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Competition Reform -- Again
The Discussion Paper and Bill C-249

The Commissioner's Proposals for Section 45 Reform and Perceptions of "Business Chill": Out of the Cold and Into the Freezer

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2003 COMPETITION INVITATIONAL FORUM

The Commissioner's Proposals for Section 45 Reform and Perceptions of "Business Chill": Out of the Cold and Into the Freezer

by
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Debate about reforming the conspiracy provision of the *Competition Act*[1] (the "Act"), section 45, has been ongoing in earnest for more than a decade. In its April 2002 report, the House of Commons Standing Committee on Industry, Science and Technology recommended that the Government amend section 45 to create a "dual-track approach" for reviewing and taking action against agreements between competitors, with a voluntary clearance system.[2] This recommendation was consistent with prior suggestions for reform by the Commissioner of Competition (the "Commissioner") and consultants hired by him.[3]

Proposals to fundamentally amend section 45 and introduce a "dual-track approach" were included in the Government's Discussion Paper entitled *Options for Amending the Competition Act: Fostering a Competitive Marketplace*, released in June 2003[4]. The Discussion Paper proposed:

- Scaling down the current criminal conspiracy offence so that it applies only to so-called "hard core" cartel behaviour (i.e. agreements to fix prices, allocate markets, or limit output).

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[1] R.S.C. 1985, c. C-34

[2] *A Plan to Modernize Canada's Competition Regime*, (April 2002), at chapter 4. Available online at http://www.parl.gc.ca/InfoComDoc/37/1/INST/Studies/Reports/indurp06-e.htm.

[3] See Robert S. Russell, Adam F. Fanaki & Davit D. Akman, "Legislative Framework for Amending Section 45 of the Competition Act" (April 2001); Al Gourley, "A Report on Canada's Conspiracy Law: 1889 - 2001 and Beyond" (August 2001); McCarthy Tétrault, "Proposed Amendments to Section 45 of the Competition Act" (August 2001). All available online at http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02277e.html.

[4] Available online at http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02584e.html.

- Creating a new reviewable practice provision under which any agreement between competitors could be reviewed to test if it has or is likely to have the effect of substantially preventing or lessening competition in a market.

- Introducing a "clearance regime" under which competitor agreements could be reviewed / cleared by the Commissioner.

The Government sought comments on all the Discussion Paper proposals and as of November 13, 2003, 92 submissions had been made to the Public Policy Forum ("PPF").[5] In October 2003, the PPF released a report summarizing the views expressed on the section 45 and other amendment proposals.[6] That report provides a useful, high level summary of the principal views expressed by supporters of reform, on one hand, and by opponents on the other hand. It does not, however, provide details about the extent or depth of comments made to the PPF. This paper takes a closer look at the views expressed to the PPF about section 45 reform and quantifies the responses so that they can be considered in a more meaningful context.

[5] All submissions are available on the PPF's website at http://www.ppforum.com/competitionact/submissions_e.htm. References below to the page number of a particular submission are either to the specific page of the .pdf version of the submission found on the PPF website, or the computer-generated page number on the site.

[6] *National Consultation on the Competition Act: Summary Report on the Submissions by Intervenors.* Available online at http://www.ppforum.ca/competitionact/Comp_Bureau_submission_report.pdf.

1. SUMMARY OF SUBMISSIONS

As noted above, the PPF has received and posted on its website 92 submissions. Submissions were made by a wide variety of stakeholders, but primarily from the business community, as follows:

Associations /Groups	37
Corporations	24
Government Agencies (including foreign agencies)	19
Law Firms	6
Individuals	4
Bar Associations	2

The respondents are geographically diverse and represent most significant industry sectors. Big business predominates, but smaller and medium sized enterprises are represented.

The content of the submissions and depth of comments is varied. Some commentators simply expressed support (or opposition) to the tenets of the Discussion Paper without responding to the particular questions contained in the Paper. Others commented in depth, but only on some of the proposals. Still others provided in depth responses to all of the Discussion Paper questions.

2. SUMMARY OF RESPONSES TO SECTION 45 – RELATED QUESTIONS

The Discussion Paper poses 23 specific questions (questions 24-46) relevant to the proposals for amending section 45. Almost all respondents answered at least some of these questions.

Most of the questions were framed so that a yes or no answer could be provided. A table summarizing the responses is provided at Appendix A. Appendix B and C summarizes the particular responses of each stakeholder. Of particular interest:

- No one expressed the view that the specific amendments proposed to be made to section 45 are workable.

- 58% of respondents who answered question 24 expressly objected to the dual-track approach. Only 9% provided unqualified support for the proposal.

- Few supporters of a dual-track approach represent "big business"; corporate Canada is largely opposed to the proposal.

- Many supporters of a dual-track approach expressed concern about over-breadth of the proposed provision.

- Only 12% of respondents think a new civil, strategic alliance provision is required (Question 36). Most think the current law is sufficient to deter and take action against anti-competitive competitor agreements.

Specific comments on the proposals are discussed below.

3. MOST OBJECT TO REFORM PROPOSALS

A. Need for Change Not Demonstrated

Although the Discussion Paper did not elicit comment on the underlying rational for the proposed amendments to section 45, approximately two-thirds of respondents expressed the view that the Commissioner (and the Government) has failed to demonstrate, on a reasonable basis, that the proposed reforms are necessary either to protect consumers or to achieve increased compliance with the Act. For example, the Canadian Council of Chief Executives wrote that "[c]ontrary to the impression conveyed in the discussion paper, we are not convinced that there is general agreement on the need to reform section 45."[7] The Canadian Chamber of Commerce went further, stating that it "does not believe that the Commissioner has demonstrated that the current law is sufficiently uncertain or deficient to make the proposed amendments necessary or desirable", and continued, "the rationale for change has not been established with reliable

[7] Submission of Canadian Council of Chief Executives, p. 3.

evidence and [we urge] the Government to conduct further study before making such a wholesale change to Section 45, which is the core of the Act."[8]

The Canadian Council of Grocery Distributors likewise argued that "it has not been satisfactorily demonstrated that there is a need to fundamentally alter the criminal conspiracy provisions by removing the requirement to demonstrate an anti-competitive effect ("undue lessening of competition"). For example, the alleged dearth of successful contested prosecutions does not support the conclusion that the conspiracy provisions are in need of reform, as this ignores the many other cases that are resolved in the prosecution's favour by way of plea agreement or otherwise."[9] And, by BCE: "The Bureau has also failed to demonstrate that section 45 has created a "chill" among businesses such that it has negatively deterred the development of pro-competitive joint ventures, strategic alliances, or other efficiency enhancing lawful agreements between competitors. There is no proof of any chilling effect on business, nor is it particularly difficult for parties who may want to engage in some form of cooperative arrangement to obtain advice from legal counsel or to seek input from the Bureau, either informally or formally pursuant to a request for an advisory opinion."[10]

