

**SUBMISSION TO THE PUBLIC POLICY FORUM
ON THE PROPOSED AMENDMENTS TO THE COMPETITION ACT**

AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW

SEPTEMBER 2003

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. 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 ABA.

Summary and General Comments

The PPF issued a discussion paper on June 23, 2003 ("Discussion Paper") that summarizes the proposed changes, sets forth draft language, and asks a series of specific questions. After providing a summary of key comments, the Section answers the specific questions in the Discussion Paper. The responses follow the organization of the Discussion Paper and include the following sections:

- I. Strengthening the Civil Provisions
- II. Reforming the Conspiracy Provisions
- III. Repealing the Pricing Provisions
- IV. Proposal for Industry Sector Inquiries

Set forth below is a summary of the main points discussed in the Section's comments.

Global Harmonization: The Section supports the efforts by the Government of Canada to modernize and reform its competition laws. The proposed changes generally reflect the advances that have been achieved in the economic and legal analysis of competition issues. As a result, most of the proposed changes will align the Canadian competition laws more closely with those of the United States, the European Union, and the many other jurisdictions around the globe with competition regimes. The ever increasing globalization of the economy makes consistency of competition regimes around the world particularly important, and the current proposals are a significant step towards that goal.

Decriminalization: The proposed modifications to the criminal conspiracy provisions are one example of the progress that has been made in competition analysis. The current Canadian competition laws impose criminal sanctions for an exceptionally broad range of conduct, much of which is likely to have ambiguous competitive effects and some of which can benefit consumers. As a result, many of the criminal aspects of the current Competition Act have led to few enforcement actions. In the United States, the Sherman Act does not delineate the line between criminal and civil violations. Nevertheless, a combination of judicial decisions and prosecutorial discretion have limited criminal enforcement to hard-core cartel behavior that has no plausible connection to legitimate joint activity. To the extent that U.S. authorities debate whether a challenged restraint is sufficiently necessary to the legitimate goals of a joint venture to warrant rule-of-reason as opposed to *per se* treatment, the debate is limited to the proper analysis in a civil, not a criminal, proceeding.

The proposed changes to the Canadian conspiracy statute will better enable Canadian authorities to focus criminal prosecutions on hard-core criminal antitrust violations. Nonetheless, the Section believes that the current draft language, particularly relating to the proposed ancillarity defense, may still be overly broad and recommends further study of this issue.

Potentially Redundant Remedies: The Section recommends that the Government of Canada study whether it is desirable to create redundant remedies for the same conduct. Under the proposed amendments, a given anticompetitive practice may subject the offender to injunctions, administrative monetary penalties (“AMPs”), and private damage actions. For deceptive marketing practices, defendants face all of these remedies plus the possibility of a restitution order. Multiple remedies create the possibility of excessive punishment, duplicative recoveries, and over-deterrence. Without taking any position on the outcome of the analysis, the Section recommends consideration of the risks of duplicative remedies and study of an incremental approach that does not create multiple new remedies simultaneously. The Section observes that the issue of potentially redundant remedies has generated substantial debate in the United States and that the Section currently has a remedies task force evaluating these and related issues. The Section also observes that civil antitrust enforcement in the United States depends more heavily on private actions brought by injured parties than it does on governmentally imposed monetary penalties.

Clearance Provision: The Section observes that the proposed clearance provisions may create additional complexity without providing significant benefits. The Section understands that a new binding advisory opinion process has been created within the last year. A similar advisory opinion system exists in the United States and has proven effective in giving parties to horizontal agreements an opportunity to present a proposed course of conduct to the antitrust agencies prior to initiation. It may be preferable to gain further experience with the advisory opinion process before creating the more extensive clearance certificate program, which appears to serve a similar purpose.

Industry Inquiries: The Federal Trade Commission (“FTC”) has as one of its missions the study of businesses and industry. The FTC can invoke compulsory process to obtain information in connection with such studies. Because of the potential burdens that requests for information and/or testimony can impose, the FTC uses these powers sparingly and

principally to educate the government and/or citizens on discrete issues. Further, the FTC is vested with these powers specifically because it is a repository of experience and expertise on competition issues. The Section encourages the Government of Canada to vest any similar authority for studies with an expert body and to ensure that any such power is used with restraint and with a sensitivity to the burdens that it can impose on private parties.

Transition Issues: As the Discussion Paper anticipates, the proposed changes, if and when adopted, may raise transition issues that should be considered. For example, under the current law, an agreement among companies with very small market shares is unlikely to have the requisite “undue” effect on competition under section 45. The proposed elimination of this requirement can increase the legal risk of such an agreement. As explained herein, the Section recommends that the Government of Canada consider a transition mechanism or mechanisms to help businesses adjust to the new competition regime. Transition mechanisms might include postponing the effective date of certain provisions or even “grandfathering” for a period of time certain collaborative agreements that pre-date the amendments.

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I. Strengthening the Civil Provisions

The Discussion Paper proposes three principal amendments to the Act's civil provisions: (i) introduce Administrative Monetary Penalties ("AMPs") for a number of civilly-reviewable matters; (ii) provide for restitution to consumers harmed by non-criminal misleading advertising and deceptive marketing violations; and (iii) create a broader private right of action for damages for breaches of the Act's civil provisions where a court or the Competition Tribunal has made an order.

A. Administrative Monetary Penalties

The sanctions currently available in respect of a civilly-reviewable matter are generally limited to Tribunal orders prohibiting the conduct and/or requiring certain steps be taken to eliminate or reduce the anticompetitive effect. The Discussion Paper proposes introducing AMPs for the following civilly-reviewable matters: refusal to deal (section 75), consignment selling (section 76), tied selling, market restriction and exclusive dealing (section 77), abuse of dominant position (section 79) and delivered pricing (section 81). The imposition and amount of any AMP would be in the discretion of the Competition Tribunal, with the express requirement that AMPs be imposed with a view to promoting compliance with the Act, not punishment. The proposed provision lists a number of factors that the Tribunal would be required to take into account in exercising its discretion to determine the amount of an AMP:

- the frequency and duration of the acts on the basis of which the order is made;
- the vulnerability of the class of person adversely affected by those acts;
- injury to competition in the relevant market;
- the history of compliance with this Act by the person;
- the volume of gross sales affected by the conduct in respect of which the order is made;

- any economic benefit or loss generated by the conduct; and
- any other relevant factor.

The Discussion Paper also proposes revising the limited AMP provisions currently in the Act relating to non-criminal misleading advertising and deceptive marketing practices, to give the Tribunal discretion in fixing the amount of any AMP.

Question No. 1: *Do you agree the Competition Tribunal should have the ability to impose AMPs when firms contravene the sections listed above? Why or why not?*

Response: The Section agrees that there should be some remedial authority beyond orders to cease and desist and/or restore competition. The Section nevertheless urges the Government of Canada to consider all of the remedies that exist or will exist when evaluating each specific potential new remedy. In particular, the Section urges study of an incremental approach as compared to the simultaneous adoption of both AMPs and a private right of action for the same behavior. Enacting both new remedies would constitute a sharp and substantial change toward greater sanctions with effects that could be difficult to predict. While they may be appropriate in certain circumstances, duplicative remedies also can be excessively punitive, deterring legitimate competitive behavior and depriving consumers of the benefits of such activity. In the United States, the Section has formed a remedies task force, in part to evaluate these issues. With respect to a choice among the remedies, the United States has found injunctions and private damage actions to be useful to foster compliance with its civil antitrust laws and does not have significant experience with AMPs in competition cases.¹ If AMPs are instituted for competition cases in Canada, the Section believes that their use should be limited to situations in which the other available remedies are not adequate.

¹ There are two instances in the United States in which an AMP is authorized in a civil antitrust matter: violations of existing government orders and violations of the Hart-Scott-Rodino (premerger notification) Act. In both instances, United States law does not allow for private damage actions. It should also be noted that the United States government has occasionally sought restitution and/or disgorgement where a civil antitrust cause of action also exists. These cases are rare, however, and because of the concerns mentioned above (*e.g.*, duplicative recovery, overdeterrence and the like) under current FTC policy restitution or disgorgement is only sought in cases where (a) the underlying violation is clear, (b) there is a reasonable basis for calculating damages, and/or (c) other remedies such as private actions and criminal proceedings are unlikely to be sufficient. See FTC “Policy Statement on Monetary Equitable Remedies in Competition Cases,” July 25, 2003.

