JOINTLY VENTURING INTO UNCHARTED TERRITORY: 
THE NEW CONSPIRACY LAW AND ITS IMPLICATIONS FOR JOINT VENTURE CONDUCT

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INTRODUCTION

In the long debate which brought us to the current Sections 45 and 90.1 of the *Competition Act*, proponents of change argued that the then current law was problematic as it did not prohibit hardcore price fixing without the need for extensive marketplace analysis; and also that it was inappropriate in that it left legitimate joint venturers uncertain as to whether they faced criminal sanctions. These are both important points, but the debate was never about whether the law should condemn naked price fixing agreements or hardcore cartels – call them what you will – without the need to undertake detailed economic analysis. It should. Nor was it about whether legitimate joint ventures should be free of criminal concerns. They should.

Rather, the debate was whether statutory drafting was equal to the task of defining conduct in a way so as to condemn as *per se* prohibited hardcore cartel conduct, to conduct rule of reason economic analysis of other sorts of agreements, and to avoid discouraging beneficial joint venture conduct. The winning side in the amendments debate was of the view that we could do better than the old Section 45 – we could draft a clearer set of rules. The losing side – my side – said that it would be problematic, at best, to draft statutory provisions which drew that boundary. The losing side argued that we had had more than a century of jurisprudence with the existing Section 45. While not perfect, together with the practice developed under it, it provided some meaningful guidance. Change in the statute would change the areas of uncertainty, but we would still have to leave it to the courts to distinguish between unambiguously bad conduct, conduct which can sometimes be bad, and conduct we seek to encourage.

Under new Section 45 we start largely afresh. My view remains, however, that despite a new set of statutory provisions, ultimately the courts will have to determine the boundaries. That is not a bad thing – indeed, I think it is an inevitable thing. But now we start without a map of jurisprudence and practice for this new legislative territory. The goal of this very brief note is to explore the new provisions a very little bit, in the context of joint ventures.

TWO APPROACHES

The fact that the United State’s *Sherman Act* and Canada’s *Competition Act* (or before that *Combines Investigation Act*) take a strikingly different approaches to defining prohibited
anticompetitive conduct is uncontroversial. Section 1 of the Sherman Act contains 96 words, only 31 of them operative ones.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.¹

Section 45, immediately prior to its amendment, contained 734 words. The new Section 45 contains a more modest 506 words, but Section 90.1 adds another 925.

This sort of sophisticated analysis, similar, as far as I can tell, to the way my high school essays were graded, cannot tell us everything, but it tells us something about the approach. Our American friends left it to the courts. We try to tell the courts what to do.

After 120 years, and with various statutory “clarifications” along the way, (Sections 45(2), 45(2.1), 45(2.2)) we gave up and started again. The Americans seem content with their 96 words (this although they change the numbers sometimes).

As noted above, despite a genuine good faith effort to statutorily define the issues with some precision I think that we will find that we will still have to leave it to the courts. But, at least for some time, we will not know how the courts will determine some of these issues. The courts may find it challenging to provide appropriate answers to some factual situations, because Parliament has provided certain guidance, but has not provided the flexibility of the previous “undue” language or its like.

**U.S. GUIDANCE**

As a Canadian lawyer I tread very carefully in commenting on the U.S. law, and will only do so minimally. Nevertheless, my understanding of the cases, and in particular *Addyston Pipe*²,

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² *Addyston Pipe and Steel Co. v. United States*, 175 U.S. 211 (1899)
Copperweld\textsuperscript{3}, Dagher\textsuperscript{4}, NCAA\textsuperscript{5}, Broadcast Music\textsuperscript{6}, Maricopa County Medical Society\textsuperscript{7} and most recently American Needle\textsuperscript{8}, suggest that with the relatively few words available to them in their statute, the American courts have charted – and continue to chart – a reasonable course between the extremes of condemning all agreements between competitors if they have some negative effect on competition, and permitting without review any agreement between competitors other than absolutely naked price fixing market allocation or output restriction.