Many respondents emphasized the need for caution, noting that there is still a vigorous debate about whether the current section 45 is effective and balanced or has impeded enforcement or had a chilling effect on strategic alliances. Several urged for a full study into the effectiveness of the current Act, noting that guilty pleas are a testament to success, and that only the "close-calls" are contested so a lower conviction rate is to be expected. One respondent, Suncor Energy, noted that regardless of whether enforcement had been made more difficult or not, the proposals went too far: "We cannot confirm or refute the statement in the Discussion Paper that the complexity of the evidence required in the existing provision fails to adequately deter such egregious anti-competitive behaviour. However, evidentiary complexities should not lead to substantive changes in the law which materially and adversely effect the competitive operation

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[8] Submission of Canadian Chamber of Commerce, p. 6.

[9] Submission of Canadian Council of Grocery Distributors, p. 8.

[10] Submission by Bell Canada Enterprises, p. 6.

and growth of lawful businesses, and the consequential adverse impact on the economy and investment generally."[11]

Not all submissions were in opposition to the amendments. Many of the 42% of respondents who favour the proposals noted that the proposals were desirable to narrow the focus of the remaining criminal law to the most harmful arrangements and, at the same time, allow for consideration of all other inter-competitor arrangements on the basis of a civil standard. That said, most of the supporters did not explain their reasoning beyond voicing general support. For example, the Canadian Federation of Independent Business wrote: "We believe that the Act can be strengthened to target price fixing, market or customer allocation and output restriction between competitors or potential competitors. We therefore support the Industry Committee's recommendation to include in the Act a criminal provision to deal with egregious anticompetitive cartel activity and a companion civil provision to deal with other types of agreements among competitors."[12] There were notable exceptions to this[13], but the arguments advanced by such supporters in some instances were superficial and in many instances failed to consider – let alone address – whether the proposed amendments are workable in practice.[14]

B. Proposals Will Lead to More Uncertainty

Most of the 58% of respondents who oppose the reform proposals base their opposition on concerns about the breadth of the proposed *per se* offence. In addition, some respondents who support a two-track regime in *principle*, expressed concern about potential overbreadth of the proposed amendments.[15] While there was much support for the decriminalization of business

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[11] Submission of Suncor Energy, p. 2.

[12] Submission of Canadian Federation of Independent Business, p. 2.

[13] The Canadian Automobile Dealers Association ("CADA") wrote, "Criminal law should be restricted to behaviour which can be clearly defined and identified; situations which require a complex economic analysis, as is the case for all but the most hard-core cartel cases, are more appropriately dealt with by a civil process before an adjudicative body with economic expertise" (Submission of CADA, p. 3.).

[14] For example, in supporting the need for clarity in defining criminal behaviour, CADA failed to address what is arguably the single most fundamental concern expressed about the proposals, namely, the scepticism as to whether it is even possible to find acceptably clear language to adequately delineate a *per se* criminal standard.

[15] For example, after indicating their support for the two-track approach, NOVA Chemicals commented: "At the same time, we are of the view that the revised provision, which will create a *per se* offence, does have the potential of having excessive coverage if there are not adequate safeguards built in to ensure that only those agreements or arrangements

agreements that potentially have pro-competitive effects, significant concerns were expressed that the proposals could make the law more uncertain, less predictable, and the criminal provision more inclusive than it is today. This, the opponents say, would have a "chilling" effect on pro-competitive business behaviour.

There were several proponents of the two-track approach, advocating the need for a means of dealing with alliances or arrangements involving competitors or potential competitors outside of the criminal law context, while keeping criminal sanctions for hard core cartels and making them more easily recognizable. The proponents generally argued that such an initiative, if implemented properly and carefully, would be helpful in establishing a more clear legal framework within which businesses could reap the economic benefits of entering into joint ventures, strategic alliances, and other progressive arrangements without fear of criminal sanction. However, even the majority of such proponents felt that the draft proposals did not accomplish this goal. Generally, their reasoning was the same as that offered by opponents of a two-track regime: simply and specifically, the criminal provisions must be clearly worded, and while it may or may not even be possible to achieve the necessary clarity, the proposals certainly fall far short.

For example, the TSX Group wrote "While TSX agrees in principle with the concept of a per se criminal provision to deal with egregious anti-competitive cartel activity, it is concerned that the per se offence, as currently drafted, will capture behaviour other than egregious cartel activity", and continued, "TSX believes that in reforming the conspiracy provisions, it is essential to ensure that the criminal provision is not over-broad and is limited to matters where there is a clear anti-competitive purpose or intent."[16]

To further illustrate this point, consider the following comments from Teck Cominco: "As noted above, we are not in theory opposed to a *per se* criminal provision to deal with egregious cartel

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which constitute naked cartel behaviour are truly targeted by the new provision (Submission of NOVA Chemicals, p. 10, para. 7).

[16] Submission of TSX Group Inc., p. 2.

activity, insofar as that can be effectively articulated and defined. However, [we] do not wish this submission to be taken to be a vote in favour of such amendment. It is not. It is a vote in favour of consideration of the [matter]. Despite its flaws we believe that the existing law is likely to be superior to amendments which are likely to be devised. Certainly it is superior to the proposed draft."[17]

4. THE *PER SE* OFFENCE

A. Purpose and Effect Test is Overbroad

The Discussion Paper queried whether a *per se* cartel offence should extend to any agreement that has the purpose or effect of fixing prices, allocating markets or reducing output. There were respondents who supported the purpose and effect test, arguing that hard core cartel activity should be so rigorously enforced. But, only very general reasons for support were given. For example, CADA stated that "the language proposed in Appendix 5 should serve as a sound basis on which to reform the criminal conspiracy provisions"[18], and the Canadian Booksellers Association noted that "[t]he language proposed in Appendix 5 appears reasonable"[19]. The Canadian Independent Petroleum Marketers Association offered slightly more insight into their support for the test. While no comment was made regarding the specific language proposed, general support was given for the amendments, including the following comment: "Legislation that has the words "unduly" and "substantial" sprinkled throughout render prosecutions virtually impossible."[20]

Tim Kennish offered a unique view, proposing that parties to an agreement must be proven to have known or must reasonably be expected to have known that their agreement would have the offensive effect. Kennish advances this proposition in response to his own suggestion that the knowledge element of the offence makes prosecution too difficult. This is interesting as, even among supporters of the proposals, most other respondents recognized that this mental element

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[17] Submission of Teck Cominco, p. 3.