Question No. 2: *Should AMPs be imposed at the discretion of the Competition Tribunal? Why or why not? Should there be a statutory maximum such as currently exists in subsection 79(3.1) (a maximum of \$15 million)? If not, what alternative would you suggest?*

Response: If the Canadian government decides to enact AMPs in competition cases (and especially if it also enacts a private cause of action), it will need to consider how best to achieve the predictability and objectivity necessary to ensure fair and effective enforcement. In general, the Section recommends that the determination of any AMPs should be pursuant to objective standards that are made known to the public. Some flexibility also would be required. For example, an AMP in any particular case should not be mandatory, and the Tribunal should have some discretion to determine the amount in each case, including consideration of a credit or offset in relation to any damages awarded in a private action. In the few instances where an AMP is authorized in the United States, the enforcement authorities and courts (a) have discretion in deciding whether to impose an AMP, and (b) nevertheless seek to follow objective standards in determining the amount in each case. In addition, the Section supports the establishment of a statutory maximum for AMPs. The Section has not had sufficient time to evaluate the best method for determining an appropriate cap on any AMPs.

Likewise, AMPs are not generally authorized for consumer protection violations in the United States.² Rather, in the vast majority of consumer protection matters, the United States relies on a system of restitution similar to that proposed in the Discussion Paper. The Section believes that, if the proposed legislation concerning restitution is enacted, an enhanced AMP remedy may be unnecessary. Additionally, if both an expanded AMP system and a restitution system are adopted (along with a private right of action), many of the same concerns about extensive change, potential duplicative/punitive recoveries and potential over-deterrence arise as discussed above regarding competition cases.

Question No. 3: *If AMPs are available for reviewable matters under Part VIII of the Act, should the general regime replace the current one that applies specifically to airlines (section 79)?*

Response: As a general matter, broadly applicable statutes are preferable to industry-specific provisions in most circumstances. Thus, the Section would encourage the Government of Canada to consider consolidating section 79 with the more general provisions under Part VIII. Aside from this general principle, the Section does not have a specific view on whether consolidation is appropriate in this particular instance.

² AMPs in consumer protection cases are allowed under United States law for violations of existing government orders and for certain specific violations in particular industries.

Question No. 4: *Do you agree that the proposed criteria for assessing AMPs as outlined in the draft provision in subsection 107.1(2) are appropriate? Should other criteria be added to guide the Tribunal's assessment? If so, which criteria do you suggest?*

Response: If the Government of Canada concludes that it should adopt AMPs, the Section agrees with the proposed list of criteria in the draft provision, except that the list also should include express reference to the likely availability of any other remedy, such as a private action.

Question No. 5: *Should the general regime for AMPs also apply to cases of refusal to supply by a foreign supplier (section 84)? Why or why not?*

Response: As a general matter, the Section believes that the competition laws should be applied in the same manner to all parties with an appropriate nexus to the jurisdiction, regardless of whether the involved entity is a foreign or domestic party.

Question No. 6: *Do you have additional comments?*

Response: Not at this time.

Question No. 7: *In case of deceptive marketing practices, should the courts have the power to impose AMPs at their discretion? Why or why not?*

Response: The Section supports reforms that simplify the competition laws and that apply generally to various types of conduct. There does not appear to be a reason to limit the courts' discretion with respect to deceptive marketing practices to a greater degree than with respect to other violations of the Act. Indeed, the net harm to consumer welfare from deceptive or fraudulent marketing practices is frequently more clear than is the case with most restraints of trade. As with any AMPs applied in competition matters, however, they should be applied in deceptive marketing practices cases only in cases of clear-cut violations in order to avoid the risk of chilling legitimate competitive conduct. The Section also supports the imposition of a statutory maximum for AMPs in both competition and deceptive marketing cases.

Question No. 8: *Subsection 74.1(5) currently sets out a list of criteria for courts to consider when assessing AMPs. Should other criteria be added to guide the courts' assessments? If so, which criteria do you suggest?*

Response: If the Government of Canada decides to adopt AMPs, the Section agrees with the proposed list of criteria in the provision, except that the list should include express mention of all other potential remedies, including a private action.

Question No. 9: *Do you have additional comments?*

Response: Not at this time.

B. Restitution

The Discussion Paper also proposes that the Tribunal and the Courts be given the power, on application by the Commissioner, to require respondents found to have violated the non-criminal misleading advertising and deceptive marketing practices in section 74 of the Act to pay restitution to consumers. This proposed power would be in addition to the Tribunal's existing authorization for AMPs. The draft provision would preclude a restitution order where the person establishes that he or she exercised due diligence to prevent the reviewable conduct from occurring. Finally, the Court would be guided in its decision by the objective of promoting conduct conforming to the Act, and not punishment.

The proposed restitution remedy includes the power to require respondents to establish a restitution fund and to distribute monies directly to entitled purchasers, or to appoint an administrator for the fund to effect the distributions. The Discussion Paper further recommends that any fund balance could be distributed, at the Court's discretion, to non-profit organizations that work to benefit consumers in similar situations.

In connection with restitution orders, a new injunctive power is proposed giving the Court the power to make a freezing order upon a Commissioner application alleging conduct contrary to the non-criminal misleading advertising and deceptive marketing practices in section 74 of the Act. The Court can make a freezing order (if necessary *ex parte* upon the Court being satisfied that the public interest and urgency warrant it) to safeguard money for restitution.

Question No. 10: *Do you agree the courts should have the ability to order restitution to consumers in certain circumstances and on application by the Commissioner of Competition? Why or why not?*

Response: As noted above in response to Question No. 2, the U.S. provides for restitution in consumer protection matters. In the Section's view, restitution may be appropriate, but the Section also recommends that consideration be given to the effect of all potentially applicable remedies. Among other issues, consideration could be given to whether private damages that are awarded should be offset against any restitution remedy and vice versa.

Question No. 11: *Should the draft provision address the appointment of a fund administrator to administer and distribute the fund created as a result of a restitution order? Why or why not?*

Response: The Section believes that the courts or Tribunal should have the authority to appoint such an administrator when deemed appropriate. The specific standards for appointing an administrator and for the conduct of an administrator may be best addressed through regulations, which can be modified more easily than statutes as more experience is gained with the provision. Consideration should be given as to how such an administrator would be funded. The administrative costs could be added to the amount of restitution ordered or subtracted from the overall pool of funds available for distribution to consumers.

Question No. 12: *Do you have additional comments?*

Response: Not at this time.

Question No. 13: *Should the provision state that the courts may make an order about the use of any balance in the restitution fund?*

Response: As reflected in the Discussion Paper, the purpose of a restitution remedy is to restore injured consumers to their state prior to the violation. *See, e.g.*, FTC Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2003). Thus, the courts should make all reasonable efforts to disburse restitution funds to the victims of the violation. If any funds remain, however, the court would not achieve “restitution” by disbursing such remaining funds to anyone else. Thus, the disposition of any remaining funds should be addressed under a rubric other than restitution, which might include, for example, payment to the government treasury or to a charitable organization (as an AMP or as part of a disgorgement remedy) or reversion to the entity that provided the funds.

Question No. 14: *Should the provision direct or suggest that any balance in the restitution fund be given to non-profit organizations in Canada for projects that would benefit consumers in similar situations?*

Response: As discussed above, contributing remaining funds to a charitable group does not directly assist those who suffered the injury and is therefore not “restitution.” In any event, the Section recommends careful consideration of whether courts should order the payment of any balance of a restitution fund to non-profit organizations. Although such an approach has some appeal, it may place the courts in the uncomfortable position of attempting to select the most worthy charity and assuring that the selected charity uses the funds appropriately. That approach also may encourage some non-profit organizations to create projects solely to obtain the balance of a restitution fund. Despite their best efforts, courts ordering the delivery of significant balances from restitution funds to non-profit organizations could find themselves defending allegations of favoritism or inappropriate usage of the funds by the ultimate recipients. Having identified these potential concerns, the Section takes no position on the appropriate outcome in this instance.