The exercise in the United States is not final – nor I expect will it ever be final. The recent American Needle case illustrates that the battles rage on. As a purely outside observer, however, and focusing specifically on the joint venture question, it is hard to be surprised at the results of American Needle – or indeed the results in Dagher before it – if one simply looks at the headline facts.

In Dagher there was an effective merging of the parties’ downstream gasoline retail operations. How could that not lead to collective price setting for those operations? It was, if not in law, in fact clearly a merger. The only logical approach was to analyze it as a merger, and if passed the merger test not to challenge the logical and inevitable consequences of that merger – joint price setting.

On the other hand, neither does it surprise me that the U.S. Supreme Court concluded that joint licensing of team logowear is not inextricably linked to the operation of a sports league. Without being any sort of expert, at least it seems to me possible that one can jointly operate a sports league and undertake the necessary collective activity to make it work, but at the same time compete in the licensing of hats.

That, of course, leads to the question of whether New York Jets caps compete with Dallas Cowboys caps, or not. For some consumers (fans) I expect you could double, triple or quadruple the price of their team’s cap and it would never cross their mind to buy another team’s cap. For other consumers, they may be indifferent as to whether they buy an NFL cap, an NBA cap or a

\textsuperscript{3} Copperweld v. Independence Tube, 467 U.S. 752 (1984)
\textsuperscript{4} Texaco Inc. v. Dagher, 547 U.S. 1 (2006)
\textsuperscript{5} NCAA v. Board of Regents, 468 U.S. 85 (1984)
\textsuperscript{6} Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979)
\textsuperscript{7} Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982)
\textsuperscript{8} American Needle, Inc. v. National Football League, No. 08-661 (2010)
John Deere cap. All of which is to say that the question of competitive effects arising out of the joint licensing of logowear by NFL teams will be an interesting question under the rule of reason analysis, but that is different than concluding that the joint licensing of intellectual property is so inextricably linked with the necessary joint activity of operating a sports league as to not be subject to review. I intentionally leave the much thornier issue of whether it is necessary for sports leagues to collectively determine team locations – which seems to me a much less obvious question than that of joint licensing of logowear – uncommented upon.

So as I say, purely as an outsider, the U.S. Supreme Court’s approach to the issues, given the facts of the cases of *Dagher* and *American Needle*, does not seem to me to be odd. But it is, clearly, the courts, not the words of the statute, which determine the question.

**THE CANADIAN APPROACH**

What about the new Canadian law. How would it deal with, for instance, the facts of *Dagher* and *American Needle*? As I said at the outset, the debate in Canada was never about whether hardcore price fixing should, in an ideal world, be *per se* unlawful; and whether efficiency enhancing joint ventures should be free from criminal review – it was about how to draw the line with legislative drafting, absent a century of jurisprudence. If the line must be drawn by the courts anyway, the question was whether the prior Section 45 was so problematic as to throw out the benefits of 120 years of experience.

(i) **Application of the New Canadian Law to Dagher**

As a way to explore the issue in connection with joint ventures, why not apply the question to the facts of the two recent U.S. Supreme Court cases. To start, how would the new Canadian Section 45 deal with *Dagher*? I hope the answer is, as a merger. Clearly, Section 91, and the language “control over or a significant interest in the whole or a part of a business”, is broad enough to capture the *Dagher* joint venture as a merger. I am not sure whether it would be a pre-notifiable merger or not, but whether or not it was one would assume that most counsel would have taken the opportunity to seek an Advance Ruling Certificate and have the Competition Bureau’s review at the outset. But even if they did not, it would still be a merger, and subject to review under Section 92. If it were challenged as a merger (or abuse, or under the new competitor collaboration provision, or as price maintenance) it could not also be challenged
under Section 45 (see s. 45.1), but of course that is not a meaningful answer to the issue, since the assumption is that it is a merger, but not one which provokes a challenge. Nevertheless, the Competitor Collaboration Guidelines\footnote{Competition Bureau, Competitor Collaboration Guidelines (December 23, 2009), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html.} are helpful. They provide:

A proposed or completed acquisition of control over, or significant interest in, the whole or part of a business through the purchase or lease of shares or assets, by amalgamation or combination, will be assessed under the merger provisions in section 92 and following of the Act, and not the civil agreements provision in section 90.1 or the conspiracy provision in section 45 of the Act. Parties who are uncertain as to whether an agreement will be assessed as a merger or a competitor collaboration are encouraged to contact the Bureau at the earliest opportunity to discuss how the Bureau will assess such an agreement.\footnote{Ibid., p.1}

I note that the above language is not quite as broad as Section 91 (it omits words like “direct or indirect” and “or otherwise”) but it is not so bad.

So, at least at the outset, if the formation of the joint venture falls within the definition of merger in the Act it is subject to merger review, and the Competition Bureau has stated that it will review the conduct as merger conduct, not under Section 45 or 90.1.

But then, of course, the joint venture will start to jointly set pump prices. That is, as I argued earlier, inevitable and appropriate given that what has occurred is in fact a merger. If the joint venture company itself does the price setting (if there is in fact a joint venture company) then perhaps we avoid technical issues under Section 45(1). If, however, for some good business reason the joint venturers set the joint venture price by agreement, it seems to me we are in the realm of Section 45(1) conduct, and the only question is whether 45(4) saves it. Here, I think – although time will tell – it probably does. We have no guidance from the courts yet but the Competitor Collaboration Guidelines provide:

The challenged restraint must be directly related to the objective of the broader agreement. For a restraint to be directly related, it is not adequate to merely assert that the participants would not enter into the broader agreement in the absence of the challenged
restraint. Nor is it adequate to demonstrate that the ancillary restraint was entered into between the parties in the same context and at the same time as the broader agreement. Rather, the parties must demonstrate that the restraint was directed at the promotion or facilitation of an objective of the broader agreement.

There is no requirement under subsection 45(4) of the Act that the challenged restraint be the least restrictive alternative. Accordingly, in determining whether a challenged restraint is reasonably necessary, the Bureau will not "second guess" the parties with reference to some other restraint that may have been less restrictive in some insignificant way. The Bureau will not examine theoretically less restrictive alternatives that are not practical given the business circumstances. Nonetheless, the ancillary restraints provision requires that restrictions be "directly related and reasonably necessary" to give effect to the objective of the broader agreement. Unless there are significantly less restrictive alternatives to give effect to the objective of the broader agreement, the Bureau is likely to conclude that the restraint is reasonably necessary. Where there are significantly less restrictive alternatives available to the parties, the parties must demonstrate that the other alternatives were inadequate or impractical, or that such alternatives would not allow the parties to achieve the objective of the agreement.  

The above quote does not specifically address joint venture price setting but, taken together with the statement about mergers, I think it offers reasonably reliable, and appropriate, comfort. I also think that the statement on this point, together with the statutory wording in s. 45(4), would give the joint venturers a good argument if challenged in a civil lawsuit.

But, what about other things the joint venture does – or the joint venturers agree to cause the joint venture to do – by way of agreement between themselves. Insofar as they effectively created a unified entity – a merger – I hope that anything the joint venturers have the joint venture do which is inherent in it being a single entity will similarly fall within Section 45(4). But, while I hope that, I am not 100% confident it will be so, because it seems to me that somebody – probably not the Competition Bureau, at least in the short term, but some private plaintiff – could argue that the conduct was not directly related to, and “reasonably necessary” (emphasis added) for the operation of the joint venture. After all, the plaintiffs will argue that

11 Supra note 9, p.14
the joint venture started engaging in the challenged conduct some time after the joint venture was set up – so how could that be “reasonably necessary” for the business.

But of course, businesses start to do new things all the time – if they do not, they fail. Why should a joint venture risk criminal prosecution when it does? My argument would be that once the joint venture is created as a unified entity, anything that entity does – or its owners do together through it – should be immune from challenge. Similarly, and for the same reasons, I think that conduct should be immune from challenge under Section 90.1.