[18] Submission of CADA, p. 3.

[19] Submission of Canadian Booksellers Association, p. 2.

[20] Submission of Canadian Independent Petroleum Marketers Association, p. 2.

was an important aspect of any criminal provision.[21] Kennish favours a law that would catch even those parties who did not intend or appreciate the implications of their arrangement, and leave it to the Government to issue enforcement guidelines or exercise prosecutorial discretion to not take action against such agreements criminally.[22]

Several of the respondents who felt that a purpose and effect test may be appropriate for section 45 also indicated their concern that the "effect" of fixing prices, allocating customers or markets, or restricting output may be overbroad. The most common explanation of this concern was that modern business arrangements are quite complex, and even benign arrangements could be caught by the suggested amendment. Some respondents noted that even a purpose test is inappropriate as it requires a detailed review of often imprecise corporate documents in an attempt to find an evil purpose.[23] Types of agreements cited as examples of arrangements that unnecessarily could be caught by the proposed amendments included: agreements not to supply based on poor credit or other operational criteria; agreements for product storage; agreements relating to use of distribution facilities; product exchange agreements; reciprocal processing agreements; agreements relating to renting ice time at hockey rinks; and technology licenses to reduce costs by reducing supply of surplus inputs.[24]

Several respondents also pointed out that it is not uncommon for horizontal competitors to both cooperate and compete with others in their field, and the proposals could result in the normal terms of supply in the industry being seen as unlawful restrictions on competition. Examples included: exclusive distribution contracts; franchise agreements; supply arrangements with downstream competitors; and subcontracts with entities in the same business (even if the

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[21] For example, Canpotex notes that incorporating the objective "ought reasonably to have known" test to an offence with criminal consequences is clearly inappropriate. (Submission of Canpotex, p. 3)

[22] Submission of Tim Kennish, p. 12, para. 11.

[23] See, for example, Teck Cominco's response to question 26, p. 4 of its submission.

[24] For a more detailed list of examples, see: submission of Canadian Chamber of Commerce, p. 16; of Computing Technology Industry Association, p. 2; of Saskatchewans Ministry of Industry and Resources, p. 1; and of Imperial Oil, pp. 2-3.

businesses do not currently compete in the same geographic markets). It was argued that such arrangements often were commonplace with no adverse effect on competition.[25]

Indeed, many respondents argued that a chilling effect on legitimate and pro-competitive activities would result from the uncertainty created by the proposals. It was also frequently noted that this chilling effect would be exacerbated by the increased potential for criminal sanction, civil prosecution, and private damage claims. Some respondents predicted that a potential worldwide competitive disadvantage would be the result. The TSX Group argued that "the proposed civil track could cast a "chill" on otherwise pro-competitive alliances, rather than facilitating them, particularly, where the parties could be subject to AMP's and civil damages."[26] The Canadian Council of Chief Executives noted that "[i]t is quite possible that setting up a separate civil regime to review strategic alliances could actually cast a "chill" on such arrangements, rather than achieve the stated objective of facilitating them, and further hamper the ability of Canadian firms to operate effectively in the global marketplace."[27]

The Canadian Chamber of Commerce went further noting that "many joint ventures and other lawful agreements may have the purpose or effect of 'maintaining' prices or 'limiting' the production or supply of a product yet have no adverse effect on competition. Making such agreements *per se* unlawful will create uncertainty and a 'chill' against competitors entering into pro-competitive, efficiency enhancing agreements."[28]

Two respondents, Kraft Canada Inc. ("Kraft")[29] and the American Bar Association ("ABA"),[30]argued that current law is uncertain and is already creating a chilling effect on

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[25] See discussion in submission of Computing Technology Industry Association, p. 2, para. 1.1(ii).

[26] Submission of TSX Group Inc., p. 4.

[27] Canadian Council of Chief Executives, at p. 4.

[28] Submission of Canadian Chamber of Commerce, p. 9.

[29] Kraft argued that under the current law and jurisprudence, "it is impossible to know when the line between legal behaviour and an illegal conspiracy under section 45 of the Act has been crossed. As a result, it is possible that the current law does have a chilling effect on legitimate and, often pro-competitive, commercial activity." The submission continues, "The end result is that those companies or individuals who are prepared to take the risk of entering into criminal agreements will do so; while those companies who will not take the risk of possibly entering into such an agreement will avoid legitimate and fully legal arrangements" (Submission of Kraft, p. 3).

business arrangements. But, a majority of respondents believe strongly that any uncertainty in the current law would pale in comparison to the uncertainty and overreach of the proposals, making any current chill seem warm by comparison.

B. "Reasonably be Expected to Compete" Element Too Vague

An overwhelming majority of respondents objected to the wording "persons who compete or could reasonably be expected to compete" in the proposed *per se* offence, arguing that it is extremely vague, could capture a wide range of horizontal and vertical arrangements, and requires a detailed assessment of market characteristics except in the clearest case. There was widespread objection to this language even from respondents who generally favoured the amendments, specifically with regards to difficulties in identifying those parties who are truly prospective competitors, and the difficulty associated with an analysis of potential or imminent market entry.

In fact, while 28 respondents (both advocates and opponents of the proposals) clearly noted their disapproval with this language, only three can be counted in support, and two of those simply because they offered a blanket endorsement of the proposals as a whole. The only respondent to express any meaningful endorsement of the language was Ogilvy Renault.[31] What is even more interesting is that the argument advanced by Ogilvy Renault in support of the language is the very same argument that many respondents brought up in opposition – namely, the inevitable and complex economic analysis involved to establish whether or not parties to an agreement are potential competitors. The other respondents unanimously viewed this as an unwelcome by-product of the language, but Ogilvy Renault's response seems to embrace it as a safety net for non-offensive activity.

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[30] However, in discussing the requirements under the proposed ancillary agreement defence, the ABA noted that the proposals themselves are likely to cause a chill: "[…] this approach could constitute a deterrent to legitimate procompetitive joint venture activity" (Submission of ABA, p. 14).