Question No. 15: *Do you have additional comments?*

Response: Not at this time.

Question No. 16: *Should the courts be able to make a freezing order to ensure that the purpose of the restitution remedy is not defeated? Why or why not?*

Response: The Section understands that current Canadian law generally permits parties to seek accessory orders, similar to a preliminary injunction under U.S. law. If so, the government already would appear to have the right to seek a preliminary order preserving assets and the need for a new provision is not clear. If, however, the existing procedures are deemed inadequate and such a provision is adopted, the Section observes that it should incorporate

adequate due process protections, including notice and an opportunity to respond, similar to the due process required under traditional preliminary injunction proceedings.

Question No. 17: *Do you have additional comments?*

Response: Not at this time.

C. *Civil Cause of Action*

The proposed amendment would allow for the recovery of losses or damages resulting from non-criminal conduct for which a court or the Tribunal has made an order.³ While the draft provision requires the court to take into account whether an order for restitution was made, the right of civil action would be independent from, and in addition to, the exposure to a Tribunal-ordered AMP.

Question No. 18: *Should section 36 be amended to allow businesses and individuals who have suffered damages to recover their losses in civil court once an order by the Tribunal or a court has been made? Why or why not?*

Response: Subject to the concern expressed above about potentially duplicative recoveries or penalties, allowing businesses and individuals who have suffered damages to recover their losses in a civil court can further the purposes of the Competition Act. A successful civil action enables the party directly injured, and therefore often the party with the greatest interest, to recover compensation for its loss. In addition, creating a private cause of action increases the incentive to comply with the competition laws. The deterrent effect of a civil cause of action should be weighed against the risk that over-deterrence will chill desirable conduct that may benefit consumers.

The Section suggests the consideration of several issues relating to private actions.

First, the combination of AMPs and a civil cause of action (and, in the case of deceptive marketing practices, restitution) creates the risk of duplicative recovery for a single injury and a potential chilling effect on competition. As discussed in section I.A above, the Section suggests further consideration of the potential risks of enacting duplicative remedies and the possibility that multiple remedial approaches could be reconciled through the use of offsets and/or credits. The resolution of this issue will likely affect whether the draft provision retains the explicit reference to a restitution order under paragraph 74.1(1)(d).

Second, in situations where a private cause of action applies, duplicative recoveries can occur if more than one plaintiff can recover for the same injury. For example, assume that a group of manufacturers conspired to fix prices of products sold to their respective distributors that, in turn, resold those products to consumers. If distributors increased their prices

³ Consent orders would be excluded.

in order to pass to consumers part of the overcharge, the question arises as to whether both the distributors and consumers can recover damages and, if so, how much. In the United States, only direct purchasers may bring antitrust claims under federal law.⁴ A number of states, however, permit both direct and indirect claims under their respective state laws. There is no consensus within the United States as to the best approach to this issue.⁵

Third, the Government of Canada should consider the possible effects of private competition actions proceeding as class actions. Certification of an antitrust action as a class action significantly increases the pressure on defendants to settle the matter, given the higher stakes if they do not. Recently, at least one FTC Commissioner has expressed his concerns that (1) class actions result in the lawyer, rather than the class, becoming the real party in interest, and (2) there exists a risk of collusive settlements that do not adequately compensate the class but richly compensate the class counsel. *See* T. Leary, *The FTC and Class Actions*, June 26, 2003 (available at www.ftc.gov/speeches/leary/classactions Summit.htm). At the same time, others view class actions as a relatively efficient means of compensating victims of antitrust violations. Thus, the Section encourages the Canadian government to monitor the use of any private right of action to minimize abuses, particularly in the class action context.

Finally, if a civil action is permitted, there will be the issue of joint and several liability and rights of contribution. For example, under U.S. antitrust law, defendants to an illegal antitrust conspiracy are jointly and severally liable for damage caused by the conspiracy. Plaintiffs need not establish specific damages caused by each defendant and may collect the entire amount of proven damages from one or more defendants, at the plaintiffs' option. Further, defendants generally do not have a right of contribution against one another. While this approach helps plaintiffs to collect damages, it also can provide uneven incentives for companies to comply with the law, depending on their relative likelihood of being selected by plaintiffs for payment. For example, potential "deep pocket" defendants may face a greater chance of being sued and paying a disproportionate share of the total harm than their smaller, less wealthy co-conspirators. The Section understands that Canadian law generally provides for joint and several liability, but with a right of contribution among defendants. The Section recommends consideration of these issues.

⁴ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

⁵ Another issue that has arisen in U.S. antitrust law in the context of a private right of action is the concept of antitrust injury. Under U.S. antitrust law, a private party must show not only a violation of the antitrust laws, but also that its injury is the type of injury that the antitrust laws were designed to prevent. A party that is tangentially injured by the violation or injured in a way inconsistent with the goals of the antitrust laws may not recover damages.

Question No. 19: *What should be the starting point for the assessment of the loss or damage suffered as a result of the reviewable practice: the day of the start of the practice or of an investigation by the Commissioner, or the date of an application to the Tribunal or a court?*

Response: The appropriate starting point in time for the assessment of loss or damage depends on the degree of deterrence sought and the value of ensuring repose with the passage of time. Starting with the date on which the practice began results in the largest potential damage award, restitution fund or AMP; accordingly, it has the greatest deterrent effect. The Section nevertheless recommends that some statute of limitations apply to Competition Act violations to avoid the burden and potential unfairness of requiring a defendant to litigate issues that occurred many years in the past. In the United States, the statute of limitations is generally four years, subject to equitable tolling.

The Section observes that prohibiting recovery of damages suffered prior to the initiation of an investigation or an application to the Tribunal or a court could undermine the deterrent effect of a private right of action. A violator would have less incentive to comply with the Act unless and until the start of an investigation or the date of an application.

As a matter of clarification, the draft language concerning the statute of limitations (proposed section 36(4)) refers in part to a time period ending two years after the day on which any criminal proceedings are finally disposed. It may be worth clarifying whether this refers to the end of criminal proceedings against the defendant being sued or to the end of criminal proceedings against any party involved in the violation.

The Section also observes that awarding damages or restitution for conduct that occurred prior to the amendments could be considered a punishment that the defendant could not have reasonably anticipated at the time. The government could consider permitting the damage or restitution period to begin at the later of (1) the effective date of the amendment or (2) the start of the practice.

Question No. 20: *Under the proposed provision, consent agreements under sections 74.12 and 105 of the Act are exempt from recourse under section 36. Do you agree with this? Why or why not?*

Response: This question requires a balancing of the benefits of consent agreements against the additional resistance that defendants would raise to consent agreements if such agreements also exposed the defendants to paying damages in civil actions. On balance, the Section believes that the benefits of consent agreements outweigh the costs, particularly if the Competition Bureau considers the appropriateness of requiring the payment of restitution or AMPs as part of a consent agreement. The Competition Bureau benefits from consent agreements by being able to operate at considerably less expense than if it were forced to try each alleged violation. Consent agreements can also provide a means for the Competition Bureau to educate businesses as to the types of conduct that the Bureau considers to violate the Competition Act. The Section understands that the Competition Bureau has used consent

agreements as part of its enforcement efforts in the past. Exempting those agreements from recourse under section 36 would continue or expand this practice.

Question No. 21: *Is it necessary to explicitly refer in the draft provision to an order made for restitution under paragraph 74.1(1)(d)? Why or why not?*

Response: Yes, the Section believes that an explicit reference is appropriate. If both a civil cause of action and a restitution remedy co-exist, this language appears important to limit the risk of duplicative recovery. See response to question 18.

Question No. 22: *Should section 36 apply to cases of refusal to supply by a foreign supplier (section 84)? Why or why not?*

Response: As a general matter, the Section believes that competition laws should be applied in the same manner to all parties with an appropriate nexus to the jurisdiction, regardless of whether the involved entity is a foreign or domestic party.

Question No. 23: *Do you have additional comments?*

Response: Not at this time.