Further, I hope, but I do not know, that that will be the case no matter how powerful the joint venture is or becomes. That is, assuming that at the time the joint venture was formed it had a 10% market share, and therefore cleared merger review, if the joint venture subsequently grows to 70% of the market, that should not make the actions of the joint venture subject to challenge under Sections 45 or 90.1. As noted in Dagher:

When “persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit…such joint ventures [are] regarded as a single firm competing with other sellers in the market.” Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 356 (1982). As such though Equilon’s pricing policy may be price fixing in a literal sense, it is not price fixing in the antitrust sense.\(^ 12\)

In American Needle the Court stated:

The relevant inquiry, therefore, is whether there is a “contract, combination…or conspiracy” amongst “separate economic actors pursuing separate economic interests,” id., at 769, such that the agreement “deprives the marketplace of independent centers of decisionmaking,” ibid., and therefore of “diversity of entrepreneurial interests,” Fraser v. Major League Soccer, L.L.C., 284 F. 3d 47, 57 (CA1 2002) (Boudin, C.J.), and thus of actual or potential competition, see Freeman v. San Diego Assn. of Realtors, 322 F. 3d 1133, 1148-1149 (CA9 2003) (Kozinski, J.); Rothery Storage & Van Co. v. Atlas Van Line, Inc., 792 F. 2d 210, 214-215 (CADC 1986) (Bork, J.); see also Areeda & Hovenkamp ¶ 1462b, at

\(^ {12} \) Supra note 4, at 4
I acknowledge, however, that there may sometimes be genuine difficulty in deciding what the joint venturers do as part of running a joint venture, as opposed to what they do separately. In my view the Act should not and does not let the joint venturers agree on anything, but it should let the joint venturers agree on anything legitimately to do with the joint venture – if they formed the venture and it passed merger review. But “legitimately” – aye – there’s the rub. Drawing that line will usually I think be fairly clear, but it may not always be. The U.S. Supreme Court touches on this issue in Dagher, noting:

The court below reached the opposite conclusion by invoking the ancillary restraints doctrine. 369 F. 3d, at 1118-1124. That doctrine governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities. See, e.g., National Collegiate Athletic Assn. v. Board of Regents of Unvi. Of Okla., 468 U.S. 85, 113-115 (1984); Citizen Publishing Co. v. United States, 394 U.S. 131, 135-136 (1969). Under the doctrine, courts must determine whether the nonventure restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purpose of the business association, and thus valid. We agree with petitioners that the ancillary restraints doctrine has no application here, where the business practice being challenged involves the core activity of the joint venture itself – namely, the pricing of the very goods produced and sold by Equilon. And even if we were to invoke the doctrine in these cases, Equilon’s pricing policy is clearly ancillary to the sale of its own products. Judge Fernandez, dissenting from the ruling of the court below, put it well:

“In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same, as any other entity could. What could be more integral to the running of a business than setting a price for its goods and services?” 369 F. 3d, at 1127.

13 Supra note 8, at 10
See also *Broadcast Music, supra*, at 23 (“Joint ventures and other cooperative arrangements are…not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all”).  

It seems to me that the judicially developed concepts of ancillary restraints and single economic entity are more likely to be able to address these sorts of concerns, and determine what is action related to the venture as opposed to activity outside the venture, than the statutory language of “reasonably necessary” and “competitors” – which include those who would be competitors but for the agreement – which we find in the Canadian statute. We will see. To the extent that the new Canadian law does address these issues, however, it will be through judicial interpretation, not via the statutory definition.

**(ii) Application of the New Canadian Law to American Needle**

Now, to take the *American Needle* example, it is not entirely clear to me that the agreement entered into in that case would fit within Section 45(1). The joint exclusive licensing agreement may be an agreement contrary to Sections 45(1)(b) or (c) – but its not entirely clear that it is. If it’s not, then whatever else we have we do not have a criminal conspiracy. But, let us assume that it does fall within 45(1)(b) or (c), as indeed I think it could. Then the question is, does it fall within the Section 45(4) defence.