[31] Submission of Ogilvy Renault, p. 15

C. U.S. Approach Not Easy to Import

There is a sense that Canadian regulators look longingly to the United States and its *per se* criminal offence, and desire some harmonization between the Canadian and U.S approaches. A handful of respondents noted that the U.S. approach to defining and analyzing *per se* offences cannot simply be imported into Canada. The respondents argued that the U.S. law has developed through years of jurisprudence and its concept of a *per se* offence has evolved over time. And, in recent years, important decisions have narrowed the scope of the *per se* offence and established important rules for screening cases that are not clearly offensive. U.S. courts now more often look for a pro-competitive component of an agreement and, if found, subject the agreement to a rule of reason analysis, not *per se* illegality. Several respondents noted this, and suggested that the proposed adoption of a statutory definition of *per se* conduct would compel a literal interpretation of the offence in Canada, without the judicial flexibility inherent in the U.S. approach.

Interestingly, while the American Bar Association was generally supportive of the amendments, the ABA commented that: "[T]he 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 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."[32]

5. PROPOSED NEW REVIEWABLE MATTER

A. Provision is Redundant

Approximately two-thirds of respondents were opposed to the introduction of a new civil regime to review competitor agreements, whether or not section 45 was amended. Those respondents typically argued that the current merger and abuse of dominance provisions provide effective

[32] Submission of ABA, pp. 13-14.

deterrence against (and appropriate remedies to correct) anti-competitive behaviour that results in a substantial lessening or prevention of competition.

For example, Irving Oil submitted that: "the Act should not be amended to create a 'dual-track' regime under which egregious anti-competitive cartel activity would be dealt with criminally, while other types of agreements among competitors would be dealt with civilly. Irving Oil believes that the current standard of 'unduly lessening competition' is appropriate for a serious criminal offence, and that the law currently functions adequately to deter and punish anti-competitive cartels. The existing conspiracy provisions are well-understood and have been the subject of substantial judicial consideration, including by the Supreme Court of Canada. Reforming them would result in considerable uncertainty in their application and enforcement, resulting in a chilling effect on aggressive competition by businesses for fear of liability."[33]

B. Analytical Factors Would be Welcome

If a new reviewable practice relating to strategic alliances is introduced, there would be widespread support for specifying analytical factors like those used in merger review, both from supporters of the civil regime and those in opposition who were simply addressing the issue for the sake of argument. Most respondents also encouraged the consideration of efficiencies as a factor to be considered, if not made available as a full defence.

6. NO DUPLICATE PROCEEDINGS PROVISION SHOULD BE INCLUDED

Almost all respondents who discussed the issue believe that a "no duplicate proceedings" provision should be enacted to prevent any overlap between the abuse of dominance provisions, the merger provisions, and the civil strategic alliances provisions, if enacted. For example, Telus wrote that "where a single set of facts gives rise to an inquiry under the criminal conspiracy, abuse of dominance or related provisions, duplicate proceedings should be expressly prohibited."[34] In fact, only two respondents stated their opposition to such a provision, and even

[33] Submission of Irving Oil, p. 8.

[34] Submission of Telus, p. 8.

then it was less in opposition than out of caution: "The real question is what additional activity, not now as a practical matter challenged, would in the future be subject to challenge under such a provision. Since we are unaware of any conduct which would appear to be appropriate for such challenge, we do not favour the creation of regime by which it might be challenged."[35]

7. DEFENCES

A. Ancillary Agreement Defence Too Vague

This Discussion Paper proposed a defence from criminal liability for agreements that are "ancillary" to a lawful "principal agreement". Many respondents argued that the proposed ancillary agreement defence is far too restrictive and vague to be useful. Specifically:

- There may be considerable juristic and economic evidence required to determine whether something is "ancillary" to something else. Also, it is unrealistic to attempt to subdivide a complex arrangement into necessary and incidental components.[36]
- Concern was expressed about how to determine which agreement is then a "principal" agreement?
- The ancillary agreement must be "necessary" to implement the principal agreement. How is "necessary" defined? Are there degrees of "necessary"? What if it is highly desirable but not critical? What if it significantly affects the economic viability of the transaction?
- What are the parameters of "less restrictive alternatives"? What kind of alternatives, and must they be economical and pragmatic? Will a lack of creativity result in criminal sanctions?

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[35] Submission of Teck Cominco, p. 6. Lang Michener used virtually identical wording in its submission (Submission of Lang Michener, p. 6.).

[36] The Canadian Petroleum Products Institute highlighted this point noting that the defence would require an assessment of "the degree of importance that an impugned provision has in an agreement, such that if it were "severed", the rest of the agreement may be enforced. The more one considers this, the more it appears to be an artificial landscape of shadows" (Submission of Canadian Petroleum Products Institute, p. 3, para. iv).

Also, a few respondents suggested providing a reasonability test in the defense, arguing that without such a qualification the defense may be virtually impossible to establish. It was also pointed out that the combination of an overbroad offence with an impossible defence would lead to further business chill. Suncor Energy stated: "An over inclusive *per se* criminal offence will cast the net so wide that, when considered in combination with an uncertain defence that may not be practically achievable, the result will be a business chill on both existing and prospective commercial transactions."[37]

One of the more lengthy submissions in support of the two-track approach advocated removal of the defence altogether, arguing that it could be used to exclude highly objectionable conduct.[38] On the one hand it was agreed that "necessary" was too vague and complex to be useful, and is similar to wording found in U.S. antitrust law, which is "plagued with ambiguities". This point was used as a springboard to make the argument that price-fixing, market allocation and output restriction agreements between actual competitors should be treated in the same way as price maintenance is currently treated under the Act, with no ancillary agreement defence. The only other respondent who opposed the inclusion of an ancillary agreement defence was the Canadian Association of Chiefs of Police[39], who advocated perhaps the most stringent approach of all respondents, including retroactive application of amendments, concurrent application of criminal and civil provisions, and the imposition of minimum fines.

[37] Submission of Suncor Energy, p. 1.

[38] Submission of Goodmans, p. 5.

[39] Submission of Canadian Association of Chiefs of Police, p. 4.

B. Existing Defences Should Remain

Those respondents that opposed the *per se* amendments generally considered the existing section 45(3) defences critically important if a *per se* offence were to be created. The argument typically advanced was that the defences would provide some measure of security against the inevitably overbroad nature of the offence. Those who favoured the *per se* offence were also virtually unanimous in their support for retaining the existing defences (with only one exception out of all who commented).

C. Burden of Proof

Many respondents argued that the Crown should have the burden of establishing that the agreement is unlawful and that the agreement lacks a pro-competitive rationale. In particular, constitutional arguments were raised with regards to the proposed reverse onus on a party defending a charge under section 45.