II. Reforming the Conspiracy Provisions

The Discussion Paper proposes a dual-track approach to replace the current, exclusively criminal, conspiracy provision. First, the proposal creates a *per se* criminal offense to address hard-core anticompetitive conduct such as price fixing, market allocation, customer allocation and output restrictions between competitors or potential competitors. Second, the proposal creates a new civil offense to address all other agreements among competitors which may have the potential to substantially lessen competition in certain circumstances. Third, to complement the foregoing amendments, the Discussion Paper proposes a clearance procedure pursuant to which parties could apply for assurances that the Commissioner will not initiate civil and/or criminal proceedings against a particular agreement.

A. Criminal Conspiracy Provisions

Question No. 24: *Do you agree with the House of Commons Standing Committee on Industry, Science and Technology's recommendation that the Competition Act include a criminal provision to deal with egregious anticompetitive cartel activity and a companion civil provision to deal with other types of agreements among competitors?*

Response: The Section supports efforts aimed at the adoption of a *per se* approach to hard-core cartel activity. Truly naked horizontal agreements not to compete are so unlikely to have redeeming benefits that they do not warrant individualized examination as to their net competitive effect and are appropriately subject to *per se* condemnation. Section 45 of the Competition Act, however, is not currently limited to hard-core cartels. Rather, it applies on

its face to all agreements, including vertical agreements and integrative joint ventures that may benefit as well as harm competition. To avoid overbreadth, section 45 condemns only agreements that have an “undue” impact on competition. As a result, the Commissioner bears the burden of showing undue harm to competition in each case, a burden that should be unnecessary in the case of hard-core cartel activity.

The United States faces a similar issue in that the Sherman Act on its face presents the possibility of criminal sanction for any agreement in restraint of trade. In practice, however, the U.S. courts, the Antitrust Division of the Department of Justice, and the various state attorneys general have provided guidance on when they will and will not bring a criminal antitrust proceeding. Such guidance can be found in Chapter III.C.5 of the Antitrust Division Manual (3rd Ed. 1998, Revised). The “general, current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging and horizontal customer and territorial allocations,” while using civil prosecution for other suspected antitrust violations. Furthermore, criminal prosecution may not be considered appropriate where “(1) there is confusion in the law; (2) there are truly novel issues of law or fact presented; (3) confusion reasonably may have been caused by past prosecutorial decisions; or (4) there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action.” The Section also observes that hard-core cartel activity that is prosecuted criminally characteristically involves concealment or covert activity by the defendants. The Section recommends that the Canadian government follow a similar approach in its statute and in the exercise of its prosecutorial discretion by limiting criminal sanctions to such hard-core, naked agreements among competitors not to compete that have no plausible connection to legitimate joint venture activity.

The proposed revision of section 45 includes a defense based on an agreement being ancillary to a principal agreement. The defense requires the defendant to show that the challenged agreement is necessary to the principal agreement and that no less restrictive alternative is available. The Section respectfully suggests that this approach could constitute a significant deterrent to legitimate procompetitive joint venture activity. Specifically, competitors forming a legitimate joint venture would face the possibility of criminal sanctions if they were to adopt a restriction that a court subsequently decides was more restrictive than absolutely necessary. Recognizing the problems with such an approach, the U.S. antitrust authorities do not prosecute criminally agreements among competitors that have any plausible connection to a legitimate joint venture, even if less restrictive means were available. In recent years, challenges to such a restraint have been brought in civil proceedings.⁶ Thus, the Section recommends revising proposed section 45 to make clear that criminal sanctions do not apply to agreements that have a plausible relationship to legitimate integrative joint venture activity. Rather, any such agreement would be reviewed, if at all, under the civil provisions of the Competition Act.

⁶ To the extent that there is a debate in the United States as to whether an agreement is reasonably ancillary to a legitimate joint venture or subject to the *per se* rule, this debate occurs exclusively in civil, not criminal, proceedings. The Section is not aware of any criminal antitrust prosecution that has occurred in many years that had even an arguable connection to a legitimate joint venture.

Question No. 25: *Do you agree that the phrase “persons who compete or could reasonably be expected to compete” will ensure the provision only captures horizontal agreements among competitors? Will this language require the Competition Bureau to do a complex competition analysis for each criminal case? If so, how else could horizontal agreements be captured by the provision? Please explain.*

Response: The Section supports efforts to limit the application of section 45(1) to horizontal agreements among competitors. The Section, however, recommends against the inclusion of the proposed “reasonably be expected to compete” language for several reasons.

First, including this language may have the unintended effect of broadening the *per se* category of offenses as there is no limit or guidance as to what constitutes “reasonably expected.” For example, vertically-related firms under certain circumstances could be potential competitors, turning vertical agreements that are almost always judged under the rule of reason in the United States into potentially criminal horizontal activity in Canada. As one illustration, a company that decides in good faith that it is more efficient to purchase a product that it could have made itself should not face criminal liability for a subsequent supply agreement.

Second, the Section believes that the phrase “persons who compete” may already be open to interpretation and the “reasonably be expected” extension will even further complicate the inquiry.

Third, “reasonably” may be difficult to prove as the requisite standard for criminal liability and may entail a subjective inquiry into, for example, the likelihood of entry. The Section does not believe that criminal liability should hinge on such a subjective inquiry that may be inconclusive. More narrowly tailored language focusing on the elimination of competition that would exist but for the agreement warrants consideration.

Question No. 26: *The draft provision would apply to agreements among competitors or potential competitors that have the “purpose” or “effect” of fixing prices, allocating customers or markets, or restricting production or supply of a product. Do you agree with the inclusion of a purpose and an effect test? Why or why not?*

Response: The Section agrees with the notion that an actual anticompetitive effect need not be proven to establish a section 45(1) violation, provided that section 45(1) is limited to hard-core, naked horizontal agreements not to compete. The establishment of a violation based on the existence of a naked agreement itself rather than on the agreement’s effect has proven to be a workable and effective approach in the U.S. and responds to the burden of proof issues associated with the current “undue” standard.

As discussed above, the Section urges the Government of Canada not to extend criminal liability to agreements that are plausibly ancillary to legitimate joint venture activity. Because such agreements hold the possibility of benefiting consumers, the United States has

found it best not to condemn them without a showing of an actual anticompetitive effect. And even where there is a showing of anticompetitive harm that requires an assessment of the procompetitive benefits, the United States addresses such agreements in civil, not criminal, proceedings.

With regard to intent, the proposed section 45(3) and 45(4) language requires a showing that: (1) the parties intended to and did agree to price fix, allocate customers, etc., and (2) the parties knew or ought reasonably to have known that the agreement or arrangement would likely have that effect.

The Section recommends against the inclusion of the second prong to this test. The language is likely superfluous given the intent requirement. As it must be shown that the parties not only intended to, but did agree to price fix, allocate customers, etc., reasonable knowledge that price fixing would result would seem to be unnecessary. Further, the removal of this requirement would not likely risk including behavior in the realm of section 45(1) that is typically pursued civilly, rather than criminally, in the United States.

The Section observes that the term “effect” should not be construed too broadly in this context. Defendants should face criminal prosecution only for agreements that directly fix prices or eliminate competition. An agreement that indirectly affects competition might be an unreasonable restraint of trade, but it should not be a criminal violation.

The Section also supports the proposition that “an agreement” has to be proven to invoke criminal liability but notes that the inclusion of the term “an arrangement” may expand the scope of criminal liability to situations where no agreement exists. Particularly when the statute uses the phrase “agrees or arranges,” an “arrangement” might be construed to include collective action short of an agreement, such as tacit collusion or conscious parallelism. The importance of differentiating collective from unilateral action in such cases warrants consideration of whether “arrangements” should be subject *de facto* to criminal liability.

Question No. 27: *Does the provision as drafted capture the types of agreements that are the most egregious? Should boycotts be mentioned specifically, or are they captured by the provision as drafted?*

Response: The Section agrees that section 45(1) as drafted will capture at least the types of agreements that are most egregious. Indeed, for the reasons discussed above, the Section recommends consideration of limiting section 45 so that it only captures more than the most egregious types of agreements and does not extend more broadly, for example, to legitimate joint venture activity. The Section does not believe that boycotts should be mentioned specifically. In the United States, allegations of boycotts or “concerted refusals to deal” are typically evaluated under the rule of reason and are virtually always addressed as potential civil, not criminal, violations. To the extent that alleged boycotts become part of a criminal proceeding, it is only where the alleged boycott is part of a hard-core, naked horizontal agreement not to compete that would itself be subject to criminal prosecution without the added element of a boycott.

