

**Submission to the Public Policy Forum on  
the Proposed Amendments to the Competition Act**

**American Bar Association Section of Antitrust Law**

**August 2000**

***Introduction***

The American Bar Association's Section of Antitrust Law (the "Section") welcomes the opportunity to provide this submission to the Public Policy Forum ("PPF") on the proposed amendments to the *Competition Act* (the "Act"). The views expressed herein are presented on behalf of the Section of Antitrust Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association (the "ABA") and, accordingly, should not be construed as representing the policy of the Association. As major trading partners, Canada and the U.S. have an unparalleled trading relationship covering a wide array of goods and services over a broad range of industries. The U.S. enforcement agencies and the Competition Bureau are also in the vanguard of cross-border cooperation in antitrust enforcement.

We recognize that the proposed amendments at this stage are contained in Private Members Bills and do not represent a formal proposal from the Canadian Government. Nonetheless, the Competition Bureau and the Minister of Industry are interested in consultative input through the Public Policy Forum process, and we understand that as a result of this initial process, the Government may choose to introduce specific amendments later this year. In this context, the Section is providing this submission in order to share with the PPF the U.S. experience with the matters dealt with below in the hope that this experience may be of some interest to the PPF in its consultative process.

The proposed amendments are of importance to the American businesses which operate in or sell into Canada, American consumers who purchase goods from Canadian-based businesses and the Section, whose members regularly advise their clients and work with Canadian counsel on cross-border matters. Moreover, given the ongoing discussions and developments in the international business, legal and enforcement community and the movement towards greater economic and legal convergence, the Section believes it is important that major changes in the key economic laws of a WTO member country such as Canada receive careful consideration from both within and outside the country.

Given the short time frame for providing input and our understanding of the current consultative process,<sup>1</sup> our comments should not be considered exhaustive. Instead, they are intended to be general in nature and are directed towards what the Section sees as the more significant issues raised by the process and substance of the proposed amendments. We hope to have the opportunity

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<sup>1</sup> In the Statement made to the House of Commons Standing Committee on Industry on May 2, 2000, Mr. Zussman, President of the PPF, stated that the intended objective of the consultation process "is to encourage dialogue and search for common ground on the principles underlying the proposed legislative amendments, rather than the technical application of the laws" and that the PPF was "not . . . seeking legal briefs" on issues, but rather "ideas and concerns about the proposed amendments".

to provide additional comments at the committee roundtables that we understand will be organized in the near future.

Our submission is organized as follows:

1. General Comments
2. The Need for Detailed Study
3. Multilateral Enforcement Cooperation
4. The Proposed New Conspiracy Provisions
5. Cease and Desist Orders - Bill C-472
6. Conclusion

### *1. General Comments*

We have two areas of general comment. The first relates to the proposal for industry-specific amendments, such as those proposed in Bill C-402. In our view, a movement in this direction runs counter to the prevailing trend in that most of Canada's trading partners (and indeed Canada itself) are moving away from sector-specific regulation. In the U.S., for example, the experience with sector-specific legislation has generally been regarded as a second best solution, both in its operation and, perhaps more importantly, in connection with the difficulties ultimately associated with deregulation. Attempts at removing entrenched regulatory regimes have created major legal and economic issues. We therefore believe that broad, flexible legislation, particularly in today's rapidly changing marketplace, is preferable to sector-specific provisions in domestic competition legislation. Amending the Act to address particular issues in the grocery industry, the airline industry or any other specific industry is also likely to create an incentive for lobby groups to seek advantages for other industries and thereby merely promote the welfare of particular interest groups, as opposed to competition and efficiency.

The second general comment relates to globalization, convergence, change and the need to ensure that significant amendments to the key economic laws of a major trading partner like Canada receive careful consideration from both within and outside the country to ensure that changes reflect evolving global business trends. As noted by the Canadian Commissioner of Competition (the "Commissioner"):

I think most of us would agree that today's competition law agencies and the legislation that they each enforce must be capable of adapting to evolving global business trends we are all experiencing. More than ever, we need to join our efforts to come up with innovative processes, strategies and approaches to deal with the asymmetry created by multinational business operating in a borderless economy on the one hand, and public institutions which remain largely limited to national borders on the other.<sup>2</sup>

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<sup>2</sup> Konrad von Finckenstein, A Canadian Competition Law and Policy, in B. Hawk, ed., *Annual Proceedings of the Fordham Corporate Law Institute International Antitrust Law & Policy* (Yonkers: Juris Publishing, Inc., 1999) 15 at 15.