8. MAINTAIN A COMPETITIVE EFFECTS TEST

There were suggestions from some respondents that it should be open to a defendant to show that an agreement does not substantially lesson competition.[40] Of course, this is effectively the same test that the proposals seek to eliminate (at least for the criminal provisions), but proponents of this option seemed to be seeking a middle-ground so that pro-competitive or competitively neutral agreements could escape criminal conviction (though not criminal prosecution). This rebutable presumption approach has been implemented by the Swiss competition authorities, as was noted in a submission made by the Swiss Competition Commission.

[40] See, for example: Submission of ABA, quoted on page 12 above; Imperial Oil commented: "We agree with the McCarthy Tetrault study [prepared for the Commissioner in 2001; see footnote 3 above] that the courts should examine the nature of the agreement" (Submission of Imperial Oil, p. 4); Information Technology Association of Canada commented: "[R]emoving the requirement for the Crown to prove that an agreement has a harmful effect on society simply means that more convictions will be obtained in respect of non-harmful agreements" (Submission of Information Technology Association of Canada, p. 9).

9. FINES

A. Maximum Limits Should be Maintained

In the Discussion Paper, it was proposed that the $10 million cap on fines imposed under section 45 be eliminated. Approximately two-thirds of respondents who addressed the issue argued that there was no need to grant courts the power to impose discretionary fines, nor to increase the current maximum fine. In support, it was noted that the Attorney-General has charged multiple counts in order to obtain fines well above the current limit. Some respondents argued that legislating a maximum fine provides guidance to courts and the public on an appropriate sentencing range. It was also noted that the absence of a ceiling may have a chilling effect on potentially pro-competitive behaviour.[41] And, concern was expressed again in this context about the lack of evidence to establish that the current regime inadequately promotes deterrence[42]. A minority of respondents commented that discretionary fines were more in line with international trends and/or other criminal provisions of the Act.[43]

B. Formulas may be Unconstitutional

Some respondents favoured fixing fines at a percentage of affected commerce, but offered little or no reasoning, while others felt it would be appropriate to consider affected commerce in a non-determinative way. The majority of respondents who commented disapproved of the idea of fixing fines as a percentage of affected commerce. The corresponding inability to take into account the actual profits or damages occasioned by the behaviour was noted, as was the inconsistency with principles of sentencing enshrined in the *Criminal Code* and Canadian caselaw requiring that sentences be determined on a case-by-case basis taking into account all relevant aggravating and mitigating factors. [44]

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[41] See, for example, submission of Irving Oil, p. 4.

[42] See, for example, submission of Bell Canada Enterprises, p. 15.

[43] See, for example, submission of NOVA Chemicals, p. 11.

[44] See, for example, submission of Canadian Cable Television Association, p. 3.

10. BLOCK EXEMPTIONS NOT APPROPRIATE

The majority of respondents believe that block exemptions from the *per se* offence are inappropriate on the basis that prohibition of criminal behaviour should apply without exception to all industries and groups. However, some respondents supported the idea of block exemptions, noting that such authority would add an important element of flexibility to the provision and could be used, for example, to exempt agreements approved or imposed by a regulator. One respondent used the example of an industry seeking to avoid foreign anti-dumping laws by agreeing to lower domestic prices.

11. EXISTING AGREEMENTS SHOULD BE GRANDFATHERED

An overwhelming majority of respondents supported some form of "grandfathering" of existing agreements from application of any amended criminal conspiracy provision. At a minimum, respondents recognized the need to give marketplace participants sufficient time to undertake the lengthy and costly legal reviews inevitably required to ensure that their historical arrangements comply with any new law. Recommendations on the degree of consideration to be given existing agreements included full and permanent exclusion (so-called "grandfathering"), exclusion until the agreement is renewed, or exclusion for a fixed period of time, with a majority favouring indefinite grandfathering.

12. CLEARANCE CERTIFICATES

A. Redundant

A large number of respondents noted that the Act already provides a mechanism whereby the Commissioner can provide binding advisory opinions, and thus the proposed clearance certificate regime would be redundant. In addition, many argued that the proposed clearance certificate process would provide less comfort for such parties, given that there is no express statement that they are binding on the Commissioner.

B. Inappropriate Burdens on Applicants and Bureau

It was noted frequently that parties to strategic alliances and joint ventures simply cannot afford to expend the necessary time and resources, or operate under the level of uncertainty that typically accompanies a Bureau review, and would be expected to accompany a Bureau review for purposes of obtaining a clearance certificate. In illustration, it was noted that except in the case of mergers having no competition issues, reviews of proposed mergers by the Bureau can take weeks or months to complete. It was also noted repeatedly that the Bureau is ill equipped to handle the likely flood of applications that will be made if overbroad and imprecise amendments are made to section 45. Respondents also noted that the U.S. has no such regime and European competition authorities are moving away from clearance certificate systems similar to that proposed because they are unmanageable, ineffective, and costly.

C. Bureau Would Become More of a Regulator

Concern also was expressed that parties would be exposed to the possibility of a combination of restitution orders, the imposition of AMPs, and the threat of private action damage awards. Because of this, there was concern over the significant shift of negotiating power to the Commissioner and his staff in respect of conduct that may very well be legitimate but which may not justify incurring substantive costs to fight. It was argued that clearance certificates would become *de facto* mandatory, and the Commissioner would be placed in the inappropriate and inefficient role of an industry regulator.

D. Specifics of Certificates

Many respondents suggested that favourable certificates should expressly and completely immunize the parties from prosecution and civil liability. It was frequently noted that the provision should prohibit the Commissioner, the Attorney General, and any private party from commencing proceedings or litigation. The argument for such measures was that anything less would make the certificates of little or no value.

Most respondents who commented on whether the Bureau should contact third parties in assessing clearance certificate applications felt that the determination should be made on a case

by case basis. Most agreed that if an applicant stipulated that third parties were not to be contacted, the Bureau should be bound by such direction, although it may jeopardize the application.

One respondent suggested that it would be appropriate to mandate the issuance of the certificates within a specific time period, such as 30 days once an application had been made, subject to giving the Commissioner the right to apply to have this period extended.[45] This respondent did not offer any discussion of potential difficulties that could arise under such a system, such as the Bureau's ability to control the commencement of the time period, as is the case in merger reviews.

13. CONCLUDING REMARKS

The consultation process initiated by the Discussion Paper has created an opportunity for thoughtful and informed debate about proposals made in recent years to amend section 45 of the Act. What is very clear from the many responses that have been filed is that while there is no consensus about whether to amend the Act, and if so the extent of any amendments, a clear majority of leading businesses and competition practitioners feel strongly that the amendments proposed by the Discussion Paper are unworkable. Arguments about overbreadth of the provisions and the difficulties associated with defining a *per se* offence in legislation are made loudly.