Question No. 28: *Does the draft provision deal appropriately with the issues of circumstantial evidence and intent? If not, what do you propose?*

Response: The Section supports the ability to prove an agreement by direct or circumstantial evidence so long as an appropriate burden of proof applies. A beyond a reasonable doubt standard should safeguard against conviction based on questionable circumstantial evidence.

Question No. 29: *Does the defense in section 45(5) of the draft provision deal appropriately with the potential overreach of a per se provision? Does it provide appropriate safeguards for exposure to civil cause of action under section 36?*

Response: For the reasons discussed above, the Section recommends consideration of limiting section 45 so that its criminal penalties apply only to agreements with no plausible connection to legitimate integrative activity. Under this approach, section 45(5) would no longer be necessary. If section 45(5) remains, however, the Section recommends studying whether the “principal agreement” should be required to violate section 45(1). If the “principal agreement” violates section 45(1), then it could be challenged directly and there would be no need to engage in the ancillarity analysis.

The Section further recommends that consideration be given to clarifying what types of agreements will be challenged under section 45. The U.S. has found it useful to provide for both civil and criminal per se offenses. The question of whether a challenged restraint is ancillary to a permissible agreement typically goes to whether the agreement is per se illegal as a civil matter or subject to a rule of reason analysis, also as a civil matter. Criminal prosecution should be reserved for those agreements that involve no colorable claims of procompetitive integration. As noted above in the response to Question No. 24, the Section recommends additional guidance for when a criminal prosecution is appropriate.

Question No. 30: *Do you agree that the burden of proof – on a balance of probabilities – should lie with the accused with respect to the proposed defense in section 45(5), taking into account the fact that they relate to information on potentially complex economic matters that are primarily within the knowledge and control of the accused? If you do not agree, what other options would you suggest?*

Response: Notwithstanding that the Section questions whether section 45(5) is necessary at all (if Section 45(1) is appropriately limited), the Section agrees that the defendant should bear the burden of producing evidence establishing a plausible connection between the challenged agreement and the “principal agreement.” The evidence necessary to prove this connection would lie primarily within the knowledge and control of the accused. The Section would have significant concerns, however, in placing the burden of proof on the defendant under the current draft of Section 45(5). In particular, the Section believes that it would not be

appropriate to require a defendant to prove the lack of any less restrictive alternative -- proving a negative on an issue that could have subjective elements -- in order to avoid criminal liability.

Question No. 31: *Should the defenses in the current section 45 be repealed? Why or why not?*

Response: The Section supports the continued effect of current section 45 defenses. As noted above, the exact parameters of the *per se* violation and the harmfulness of at least some agreements among competitors are not so easily delineated. Continuation of the current section 45 defenses helps to address this issue and to provide useful guidance as to what horizontal conduct would be permitted under the law. Moreover, proposed section 45(9) does not appear to incorporate entirely the scope of agreements envisioned by current section 45 as the proposed section applies only to services.

Question No. 32: *Do you think that block exemptions, such as exemptions by industry, sector or activity as outlined in draft subsection 45.2(2), should be part of any new criminal conspiracy provision? Why or why not?*

Response: The Section suggests that block exemptions generally should be viewed with disfavor and that it is preferable to adopt broadly applicable statutes that set forth general competition principles. In the United States, antitrust exemptions generally are limited to industries in which comprehensive government regulation has displaced the normal competitive environment. Exemptions in these instances avoid conflict between the competition laws and the specific regulatory regime. The Section also observes that the European Union appears to be moving away from a regime of presumptive illegality with specific block exemptions to a more general approach that does not require industry-specific block exemptions.

Question No. 33: *Given the amounts of recent fines obtained from conspiracy prosecutions, would allowing the courts to set the fines at their discretion be a more appropriate way to respond to criminal conspiracies than the current \$10 million fine? Or, should the fine be set based on a fixed percentage of affected commerce? Why or why not?*

Response: As an initial matter, the Section reiterates its recommendation that any fine be considered in the context of all the remedies that may apply to a given set of actions. In determining the amount of any fines that might be adopted, the Section observes that two considerations are important: fairness and transparency. Fairness can be expressed as an effort to balance deterrence against excessively punitive, duplicative, or disparate punishments. Transparency in the imposition of fines significantly improves fairness and therefore the Section generally supports the applicability of bright-line rules to fine determinations. Statutory maximums and announced regulatory standards can provide transparency and have the added benefit of easy administration. While some discretion is generally desirable to reflect the seriousness of the particular case, the Section cautions against unguided judicial or administrative discretion.

The Section is not in a position to evaluate whether recently imposed fines represent sufficiently serious deterrents. The Section observes that the current structure permits a certain amount of flexibility including the possibility of fines above the statutory \$10 million maximum obtained, for example, by charging multiple counts.

Whatever system is chosen, the Section recommends that the possibility of duplicative fines imposed by multiple jurisdictions be considered to avoid excessively punitive fines. For example, if a volume of affected commerce standard were chosen -- a potential standard that the Section has not yet had sufficient time to evaluate -- consideration should be given to expressly limiting the volume of commerce to Canadian commerce and/or commerce as measured by the individual company's sales in Canada.

Question No. 34: *The new draft criminal provision applies to existing and proposed agreements. How should existing agreements be handled under the new provision? Should there be transitional provisions to deal with existing agreements? If so, what do you suggest? Please explain.*

Response: Given the greater risk of prosecution associated with some of the proposed changes, the Section recommends a notification period before the effective date of some or all provisions. The Section also recommends that the Bureau endeavor to publicize any amendments and provide public guidance as to the likely implementation of the new sections as appropriate. An example in this area is provided by the Office of Fair Trading's efforts to publicize and provide guidance regarding the recently effective Enterprise Act. The Government of Canada also may want to consider "grandfathering" for a period of time certain collaborative arrangements that pre-date the amendments. The case for grandfathering would be strongest for collaborations that involved significant investment and integrative efficiencies and least strong for naked horizontal agreements.

Question No. 35: *Do you have additional comments?*

Response: Not at this time.

B. Civil Strategic Alliances Provisions

The proposed section 79.11 would authorize the Tribunal to issue an injunction and/or to assess AMPs (under proposed section 107.1) where it "finds that an agreement or arrangement between two or more persons prevents or lessens or is likely to prevent or lessen competition substantially in a market." Section 79.12 would authorize the Tribunal to order certain divestitures. Further, proposed section 36 would authorize private rights of action under section 79.11. While the Section sees potential benefit from proposed section 79.11, the specific language in the draft statutory provision presents issues that the Section respectfully suggests warrant further consideration.

First, although the discussion supporting the draft provision addresses only agreements among competitors, the draft language covers all agreements regardless of whether they involve competitors. Particularly given the other statutory provisions that address vertical agreements, it is appropriate to focus section 79.11 on horizontal agreements.

Second, the draft statutory provision lists a range of factors to consider in evaluating agreements among competitors. It does not, however, delineate how those standards will be applied. In the United States, the rule of reason presents a similar broad and open-ended inquiry. Such an approach makes it difficult for businesses to predict the outcome of the analysis. The uncertainty makes it more difficult to comply with the competition laws and may chill legitimate behavior that would benefit consumers. In addition, conducting a full-fledged analysis of all factors in every case can be excessively burdensome and time consuming. The U.S. courts and enforcement agencies have addressed this concern by developing substantive standards on how to apply the rule of reason. Thus, for example, an agreement between competitors that involves integration of economic activity and that does not affect a significant percentage of the relevant market almost certainly survives antitrust scrutiny under the rule of reason.

The Section recommends that the language in proposed section 79.11 be modified to provide more specific guidance on how the factors should be applied and, where appropriate, to provide safe harbors. Such guidance could be provided through a combination of redrafting the statutory provision, guidance issued by the Commissioner (*e.g.*, through explanations, where possible, of specific enforcement decisions), and decisions by the Tribunal and the courts.