The Section also believes that any amendments must have regard to basic rights and fundamental principles of procedural fairness and should impose only reasonable costs and burdens on economic activity. In this context, there is a growing consensus that greater convergence or compatibility in competition laws among nations can reduce transaction costs and provide greater legal certainty for businesses operating in multiple jurisdictions. In this sense there are some lessons to be learned from the European Union, where a process of "soft" or voluntary harmonisation is underway. While we are not advocating that the goal of convergence requires absolute conformity between Canadian and U.S. laws, we do believe that caution should be exercised in proposing any changes that may increase differences, which may increase transaction costs and uncertainty and make it more difficult for multinational businesses to comply with disparate sets of rules.

## 2. *The Need for Detailed Study*

The Section appreciates the decision of the Commissioner to consult with a wide range of stakeholders as part of the consultative process. We note, however, that stakeholders and the PPF have been given a very short time frame to address the many issues raised by the proposed amendments. By way of comparison, the International Competition Policy Advisory Committee to the Attorney General and the Assistant Attorney General for Antitrust ("ICPAC") released a report dealing solely with international competition issues on February 28, 2000. The report was the culmination of over two years of work. ICPAC held two sets of public hearings in the fall of 1998 and the spring of 1999. The hearings on November 2-4, 1998 involved 48 expert participants, including senior competition officials from around the world, investment bankers, economists and academics from the United States, Australia, Brazil, Canada, the European Union, France, Germany, Japan, Mexico, Spain and Venezuela.

Hearings were also conducted on April 22, 1999 and May 17, 1999, which provided an opportunity to hear from a number of business and trade associations which reported on the findings of special task forces that each had formed to consider issues under consideration by ICPAC. The American Bar Association Section of Antitrust Law also formed a task force comprised of three separate working groups: on Multijurisdictional Mergers and Joint Ventures, on Effectiveness of Private Litigation as an Enforcement Tool, and on Enforcement Cooperation. Representatives from the Section also testified at the ICPAC hearings. Members of the International Antitrust Law Committee of the ABA Section of International Law and Practice also formed a task force. That task force testified at the hearings and provided a written submission on the U.S. merger review process from the perspective of foreign parties. ICPAC also heard from a number of business and other representatives, including the National Association of Manufacturers, the AFL-CIO, the U.S. Chamber of Commerce, the U.S. Council for International Business, as well as presentations by representatives from the Brookings Institution, IMF, OECD, U.S. Agency for International Development and The World Bank. The International Bar Association as well as the International Chamber of Commerce submitted written comments on confidential information sharing and made a presentation at the spring hearings. ICPAC also undertook a number of other more targeted efforts.

The ICPAC experience demonstrates the complexity of the issues surrounding this area of the law and the need for detailed study and broad consultation. Indeed, the need for careful

study and broad consultation is arguably even more pronounced in the instant context, wherein actual legislative amendments (as opposed to merely advisory recommendations) are under consideration.

We understand that the PPF has been requested to make its report to the Commissioner by the end of September of this year. In our view, this time frame is simply not sufficient for the PPF to fully consult with and receive input from the various stakeholders on the many complex issues raised by the proposed amendments.

### 3. *Multilateral Enforcement Cooperation*

Bill C-471 is of great interest to the Section. The Section has previously acknowledged that restrictions on the ability of antitrust enforcement authorities to share confidential business information with their counterparts in other jurisdictions may constitute an impediment to informed and effective antitrust enforcement efforts.<sup>3</sup> In 1994, for example, the Section's NAFTA Task Force observed that A[t]he most significant obstacle to effective cooperation and coordination among competition authorities is the restriction on information sharing imposed by statutory confidentiality requirements.<sup>4</sup> It has been noted by the Section, moreover, that broader exchanges of information among antitrust enforcement authorities could result in better protection for consumers, more efficiently functioning markets, and more rational outcomes in dual investigations.<sup>5</sup>