The U.S. Supreme Court, it seems to me, while not addressing the question of the Canadian statute, concluded that this joint exclusive licensing was not “reasonably necessary” to the business of running a sports league.

In defense, respondents argued that by forming NFLP, they have formed a single entity, akin to a merger, and market their NFLP brands through a single outlet. But it is not dispositive that the teams have organized and own a legally separate entity that centralizes the management of their intellectual property. An ongoing §1 violation cannot evade §1 scrutiny simply by giving the ongoing violation a name and label. “Perhaps every agreement and combination in restraint of trade could be so labeled.” *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951).

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14 *Supra* note 4, at 5
Directly relevant to this case, the teams compete in the market for intellectual property. To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks. When each NFL team licenses its intellectual property, it is not pursuing the “common interests of the whole” league but is instead pursuing interests of each “corporation itself,” *Copperweld*, 467 U.S., at 770; teams are acting as “separate economic actors pursuing separate economic interests,” and each team therefore is a potential “independent center[r] of decisionmaking,” *id.*, at 769. Decisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that “deprive[e] the marketplace of independent centers of decisionmaking,” *ibid.*, and therefore of actual or potential competition. See *NCAA*, 468 U.S., at 109, n. 39 (observing a possible §1 violation if two separately owned companies sold their separate products through a “single selling agent”); cf. Areeda & Hovenkamp ¶ 1478a, at 318 (“Obviously, the most significant competitive threats arise when joint venture participants are actual or potential competitors”).

It is hard for me to disagree with that. But, under the new Canadian law, if the conduct does fall within 45(1), but is not saved by 45(4), it is a *per se* criminal offence. Yet, as I argued earlier, it seems to me that purely on the basis of the impact on competition for hats, one would have thought there would be *de minimis* impact on the marketplace, at best.

Those who favour the Section 45 amendments will argue that the decision taken with respect to amending Section 45 was that *de minimis* impact or not, hardcore cartels are bad. We should condemn them, we should not invest the resources to determine if there is a meaningful impact on competition – we simply condemn hardcore cartels. And I agree. That said, while this conduct does not appear to me to be necessary to run a sports league, it does not look very much like what I would consider a hardcore cartel, either. If I am right, then in Canada Jerry Jones and Bill Ford, *inter alia*, go to jail – or might, depending on, how the logowear licensing joint venture is structured. That seems a bit odd. It does not appear to be the approach contemplated in the Competitor Collaboration Guidelines. The Guidelines note that joint ventures will be reviewed, if at all, under the civil provision.

Where the Bureau has determined that an agreement should be evaluated under either section 45 or 90.1, as distinct from other

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15 *Supra* note 8, at 14-15
provisions of the Act, the Bureau will then determine, based on any available evidence, whether the criminal provision in section 45 or the civil agreements provision in section 90.1 is applicable to the agreement. As described more fully in Section 2 of these Guidelines, only certain types of agreements or arrangements may be subject to criminal prosecution under section 45 of the Act. As explained in greater detail in these Guidelines, the amended criminal prohibition is reserved for agreements between competitors to fix prices, allocate markets or restrict output that constitute "naked restraints" on competition (restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture). Other forms of competitor collaborations, such as joint ventures and strategic alliances, may be subject to review under a civil agreements provision that prohibits agreements only where they are likely to substantially lessen or prevent competition. Once the Bureau communicates to the parties that the agreement will be reviewed solely under the civil agreements provision, the Bureau will not refer the agreement to the DPP for prosecution on the basis of the same or substantially the same facts. The Bureau will make every effort to arrive at a timely decision on the appropriate section to be applied in evaluating an agreement.16

What our new Canadian approach lacks, or may lack unless or until the courts develop it, beyond the statutory wording of Section 45(4) (wording which by its very specificity may limit the ability of the courts to exempt conduct from criminal challenge) is flexibility with respect to distinguishing between “hardcore” cartels and other conduct deserving of more detailed consideration. Further, by including an express affiliates defence which is fairly precise and circumscribed, and by statutorily defining competitors as those who compete or would compete but for the agreement, it may be difficult to judicially develop the U.S. concept of the single economic entity. Finally, despite the useful policy articulated in the Competitor Collaboration Guidelines, if the conduct falls within Section 45(1), and is not saved by 45(4), it is a criminal offence.

