Canadian Competition Act Amendments to Sections 45 and 90.1: Conundrums, Clarifications and Curiosities

by

Randall Hofley and Dustin Kenall

The Canadian Bar Association
Competition Law 2010
Spring Forum
May 17, 2010 – Toronto, Ontario

Blake, Cassels & Graydon LLP
Toronto, Ontario, Canada
Canadian Competition Act Amendments to Sections 45 and 90.1:
Conundrums, Clarifications and Curiosities

Randall Hofley and Dustin Kenall

I. Introduction

The most significant amendments to the Canadian Competition Act\(^2\) (the “Act”) in almost twenty-five years came into force in 2009-2010. In the criminal law area, the amendments reshaped the gamut of Canadian competition law, decriminalizing price discrimination and retail price maintenance on the one hand while, on the other, turning “naked” conspiracies between competitors and potential competitors in restraint of trade into per se criminal offenses subject to (substantially increased) fines and terms of imprisonment consistent with the most serious economic crimes in Canada's Criminal Code. For all other agreements between competitors, the amendments provide for review, only upon application of the Commissioner of Competition (“Commissioner”), by the Competition Tribunal (“Tribunal”) as to whether the agreement substantially lessens or prevents competition, or can be saved by an efficiency defence, with the remedy limited to injunctive relief (no monetary penalties nor private actions for damages). This paper follows on the work of my fellow panellists\(^3\) which introduce the amendments and comment on issues which call for additional action or clarification, notably the narrow “affiliates” exemption, the role of the Commissioner in respect of private actions and the “ancillary restraints doctrine” (“ARD”). We have been asked, and attempt herein, to identify other issues arising from the amendments that are worthy of note for stakeholders.

With this request, and by no particular design, this paper discusses, a conundrum, clarifications, and a curiosity; a consideration of each of these issues and those raised by my fellow panellists repeatedly lead the authors to the same question which question reads to a suggestion going forward. The conundrum this paper explores is the place of the regulated conduct doctrine (or defence) within sections 45 and 90.1 (and to a brief extent, the Act). The cries for clarification this paper explores, by way of example, relate to the status of group boycotts and of agreements affecting the quality of products under section 45. The curiosity is the current role of the “specialization agreement” provisions in the new regime.

While it is undeniable that the amendments bring Canada’s competition laws into the mainstream of contemporary thinking with respect to antitrust enforcement, the amendments

---

1 Randall Hofley is a senior partner at Blake, Cassels & Graydon, LLP, based in Toronto and Ottawa; he is a former Special Counsel to the Commissioner of Competition. Dustin Kenall is a member of Blakes’ Competition, Antitrust, and Foreign Investment group in Toronto.

2 R.S.C. 1985, c. C-34. The Act was last comprehensively revised in 1986 with the introduction of the pre-merger notification and abuse of dominance provisions. The Act’s origin dates back almost a century earlier to 1889, when the first law addressing competition infractions promulgated by a modern national government was passed by the Canadian Parliament.

3 Adam Fanaki, Cops, Copperweld and Copping Out: Recent Amendments to Canada’s Conspiracy Regime; Michael Egge and Patrick English, A Peek at Ancillary Restraints Doctrine through the New Defence in the Amended Competition Act.
leave more questions than answers, particularly as regards the scope of section 45. We wonder whether these questions result from the laudable attempt to codify, relatively precisely, the normative rules that those advocating for amendments (one author amongst them) believed to be in the best interests of competition law and policy consistent with the principles underlying criminal and civil conduct. Our review of the issues addressed by my fellow panellists and the, ad hoc, issues addressed in this paper lead the authors, inexorably, to ask whether the simpler approach may have been—and may turn out to be—the best approach, as more words do not seem to provide for greater clarity nor greater certainty of result. Indeed, we suggest that we may ultimately be able to achieve greater clarity and greater certainty with respect to section 45(1) by focusing on the purpose of the agreement regardless of whether that focus is achieved by virtue of enforcement policy, judicial fiat, or further legislative amendment.

II. A Conundrum: Regulated Conduct

A. Background

Prior to March 12, 2010, section 45 prohibited only those conspiracies or agreements among competitors which “unduly” restricted competition. The term “unduly” required the government to prove beyond a reasonable doubt that the agreement in question had an anti-competitive effect. Thus, proponents of the amendments will tell you, criminal convictions were elusive (or perhaps, better said, difficult to pursue before a court) because a conviction would require the Crown to establish complex economic concepts that often require unavailable (certainly difficult to gather) empirical economic evidence all to be proven beyond a reasonable doubt. Undoubtedly, Canada’s treatment of the most harmful type of agreements (hard-core cartels) was out of step with the U.S. and the E.U. as well as the modern trend of cartel enforcement across many jurisdictions, being to treat naked restraints of trade between competitors as per se illegal without requiring proof of economic harm. Thus, the new section 45 makes it per se illegal for “competitors” to enter into an agreement to fix or control prices; allocate sales, territories, customers or markets; or fix or control production or supply. Consistent with narrowing the conduct covered, the new section 45 increases substantially the applicable sanctions, with the possibility of incarceration for up to 14 years (as opposed to up to 5 years before) and/or fines of up to Cdn $25 million (as opposed to Cdn $10 million before).

4 Market power and relevant product and geographic market have been said to be concepts especially difficult to prove beyond a reasonable doubt in all but the simplest cases.

5 The term “competitor” is defined in subsection 45(8), which states that “competitor includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1) (a) to (c) [of section 45 of the Act].” The definition applies an objective “reasonableness” standard, opening the possibility of liability even where a defendant has the subjective (but mistaken) belief that another person is not a competitor. Phrased in the subjunctive (“would be likely to compete”), the provision probably requires that a person be actually presently competing or (but for the illegal agreement) intending to immediately compete, not merely contemplating or potentially able to compete in the future. This may somewhat mitigate the objective standard, requiring an assessment only of the information reasonably available to the defendant on this issue at the time of the challenged agreement.