While acknowledging the benefits of cross-border information exchanges, the Section has long emphasized that any sharing of information must be accompanied by appropriate safeguards to protect the confidentiality of shared information. In 1994, for example, the Task Force of the Antitrust and International Sections on the International Antitrust Enforcement Assistance Act ("IAEAA") observed that A[a]dequate safeguards to protect the confidentiality of sensitive business information are of paramount concern . . . . Th[e] overriding need for confidentiality in any international exchange program cannot be overstated.<sup>6</sup> Similar concerns were expressed by the Section in its 1999 comments on the European Commission's *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*.<sup>7</sup> In each of these instances, the Section

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<sup>3</sup> See, e.g., Report of the Section of Antitrust Law and the Section of International Law and Practice of the American Bar Association on the Proposed International Antitrust Enforcement Assistance Act (Aug. 1, 1994), quoting the Report of the American Bar Association Section of Antitrust Law's Special Committee on International Antitrust, p. 169 (Sept. 1, 1991).

<sup>4</sup> American Bar Association Section of Antitrust Law, NAFTA Task Force Report (July 18, 1994).

<sup>5</sup> Report of the Section of Antitrust Law and the Section of International Law and Practice of the American Bar Association on the Proposed International Antitrust Enforcement Assistance Act, at 18.

<sup>6</sup> *Ibid.*, at 19.

<sup>7</sup> Comments of the Section of Antitrust Law of the American Bar Association on the European Commission's *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty* (Nov. 3, 1999).

recommended the incorporation of safeguards that would preserve the confidentiality of exchanged information.

Bill C-471 proposes to provide a framework for non-criminal mutual legal assistance with respect to competition law enforcement. In principle, we view cooperation between the Competition Bureau and its foreign counterparts such as the Federal Trade Commission and the Department of Justice in the United States as part of an evolution in the development of a coordinated approach to the analysis and resolution of the complex issues that may be raised by international matters. In this regard, we understand that the proposed amendments may, among other things, pave the way for an agreement between Canada and the United States in accordance with the IAEEA,<sup>8</sup> which, as noted above, the Section has generally supported in the past.<sup>9</sup>

Of key concern, however, are legal certainty and the adoption of appropriate safeguards for the protection of confidential information. In this regard:

- ∃ Any legal framework providing for international enforcement cooperation in the competition law field should contain explicit safeguards and protections regarding the use and return of confidential information. While confidentiality guarantees are of critical importance, it must be acknowledged that such guarantees are only as good as the enforcement regime and judicial system of the jurisdiction offering the guarantee. Thus, such guarantees must be based not only on the *de jure* obligations to preserve confidentiality given by the recipient jurisdictions, but there should also be a well-founded determination that such guarantees will be respected through *de facto* enforceability. In this sense, fundamental rule-of-law questions must be taken into consideration to ensure that the judicial system in the recipient state can satisfactorily undergird the protection of confidential information in the context of multilateral enforcement cooperation.
- ∃ Preferably, the circumstances in which confidential information may be disclosed to a foreign enforcement authority should be explicitly addressed. Section 30.4 of Bill C-471 provides that an agreement entered into under the authority of the Bill must contain "provisions" respecting certain matters. It does not identify the parameters of those provisions. At a minimum, we suggest that those basic parameters be identified. Moreover, with respect to the right of Canada to refuse to give effect to a request for information, for reasons related to security, sovereignty or public interest, consideration should be given to identifying the standards to be applied and the details of the decision-making process, including who will be responsible for making such determinations. We suggest that the person who makes this broad public interest determination be someone other than the Commissioner, whose mandate is limited to competition matters.

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<sup>8</sup> 15 U.S.C. §§ 6201-6212.

<sup>9</sup> See Report of the Section of Antitrust Law and the Section of International Law and Practice of the American Bar Association on the Proposed International Antitrust Enforcement Assistance Act, *supra*, note 6.