And, in a sense, the proposed amendments are made in a factual vacuum. While the Commissioner has from time-to-time expressed his rationale for wanting to amend section 45, the business and the legal community is not convinced. Before any debate about how to amend section 45 can be advanced further, there must be convincing evidence presented by the Government that the current law is insufficient so that those particular deficiencies can be considered in the context of any proposed amendment. The Commissioner is advocating a remedy for an illness that many do not believe exists.

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[45] Submission of Canadian Bankers Association, p. 3.

RESPONDENT ANALYSIS — 2003 *COMPETITION ACT* PROPOSALS

Summary of Key Aspects of Respondent Submissions on Conspiracy Provisions

CHART 1 of 2[1]

Question[2]	24	25	26	27	28	29	30	31	32	33	34
	Support dual track approach?	**Support "reasonably be expected to compete"?**	**Support purpose and effect test?**	**Draft catches most egregious / Need to mention boycotts?**	**Draft appropriate w/r/t circum-stantial evidence and intent?**	**Draft defence in s. 45(5) is adequate safeguard?**	**Appropriate to put burden of proof on accused for s. 45(5)?**	**Should current s. 45 defences be repealed?**	**Support block exemptions?**	**Support discretion-ary fines / fixed percentage?**	**Include transitional provisions for existing agreements?** [3]
Respondent											
Air Canada Pilots Association	The ACPA did not provide any comments on point, instead expressing general opinions about the state of the airline industry in Canada and noting that "[the] ACPA does not take exception to the proposals outlined in the Discussion Paper, at this time."										
Alberta Economic Development	Did not comment.										

[1] The summary is based upon a review of the 92 submissions filed with the PPF as of November 13, 2003. Most respondents did not answer all questions, and many answers were qualified. To compile this summary, some answers had to be interpreted. Note also that some questions have subparts. "N/A", for "Not Addressed", has been used where no answer was provided directly or through general comments.

[2] Question 35 requested additional general comments and is therefore not included in this tabulation.

[3] No Respondent expressed opposition to some transitional period or other such provision for existing agreements. Where a Respondent advocated a grandfathering provision to exclude existing agreements from the proposed amendments altogether, this has been noted in the tabulation as "Supports GF".

Question[2]	24	25	26	27	28	29	30	31	32	33	34
	Support dual track approach?	**Support "reasonably be expected to compete"?**	**Support purpose and effect test?**	**Draft catches most egregious / Need to mention boycotts?**	**Draft appropriate w/r/t circum-stantial evidence and intent?**	**Draft defence in s. 45(5) is adequate safeguard?**	**Appropriate to put burden of proof on accused for s. 45(5)?**	**Should current s. 45 defences be repealed?**	**Support block exemptions?**	**Support discretion-ary fines / fixed percentage?**	**Include transitional provisions for existing agreements?[3]**
Respondent											
Alberta Government Services	YES	N/A	YES	N/A	N/A	N/A	N/A	N/A	N/A	YES	N/A
Aluminium Association of Canada	No comments on point.[4]										
ABA Antitrust Section	YES	NO	YES	YES / N/A	YES	N/A	YES	NO	NO	NO	YES
Association of Canadian Advertisers	No comments on point.										
Association of Canadian Travel Agencies	YES (but vague)	Generally supportive of proposals without discussing specifics.									
BCE Inc.	NO	NO	NO	YES / N/A	YES	NO	NO	NO	NO	NO	YES

[4] The AAC endorsed the submission from the Canadian Council of Chief Executives.

Question[2]	24	25	26	27	28	29	30	31	32	33	34
	Support dual track approach?	**Support "reasonably be expected to compete"?**	**Support purpose and effect test?**	**Draft catches most egregious / Need to mention boycotts?**	**Draft appropriate w/r/t circum-stantial evidence and intent?**	**Draft defence in s. 45(5) is adequate safeguard?**	**Appropriate to put burden of proof on accused for s. 45(5)?**	**Should current s. 45 defences be repealed?**	**Support block exemptions?**	**Support discretion-ary fines / fixed percentage?**	**Include transitional provisions for existing agreements?** [3]
Respondent											
BC Ministry of Inter-governmental Affairs	Generally supportive of proposals without discussing specifics.										
Canada's Association for the Fifty-Plus[5]	YES	N/A	YES	N/A	N/A	YES	YES	N/A	N/A	YES	YES
Canada's Research-Based Pharma-ceutical Companies	NO	NO	NO	YES / NO	YES	NO	YES	NO	YES	NO / YES	N/A
Canadian Advanced Technology Alliance	Expressed general concern, but no comments on point.										

[5] Several answers from this respondent, while unequivocal, seem to have misinterpreted the crux of the questions, and may not be truly responsive.

Question[2]	24	25	26	27	28	29	30	31	32	33	34
	Support dual track approach?	**Support "reasonably be expected to compete"?**	**Support purpose and effect test?**	**Draft catches most egregious / Need to mention boycotts?**	**Draft appropriate w/r/t circum-stantial evidence and intent?**	**Draft defence in s. 45(5) is adequate safeguard?**	**Appropriate to put burden of proof on accused for s. 45(5)?**	**Should current s. 45 defences be repealed?**	**Support block exemptions?**	**Support discretion-ary fines / fixed percentage?**	**Include transitional provisions for existing agreements?[3]**
Respondent											
Canadian Association of Chiefs of Police	YES	N/A	YES	N/A	YES	NO (opposed to the defence)	N/A	YES	N/A	NO / NO	YES (unclear)
Canadian Association of Petroleum Producers	General concern regarding overbreadth, but no comments on point. Endorsed the submission from Canadian Council of Chief Executives.										
Canadian Automobile Dealers Association	YES	YES	YES	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Canadian Bankers Association	YES	Agreed in principle, but disliked overbroad language. No other answers could be gleaned from comments.									
Canadian Bar Association	MIXED	NO	NO	YES / NO	NO	NO	NO	NO	NO	NO / NO	YES (Supports GF)
Canadian Booksellers Association	YES	YES	YES	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

Question[2]	24	25	26	27	28	29	30	31	32	33	34
	Support dual track approach?	**Support "reasonably be expected to compete"?**	**Support purpose and effect test?**	**Draft catches most egregious / Need to mention boycotts?**	**Draft appropriate w/r/t circum-stantial evidence and intent?**	**Draft defence in s. 45(5) is adequate safeguard?**	**Appropriate to put burden of proof on accused for s. 45(5)?**	**Should current s. 45 defences be repealed?**	**Support block exemptions?**	**Support discretion-ary fines / fixed percentage?**	**Include transitional provisions for existing agreements?[3]**
Respondent											
Canadian Cable Television Association	YES	N/A	N/A	N/A	N/A	N/A	N/A	N/A	YES	NO / NO	YES (Supports GF)
Canadian Chamber of Commerce	NO	NO	YES (but not as proposed)	YES / NO	YES	NO	NO	NO	NO	NO	YES (Supports GF)
Canadian Cosmetic, Toiletry and Fragrance Association	(NO)[6]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Canadian Council of Chief Executives	No question by question response, but general concern over ability to find clear wording to distinguish hard core from other arrangements.										