6 The amendments also implement a new dual-track approach to agreements between competitors: criminal treatment for hard-core violations under section 45 and civil treatment for potentially pro-competitive collaborations under the new section 90.1, which authorizes the Competition Bureau (the “Bureau”) to apply to the Tribunal for an injunction against competitor agreements that fail to satisfy a competitive effects test and are found to lessen or
Defences are provided in addition to the ancillary restraint defence. Our “conundrum” relates to subsection 45(7)’s explicit recognition of one defence, the regulated conduct defence (“RCD”):

The rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defence to a prosecution under subsection 45 (1) of [the] Act, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1).

The RCD is a common law doctrine that provides a form of immunity from certain—maybe all—provisions of the Act for persons engaged in conduct that is authorized, expressly or impliedly, by other validly enacted provincial or federal legislation. While some commentators have argued that the RCD is not a defence but rather an exemption, this has seemingly been settled by the text of subsection 45(7) which describes the RCD as a “defence to a prosecution under subsection 45(1) of [the] Act” [emphasis added]. While this question may have been settled by subsection 45(7), in our view, the clarity stops there. Indeed, it is our contention that both the inclusion of this provision, and its text, gives rise to more questions than answers, many of which could be avoided by a simple, one sentence, provision.

---

7 E.g., subsection 45(1) also does not apply if the conspiracy, agreement or arrangement is between federal financial institutions. *Competition Act*, s. 45(6)(b).


9 The equivalent to the RCD is the “state action doctrine” in the U.S. In *Parker v. Brown*, 317, U.S. 341 (1943), the Supreme Court held that the *Sherman Act*, which prohibits conspiracies in restraint of trade, does not prohibit the States from restricting competition. Even though the *Sherman Act* was intended to protect competition, it was not intended to limit the sovereignty of the States and their power to regulate. From *Parker* on, the Supreme Court has extended the doctrine to cover a broad range of regulated activities. See Calvin S. Goldman, Q.C. and Benjamin R. Little, *The Regulated Conduct Defence in Canada* (2004), at 2 n.5, available at: http://www.eui.eu/RSCAS/Research/Competition/2004/200409-compet-Goldman&Little.pdf.


12 Parliament’s choice of words here is not without import because an exemption could be raised as a jurisdictional bar prior to adjudication, while a defence is only available during the adjudication before a court or tribunal.

13 It is a curious characterization particularly in the context of a “conflicting” federal statute. *See infra*, Part C.
B. RCD in the Provincial Law Context: Reverse Paramountcy

Under Canada’s Constitution, the provincial and federal governments have distinct and sovereign powers to legislate.\(^\text{14}\) It is not unusual for federal and provincial laws to overlap from time to time, leading to a perceived or, more rarely, real conflict of laws. In order to address these conflicts, Canadian courts developed the so-called “paramountcy” doctrine which provides that a provincial law will be of no force to the extent of its inconsistency with a federal law.\(^\text{15}\) In other words, under the paramountcy doctrine, if there is a conflict,\(^\text{16}\) the federal law is supreme. The RCD, however, operates as an exception to the general rule of federal paramountcy; it operates to deny the application of the Competition Act in cases where conduct is, expressly or impliedly, authorized by a provincial law (typically a regulatory scheme).\(^\text{17}\) In these cases of “reverse” paramountcy, a valid provincial law (seemingly) provides a defence against the application of the federal law in question, one rationale being that valid provincial acts are to be considered within the public interest but the more likely rationale being that courts did (and do) not want to convict someone of a criminal offence for actions expressly or impliedly authorized by a valid law (can such a person have a criminal “mens rea”?) and did (and do) not want to address a constitutional issue in these narrow (and rare) circumstances.\(^\text{18}\) Instead of codifying this (or another principle), the new subsection 45(7) simply instructs the courts to apply the RCD to section 45 as it was applied immediately before its coming into force, i.e., there is no explicit delineation of the substantive elements of the defence in the Act.\(^\text{19}\)

So what to do? A starting point is a review of the Bureau’s public position on the meaning of subsection 45(7). The Bureau’s Competitor Collaboration Guidelines (“Collaboration Guidelines”) state that the removal of the term “unduly” from section 45 does not affect the availability of the RCD and that the Bureau will continue to apply the approach articulated in the Technical Bulletin on “Regulated” Conduct (the “RCD Bulletin”).\(^\text{20}\) Of course, as the Bureau

---

\(^{14}\) Constitution Act (1867), ss. 91, 92.

\(^{15}\) See Mark Katz, supra, note 10.

\(^{16}\) A conflict will only be found where the provincial law “frustrates” the purpose of the federal law or where dual compliance with both laws is impossible: Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161 at 191; Rothman, Benson & Hedges v. Saskatchewan, [2005] 1 S.C.R. 188, at para. 12.


\(^{19}\) Three Bills proposing statutory RCDs were proposed in the 1970s but none was ever passed. See T. Kennish and J. Bolton, The Regulated Conduct Defense: A Time for Legislative Action?, Canadian Competition Record (Summer 2003), Appendix A.

states itself, bulletins are neither intended nor constituted to give a binding statement of the law. Accordingly, courts will be free to determine what influence the removal of the word “unduly” from the new section 45 has on the application of the RCD – perhaps better described as how prior RCD caselaw should now be interpreted in the context of the new section 45 – and may not share the Bureau’s views. This is because in Garland, the most recent Supreme Court of Canada decision discussing RCD, the Court held that “leeway language” such as “unduly” was of fundamental importance to the availability and the application of the RCD.

Garland involved a private action for restitution of late payment penalties from an electric utility provider that were approved by a provincial agency but prohibited by a strictly worded provision of the Criminal Code (section 347). The Supreme Court ruled (per Justice Iacobucci, a judge familiar with competition law), that the absence of the recognition of “an exception” — such as through words like “unduly” or the phrase “within the public interest” — to a strict application of the prohibition in the applicable Criminal Code provision precluded the application of the RCD: “[i]n order for the RCD to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that [] the criminal code granted leeway to those acting pursuant to a valid provincial regulatory scheme. If there were any such indication . . . it should be interpreted, in keeping with the above principle, not to interfere with the provincial regulatory scheme.”