- ∃ In addition, we suggest that consideration be given to the rules that will govern the exchange of confidential information. In this regard, several difficult issues arise. One such issue is whether notice should be provided in appropriate circumstances to the party whose information the Commissioner proposes to disclose pursuant to an international enforcement cooperation agreement. In this regard, in contrast to criminal matters where it may be inappropriate to notify a party before disclosing information, notification may be less likely to jeopardize a civil investigation. Thus, there may be less compelling reasons for refusing to provide notice to parties before disclosing confidential information to a foreign authority obtained in connection with a civil matter, unless notice were to unduly interfere with the investigation at hand.<sup>10</sup> Where notice is provided, the parties should be informed of the specific information that the Commissioner proposes to disclose, and the Commissioner's authority for doing so. Another issue relates to how (and whether) disputes regarding the exchange of confidential information should be addressed and whether there should be an opportunity for judicial oversight and review of such matters.<sup>11</sup>
- ∃ Consideration should also be given to amending the Act to extend the protections in section 29 to include confidential information which has been voluntarily supplied. This would simply reflect what we understand to be existing enforcement practice.<sup>12</sup> Consideration could then be given to requiring that before information is disclosed to a foreign enforcement authority, notice be given or a waiver be obtained from the party who supplied such information on a voluntary basis to the Commissioner. This would be consistent with the practice currently followed between U.S., Canadian and European enforcement authorities in respect of many international mergers.
- ∃ Subsection 30.4(e) of Bill C-471 provides that an agreement should contain an undertaking that information or evidence obtained will be used only for the purpose of enforcement and administration of the competition law of the foreign state. Conceivably, this provision could go further and state that the information or evidence obtained will be used only for the specific investigation in respect of which

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<sup>10</sup> ICC Policy Statement, "ICC recommendations to the International Competition Policy Advisory Committee (ICPAC) on exchange of confidential information between competition authorities in the merger context", Document 225/525, May 21, 1999. These recommendations are consistent with an earlier 1996 ICC policy statement, "ICC Statement on International Cooperation between Antitrust Authorities", Document No. 225/450, Rev. 3 (28<sup>th</sup> March, 1996). Note also that ICPAC's final report recommended that U.S. antitrust authorities consider providing notice of their intent to disclose information to antitrust authorities in other jurisdictions unless such notice would violate a treaty obligation of the United States or a court order or jeopardize the integrity of any U.S., state or foreign investigation. See ICPAC, *Final Report to the Attorney General and Assistant Attorney General for Antitrust*, February 28, 2000, at 199.

<sup>11</sup> In 1994, the U.S. Council for International Business proposed an amendment to the proposed language of the IAEAA to provide notice to the company whose information is to be disclosed to a foreign authority, a very short time frame to object to that disclosure, and an expedited judicial review procedure that would override a decision by the Attorney General or the FTC only in the case of an abuse of discretion. See Statement of the United States Council for International Business on the International Antitrust Enforcement Assistance Act of 1994 (Aug. 2, 1994).

<sup>12</sup> Industry Canada, *Communication of Confidential Information Under the Competition Act*, May 1995.

it may have been requested, unless appropriate arrangements are made to authorize an additional use. In addition, it could clarify that the enforcement and administration of the competition law of the foreign state does not include enforcement by private parties. It should also require that the confidentiality laws of the recipient jurisdiction provide at least the same protections and safeguards (including the obligation to resist disclosure) as provided under Canadian law.<sup>13</sup>

Finally, while the summary to Bill C-471 states that the Bill's purpose is "to promote international mutual cooperation in *civil* reviewable matters" (emphasis added), there is nothing in the Bill that would limit its operation to civil matters. Because a legal framework for international enforcement cooperation in the criminal context already exists,<sup>14</sup> we suggest that amendments to the Act relating to international enforcement cooperation explicitly state that they apply only to civil matters. In this regard, the term "violate", as used in paragraphs 30.3(a) and (b) of Bill C-471, would seem inappropriate in the context of civil matters.

The position taken by the Section in this submission is generally consistent with positions previously taken by the Section with respect to cross-border exchanges of confidential information. It is important to note, though, that the Section in this submission recommends the consideration and study of certain procedural safeguards not previously identified by the Section as requiring consideration in this context.

First, the Section raises the issue of whether advance notice should be given to the party whose information is to be disclosed pursuant to an international enforcement cooperation agreement, in certain circumstances. Other entities have considered this issue, including the International Chamber of Commerce, the U.S. Council for International Business and ICPAC.<sup>15</sup> Where notice is provided, moreover, this submission recommends that in certain circumstances parties should be informed of the specific information that the Commissioner proposes to disclose, and the authority for doing so. The ICC and the USCIB previously have made similar recommendations.<sup>16</sup> These are complex issues and it would seem appropriate, therefore, that they be studied and debated in greater detail in the present circumstances.