[6] Responses in parentheses did not overtly state their opposition to the Dual Track regime, but it could be gleaned from their overall response and is useful for tabulation purposes.

Question[2]	24	25	26	27	28	29	30	31	32	33	34
	Support dual track approach?	**Support "reasonably be expected to compete"?**	**Support purpose and effect test?**	**Draft catches most egregious / Need to mention boycotts?**	**Draft appropriate w/r/t circum-stantial evidence and intent?**	**Draft defence in s. 45(5) is adequate safeguard?**	**Appropriate to put burden of proof on accused for s. 45(5)?**	**Should current s. 45 defences be repealed?**	**Support block exemptions?**	**Support discretion-ary fines / fixed percentage?**	**Include transitional provisions for existing agreements?[3]**
Respondent											
Canadian Council of Grocery Distributors	(NO)	N/A	NO	N/A	N/A	N/A	N/A	N/A	NO	N/A	N/A
Canadian Federation of Independent Business	YES	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Canadian Fertilizer Institute	NO	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Canadian Independent Petroleum Marketers Association	YES	No comments on point.									
Canadian Manufacturers and Exporters Assoc.	(NO)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

Question[2]	24	25	26	27	28	29	30	31	32	33	34
	Support dual track approach?	**Support "reasonably be expected to compete"?**	**Support purpose and effect test?**	**Draft catches most egregious / Need to mention boycotts?**	**Draft appropriate w/r/t circum-stantial evidence and intent?**	**Draft defence in s. 45(5) is adequate safeguard?**	**Appropriate to put burden of proof on accused for s. 45(5)?**	**Should current s. 45 defences be repealed?**	**Support block exemptions?**	**Support discretion-ary fines / fixed percentage?**	**Include transitional provisions for existing agreements?** [3]
Respondent											
Canadian Motion Picture Distributors Association	NO	NO	NO	N/A	NO	NO	NO	NO	N/A	NO	YES (Supports GF)
Canadian Petroleum Products Institute	(NO)	N/A	N/A	N/A	N/A	NO	N/A	NO	N/A	N/A	YES (Supports GF)
Canadian Real Estate Association	NO	NO	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Canadian Vehicle Manufacturers Association	NO	NO	NO	N/A	N/A	N/A	NO	NO	N/A	N/A	N/A
Canpotex Limited[7]	(NO)	NO	N/A	N/A	N/A	NO	NO	NO	N/A	N/A	N/A

[7] In addition to its submission, Canpotex adopts the submission of the Canadian Fertilizer Institute.

Question[2]	24	25	26	27	28	29	30	31	32	33	34
	Support dual track approach?	**Support "reasonably be expected to compete"?**	**Support purpose and effect test?**	**Draft catches most egregious / Need to mention boycotts?**	**Draft appropriate w/r/t circum-stantial evidence and intent?**	**Draft defence in s. 45(5) is adequate safeguard?**	**Appropriate to put burden of proof on accused for s. 45(5)?**	**Should current s. 45 defences be repealed?**	**Support block exemptions?**	**Support discretion-ary fines / fixed percentage?**	**Include transitional provisions for existing agreements?[3]**
Respondent											
Christian Labour Association of Canada	(YES)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Computing Technology Industry Association	(NO)	NO	N/A	N/A	N/A	NO	NO	N/A	N/A	N/A	N/A
Davies Ward Phillips & Vineberg	NO	NO	N/A	N/A	N/A	NO	N/A	N/A	N/A	N/A	N/A
Fair Trading Commission of Jamaica	No comments on point.										
Family Funeral Home Association	No comments on point.										
Michael Flavell	(NO)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

Question[2]	24	25	26	27	28	29	30	31	32	33	34
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Respondent											
Forest Products Association of Canada	(NO)	N/A	NO	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Goodmans LLP	YES	NO	YES	YES	N/A	NO (advocates removal)	N/A	N/A	NO	N/A	YES (Supports GF)
Hudson's Bay Company	(NO)	NO	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	YES (Supports GF)
HRDC	Did not comment.										
IMC Canada Ltd.											
Imperial Oil Limited	(NO)	NO	NO	N/A	N/A	NO	N/A	NO	NO	N/A	YES (Supports GF)

Question[2]	24	25	26	27	28	29	30	31	32	33	34
	Support dual track approach?	**Support "reasonably be expected to compete"?**	**Support purpose and effect test?**	**Draft catches most egregious / Need to mention boycotts?**	**Draft appropriate w/r/t circum-stantial evidence and intent?**	**Draft defence in s. 45(5) is adequate safeguard?**	**Appropriate to put burden of proof on accused for s. 45(5)?**	**Should current s. 45 defences be repealed?**	**Support block exemptions?**	**Support discretion-ary fines / fixed percentage?**	**Include transitional provisions for existing agreements?** [3]
Respondent											
Information Technology Association of Canada	NO	NO	NO	NO / NO	YES	NO	YES	NO	NO	YES	YES
Institute of Communi-cations and Advertising	No comments on point.[8]										
Insurance Bureau of Canada	(NO)	NO	NO	N/A	N/A	NO	N/A	N/A	N/A	N/A	N/A
Irving Oil Limited	NO	NO	NO	N/A	N/A	NO	NO	NO	YES	NO	YES
Timothy Kennish	YES	NO	YES	YES / NO	YES	NO	YES	YES (but retain if any doubt)	NO	YES	YES

[8] The ICA endorsed the submission from Proctor and Gamble.