Clearly, the drafters of the new section 45 believed that the express statement that the “rules and principles . . . continue in force [as it did prior to the amendment] and apply in respect of a prosecution under subsection (1)” provides the requisite “indication” that Parliament intends the RCD to apply. However, the removal of the term “unduly” and the replacement of the Act’s prior conspiracy offence with a per se rule for hard-core cartel agreements is not consistent with any Parliamentary intention that courts grant the “leeway” necessary to excuse (exempt) the action in question from the application of the Act. More importantly, when one reads the text of subsection 45(7), it would seem that a court must ask whether the law on RCD as of March 12, 2010 required “leeway language” in the principal provision at issue in order for RCD to apply and if so, where is that language in the new subsection 45(1).


22 Approach taken by Winkler J. in Ontario Superior Court of Justice (2000), 185 D.L.R. (4th) 536, and agreed upon by Iacobucci J. rendering the judgment in Garland v. Consumers’ Gas Co., [2004] 1 S.C.R. 629, 2004 SCC 25, at paras. 75-76 (“Garland”). Specifically, the Court stated “[t]he defendant can point to no case which allows the defence unless the federal statute in question uses the word ‘unduly’ or the phrase ‘in the public interest.’”

23 Garland specifically referenced s.45 of the Act.


25 In stark contrast to the Criminal Code provision in Garland which stated that the section governs “[n]otwithstanding any [other] Act of Parliament.”

A quick review of the RCD jurisprudence offers some insight. In Chung Chuck,\(^\text{27}\) it was held that adherence to the provincial statute could not amount to an intent “unduly” to limit production. Simoneau,\(^\text{28}\) a later case, found no conflict between the provincial and federal statutes as compliance with a valid provincial statute could not result in an action contrary to the public interest. In Cherry v. The King ex rel. Wood,\(^\text{29}\) the court applied the doctrine out of concern with the practical problem of the presence or absence of “intent” on the part of provincial administrators to breach federal law. In Canadian Breweries, the court proceeded on the basis that the word “unduly” in section 32 connotes substantially the same meaning as the more general words “operated or is likely to operate to the detriment or against the interest of the public.” In other words, the term “unduly” need not be used to indicate a valid public interest exception worthy of reading down the Act to avoid a direct conflict with provincial law—a statute may implicitly authorize an RCD defence absent such language.\(^\text{30}\) The courts in all these cases explained in various ways that compliance with the edicts of a validly enacted provincial measure can hardly amount to something contrary to the public interest, i.e., a “crime,” either when examined from the perspective of the purpose of the “competing” laws, the elements of the underlying conspiracy offense, or the defendant’s (criminal) mens rea. Thus, regulatory boards may be deemed to be acting in the public interest when exercising their statutory powers, as in Jabour,\(^\text{31}\) where the Law Society of British Columbia was found to be operating within the bounds of the RCD by issuing advertising regulations under the broad mandate of issuing rules to ensure professional good conduct. As the Canadian Bar Association noted in its submissions to the Bureau on the Technical Bulletin on Regulated Conduct, “competition policy is one of many government social and economic policies,” that may be displaced by others.\(^\text{32}\)

In the end, the Competition Act may be constitutionally incapable of existing without some form of RCD exception, whether explicitly acknowledged by the statutory text or not.\(^\text{33}\) Having said that, should not the existence and nature of a defence to a hard-core cartel offence akin to felony crimes\(^\text{34}\) be more express - it is the same legislature, after all? While it may not


\(^{29}\) Cherry v. The King ex rel. Wood (1937), 69 C.C.C. 219.


\(^{33}\) See Peter Hogg, CONSTITUTIONAL LAW OF CANADA (2008), section 21.6 (observing that “[t]he trade and commerce power will [] authorize the regulation of competition, but not the regulation of wages and prices, product standards or particular industries such as insurance.”). Sections 125 and 126 of the Act, permitting the Commissioner to appear before provincial and federal regulators to provide advice on competition matters but not to impose her will thereon, reinforce this conclusion.

\(^{34}\) More serious than the usurial interest provision at play in Garland.
have been simple to secure an agreement with the provinces over the required language to meet the timing exigencies of the budget bill, the authors suggest that it would have been simple, from a textual standpoint, to say so. The cry for this simplicity and clarity becomes more acute when we consider the federal law context.

C. RCD in the Federal Law Context: Statutory Interpretation

While the RCD was initially developed in the context of provincial regulatory schemes, a few court decisions have applied the RCD in the context of federal legislation.\textsuperscript{35} If there was any question as to whether the RCD should apply to federally regulated conduct,\textsuperscript{36} the new subsection 45(7) seemingly answers that question by suggesting that the RCD applies in the case of any “requirement or authorization by or under another Act of Parliament or the legislature of a province.” In the federal context, the courts have needed to, and will continue to need to, consider Parliament’s intent in the \textit{Competition Act} (section 45, for example) and the other federal legislation where the laws in fact conflict (in which case, caselaw suggests that the most recent law will prevail).\textsuperscript{37} The question remains, as with reverse paramountcy in the provincial context, what does subsection 45(7) tell us about Parliament’s intent?