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<sup>13</sup> See note 11, *supra* (1999).

<sup>14</sup> *Mutual Legal Assistance in Criminal Matters Act*, R.S. 1985, c. 30 (4<sup>th</sup> Supp.), pursuant to which the Governments of Canada and the U.S. entered into a *Treaty Between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters*.

<sup>15</sup> See ICC Policy Statement (1999), *supra*, note 11; ICC Policy Statement (1996), *supra*, note 11; ICPAC Final Report (2000), *supra*, note 11; United States Council for International Business, U.S. Council Recommendation to DOJ Regarding the International Antitrust Enforcement Assistance Act of 1994; and Statement of the United States Council for International Business on the International Antitrust Enforcement Assistance Act of 1994 (Aug. 2, 1994).

<sup>16</sup> See ICC Policy Statement (1999), *supra*, note 11; ICC Policy Statement (1996), *supra*, note 11; and Statement of the United States Council for International Business on the International Antitrust Enforcement Assistance Act of 1994 (Aug. 2, 1994).

Second, in this submission the Section raises the question of whether information disclosed under an international cooperation agreement should be used only for the specific investigation with respect to which it was requested, unless appropriate arrangements are otherwise made for an additional use. While the IAEAA provides that disclosed information may be used only for antitrust enforcement purposes,<sup>17</sup> it does not incorporate, and the Section has not in the past recommended, this further limitation.<sup>18</sup> In addition, the Section suggests in this submission that the enforcement and administration of competition laws of foreign states not include enforcement by private parties. Although this limitation is consistent with the IAEAA, no similar clarification had been requested by the Section in the context of its comments on the IAEAA. As with the issues raised above, these too are areas in need of further study and debate.

#### 4. *The Proposed New Conspiracy Provisions*

##### (1) Overview

Bill C-472 proposes to make several fundamental changes to the manner in which horizontal restraints and other forms of cooperation between competitors are dealt with under the Act. Perhaps the most fundamental change being proposed would be to define several types of conduct as illegal *per se* as in the U.S. Although the Section is supportive of efforts which may lead to greater convergence and in this regard of adopting a *per se* approach to certain types of hard core criminal conduct, the proposed amendments raise at least three main issues which require, in our submission, greater study: (i) while it is not difficult to support the proposition that "collusion" is harmful, it is difficult in practice to determine whether a restraint constitutes collusion or is, in the language of Bill C-472, ancillary to some other restraint; (ii) the law and economics of competition policy change over time, and so what may be perceived to be harmful today, may turn out to be beneficial in light of changed economic factors and new learning; and (iii) whether conduct is harmful or helpful often requires a consideration of whether the conduct in question is efficiency enhancing, something not expressly provided for in Bill C-472. Individually and collectively, these considerations underscore the importance of taking the time to ensure that definitions of *per se* illegal categories of conduct are not over-inclusive.

The categorization of conduct as illegal *per se* is known in the U.S. as a "bright line" test. Under section 1 of the Sherman Act, whether an agreement is illegal *per se* or whether it is to be judged under the rule of reason has been the subject of extended debate. The rule of reason was stated in an early antitrust decision by the U.S. Supreme Court as follows:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.<sup>19</sup>

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<sup>17</sup> The IAEAA provides that the U.S. antitrust agencies may provide antitrust evidence to assist foreign antitrust authorities in the enforcement of their antitrust laws.

<sup>18</sup> See, e.g., Article VII of The Agreement Between The Government of the United States and the Government of Australia on Mutual Antitrust Assistance (April 27, 1999).

<sup>19</sup> *Chicago Board of Trade v. United States*, 38 S. Ct. 242 (1918), at 244.

Notwithstanding the generality of this approach, which mandates an inquiry into the effects of an agreement, naked price fixing and certain other agreements have long been found to be illegal *per se*. The underlying rationale has been that where a practice usually results in significant adverse competitive effects and rarely, if ever, is justified by significant redeeming virtues, there is little reason for an extended trial. The Sherman Act does not define what are "*per se*" offenses and what is objectionable or permissible under the rule of reason. It is a flexible statute that allows the interpretive gloss to evolve over time with changes in the economy and the economic and legal thinking of the day.