Question[2]	24	25	26	27	28	29	30	31	32	33	34
	Support dual track approach?	**Support "reasonably be expected to compete"?**	**Support purpose and effect test?**	**Draft catches most egregious / Need to mention boycotts?**	**Draft appropriate w/r/t circum-stantial evidence and intent?**	**Draft defence in s. 45(5) is adequate safeguard?**	**Appropriate to put burden of proof on accused for s. 45(5)?**	**Should current s. 45 defences be repealed?**	**Support block exemptions?**	**Support discretion-ary fines / fixed percentage?**	**Include transitional provisions for existing agreements?[3]**
Respondent											
Kraft Canada Inc.	YES	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Lang Michener	YES	NO	NO	NO / NO (purpose test invites review)	NO	NO	NO	Indifferent (but repeal export defence)	YES (b?c so overbroad)	N/A	YES (Supports GF)
Literary Press Group of Canada	No comments on point.										
McMillan Binch LLP	NO	NO	NO	YES / NO	NO	NO	NO (should be same as all others in 45)	NO	N/A	NO / NO	N/A
Manitoba Dept. of Labour & Immigration	Did not comment.										
Natural Resources Canada	Did not comment.										

Question[2]	24	25	26	27	28	29	30	31	32	33	34
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Respondent											
Norwegian Competition Authority	The Norwegian Authority did not offer opinions on the reform proposals, but noted that the Norwegian Act considers efficiencies and competitive effects in conspiracy cases.										
NOVA Chemicals	YES	NO	YES (but not as proposed)	YES / NO	NO	NO	YES	YES (but leave if any doubt)	NO	YES	YES
Nova Scotia Dept. of Municipal Relations	No comments on point.										
Ogilvy Renault	NO	N/A	NO	N/A	N/A	NO	NO	NO	NO	YES / YES	YES
Ontario Ministry of Consumer and Business Services	No comments on point.										
Ontario Ministry of Intergovern-mental Affairs	Did not comment.										

Question[2]	24	25	26	27	28	29	30	31	32	33	34
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Respondent											
Ontario Ministry of Transportation	No comments on point.										
Osler Hoskin & Harcourt LLP	YES	NO	MAYBE (but worried about overbreadth)	YES / NO	NO	NO	YES	NO	YES	NO / NO	YES
L'Association du consommateurs du Quebec	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Petro-Canada	NO	NO	NO	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Pfizer Canada	NO	General displeasure with proposals, noting a lack of justification and an increased likelihood of confusion.									
Potash Corporation of Saskatchewan[9]	NO	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

[9] The Potash Corporation submission also endorsed the submissions of the Canadian Fertilizer Institute and Canpotex Limited.

Question[2]	24	25	26	27	28	29	30	31	32	33	34
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Respondent											
Prism Sulphur Corporation	NO	N/A	N/A	N/A	N/A	N/A	N/A	NO (especially export defence)	N/A	N/A	N/A
Procter & Gamble	No comments on point.										
Public Interest Advocacy Centre	Yes	N/A	N/A	N/A	N/A	N/A	N/A	N/A	NO	N/A	N/A
Public Service Commission of Canada	Did not comment.										
Public Works and Government Services Canada	No comments on point.										
RBC Financial Group	Noted that the Group's comments were being provided through the Canadian Bankers Association.										

Question[2]	24	25	26	27	28	29	30	31	32	33	34
	Support dual track approach?	**Support "reasonably be expected to compete"?**	**Support purpose and effect test?**	**Draft catches most egregious / Need to mention boycotts?**	**Draft appropriate w/r/t circum-stantial evidence and intent?**	**Draft defence in s. 45(5) is adequate safeguard?**	**Appropriate to put burden of proof on accused for s. 45(5)?**	**Should current s. 45 defences be repealed?**	**Support block exemptions?**	**Support discretion-ary fines / fixed percentage?**	**Include transitional provisions for existing agreements?[3]**
Respondent											
The Railway Association of Canada	NO	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Stephen Ranney	No comments on point.										
Thomas W. Ross	YES	NO	MAYBE	N/A	N/A	NO	N/A	N/A	NO	N/A	N/A
Saskatchewan Department of Justice	YES	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Saskatchewan Ministry of Industry and Resources	The Ministry offered general comments and raised several questions. It generally favoured strengthening of the *Act* but was sensitive to possible overbroad impacts of the proposed reforms on municipalities.										
Sasktel	(NO)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	YES
Shell Canada Products Limited	NO	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	YES (Supports GF)

Question[2]	24	25	26	27	28	29	30	31	32	33	34
	Support dual track approach?	**Support "reasonably be expected to compete"?**	**Support purpose and effect test?**	**Draft catches most egregious / Need to mention boycotts?**	**Draft appropriate w/r/t circum-stantial evidence and intent?**	**Draft defence in s. 45(5) is adequate safeguard?**	**Appropriate to put burden of proof on accused for s. 45(5)?**	**Should current s. 45 defences be repealed?**	**Support block exemptions?**	**Support discretion-ary fines / fixed percentage?**	**Include transitional provisions for existing agreements?[3]**
Respondent											
Carole Steele	No comments on point.										
Suncor Energy	NO	NO	NO	N/A	N/A	NO	N/A	NO	N/A	NO	YES (Supports GF)
Swiss Competition Bureau	The Swiss Bureau did not offer opinions on the reform proposals, but instead compared certain aspects of the proposals to the recently revised Swiss law. Among other things, it noted that while Swiss law does provide for presumptive illegality (similar to *per se* treatment) for some agreements, the presumption may be rebutted if a party proves efficiency gains or that there has been no anti-competitive effects.										
TSX Group Inc.	YES	NO	NO	N/A	N/A	NO	N/A	NO	YES	N/A	YES (Supports GF)
Teck Cominco Limited	MIXED	NO	NO (opposed to purpose test)	N/A	N/A	NO	NO	N/A	YES	N/A	YES (Supports GF)
Telpay Incorporated	No comments on point.										

Question[2]	24	25	26	27	28	29	30	31	32	33	34
	Support dual track approach?	**Support "reasonably be expected to compete"?**	**Support purpose and effect test?**	**Draft catches most egregious / Need to mention boycotts?**	**Draft appropriate w/r/t circum-stantial evidence and intent?**	**Draft defence in s. 45(5) is adequate safeguard?**	**Appropriate to put burden of proof on accused for s. 45(5)?**	**Should current s. 45 defences be repealed?**	**Support block exemptions?**	**Support discretion-ary fines / fixed percentage?**	**Include transitional provisions for existing agreements?[3]**
Respondent											
TELUS	YES	NO	N/A	N/A	YES	NO	YES	NO	YES	NO	YES (Supports GF)
Ultramar Ltee	NO	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Visa	NO	N/A	N/A	N/A	N/A	NO	N/A	N/A	N/A	N/A	YES (Supports GF)
Western Economic Diversification	Did not comment.										
York Truck Centre	No comments on point.										
Zambia Competition Commission	No comments on point.										