Does it tell us that Parliament intended, by the amendments to section 45, to maintain RCD as a defence to a section 45 conviction? While it would seem so, all the provision says is that the law as it existed prior to March 12, 2010 continues to apply and, as we have seen, that law suggested that, absent leeway language in the statute, the RCD does not apply. One can convincingly argue, for example, that non-application of the RCD, or a muted application, would be entirely consistent with Parliament’s narrowing of the conduct covered, enhancement of the sanctions, and removal of the requirement that the conduct be undue or contrary to the public interest. Has not Parliament—at least as between federal statutes—clearly suggested, in its most recent pronouncement that an agreement by competitors to fix prices, allocate markets or fix production is always contrary to the public interest and thus cannot be excused because it occurred in a regulated context? Would it not be reasonable to conclude that underlying section 45 is a Parliamentary conclusion that if prices, markets or production are to be controlled, they are not to be controlled through an agreement between competitors but by virtue of a decision of an (independent) regulator pursuing its statutory mandate? A good argument can be made that Parliament—having narrowed the offence and strengthened the sanctions—did not intend to exempt the specified agreements between competitors (even if undertaken by competitors who are subject to regulatory supervision) nor, by virtue of the establishment of any


\textsuperscript{37} Hogg, \textit{supra}, note 33, section 16.1. The scope for operational conflict between the Act and other federal laws may not be as wide in Canada as other jurisdictions such as the U.S. with more extensive antitrust enforcement mechanisms (such as private treble damage actions for any antitrust violation) that present more opportunities for interference with other regulatory regimes through inconsistent determinations of complex regulatory matters by generalist judges and lay juries. \textit{See Credit Suisse Securities USA (LLC) v. Billing}, 551 U.S. 264 (2007) (concluding that federal security regulation implicitly precludes application of federal antitrust law).
regulatory scheme,\(^{38}\) to have prices, markets or production determined by agreement as opposed to the decision of an (independent) regulator with a clear mandate from (and under the supervision of) Parliament to do so in the broader public interest. As with the “reverse paramountcy” doctrine in the provincial context, a one sentence statement of Parliament’s intent would have resolved these questions.\(^{39}\)

\[D. \text{ Section 90.1 and the RCD}\]

Another question raised by the presence of subsection 45(7) is whether the RCD applies to the new civil provision under section 90.1 of the Act. In *Law Society of Upper Canada v. Canada (Attorney General)*, the Ontario Divisional Court held that the RCD applies to civil reviewable practices in the context of the Bureau’s investigation into allegations of abuse of dominance by the Law Society as a result of its mandatory insurance policy.\(^{40}\) However, the application of the RCD was not discussed by the court in depth, as all parties agreed that it was available. With the amendments, the Act now expressly recognizes the RCD with regard to section 45(1) but does not mention it in respect of section 90.1 or any other reviewable practice in the Act. By expressly providing for the RCD only under section 45, Parliament has arguably (at least according to the *expressio unius* canon of construction) signalled that the RCD has no role to play in respect of the application of section 90.1.\(^{41}\) This Parliamentary intent is arguably all the more clear given that the Bureau has said, in its Technical Bulletin, that the Bureau will not limit its statutory mandate by the general application of the RCD to the reviewable matters provisions of the Act. From a fairness standpoint, it is unclear why anyone whose actions are authorized expressly or impliedly by law should be precluded from using the RCD, whether in a criminal prosecution or a civil application. Surely, section 90.1 is not a law somehow less in the “public interest” than section 45. Some would even call it perverse if the RCD could immunize the most egregious hard-core cartel conduct but not potentially pro-competitive collaborations.\(^{42}\) These are neither new nor under-analysed issues. Again, a one sentence provision would have brought clarity to a now even more murky area.

---

\(^{38}\) Such comprehensive regulatory regimes exist in regards to, for example, telecommunications, transport, or even supply-managed products.

\(^{39}\) Unlike the “reverse paramountcy” issues above, this would not have raised the dicey issue of federal-provincial relations nor required federal-provincial consultations in the midst of the worst economic crisis since the Great Depression.


\(^{41}\) Section 93 governing merger review probably includes more than sufficient leeway language, given the Tribunal’s mandate to consider “any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.” And section 47, governing bid rigging, also may afford an RCD safety-valve, so long as the party requesting the bid is informed via the regulatory process of a joint bid submission. *See Competition Act,* s.47(1) (defining bid rigging offense as agreements to fix or withhold a bid “where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is submitted or withdrawn, as the case may be, by any person who is a party to the agreement or arrangement.”)

\(^{42}\) CBA, *supra*, note 32, at 7.
III. Clarifications Outstanding: Group Boycotts and Agreements Respecting Quality

Whereas the U.S. Sherman Act provides only cryptic one-sentence\(^{43}\) prohibitions of agreements in restraint of trade and monopolization and thus as ample opportunity for interpretive development through treble-damages private actions,\(^{44}\) the Competition Act provides a detailed, textual codification of substantive rules. The Competition Act therefore lends itself more to development through the tools of statutory interpretation—such as the canon of construction \textit{expressio unius est exclusio alterius} referenced above—than it does through common-law development. Inevitably, there are grey areas where the text and statutory interpretation principles are not determinative and, indeed, where jurisprudence is not of significant assistance. The answer to date for the Bureau has been “enforcement guidelines” such as the Collaboration Guidelines. While relatively detailed and clearly worthwhile, the Bureau has chosen in a number of instances not to guide or to give little guidance in the Collaboration Guidelines. Two examples illustrate this point: group boycotts and agreements on product quality. Both the examples raise the question again of whether a simpler text, or alternatively prosecutorial or judicial approach, to section 45 might provide equal or greater certainty.

As regards group boycotts, it was generally understood that group boycotts could constitute criminal conspiracies unduly restricting competition under the former section 45.\(^{45}\) However, over many years and many attempts to amend section 45, every attempt to specifically identify group boycotts as a per se criminal offense has failed to win legislative support.\(^{46}\) One

\(^{43}\) See 15 U.S.C. §§ 1 (“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.”), 2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony….”).

\(^{44}\) See, e.g., \textit{Nat’l Soc’y of Professional Engineers v. United States}, 435 U.S. 679, 688 (1978) (“Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute’s broad mandate by drawing on the common-law tradition.”).