## (2) Collusion v. Ancillary Agreements

While it is common ground that naked price fixing is usually harmful, in practice this type of conduct has been difficult to distinguish from ancillary restraints in a range of situations. Thus, this approach has led to "characterization" issues and a great deal of uncertainty. Is the conduct price fixing, or is it ancillary to another agreement? For example, in *Vogel v. American Society of Appraisers*,<sup>20</sup> a gem appraiser attempted to charge a flat 1% fee for his work, subject to a minimum fee of \$10. As a result, he was expelled from the American Society of Appraisers on grounds that it was "unprofessional and unethical for [an] appraiser to do work for a fixed percentage of the amount of value . . . which he determines at the conclusion of his work". Vogel claimed he lost referrals from members of the society as a result of his expulsion. Would this be "collusion" under Bill C-472? Or would such an agreement be ancillary to some larger purpose?

Posner J. declined to treat the Society bylaw as either a boycott or price fixing, which are illegal *per se*. Although the bylaw had a direct effect on price, Posner J. held that its purpose or likely effect was not to raise price above competitive levels, but rather was designed to outlaw a method of fee setting that could lead to fraud on customers: the appraiser might have an incentive to over-appraise items in order to maximize fees. It remained open to Vogel, however, on a full trial and under a rule of reason to demonstrate any anticompetitive purpose or effect of the bylaw.

The more recent case of *California Dental Association v. FTC*<sup>21</sup> is also instructive. In that case the California Dental Association ("CDA") was alleged to have barred members from representing that their prices were "low", "reasonable" or "affordable", to have effectively prohibited certain pricing discounts by its members and to have imposed certain other non-price restraints or guidelines. The Federal Trade Commission treated the CDA's restrictions on discount advertising as illegal *per se*. In the alternative, the Commission held the price advertising (as well as the non-price) restrictions to be violations under an abbreviated rule-of-reason analysis. One Commissioner concurred separately, arguing that the Commission should not have applied the *per se* analysis to the limitations on price advertising. Another Commissioner dissented, finding the evidence insufficient to show either that the restrictions had an anticompetitive effect under the rule-of-reason, or that the CDA had market power.

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<sup>20</sup> 744 F.2d 598 (7th Cir. 1984), at 599.

<sup>21</sup> FTC Docket No. 9259; 128 F.3d 720 (9th Cir. 1997); 526 U.S. 756 (S. Ct. 1999).

The Court of Appeals for the Ninth Circuit affirmed, sustaining the Commission's ultimate conclusion on the merits. The Court thought it an error, however, to have applied *per se* analysis to the price advertising restrictions, finding analysis under the rule-of-reason to be required for all the restrictions. The Court of Appeals explained that the Commission had properly applied an abbreviated or "quick-look" rule-of-reason analysis designed for restraints that are not *per se* unlawful, but are sufficiently anticompetitive on their face that they do not require a full-blown rule-of-reason inquiry. On appeal, the Supreme Court vacated the Court of Appeals' decision and remanded, finding that the Court of Appeals erred in its application of quick-look analysis in the circumstances.

In its reasoning, the Supreme Court wrote:

[t]he truth is that our categories of analysis of anticompetitive effect are less fixed than terms like '*per se*', 'quick look', and 'rule of reason' tend to make them appear. We have recognized, for example, that 'there is often no bright line separating *per se* from Rule of Reason analysis,' since 'considerable inquiry into market conditions' may be required before the application of any so-called '*per se*' condemnation is justified. 'Whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same - whether or not the challenged restraint enhances competition.'<sup>22</sup> [citations omitted]

Thus, the uncertainty over the competitive implications of any given restraint may make it difficult to design and implement legislation with sufficient flexibility to determine whether an agreement involves naked collusion or whether price implications are ancillary to a procompetitive restraint. The use of *per se* rules has certainty as an attribute, but as the U.S. experience shows, legislating whether a type of agreement falls into a category "most of the time" requires detailed study and careful consideration.

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*Ibid.* at 779-80.