Question No. 36: *Do you think that a new civil provision is required or can the current abuse of dominant position and merger provisions adequately address all other types of agreements not covered by the proposed criminal provision? Why or why not?*

Response: The abuse of dominant position and merger provisions should address the large majority of agreements among competitors likely to harm competition. If an agreement is not a naked agreement among competitors to fix prices or otherwise not to compete (which should be addressed by the criminal provision), it should involve some integration of activity that may benefit consumers (or it may be an agreement that does not reduce competition at all). Under these circumstances, it is unlikely that an agreement will harm consumers unless the parties to the agreement could, individually or collectively, exercise market power. Nevertheless, the competitive effects of an agreement frequently are fact specific and there remains the possibility that other agreements might raise competition concerns without violating the abuse of dominant position provision. Further, absent a provision comparable to the proposed section 79.11, there may be an incentive to structure agreements with competitors in a way that avoids the joint venture or merger provisions. Accordingly, the Canadian government may deem it advisable to adopt a provision along the lines of the proposed section 79.11.

As discussed above and below, however, the Section recommends that the scope of the draft provision be well-defined and that the government provide guidance on how to apply the competition analysis to such agreements.

Question No. 37: *Do you think that the addition of a "no duplicate proceedings" clause could adequately address a potential overlap between the abuse of dominant position provision, the merger provision and the civil strategic alliances provision? Should notifiable transactions under Part IX be excluded from the civil strategic alliances provision? Why or why not?*

Response: The proposed section 79.11 would not apply where proceedings have been instituted under the conspiracy (section 45), abuse of dominant position (sec. 79), or merger control (sec. 92) provisions. The Section supports the prohibitions in proposed section 79.11 against duplicative proceedings.

The Section observes that application of these prohibitions can be difficult in practice. As one illustration, the prohibition appears to leave it to the plaintiff (*i.e.*, the Commissioner or a private plaintiff) to decide under which provision to proceed. The Commissioner might initiate a criminal proceeding under section 45, but fail to obtain any relief under the "beyond a reasonable doubt" standard. Does this result mean that the activity is exempt from further challenge under any other provision of the Competition Act? Can the Commissioner (or a private plaintiff) bring a proceeding arguing theories in the alternative? The Section recommends further study as to whether the statute can provide more direction on when each provision can apply.

With respect to transactions that are notifiable under Part IX, it is more efficient to avoid imposing an additional layer of potential review under section 79.11. Accordingly, the Section agrees that it makes sense to exclude notifiable transactions from section 79.11.

Question No. 38: *Should a list of factors similar to that included in the Act for merger review be included for civil strategic alliances? Why or why not?*

Response: Given the broad range of potential agreements subject to proposed section 79.11 and the fact-specific nature of competition analysis, it makes sense to provide flexibility. Certain agreements, such as joint ventures, can be analyzed using the same factors applied to merger reviews, so these factors should be available for consideration under section 79.11. It bears repetition, however, that the wide range of factors available for the analysis should not undermine the goal of greater predictability and certainty described above. The need remains for guidance on when and how to apply these factors in particular situations. In the United States, guidance comes not only from judicial decisions, but also from explanations of enforcement decisions issued by enforcement agencies as well as speeches from enforcement officials.

Question No. 39: *Should efficiencies be considered as a factor in the civil strategic alliances provision? Should efficiencies be considered as a factor in a merger review? Why or why not?*

Response: The proposed 79.11 should allow for the consideration of efficiencies. Indeed, most agreements among competitors that will fall outside the criminal conspiracy provisions in section 45 are likely to involve the creation of efficiencies that may benefit consumers.

While efficiencies should be considered, the competition analysis should reach an assessment of efficiencies only if and when there is reason to believe that an agreement may restrict competition. If the government or a private plaintiff cannot demonstrate as a threshold matter that an agreement poses a significant threat to competition, the competition analysis should end at that point and the agreement should be upheld. Otherwise, every competition analysis could become a burdensome collection of all potentially relevant facts that is not necessary in many cases.

Question No. 40: *Do you think that the proposed civil strategic alliances provision could replace the joint venture and the specialization agreement provisions? Is this a desired outcome? Why or why not?*

Response: The Section recommends that Canada work towards consolidating various statutory provisions that may apply to similar conduct. A more general provision addressing agreements among competitors should reduce the need for specific provisions addressing joint venture and specialization agreements. The more general provision is likely to serve Canada better in the long run. With a few exceptions (such as for naked price fixing agreements among competitors), the competitive effects of a particular type of agreement are difficult to anticipate. A statutory provision limited to specific categories of agreement can limit the competition analysis in a manner that may deter efficient and beneficial conduct (or that may inhibit the government's ability to stop anticompetitive conduct) as the economy evolves. Thus, where possible, it is preferable to adopt a statutory provision with a general set of principles that will apply to most circumstances.

Question No. 41: *Do you have additional comments?*

Response: Not at this time.

C. *Clearance Certificate*

Proposed section 124.3 would authorize the Commissioner to issue a certificate where he/she “determines not to refer the matter to the Attorney General of Canada for consideration as to whether an offense has been or is about to be committed against section 45” or “where the Commissioner is satisfied that sufficient grounds do not exist to apply to the Tribunal under section 79.11.” At the outset, the effect of a certificate is unclear. For example, it is not clear whether the certificate (i) merely memorializes the enforcement intentions of the Commissioner at that point with no preclusive effect on either the Commissioner or any other party; (ii) bars the Commissioner from challenging the activity covered by the certificate; and/or

(iii) bars private parties from challenging the covered activity. The Section recommends that the draft statutory provision be revised to clarify the effect of the certificate.

The Section also observes that the proposed provision does not make clear whether a party must file separate applications for the civil and criminal certificates or whether one application could apply to both provisions.

More generally, the need for a clearance certificate program is not clear in light of the availability of written opinions under section 124.1, which the Section understands only recently became binding. Further, the need for a clearance procedure may depend on the ultimate form of the civil strategic alliances provision. The Section understands that Canada is not seeking to expand the substantive reach of the competition laws through the clearance provision, but merely to increase the public's ability to understand what is prohibited under the Competition Act. The Section recommends that the Canadian government revisit the clearance certificate issue as the scope of the proposed civil strategic alliances provision becomes more clear. To the extent the applicability of that provision is more transparent, the need for a clearance certificate program may decrease. As a general consideration in this regard, the European Union appears to be moving away from its clearance provision for civil agreements.

In the event that a clearance certificate provision is adopted, the Section addresses the specific questions presented in the Discussion Paper.

Question No. 42: *Should the clearance certificate apply to both proposed and existing agreements? Why or why not?*

Response: As a general matter, the government should limit the clearance certificate process to proposed agreements. Permitting parties to an existing agreement to seek clearance would tend to confuse the clearance process with an investigation of a current violation. Both the Federal Trade Commission and the Department of Justice issue advisory opinions only on proposed activity and not on agreements that have already been implemented. If the parties have already implemented an agreement, then a violation either has or has not already occurred, and the traditional investigation mechanisms should apply.

The government may, however, want to consider an initial “amnesty” period to permit parties to seek opinions on existing agreements given that the clearance certificate option was not previously available.

Question No. 43: *Should the Competition Bureau require certain types of information from parties applying for a clearance certificate similar to the information requested prior to issuing an advance ruling certificate in a merger review? Why or why not? Should this required information be defined through regulations?*

Response: The government should avoid turning the clearance certificate process into a full or mini-investigation. Among other concerns, it would create substantial delay in the decision-making process. Particularly if the clearance certificate process is limited to proposed agreements, the applicants may not be able to wait a substantial period of time for a decision before implementing the proposed agreement. It is more efficient and effective to require the

applicants to make representations about the parties, the agreement, the market, and other relevant factors. The Competition Bureau can base its decision on those representations. If the parties misrepresent any of those facts, they risk losing the benefit of the clearance certificate.

Question No. 44: *Subject to confidentiality requirements, should the Bureau contact third parties before issuing a clearance certificate?*

Response: The burden should be on parties to provide representations about the pertinent facts to avoid turning the clearance certificate process into mini-investigations. The Competition Bureau should not be precluded -- within the bounds of appropriate confidentiality requirements -- from contacting third parties to educate itself about the specific industry. Based on the experience in the United States, the Section recommends that any such contacts be on a voluntary basis for the responding entities.