\(^{45}\) See, e.g., Competition Bureau, \textit{Applicability of the collective bargaining exemption} (Dec. 22, 1999) (finding a clause in collective bargaining contract prohibiting subcontracting from non-union general contractors to likely be an illegal group boycott under section 45), available at: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00880.html; Competition Bureau, \textit{The Competition Act and the Professions: Notes for an Address by Calvin S. Goldman} (Apr. 25, 1989) (“As members of the legal profession, you should be aware of the potential application of the Competition Act to agreements or arrangements to boycott or otherwise impede the entry of new paraprofessional groups with the object of preventing competition in the particular service concerned. Such exclusory activity may be subject either to the criminal conspiracy provisions or to the non-criminal abuse-of-dominance provisions.”), available at: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01128.html.

\(^{46}\) Bill C-472, 2nd Sess., 36th Parl., 1999-2000, sections 1 and 7, which would have condemned as a per se offence agreements “boycotting a competitor or a competitor’s suppliers or customers,” died on the Order Paper with the dissolution of Parliament on October 22, 2000. Various other proposals would also have explicitly treated boycotts as per se and/or criminal but were never incorporated into successful amendments. See Canadian Bar Ass’n, \textit{Submission on Reform of Section 45 of the Competition Act (Conspiracy)} (Feb. 2003), at 25 (discussing reports recommending per se and/or criminal treatment of group boycotts), available at: http://www.cba.org/CBA/submissions/pdf/03-05-eng.pdf.
would expect that this is because, from a policy standpoint, group boycotts are not virtually-always-harmful restraints that should be treated as per se criminal offenses, e.g., the OECD’s definition of hard core cartels does not include boycotts nor do the European Guidelines include boycotts under the most egregious agreements “that almost always fall under article 81(1).” Moreover, even if a particular group boycott is harmful, it (unlike a covert price-fixing cartel) would readily be perceived by the victim, who may then bring an application before the Tribunal under section 75 for refusal to deal or urge the Commissioner to bring an application under section 90.1

When asked in a consultation session on the Collaboration Guidelines, senior Bureau officials confirmed that the failure to mention group boycotts in the Guidelines can be taken to mean that they are not covered by the new section 45. Do the Collaboration Guidelines tell us this? They do not, notwithstanding requests, for example, to address the issue by the Canadian Bar Association. Why not? Our strong suspicion is that coverage of boycotts by section 45 will depend on one’s definition of a “group boycott?” In other words, to address boycotts, in the Collaboration Guidelines, the Bureau would have had to define a boycott and once defined, it will be clear that there are certain types of boycotts—say, an agreement by suppliers to a particular customer not to sell to that customer because it is insisting that “environmental” standards of a questionable effect be met within an impossible timeframe—may still be viewed as hard-core cartel conduct. In other words, any non-criminal enforcement may only apply to “classic boycotts” in antitrust terms. Agreements by competitors to deny other actual or potential competitors access to upstream suppliers or downstream customers, and not to boycotts that may be said to “regulate” competition amongst the participants or that have as their objective or effect to stop (or diminish) actions by suppliers or customers. Clearly, subsection 45(1)(a) prohibits agreements that not only fix but control prices or supply; indeed the Collaboration Guidelines note that subsection 45(1)(c) prohibits “all forms of output [supply] restriction agreements between competitors, including agreements between competitors to limit quantity or quality of products supplied . . . to specific customers . . . or discontinue supplying products to specific customers . . .”.

U.S. Courts, in considering whether boycotts should be treated as a hard-core (criminal) cartel, ask whether the price to consumers for the products would rise or choices available to consumers would diminish. In the face of an agreement by lawyers (members of a D.C. bar


50 Defining a boycott is likely as difficult a task to get agreement on within the Bureau as it is outside the agency.

51 A “classic boycott” is designed to harm a competitor while other agreements may be designed to control price, production or some other aspect of competition.

52 Competition Bureau, Collaboration Guidelines, s.2.4.3.
association) to stop representing indigent defendants unless D.C. raised the lawyers’ rates, the U.S. Supreme Court held that even though the boycott’s stated purpose was political, social or otherwise non-commercial, “a boycott conducted by business competitors who stand to profit financially from a lessening of competition in the boycotted market” was a hard-core (criminal) cartel. In *Catalano, Inc. v. Target Sales, Inc.*, the U.S. Supreme Court found that an agreement to eliminate credit terms was tantamount to an agreement to eliminate discounts (and a direct agreement to raise prices) and thus was a hard-core (criminal) price fixing cartel.

We have no clarity around this issue because there is no clear answer in section 45—there is no screen for this conduct even though boycotts would not seem, save where a sham to mask a price fixing cartel, to constitute *per se* conduct. It would seem that, to determine whether a boycott is ‘criminal’ conduct always contrary to the public interest, one should ask what the purpose of the agreement is? If it is to fix a price, it is a section 45 issue; if it is to address a power imbalance and, in so doing has anticompetitive effects, it should be enjoined.

As to agreements with respect to the quality of goods, we have a little guidance. It would seem that if such an agreement has a pro-competitive objective such as standard setting, it will probably be analyzed under section 90.1 but, again, even the Bureau acknowledges that one must determine the purpose of the agreement:

“The Bureau does not interpret paragraph 45(1)(a) to prohibit agreements solely on the basis that they have the effect of increasing prices charged by competitors. For example, an agreement among competitors to implement certain measures designed to protect the environment or implement a new industry standard may increase the costs of producing a product and ultimately result in an increase in price. However, the Bureau does not consider such initiatives alone to be agreements to fix or increase prices; rather, these are agreements to implement measures to protect the environment or implement industry standards.”

---

53 See *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990). The FTC’s “Guide to Dealing with Competitors” states that a “group boycott may be used to implement an illegal price-fixing agreement. In this scenario the competitors agree not to do business with them except on agreed upon terms, typically with the result of raising prices.”

54 446 U.S. 643 (1980).

55 The Bureau’s new *Collaboration Guidelines* note that subsection 45(8) of the Act defines “price” to include “any discount, rebate allowance, price concession or other advantage in relation to the supply of the product” and states that the Bureau interprets the new provision “as applying to agreements between competitors as to a component of a price such as a surcharge or credit terms” (p. 12).