CANADIAN JURISPRUDENCE

Despite my concern about the revised Section 45 language, which I have outlined above, I think it is fair to note that the jurisprudence under the old Section 45 does not provide a great deal of assistance with respect to joint ventures. The vast majority of cases under the previous provision

16 Supra note 9, Preface
dealt with garden variety price fixing, and the issues tended to turn on whether the agreement could be proven (obviously a continuing issue under the new provision but, unlikely to be relevant vis a vis arguably legitimate joint venture arrangements), and whether or not the agreement, if proven, had the requisite “undue” effect on competition. The most authoritative review is found in the PANs case17:

The peculiar nature of the inquiry under s. 32(1)(c) of the Act becomes apparent when it is compared with § 1 of the Sherman Act. Since the inception of the Sherman Act, American antitrust law has developed the two paradigms of adjudication known as the "per se rule" and the "rule of reason". The former attaches consequences to precisely-defined acts, irrespective of surrounding circumstances, whereas the latter is more general and invites in-depth inquiry into the details of the operation. The distinction between the two is not airtight, as leading authors have shown (see 7 P. Areeda, Antitrust Law ¶ 1511 (1987 & Supp. 1990)).

Section 32(1)(c) of the Act lies somewhere on the continuum between a per se rule and a rule of reason. It does allow for discussion of the anti-competitive effects of the agreement, unlike a per se rule, which might dictate that all agreements that lessen competition attract liability. On the other hand, it does not permit a fullblown discussion of the economic advantages and disadvantages of the agreement, like a rule of reason would. Since "unduly" in s. 32(1)(c) leads to a discussion of the seriousness of the competitive effects, but not of all relevant economic matters, one may say that this section creates a partial rule of reason.

The public policy objectives of s. 32(1)(c) of the Act already offer a clear idea of what is meant by "unduly" lessening competition, and what kind of inquiry is mandated. In fact, s. 32(1)(c) embodies a general standard, much like art. 1053 of the Civil Code of Lower Canada or s. 219 of the Criminal Code, for that matter. It represents an intelligible principle, one that carries meaning and that has conceptual force. In all its generality, however, it cannot readily be applied to a factual situation to yield an answer. Few legal norms are so.

The accused may actually be favoured by having a clear statement of principle, inasmuch as it contains the "spirit" as well as the letter of the law. Even when considered without the rest of the Act and case law, I would be inclined to say that s. 32(1)(c) of the Act is sufficiently precise to meet the constitutional standard. It outlines

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an area of risk, agreements that lessen or prevent competition, and imposes some boundaries on enforcement discretion, inasmuch as courts will scrutinize the impact of the agreement on competition to see if it runs against our public policy of free competition.

[...] Section 32(1)(c) therefore requires, in addition to some market power, some behaviour likely to injure competition. It is the combination of the two that makes a lessening of competition undue. Many combinations are possible. For one, market power may come from the agreement. The agreement could either have an "internal" effect, in consolidating the market power of the parties (as is the case with price-fixing) or have an "external" effect, in weakening competition and thus increasing the market power of the parties (as is the case with market-sharing). Market power may also exist independently of the agreement, in which case any anticompetitive effect of the agreement will be suspicious. A particularly injurious behaviour may also trigger liability even if market power is not so considerable. These are only examples of possible combinations of market power and behaviour likely to injure competition that will be "undue" under s. 32(1)(c) of the Act.18

That decision gives content and contour to the “undueness” consideration – and guidance to joint venturers – but we do not have refined jurisprudence specifically addressing the joint venture issue.

