approximately C\$3.2 million) to the greater of NZD\$10 million, three times the value of any commercial gain or expected commercial gain or, if the commercial gain is unknown, 10% of annual turnover of the body corporate and its interconnected bodies, if any.

<sup>20</sup> We believe that it is desirable, as a matter of sound competition law policy, to vest the Tribunal with broad remedial powers which will permit it to respond effectively to the anti-competitive effects of (non-criminal) agreements, arrangements and understandings.

<sup>21</sup> The treatment of efficiencies proposed in paragraph 79.1(4)(g) is consistent both with the view shared by many that efficiencies should constitute a factor, rather than an absolute override, in the Tribunal’s review of agreements among competitors (and mergers) and the consumer-oriented efficiencies analysis prescribed by US law. In the United States, the Joint Guidelines (*supra* note 7) recognize only “cognizable efficiencies”; defined as “efficiencies that have been verified by the Agencies, that do not arise from anticompetitive reductions in output or service, and that cannot be achieved through practical, significantly less restrictive means”. Further, the Guidelines clearly establish that any claimed efficiencies must be potentially pro-competitive in the sense that they benefit consumers (*qua* consumers):

The Agencies recognize that consumers may benefit from competitor collaborations in a variety of ways. For example, a competitor collaboration may enable participants to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would be possible absent the collaboration. A collaboration may allow its participants to better use existing assets, or may provide incentives for them to make output-enhancing investments that would not occur absent the collaboration.

(See Joint Guidelines, *supra* note 7 at 2.1, 3.36 and 3.36(a)). Such a provision is also consistent with the recently enacted amendment to subsection 96(1) found in Bill C-249.

<sup>22</sup> We believe that consideration should be given to whether subsection 79.1(4) should include reference to sections 75 and 77.

<sup>23</sup> Apart from the Kennish-Ross Proposal, which does not propose a notification process, the Proposals advocate the creation of a notification system. (The core elements of the notification/clearance systems recommended in each of the Proposals are described in Robert S. Russell, Adam F. Fanaki and Davit D. Akman, “Amending Section 45 of the *Competition Act*: A Review of Models for Reform” (May 2002) (“Russell *et al.*”). The federal government has also indicated that there is support for what it (and the House of Commons Standing Committee) describes as “pre-clearance”. There is divided opinion, however, regarding both the timing of notification and the appropriate scope of the Commissioner’s discretion under such a system. As regards timing, the notification regimes recommended in the Russell, Gourley and Beriault Proposals as well as Bill C-472 (at least in relation to otherwise criminal agreements) permit notification at any time, that is, both prior to and following entry into or implementation of the agreement in question. In contrast, the notification system described in the Warner-Trebilcock Proposal excludes agreements thirty-one days after execution. On the issue of discretion, the Gourley and Russell Proposals advocate systems that would preserve the Commissioner’s discretion to recommend the criminal prosecution of even notified agreements. The Warner-Trebilcock Proposal, Bill C-472 and the Beriault Proposal, on the other hand, recommend an “automatic” notification regime under which agreements notified to the Commissioner would be immune from criminal prosecution provided that they are implemented as notified.

In two earlier papers (see Russell Proposal, *supra* note 4 at 70-75; Russell *et al.*, *supra* at 18-19, 22-23) we advocated the creation of a discretionary track notification model (“DTM”), pursuant to which Commissioner would be authorized to respond to the notification of an agreement in one of three ways:

- (a) grant an exemption to the parties by issuing an Exemption Certificate, with or without conditions or an expiry date, the effect of which would be to exempt the applicants from both civil and criminal liability;

- (b) deny an Exemption Certificate and, where the agreement has been entered into or implemented, refer the matter to the Tribunal for review under the civil regime or to the Attorney General for prosecution under the criminal regime; or
- (c) deny an Exemption Certificate, and where the agreement has not yet been entered into or implemented, advise the parties that should they proceed with the agreement in question they could face either civil review or criminal prosecution.

Further, we observed (see Russell Proposal, *supra* note 4 at 70-73; Russell *et al.*, *supra* at 22-23) that the advantages of such a discretionary system are numerous and compelling; for example:

- the experience under Article 81(3) of the EC Treaty suggests that a notification system would facilitate the development of a coherent body of precedent decisions, something sorely lacking from Canada's competition law regime. Indeed, in explaining its recommendation to abolish the notification system established by Regulation 17, the principal regulation for the implementation of Articles 81 and 82 of the European Community Treaty, the European Commission noted that "[t]he notification system ... has enabled the Commission to build up a coherent body of precedent cases, and to ensure that the competition rules are applied consistently throughout the Member States of the Community ... The notification system proved useful as long as the interpretation of Article 85 and in particular paragraph 3 was uncertain": *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty* (1999) at 29;
- determinations by the Commissioner would provide legal certainty that is critical to effective business planning. On this point, the *White Paper on Modernisation* found (at 22) that "Undertakings ... at present enjoy a satisfactory level of legal certainty thanks to the clear set of rules that have been developed and refined through more than 30 years of Commission decision-making practice and Courts of Justice case law and by the many different kinds of general instruments that have been adopted (block exemption regulations, notices and guidelines)";
- absent the discretion to recommend criminal prosecution despite notification, the efficiency and effectiveness of the conspiracy regime in deterring and punishing hard-core cartel behaviour would be diminished due to the automatic and unilateral entitlement of notifying parties to avoid criminal liability, regardless of the scope and magnitude of the nefarious consequences flowing from their collaboration, and, further, the necessity of a full-blown competitive effects analysis under the civil regime for any and all notified agreements, including those involving hard-core cartel behaviour; and
- the creation of such a regime would produce a further harmonization with the merger provisions. Similar to the issuance of advance ruling certificates pursuant to section 102 of the *Act*, under a notification system, parties would be entitled to or could, at the Commissioner's discretion, be granted Exemption Certificates for specific arrangements, thereby insulating these from review. Further, the administrative discretion contemplated by the DTM parallels the discretion the Commissioner already enjoys with respect to mergers, in relation to which the *Act* entitles him to elect to proceed under section 92 or 45. See also the *Act's* dual track, misleading advertising regime.

It is noteworthy that a number of commentators continue to oppose the adoption of a notification or pre-clearance system, based largely on a concern over the administrative burden resulting from such notifications and the European Community's intention to abandon the notification system applicable to Article 81 of the EC Treaty. Such criticisms are similar to concerns raised by Warner and Trebilcock (see note 3, *supra* at 719) in initially proposing a system of notification:

We cannot emphasize too strongly that the notification regime we propose is *not* a registration or authorization procedure. To empower the Director to review notifications and to decide whether to accept, reject or propose modifications to the underlying agreement as a precondition of the parties' immunity from criminal prosecution would impose heavy burdens on both the parties and the Bureau. Conferring such powers on the Director risks creating the same paper nightmare that has bedevilled both the European Commission, with negative clearance and exemption applications under article 85 of the *Treaty of Rome*, and Office of Fair Trading in the United Kingdom under the *Restrictive Trade Practices Act*. Under both regimes, parties are subjected to enormous delays and great uncertainty pending the administrative review of often trivial or benign arrangements by official agencies. [emphasis in the original]

More recently, Goldman *et al.* (in "The International Experience with Cartel Enforcement" (October 2001) at 19) stated:

The three reports referred to above all advocate some form of notification regime similar to that in the EC. It should be noted, however, that the EC intends to radically alter its notification system, based on the conclusion that this system "does not serve to safeguard competition".

The same concern was restated by Brian Facey and Dany Assaf ("Innovation, Growth and Prosperity: A Framework for Amending Canada's Conspiracy Laws" (2001) 20 Canadian Competition Record 61 at 71) as follows:

The costs and delays that will be imposed on the private sector as well as the Competition Bureau by a pre-clearance regime are likely to make it unworkable. As pointed out above, the EC is moving away from this type of regime.

The administrative burden and other concerns in relation to the design and implementation of a notification system similar to that found in Article 81 were reviewed in our earlier papers. As we noted therein, the administrative burden arising from the European notification regime is not the result of any weakness inherent to notification and clearance systems *per se*, but rather is the product of the broad interpretation given to Article 81(1) of the EC Treaty by the European Commission. Article 81(1) has been interpreted as prohibiting all agreements whose object or effect is the prevention, restriction or distortion of competition within the common market. Thus, where parties enter into an arrangement with the object of restricting or distorting competition, such conduct is prohibited under Article 81(1), regardless of its effect on competition. As a consequence of the European Commission's broad interpretation, agreements with little or no risk of being anti-competitive are caught by Article 81(1). Further, and more importantly for present purposes, Article 81(2) deems all forms of agreements which fall within the broad scope of Article 81(1) void and unenforceable, unless the agreement has been exempted. The consequences of this requirement were described in the Russell Proposal (at 19) as follows:

...parties are required to submit a notification to secure an individual exemption or are required to "fit" the arrangement within the scope of a block exemption. **More generally, the result is that companies are required to notify a large number of agreements that do not raise serious competition issues. Such notifications are encouraged by the availability of provisional immunity from fines.**

The significant number of notifications imposes a large administrative burden on the Commission. [emphasis added]

In light of these concerns, we concluded that "a system which requires notification of all forms of agreements which could potentially violate the criminal or civil provision may be unmanageable". To address this issue, we have and continue to advocate a criminal provision that is significantly narrower than the prohibition found in Article 81(1) of the EC Treaty; namely, one corresponding to the proposed enumerated *per se* prohibitions. As such, notifications would typically only be sought in respect of the limited number of agreements caught by the *per se* prohibitions, and not otherwise exempted through the exception (whether in the form of a defence or otherwise) for ancillary restraints: see Russell Proposal, *supra* note 4 at 74.