Question No. 45: *Do you think that existing section 124.1 (written opinions binding on the Commissioner) should be used instead of a clearance certificate for both existing and proposed agreements? Why or why not?*

Response: Section 124.1 should be used for proposed agreements instead of the proposed clearance certificate in proposed section 124.3. For the reasons set forth in response to Question 43, the Competition Bureau should not undertake an independent investigation of a proposed agreement. To do so would prolong the process and render the clearance procedure excessively burdensome and less useful. Instead, the Competition Bureau should require the applicants to represent the facts important to the competition analysis and the validity of the clearance should depend on the accuracy of these representations. Approached in this fashion, the clearance certificate process for proposed agreements would be largely redundant with section 124.1.

One potential difference is the preclusive effect of the clearance certificate issued under proposed section 124.3. A written opinion issued under section 124.1 is binding on the Commissioner, but the preclusive effect of is unclear, as discussed above.

For existing agreements, the normal investigatory processes should be sufficient. Parties to an agreement may, of course, approach the Competition Bureau without a formal clearance certificate provision and disclose the existence of agreements to ascertain whether an enforcement action is likely. Rather than undertaking a written opinion process, however, the Competition Bureau should conduct an investigation.

Question No. 46: *Do you have additional comments?*

Response: The proposed clearance certificate provision is limited to section 45 and the proposed 79.11. It is not clear whether the certificate has any effect on the government's ability to bring an abuse of dominant position case or a case under one of the other civil provisions (*e.g.*, exclusive dealing, refusal to deal).

III. Repealing the Pricing Provisions

The Discussion Paper proposes repealing certain of the Act's current criminal provisions regarding pricing practices. In the future, price discrimination, predatory pricing and promotional allowances would be dealt with under the Act's general abuse of dominance provision, thereby requiring a market effects test of substantial prevention or lessening of competition, and limiting available sanctions to stop orders, AMPs, and exposure to private damages claims under section 36 (the latter two assuming that the proposed amendments to the civil provisions are implemented.).

A. *Price Discrimination*

The current pricing provisions (sections 50 and 51) target discriminatory pricing practices among suppliers distorting competition among their downstream purchasers.

Question No. 47: *Do you agree that the criminal provision dealing with price discrimination should be repealed? Why or why not?*

Response: The Section agrees that subsection 50(1)(a) ought to be repealed. There are a number of reasons why a broad criminal prohibition of price discrimination is unjustified. First, price discrimination arises in many different economic contexts and the competitive effects are widely recognized to be ambiguous.⁷ In the United States, criminal antitrust enforcement is limited to conduct that is unambiguously harmful to consumers. Second, for various reasons including its apparent overbreadth, the provision has led to few enforcement actions and may not be effective in deterring anticompetitive conduct. Third, repealing the criminal prohibition on price discrimination would bring Canadian law into line with international norms.

Question No. 48: *Should price discrimination govern all types of products, including articles and services? Why or why not?*

Response: For the reasons discussed above, any price discrimination provisions, whether for articles or services, should be civil and not criminal provisions. The Section suggests study of whether it is inherently more difficult to assess price discrimination claims in the context of services. For example, the relative quality of services may be more difficult to compare than the relative quality of articles. In this regard, the Robinson-Patman Act in the United States applies only to goods and not to services.

⁷ See F.M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 492-94 (3d ed. 1990) (identifying more than a dozen economic types of price discrimination and concluding that, “[w]ith such a diversity of types, it is impossible to reach any simple blanket judgment about the social desirability of price discrimination”).

Question No. 49: *Is the existing abuse of dominant provision sufficient to respond to anticompetitive price discrimination and promotional allowances? Why or why not? If not, please provide alternatives?*

Response: Subsection 78(1) of the Competition Act specifies, non-exclusively, a number of acts that may be deemed “anti-competitive” for purposes of the abuse of dominance provision. These include, among many others, “pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market”⁸ and “selling products at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.”⁹ According to the Commissioner, the common thread underlying the concept of “anti-competitive acts” is that they are predatory, exclusionary, or disciplinary.¹⁰ By contrast, price discrimination is merely a way of maximizing profits; it is not normally associated with predation, nor does it normally serve to exclude or discipline competitors. Price discrimination may, however, be associated with abusive practices, such as exclusive dealing arrangements covering a large part of the market.

Accordingly, the Section does not see a need for separate treatment of price discrimination. Moreover, in view of the non-exclusive nature of the list of anti-competitive practices found in subsection 78(1), there does not appear to be any need for separate mention of price discrimination.

Question No. 50: *Do you agree that the abuse of dominant position provision would provide sufficient deterrence against price discrimination if AMPs were available and with the lower burden of proof of a civil setting?*

Response: The Section believes that anticompetitive effects from price discrimination are relatively rare and that harm is most likely to arise when the company at issue has market power. Thus, the abuse of dominance provision with the possibility of AMPs likely would provide sufficient deterrence. Indeed, if anything, the potential imposition of AMPs risks deterring activity that could benefit consumers. As to the general issue of AMPs, deterrence, and over-deterrence, the Section incorporates by reference the responses to Questions Nos. 1 & 2.

Question No. 51: *Do you have additional comments?*

Response: Not at this time.

⁸ Subsection 78(1)(c).

⁹ Subsection 78(1)(i).

¹⁰ COMPETITION BUREAU, ENFORCEMENT GUIDELINES ON THE ABUSE OF DOMINANCE PROVISIONS 3.2.2(b) (2001) (Abuse of Dominance Guidelines).

B. *Predatory Pricing Behavior*

Question No. 52: *Should the criminal provisions dealing with geographic price discrimination and predatory pricing be repealed?*

Response: Yes, the Section concurs with those who have urged the repeal of subsection 50(1)(b) (criminalizing geographic price discrimination within Canada, in certain circumstances) and subsection 50(1)(c) (criminalizing “unreasonably low” prices in certain circumstances).

Read literally, subsection 50(1)(b) could allow conviction even though the party engaging in the discrimination (i) was not a dominant firm—and perhaps lacked any market power at all, (ii) always sold above cost, even in the part of Canada where it sold at its lowest price, and (iii) had no objective prospect of eliminating competition. The Section respectfully submits that such activity is not likely to harm consumers.

To the extent that a geographically diversified firm might engage in *predatory* pricing in a local market, the general law of predatory pricing as an abuse of dominant position would suffice to deal with the issue. The mere fact that the price charged by the alleged predator is less than that charged in some other area of Canada should have no legal significance in establishing whether or not the price is predatory.

Judicial interpretation and enforcement guidance¹¹ have narrowed the broadly drafted language of subsection 50(1)(c)¹²—by requiring, for example, that the party charged must have market power, and that the price claimed to be predatory (“unreasonable”) must be below total cost. These clarifications of enforcement intentions have reduced the risk that the current law overdeters vigorous price competition.

The Section nevertheless believes that subsection 50(1)(c) should be repealed and that predatory pricing should be treated similarly to other potentially anticompetitive acts that may amount to abuse of a dominant position. There is no reason to regard predatory pricing as more harmful or more important to deter than other potentially abusive practices. On the contrary, unlike some other acts, predatory pricing benefits consumers, at least in the short run. The law should be especially vigilant not to overdeter practices that potentially benefit consumers. Moreover, the scarcity of prosecutions under the provision argues for repeal, and repeal would bring Canadian law into line with the antitrust laws of most other jurisdictions.

¹¹ DIRECTOR OF INVESTIGATION & RESEARCH, PREDATORY PRICING ENFORCEMENT GUIDELINES (1992) (Predatory Pricing Guidelines).

¹² The provision makes it unlawful for “every one engaged in a business” to engage[] in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect[.]

Question No. 53: *Is the existing abuse of dominant position provision sufficient to respond to anticompetitive predatory pricing? Why or why not? If not, please provide alternatives?*

Response: Unlike many other forms of anticompetitive activity, predatory pricing harms the predator, at least in the short run. Predation requires the seller to lose real dollars on each sale, in the hope of recouping its predatory “investment” in the long run. Economists and practitioners debate how rare the practice is, but there is no significant body of opinion that regards predatory pricing campaigns as a frequent event. For that reason—and because predatory prices can benefit consumers in the short run—there does not appear to be any reason to single out predatory pricing for unique or especially harsh treatment.