56 The ARD does not apply and while predatory group boycotts could be dealt with under section 90.1 or section 79 and union group boycotts for wage increases could, conceivably, be considered in the context of the collective bargaining exemptions to the Competition Act, in no other case does a screen exist.

57 Competition Bureau, *Collaboration Guidelines* (2009), s. 2.4.1.
Notwithstanding this acknowledgement, the same Guidelines also state that certain restrictions regarding “quality” are covered by sub-section 45(1)(c):

This provision prohibits all forms of output restriction agreements between competitors, including agreements between competitors to limit the quantity or quality of products supplied, reduce the quantity or quality of products supplied to specific customers or groups of customers, limit increases in the quantity of products supplied by a set amount or discontinue supplying products to specific customers or groups of customers. The prohibition in paragraph 45(1)(c) applies to agreements to restrict the supply or production of a product. Accordingly, agreements between competitors to impose production quotas, permanently or temporarily close manufacturing facilities, reduce the quality of components used in a product, or other agreements to reduce the quantity or quality of products that are produced can violate paragraph 45(1)(c).

The Bureau makes these pronouncements notwithstanding the fact that the new section 45 makes no mention of quality. The former section 45 addressed the issue directly, providing an exemption for agreements respecting “product standards” but not agreements unduly restricting competition respecting the “quality of production.” Why would agreements respecting quality be covered under section 45 given the clear contrast between the current and former provision? Isn’t this question amplified all the more by the fact that where Parliament has sought to expand the reach of section 45, it has done so explicitly? If section 45 can be interpreted as either prohibiting an agreement on quality or not (as it can), the rule established by the Supreme Court of Canada in R. v. Bélanger would seem to apply: “Where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself”. Regardless, like group boycotts, is this not too much uncertainty for 14 years in jail? There may be a simple solution to this issue: the prosecutorial, judicial or, if necessary, statutory imposition of a truly criminal mens rea requiring that prosecutors or courts pursue or convict only where they can conclude, beyond a reasonable doubt, that the parties to the agreement (accused) had as their purpose the fixing of prices or production (for example).

58 Competition Bureau, Collaboration Guidelines (2009), s. 2.4.3.

59 In 1976, when Parliament sought to bring the service sector within the ambit of the criminal conspiracy provisions, it amended section 45’s predecessor by replacing the word “article” with “product” and changing the catch-all offense from “restrain or injure trade or commerce in relation to any article” to “otherwise restrain or injure competition unduly.” An Act to Amend the Combines Investigation Act and the Bank Act and to Repeal an Act to Amend the Combines Investigation Act and the Criminal Code, S.C. 1974-75-76, c.76, section 14.

60 By way of example, if the Bureau sought to bring a criminal case against parties who had agreed to use a specific low-cost input in the production of their competing goods, a court might interpret section 45 as prohibiting all types of hard-core restraints and convict or it might, relying on section 45, focus on only two axes (prices and output), the history of the Act, and the dicta above and exonerate the defendant.

III. The Curiosity: the Survival of Specialization Agreements

Sections 85-90 provide for immunity from the enforcement of sections 45 and 90.1 of the Act with respect to “specialization agreements” that have been filed with and “registered” (approved) by the Tribunal. A “specialization agreement” is any “agreement under which each party thereto agrees to discontinue producing an article or service that he is engaged in producing at the time the agreement is entered into on the condition that each other party to the agreement agrees to discontinue producing an article or service that he is engaged in producing at the time the agreement is entered into, and includes any such agreement under which the parties also agree to buy exclusively from each other the articles or services that are the subject of the agreement.” A specialization agreement will be registered if the Tribunal finds that the agreement is (a) “likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result”; (b) such efficiencies “would not likely be attained if the agreement were not implemented”; and (c) no party has been coerced into the agreement. 62 Not one single specialization agreement has ever been registered by the Tribunal in the nearly 25 years that have passed since the addition of the provisions to the Act.

Of course, at the time the specialization agreement provisions were passed, no middle-ground existed for the review of agreements between competitors, i.e., there was only section 45’s criminal conspiracy prohibition and section 90’s merger review procedures. 63 In 2004, the Bureau released a consultation paper concluding “[i]f a civil strategic alliances provision incorporating a consideration of efficiencies were to be adopted as part of section 45 reform, then the specialization agreements provisions of the Competition Act (sections 85 through 90) may no longer be necessary.” 64 Section 90.1 seems to fill the gap now, and, indeed, the Bureau has noted that it will review unregistered specialization agreements “where parties unilaterally or reciprocally agree to discontinue production of a product and instead purchase that product from another party” as a type of joint production agreement under section 90.1. 65 While prior to the creation of section 90.1, there may have been some risk that these types of agreements could fall into the realm of criminal conspiracies under section 45, isn’t such risk effectively gone?

62 *Competition Act*, s. 86(1). These provisions were apparently included in the 1986 amendments to ensure the competitiveness of Canadian small-scale manufacturing against foreign competitors in the context of more liberalized bilateral and multilateral trade regimes. *See* Competition Bureau, *Notes for an address by Wayne D. Critchley, Deputy Director of Investigation and Research (Resources and Manufacturing)* (Apr. 18, 1989), available at: http://comopetitionbureau.gc.ca/eic/site.cb-bc.nsf/eng/01127.html.

63 *Id.* (reporting that “[t]here were concerns that the old Act served as a disincentive to these arrangements. Companies feared, perhaps not unreasonably, that a specialization agreement might bring on an inquiry or prosecution of conspiracy.”).