### (3) Competition Policy and Economics Change Over Time

Because the law and economics of competition policy change over time, it is important for changes to framework legislation such as competition law to proceed with caution. What may be perceived as harmful today, may turn out to be beneficial in light of changed economic factors and new learning. For example, in the 1977 case of *Continental T.V., Inc. v. GTE Sylvania Inc.*,<sup>23</sup> the Supreme Court relied on efficiencies to find that Sylvania's contractual restriction on where retailers could resell Sylvania products was not a *per se* violation of section 1 of the Sherman Act. Only 10 years earlier, in *United States v. Arnold, Schwinn & Co.*,<sup>24</sup> the Supreme Court had held that such restraints were *per se* illegal because they "are so obviously destructive of competition that their mere existence is enough".

These cases underscore both the need to be very careful when defining categories of conduct that will be subject to *per se* rules of illegality and the many issues raised by the proposed amendments. This is another issue which, in our submission, appears to require detailed study and debate.

### (4) A Consideration of Efficiency Benefits

Whether conduct is harmful or helpful often turns on whether the restraint in question is efficient. For example, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,<sup>25</sup> the Supreme Court held that the issuance of blanket licences by BMI X arguably a direct horizontal restriction on price competition among rivals X was not a *per se* violation of section 1, because the practice facially appeared to "increase economic efficiency and render markets more, rather than less, competitive". The Court identified several efficiencies resulting from issuance of the licences, including transaction, monitoring and enforcement cost savings, before remanding the case for consideration under the rule-of-reason test.

By contrast, in *NCAA v. Board of Regents of the University of Oklahoma*, the Court held that the NCAA's plan for televising football games, which prevented member institutions from competing against each other on the price or kind of television rights that could be offered to broadcasters, was not justified by any "procompetitive efficiencies which enhanced the competitiveness of college football television rights".<sup>26</sup> The Court noted, however, that if the NCAA's plan had produced procompetitive efficiencies, rather than being a naked restraint on price and output, the plan would have "increase[d] output and reduce[d] the price of televised games".<sup>27</sup>

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<sup>23</sup> 433 U.S. 36 (S. Ct. 1977).

<sup>24</sup> 388 U.S. 365 (S. Ct. 1967).

<sup>25</sup> 441 U.S. 1 (S. Ct. 1979) (*BMI*).

<sup>26</sup> 468 U.S. 85, 114 (S. Ct. 1984) (*NCAA*).

<sup>27</sup> *NCAA*, 468 U.S. at 114. Lower courts, following *BMI* and *NCAA*, generally recognize that efficiencies can have a significant impact on competition. *See, e.g., SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 2600 (1995).

These cases demonstrate the need to consider and account for the possible efficiency benefits of arrangements that do not constitute truly "hard core" criminal conduct - something only implicitly acknowledged in paragraph 45(7)(d) and completely absent from section 79.2. The absence of an explicit requirement to consider efficiency benefits may chill otherwise efficient business arrangements or at a minimum delay their implementation.

#### (5) 25% Market Share Safe Harbour

We question the appropriateness of the proposed 25% "safe harbour" exemption in paragraph 45(7)(e) of Bill C-472. It is not immediately apparent why conduct such as "naked" price fixing, market allocation or bid-rigging should be any less reprehensible when pursued by small firms.

In any event, this proposal likely would impose considerable costs on the Bureau as well as on parties to proposed agreements in the broad range of cases where the scope of the relevant market, its size and the parties' market shares are not immediately apparent. Market share measurement is a difficult and controversial issue in any specific case. The Section questions whether in this context it would be useful as a guideline. Rather than increasing certainty and predictability regarding the application of the law in these types of cases, this proposal would likely reduce certainty and predictability.

This problem would be exacerbated by the fact that market shares fluctuate over time, and parties who entered into a cooperative arrangement with one or more competitors at a time when their combined market share was below 25% could find themselves in contravention of the law at a later date if their share increased above that threshold, either through their own competitive efforts or because other firms had exited the market.

#### (6) Pre-clearance

Paragraph 45(7)(c) of Bill C-472 proposes to exempt from criminal liability any agreement that is notified to the Commissioner pursuant to subsection 79.2(1) of Bill C-472. In other words, it appears that parties to any proposed price fixing or other cartel agreement would be able to avoid criminal sanctions by merely *requesting* a clearance certificate under subsection 79.2(1). We submit that it would not be appropriate to permit parties to truly hardcore cartel conduct to avoid the application of section 45 simply by notifying the Commissioner of their agreement. At a minimum, the Commissioner should have granted the certificate before an agreement would be exempt from section 45.