To me, however, the lack of jurisprudence is pretty good evidence that the Crown – appropriately – had simply not tried to demonstrate that such conduct was contrary to the prior Section 45. Civil plaintiffs, perhaps discouraged by the need to prove “undueness”, similarly did not have much of a run at it, although it was very often considered, and even threatened with some frequency. Nevertheless, the history of challenge, or lack of challenge, under the provision provides some guidance, which we do not enjoy with the new provisions.

The case closest to considering these issues, it seems to me, was the *BC Fruit Growers* case19. That case ultimately was decided on whether there was any undue impact on those outside the

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18 *Supra* note 17, at 650-651, 657
association, which consideration will presumably not be relevant to cases under the new provision. That flexibility will no longer be available.

The fact, however, that there are no reported cases – either criminal cases or civil cases – relying on the prior Section 45, which alleged that a traditional joint venture arrangement constituted a criminal conspiracy, is at least some evidence that the concern with respect to chilling pro-competitive behaviour, articulated with respect to the need to revise the prior Section 45, while theoretically appropriate may not have been a pressing need.

A recent, and somewhat troubling approach by the courts to Section 45, which may not bode well for a sensible approach to the new provisions, is the decision of the Ontario Superior Court of Justice in *Rogers v. Shaw*\(^{20}\). That case involved a non-competition agreement between cable companies, entered into as part of a mutual purchase and sale of cable systems (a swap) between them. As part of that deal the agreement included a non-competition agreement with each other in the areas in which they sold systems to the other. This is in some respects a fairly standard business sale non-compete agreement. It could, of course, have been subject to typical review as allegedly being over broad geographically or temporally, but instead the court said, in obiter, …

> In my view, [… ] Shaw has a good case that […] these covenants are contrary to section 45(1)(d) of the *Competition Act* as it existed in 2000 and exists today.\(^{21}\)

This decision does not give great confidence that the statement in the Competitor Collaboration Guidelines, that the Competition Bureau will generally not assess under Section 45 “a non-compete clause found in an employment agreement, or an agreement for the sale of assets or shares between parties”,\(^{22}\) will be accepted by the courts.

**CONCLUSION**

The point of this paper has not been to continue to fight old battles lost. We have a new Section 45, including the detail and specificity of the defence in Section 45(4) and the definition of competitor. We have absolute prohibitions on agreements between competitors with respect to things like price, output restriction and market allocation. We have lost the flexibility of

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\(^{20}\) *Rogers Communications Inc. v. Shaw Communications Inc.* (2009), 63 B.L.R. (4th) 102 (Ont. Sup. Ct.)

\(^{21}\) *Ibid.*, at para. 64

\(^{22}\) *Supra* note 9, p. 12
“undue”; flexibility of which American courts read into Section 1 of the Sherman Act with the language of “unreasonably”.

The question is, given that we have the new law, what will our courts do with it? The Rogers v. Shaw case notwithstanding, I am reasonably optimistic that, in time, and in most cases, our courts will articulate approaches similar at least in many respects to the reasonably ancillary doctrine in the United States, and will also explore whether the activity is by multiple decision makers, or is effectively unitary activity, again as the U.S. courts have done. I am also reasonably confident, and am encouraged in that confidence by the Competitor Collaboration Guidelines, that the Competition Bureau is unlikely – at least in the short term – to take inappropriate cases. But, I think, because our new Section 45 is much more specific and directory than Section 1 of the Sherman Act, it will be difficult for our courts in some cases to do this. I also think it will take considerable time to develop jurisprudence on these points. Once we do develop that jurisprudence it is not clear to me that joint venturers will be any more secure in their ability to organize their affairs free of risk of criminal challenge – or civil damages claims – than they were under the prior Section 45. Try as we will, this is an area of law where the courts have to be able to ‘know it when they see it’, with the uncertainty that entails, or we will create an unacceptably rigid straight jacket. So, buckle up, some bumps are likely ahead.