65 Competition Bureau, *Collaboration Guidelines*, s. 3.9.
First, the Bureau is unlikely to treat an agreement not constituting a hardcore restraint as within the ambit of section 45: “agreements subject to criminal prohibition under section 45 are agreements between competitors to fix prices, reduce output or allocate markets 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 agreements between competitors may be reviewed under the civil provision in section 90.1.” The Collaboration Guidelines confirm that “[j]oint production agreements may generate cost savings through various means, such as economies of scale or scope, sharing a better production process, and combining complementary technologies and know-how. Clearly, joint production agreements can be pro-competitive.” Second, even if a specialization agreement fits the statutory test as an agreement between competitors to control the production of a product, a party to the agreement could establish that the allocation of production was ancillary to a broader lawful agreement (expansion of production runs) and directly related to and reasonably necessary for giving effect to that broader lawful agreement’s objective, e.g., achieving economies of scale. Undoubtedly, this broader agreement would be memorialized in a detailed JV and the Bureau has stated that it expects that “ancillary restraints will be reduced to writing as part of formal agreements.” Indeed, given its past approval of unregistered specialization agreements, it would be surprising if the Bureau pursued the agreement under section 45 unless it also affected competition in unrelated markets. Finally, the analysis conducted by the Tribunal under section 86 is essentially the same as it conducts under 90.1.

The continued presence of the specialization agreement provisions is a curiosity, particularly where legislative simplicity demands its removal. So why are these provisions on the books when a repeal is a simple matter? For the authors, the only logical conclusion is that the provisions have been maintained because, on its face and without a criminal mens rea

---

66 Competition Bureau, *Collaboration Guidelines* (2009), s. 1.3.

67 Competition Bureau, *Collaboration Guidelines* (2009), s. 3.9. The European Commission has its own block exemption for specialization agreements specifically citing their procompetitive potential, while withholding immunity for specialization agreements with hard-core cartel objectives. *See Commission Regulation* (EC) No 2658/2000 (Nov. 29, 2000) (“Agreements on specialisation in production generally contribute to improving the production or distribution of goods, because the undertakings concerned can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply. Agreements on specialisation in the provision of services can also be said to generally give rise to similar improvements. It is likely that, given effective competition, consumers will receive a fair share of the resulting benefit.”), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:304:0003:0006:EN:PDF.

68 *Competition Act*, s. 45(4).

69 Competition Bureau, *Collaboration Guidelines*, s. 2.5(b).


standard, subsection 45(1)(b) and (c) can reasonably be construed to apply to specialization agreements and the ARD is not a clear defence. In other words, the ARD is not a sufficient screen. Consequently, Parliament has maintained an alternative means for businesses to immunize themselves from prosecution under section 45 in these circumstances. There must have been – must be – a simpler way.

IV. Simplicity and Clarity: Towards a Criminal Mens Rea Requirement

Section 45 is criminal law and therefore requires proof of mens rea or criminal fault under section 7 of the Canadian Charter of Rights and Freedoms because “the morally innocent should not be punished.” Formerly, the mens rea required to establish guilt under section 45 was that the defendant intended to enter into an agreement and was aware or ought to have been aware that the effect of the agreement was to prevent or lessen competition unduly. In R. v. Nova Scotia Pharmaceutical Society, the Supreme Court of Canada described the latter in objective terms, finding that proof by the government that the accused had entered into an agreement that had the effect of lessening competition unduly would “in most cases” be all that was needed, because the “logical inference” of the accused entering into such an agreement would be that the accused ought to have known the agreement would result in an undue lessening of competition. Some commentators have found the Court’s reasoning difficult to support—a defendant’s section 7 Charter right not to be deprived of liberty except in accordance with the “principles of fundamental justice” (which had been interpreted as requiring the government to prove a minimum fault requirement for criminal offenses) would turn somewhat arbitrarily on a hindsight examination of competitor collaborations to determine whether on balance their procompetitive effects outweighed their anticompetitive effects.

With the transformation of section 45 into a per se offense, it could be argued that there is no mens rea required anymore under section 45 beyond an intention to enter into an agreement that fixes or controls prices or production (supply) or allocates markets, customers, territories, etc. Presumably, in the case of prosecutions involving “naked” restraints of trade, Parliament (and the drafters) believe that the mental element can be presumed ex ante, e.g., there could be no other intent to entering a “naked” agreement to control price or production other than to maintain or increase prices. Of course, in the context of regulated conduct, production-sharing agreements, standard setting agreements or even collective refusals to deal or supply (boycotts), discussed above by way of example, this assumption breaks down fast. Notwithstanding this breakdown, the defendant must show that a defence applies, e.g., that the agreement respecting

---


73 Id.

74 See, e.g., Hogg, supra, note 33, s.47.11(c).

75 Formerly, the conspiracy provision had explicitly not required any mens rea regarding the effect of the agreement to unduly restrict competition. Competition Act, s.45(2.2) (1986).
price or production was “ancillary” to a lawful broader or separate agreement including the same parties and is “directly related” to and “reasonably necessary for” giving effect to the objective of that broader or separate agreement or that the conduct was required or authorized by another federal or provincial law. While these kinds of issues can be mitigated somewhat by a mandatory pre-clearance mechanism for such agreements (which does not exist) or by the Bureau’s exercise of investigatory discretion, this does not resolve what can reasonably be suggested is a disconnect between the mens rea required for serious (morally culpable) criminal conduct, concerning which section 45 is now said to be akin, and the mens rea seemingly required in the new section 45 in such circumstances.

Section 45 makes it an offense for an individual to conspire, agree, or arrange with a competitor “to” fix prices, “to” allocate markets, or “to” fix supply. Section 90.1, in turn, allows the Tribunal to prohibit any agreement between competitors that substantially lessens competition. Would not one way – perhaps the simplest (and best) way – for the Bureau, as a matter of enforcement policy, and the courts, as a matter of interpretation, to distinguish sections 45 and 90.1 be to impute a truly criminal mens rea to the former, requiring proof that the accused’s (principal) purpose was to, for example, raise or maintain prices through the agreement with a competitor? Arguably, a prosecutorial or judicial focus on purpose would be consistent with Canada’s other per se criminal offense: bid rigging. In the U.S., bid-rigging is typically lumped together with fixing prices and allocating markets as hard-core conduct. In

76 Per se rules, especially in the antitrust context, serve principally to minimize administrative costs of enforcement and evidence gathering while (through their clarity and likelihood of securing convictions) maximizing deterrence by carving out a narrow category of conduct that is always harmful and marked by clear criminal fault. A good argument can be made that the bright line simplicity and efficacy of the per se regime is blurred by the introduction of a two-step ARD test; arguably, it reintroduces an “effects” test that the amendments just repealed.