However, we question whether the benefits of a pre-clearance regime will justify the costs and delays that will be imposed on the private sector as well as the Competition Bureau. It may be noted that other jurisdictions are moving away from this type of procedure. We submit that it would be better to clarify the law to facilitate self-compliance. Businesses in Canada, the U.S. and elsewhere have a long history of relying upon internal compliance programs to promote adherence to the law.

In any event, it is unclear why a certificate issued under proposed subsection 79.2(5) would be limited for a period of three years. The uncertainty regarding what would happen at the end of the three-year period likely would dissuade persons from making the significant investments associated with strategic alliances, joint ventures and other types of conduct that may be good candidates for such certificates. Accordingly, we submit that if a clearance certificate regime is adopted, certificates should continue in force as long as the facts upon which they are issued remain the same, in much the same way as advance ruling certificates apply under what is now section 102 of the Act.

#### (7) Horizontal Price Maintenance

The price maintenance provisions in section 61 of the Act have in the past been invoked to address horizontal conduct between competitors. We question whether such a broadly worded price maintenance provision would continue to be necessary if section 45 were amended to create a two-track approach to horizontal arrangements. We suggest that consideration be given to dealing with all horizontal restraints under section 45 or the proposed section 79.2, and confining section 61 to vertical price maintenance. We further suggest that consideration be given to amending section 61 to require a demonstration of anti-competitive effects and to permit a consideration of any efficiencies or other pro-competitive effects of vertical price maintenance.

#### (8) Export Cartels

Consideration should be given to revisiting the defence for export cartels, which appears in subsection 45(5) of the current Act and which is set forth in subsection 45(5) of Bill C-472. Maintaining an explicit "defence" for export cartels suggests an implicit sanction of such conduct, which would appear inappropriate in today's global trading environment.<sup>28</sup>

### 5. *Cease and Desist Orders B Bill C-472*

The Section opposes the cease and desist powers proposed by Bill C-472. Those provisions would give the Commissioner the power to issue temporary orders prohibiting a person "from doing an act or a thing that could, in the opinion of the Commissioner, constitute an anti-competitive act or requiring the person to take the steps that the Commissioner considers necessary to prevent injury to competition or harm to another person". Under the proposal, the Commissioner may issue a cease and desist order without advance notice to the affected party for a period which may be extended up to 80 days. A breach of the order may be an offence punishable by fine or incarceration pursuant to section 66 of the Act.

The Section is not aware of any demonstrated need for such a provision. By way of comparison, no similar provision exists for the enforcement of U.S. antitrust laws, which are instead enforced, where interim relief is appropriate, before the courts pursuant to the provisions of the Clayton Act.<sup>29</sup>

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<sup>28</sup> See, e.g., Report of the Task Force of the Antitrust Section of the American Bar Association on The Competition Dimension of the North American Free Trade Agreement (July 20, 1994), at 180 *et seq.* and 300.

<sup>29</sup> 15 U.S.C.A. § 16.

The Section's fundamental concern with this proposal relates to due process. In particular, the Section is concerned that the proposal fails to provide a person whose interests may be affected by an order with notice and an opportunity to make representations before that order is made. Under the proposal, a person could be imprisoned for breach of a temporary order of the Commissioner without even these basic protections. Although the person would have the right to appeal the Commissioner's order to the Tribunal, at the initial stage, there would still be no requirement of notice or of a hearing. The proposal also removes the distinction between adjudicator and investigator and thereby fails to set up an impartial procedure for determining whether such an order should be made.

The possibility for such an order to have far-reaching effects on businesses and consumers on both sides of the border magnifies the Section's concerns in this regard. The Section recommends that no such proposal be adopted. If a more expeditious procedure for the issuance of interim orders is in fact needed, then changes to the procedures governing the Tribunal's jurisdiction to grant such orders could be considered.

#### 6. *Conclusion*

We hope that the PPF will take into account the views contained in this submission as it moves forward in its deliberations on the issues raised by the proposed amendments. The Section would be pleased to participate further in the consultative process. In this regard, please contact Mr. Ky Ewing, Chair of the American Bar Association's Section of Antitrust Law at (202) 639-6580, or at [kewing@velaw.com](mailto:kewing@velaw.com).

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