Subsection 78(1)(i) identifies “selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor” as one of the non-exclusive set of practices that may amount to anticompetitive acts for purposes of the law of abuse of dominant position. Because of the specific reference to “the acquisition cost,” this provision seems to refer to pricing by retailers and other resellers, but not by manufacturers. In the *NutraSweet* case the Competition Tribunal confirmed this reading of the provision.¹³ Even though subsection 78(1) provides a non-exclusive list of anti-competitive practices, and even though it is recognized that “predatory pricing” is not necessarily limited to acts specifically proscribed by 78(1)(i),¹⁴ the point could usefully be clarified simply by striking the words “the acquisition” in that subsection, and referring instead to “cost” or to “an appropriate measure of cost.”

With that clarification, the pertinent question then becomes not whether sections 77 and 78 appropriately address (and deter) predatory pricing, but whether they appropriately address and deter anticompetitive acts of dominant firms generally. In that regard, the Section has no reason to believe there is any deficiency in this regard in the existing Canadian law on abuse of dominance.

Question No. 54: *Do you agree that the abuse of dominant position provision would provide sufficient deterrence against predatory pricing if AMPs were available and with the lower burden of proof in a civil setting?*

Response: As to the general issue of AMPs, deterrence, and over-deterrence, the Section incorporates by reference its responses to Questions Nos. 1 & 2.

¹³ *Dir. of Investigation & Research v. NutraSweet Co.*, [1990] 32 Can. Patent Rep. (3d) 1, 43 (Comp. Trib.).

¹⁴ See Abuse of Dominance Guidelines 4.3.

Question No. 55: *Do you agree with the House of Commons Standing Committee on Industry, Science and Technology’s recommendation that subsection 79(1)(a), which requires establishing that “one or more persons substantially or completely control” a market, should be repealed? Why or why not?*

Response: To the extent that the suggested change would abolish the distinction between rules applicable to, on the one hand, dominant firms (*i.e.*, firms with substantial market power) and, on the other hand, firms with little or no market power, the Section disagrees with any proposal to abolish the distinction. The concept that special antitrust concern attaches to anticompetitive strategies adopted by monopolists or dominant firms is fundamental to the antitrust jurisprudence of the European Union, the United States, and many other jurisdictions. Most or all of the anticompetitive practices specified in subsection 79(1)—cost-price squeeze, vertical acquisitions, below-cost pricing—would have little competitive significance if engaged in by firms without market power. It is the actor’s market power that gives such practices the potential to eliminate or injure competitors in ways that harm the competitive process and ultimately injure consumers.

Alternatively, it has been suggested that the point of the suggested change may be to resolve uncertainties created by the present statutory language. If clarification is the point,¹⁵ then amendment, not repeal, is the best approach. The Section is in general accord with the observation by the Canadian Bar Association’s National Competition Law Section that

If the intention is to overcome uncertainty arising out of the use of the terms “control”, “class or species of business” and “throughout Canada or any area thereof”, the Section makes the following recommendation. section 79(1)(a) should be amended to clarify that a remedial order under that section is only available where the person(s) whose conduct is being reviewed is dominant in a relevant market in Canada.¹⁶

The Section observes, however, that the Abuse of Dominance Guidelines have already clarified, in a generally appropriate fashion, the Commissioner’s view of subsection 79(1)(a).

¹⁵ See HOUSE OF COMMONS, STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY, *A PLAN TO MODERNIZE CANADA’S COMPETITION REGIME* ch. 6, available at <http://www.parl.gc.ca/InfoComDoc/37/1/INST/Studies/Reports/indurp06/03-cov-e.htm> (suggested repeal intended to “bring the wording of section 79 into closer conformity with the concept of market power as it has evolved through judicial interpretation”).

¹⁶ See CANADIAN BAR ASS’N, *RESPONSE OF THE NATIONAL COMPETITION LAW SECTION OF THE CANADIAN BAR ASSOCIATION TO THE RECOMMENDATIONS ON THE APRIL 2002 REPORT OF THE STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY, A PLAN TO MODERNIZE CANADA’S COMPETITION REGIME* (2002), at 8, available at http://www.cba.org/CBA/pdf/2002-08-29_comp.pdf (objecting to any change that would remove the concept of dominance from the law).

Accordingly, there may less need to revise this statutory provision than would exist without this guidance.

Question No. 56: *Do you have additional comments?*

Response: Not at this time.

IV. Inquiries Into the State of Competition

The Discussion Paper proposes that the Commissioner receive a new power to request an inquiry into the state of competition and the functioning of markets in any sector of the Canadian economy. Such inquiries would be made by an independent and impartial body, such as the Canadian International Trade Tribunal, on terms approved by the Minister of Industry. Findings would then be reported to the Minister and tabled in Parliament.

The Discussion Paper indicates that the Commissioner currently has no such broad powers, and is limited to investigating specific allegations of anticompetitive conduct in respect of one or more businesses or individuals. The benefit of the proposed amendment, according to the Discussion Paper, would be to provide thorough and valuable insights into various sectors, which would otherwise be unavailable.

Question No. 57: *Should the Act be amended to allow the Commissioner to ask an independent and impartial body such as the CITT, with the approval of the Minister of Industry, to inquire into the state of competition and the functioning of markets in any sector of the Canadian economy? Why or why not? Are there other bodies that could conduct such inquiries?*

Response: In the United States, the FTC has authority to conduct studies (and use compulsory process) without having reason to believe that an antitrust violation has occurred or is about to occur, and the FTC has broad discretion in deciding if and when to conduct such studies. The Section observes that the FTC has conducted these type of studies exceedingly rarely in recent years because (a) the use of compulsory process to obtain data, business documents and/or testimony from companies can be extremely burdensome, especially if done on a broad, industry-wide basis; (b) such studies tend to tie up a considerable portion of the government's limited resources, and (c) other effective yet less burdensome/costly means are often available. For example, rather than conduct official studies, the FTC has in recent years conducted extremely informative and successful hearings on a number of industries (such as e-commerce and healthcare), where a broad representation of industry participants and experts provided testimony and other information on an informal/voluntary basis. Thus, while the Section recognizes that there may be circumstances where the Canadian government believes an inquiry into the state of competition would be appropriate, it urges the responsible agency to exercise the power sparingly and with a sensitivity to the burdens that it can impose.

The proposed legislation appears similar to that used in the United States, with one important exception – in the United States the inquiry is conducted by the FTC, a body expressly intended to develop expertise on competition and consumer protection issues. Because state-of-competition inquiries normally involve complex issues and sophisticated analyses, it is

important that the investigating body have significant experience and expertise in competition matters. The Section does not take a view as to which entity within the government would be best suited to conduct the proposed inquiries, but recommends that the agency that is given the authorization be one that has substantial, demonstrated expertise in competition matters.

Question No. 58: *If inquiries into the state of competition were allowed, should the proposed provisions include specific criteria to determine under which circumstances the Commissioner of Competition would be allowed to ask for an inquiry? If so, which criteria should be considered? Please explain.*

Response: As described in the response to Question No. 57, the FTC has broad discretion to determine when it should exercise its inquiry powers. Setting forth criteria for when to conduct industry studies is difficult. Thus, while there is great potential for abuse, the Section believes that it may not be feasible to list specific criteria to determine when an inquiry is permissible. The expense and effort required on behalf of the initiating agency provide some limitation on the initiation of wide-ranging, expensive proceedings. In the United States, the Paperwork Reduction Act provides an additional potential check on potentially overly burdensome government requests for information by requiring the FTC to obtain permission from the Office of Management and Budget (“OMB”) before issuing significant requests for information and documents.

Question No. 59: *Do you have additional comments?*

Response: Not at this time.

V. Conclusion

The Section offers these comments for consideration in the deliberations being organized by the Public Policy Forum. Given the breadth of issues and the relatively short time between publication of the Discussion Paper and the comment deadline, the Section has not been able to address every issue raised by the proposed amendments. The Section would be pleased to participate further in the consultative process. In this regard, please contact Mr. Kevin E. Grady, Chair of the American Bar Association’s Section of Antitrust Law at (404) 881-7164, or at KGrady@alston.com.