77 Presently, the Bureau does not consider itself obligated to provide advisory opinions vetting competitor collaboration agreements submitted for approval in advance of implementation. See Competition Bureau, All about written opinions, available at: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02927.html. Under section 124.1 of the Act, any person may request a written opinion from the Commissioner regarding any provision of the Act, which will be binding if all “material facts” have been accurately disclosed and the contemplated conduct is carried out substantially as proposed. On its face this would allow competitors entering into JV with provisions that control price or production or allocate markets or territories to obtain binding comfort should they believe that necessary, except the Commissioner takes the position that issuance of an opinion is within her discretion. So even if parties were of a mind to advise a law enforcer of proposed conduct and take the chance they will be told not to proceed, in very complicated situations where this might make sense, they would do so with no assurance they will get an opinion at all, let alone one without many caveats. While the Commission’s approach was in place well before the amendments, it takes on a greater significance we suggest in a per se regime with an ARD defence.

78 For example, the Collaboration Guidelines’ exemption of any agreement falling within the definition of a merger from section 45 or section 90.1’s ambit serves as such an administrative exemption as a matter of policy.

79 When confronted with the opaque terseness of section 1 of the Sherman Act’s prohibition of unreasonable restraints of trade, this is arguably how the U.S. courts have responded—clearly delineating civil and criminal mens rea? “[T]he perpetrator’s knowledge of the anticipated consequences [of cartel activity] is a sufficient predicate for a finding of [the requisite] criminal intent.” See, e.g., United States v. U.S. Gypsum Co., 438 U.S. 422, 446 (1978) (explaining that even though Sherman Act did not contain explicit mens rea requirement, Congress could not be presumed to have created a strict liability offense, and criminal conviction required more than a presumption of unlawful intent based on effect of conduct).
Canada, it is separately codified in section 47 as per se with an important caveat—not just a defence but a blanket exemption no less—which provides that a conviction will lie only “where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is submitted or withdrawn, as the case may be, by any person who is a party to the agreement or arrangement.” The provision does not include any defence based on a complex link of causation, reasonableness, and hindsight efficacy findings but goes straight to the heart of the matter—no joint bid that was revealed up front to a buyer will be considered a naked attempt to fix prices because, presumably, “joint bids” can be procompetitive, may not be anticompetitive if there are numerous other bidders, and do not, if revealed to the buyer, have the requisite indicia of moral culpability, e.g. fraud, like other serious economic crimes. 

Parliament has, in section 47, relied on this screening mechanism to distinguish between a clearly unlawful and not-so-clearly unlawful conduct. One might even argue that this screen recognizes a potentially lawful purpose by requiring objective affirmative action, disclosure of the agreement to the buyer, which, in the end result, ensure that a serious felony requires a felonious mens rea.

V. A Parting Thought

The coming into force of sections 45 and 90.1 was a seminal event in the history of Canadian competition law. In its laudable efforts to delineate clearly and precisely the line between truly criminal conduct and conduct that warrants civil review and remedy, the amendments raise as many new questions as they provide answers. Unfortunately, these questions are principally related to the criminal law provision where the line between right and wrong (guilt and innocence) should be bright and the moral culpability of the accused readily apparent. The conundrum, clarifications and curiosities described above are not intended to suggest that the amendments were unwarranted, ill-conceived or poorly drafted. To the contrary, the amendments were—in the great “Canadian” tradition—an earnest attempt to recognize and address, expressly if possible, legitimate views concerning the virtues and the dangers of a per se regime. However, in light of the topics discussed on this panel, we wonder if in another 25 years, we—prosecutors, advisors and defenders alike—will wish Parliament had expressly said that only agreements entered into by competitors for the purpose of fixing prices, allocating customers or markets, or fixing production or supply should be pursued, vigorously and unequivocally, as criminal matters and that all other agreements that substantially lessen or prevent competition will be pursued civilly, perhaps even with wider and more flexible remedial

80 Since early 2006, for example, the U.S. Department of Justice (“DOJ”) has been investigating private equity “club” or joint bid deals for signs of collusion or other per se behaviour but has not brought any criminal charges, presumably due to the lack of evidence of any illegal purpose behind the joint bidding. The U.S. DOJ is not attempting to determine whether on balance an ARD may apply or procompetitive effects outweigh anticompetitive effects—it is merely looking for “smoking gun” evidence of a raw conspiracy to raise prices. While such evidence may be difficult to find (the minutes of cartel meetings are not memorialized, nor are they scheduled by e-mail), it can be found (by written or testimonial evidence) and establishes, clearly, a subjective awareness on the part of the defendant of the illegality of his or her conduct. C f. Pennsylvania Ave. Funds v. Borey, No. C06-1737 (W.D. Wash. Feb. 21, 2008) (dismissing complaint against defendant private equity firms alleging collusive joint bidding based on procompetitive potential of joint bids).

81 Because proof of the impugned act as such purpose clearly provides sufficient moral authority for society to deprive a person of his or her liberty.
options that can more readily be tailored to meet the policy goals underlying competition law. From a more practical perspective, we also wonder whether we will, or we should, get to that same point through enforcement policy/conduct and judicial pronouncement so that such a wish need not be granted by the some times laborious and time-consuming process of legislative amendment. 82 Time will tell.

82 One such pathway would be through the interpretation of the word “to” in subsection 45(1) of the Act as requiring a criminal mens rea of fixing prices, production, etc. with the anticompetitive goal of raising or maintaining prices without any non-pretexual purpose of achieving valid (otherwise lawful) business objectives.