We submit that given the limited circumstances in which a notification will be sought, the likelihood and magnitude of any administrative burden or delay, common in the European Community experience and highlighted by critics in objecting to proposals for a Canadian notification regime, is overstated, if not unsupported. The experience to date under Australia's authorisation regime supports this conclusion. As we noted in an earlier paper (see the Russell Proposal, *supra* note 4 at 48-51) the number of notifications under the *Trade Practices Act* has been far from overwhelming. Between 1996 and 2000, the ACCC received only seven applications – four in 1996-97 and three in 1998-99.

Further, the failure to include a notification system would defeat an important goal underlying the need for legislative reform, namely increased harmonization of the conspiracy regime with the existing merger regime. As noted above, under the notification systems proposed by Gourley *et al.*, ourselves and others, the Commissioner would have the ability to issue exemption/clearance certificates that are similar to the advance ruling certificates issued under section 102 of the *Act* in respect of mergers.

<sup>24</sup> We do not believe that the delegation of exemption-making authority to the Commissioner would be exceptional. Even if this could be characterized as a legislative power to issue block exemptions, as Sara Blake (*Administrative Law in Canada*, 3<sup>rd</sup> ed. (2001) at 135) observes: “Canadian legislatures now routinely delegate legislative powers to subordinate authorities. It is not uncommon for a legislature to enact general legislation providing for the regulation of a sphere of activity, and to empower a regulatory authority to enact rules filling in the details of the regulatory scheme. Thus Cabinet, ministers, and tribunals acquire power to ‘create original law’”: see also David Phillip Jones *et al.*, *Principles of Administrative Law*, 3<sup>rd</sup> ed. (1999) at 27-44, 89-122; *Reference Re: Regulations in Relation to Chemicals*, [1943] S.C.R. 1; *Johnson v. Federated Mutual Insurance Co.*, [1988] A.J. No. 202 (Q.B.), rev'd [1989] A.J. No. 505 (C.A.); *British Columbia (Attorney General) v. Craig*, [1986] B.C.J. No. 774 (S.C.), rev'd [1987] B.C.J. No. 1103 (C.A.). The high degree of specialized expertise required in the field of competition law offers additional support for our recommendation that this specific power be granted to the Commissioner: see *Responsibility and Responsiveness – Final Report of the Ontario Task Force on Securities Regulation* (July 1994). In this regard, securities regulation in Canada provides a compelling precedent:

The securities commissions in Ontario, Alberta, British Columbia, Manitoba and Nova Scotia may now make “rules” [see B.C.S.A., s. 184; O.S.A., s. 143(1); N.S.S.A., s. 150, A.S.A., s. 196.1] with powers corresponding to those of the Lieutenant Governor in Council to make regulations. In Saskatchewan the Lieutenant Governor in Council may authorize the Commission to make regulations. The approach in British Columbia and Alberta has been to convert much of what were once regulations to rules.

Mark R. Gillen (*Securities Regulation in Canada*, 2<sup>nd</sup> ed. (1998) at 93-98.

In our view, the proposed block exemptions will offer a number of important benefits; at a very practical level, they promise to reduce the number of notifications and the attendant administrative burden on the Competition Bureau. The block exemptions will also provide collaborating companies with guidance in formulating their agreements, arrangements and understandings in order to take advantage of the “safe harbours” created by the block exemptions. See Russell Proposal, *supra* note 4 at 17-18, 23 for a discussion of block exemptions under EU law.

<sup>25</sup> We believe the effectiveness of civil provisions, insofar as their deterrent effect is concerned, will be increased by permitting parties to recover damages suffered as a result of agreements, arrangements, or understandings that are the subject of an order issued by the Tribunal. A civil right of action in respect of purely civil offences is available in Australia. Under the *Trade Practices Act* (see section 82), private plaintiffs are permitted to bring suit to recover damages for loss or injury suffered as a result of acts or omissions in breach of Part IV of that statute. Notably, half the litigation under the *Trade Practices Act* is commenced by non-governmental plaintiffs: see Russell Proposal, *supra* note 4 at 42.

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