

A New Era for Canadian Cartel Enforcement

By A. Neil Campbell and Casey W. Halladay*
McMillan LLP

In March 2009 Canada enacted the most significant reform¹ of its cartel regime since the introduction of the original *Combinations in Restraint of Trade Act* of 1889.² Drawing upon three private studies commissioned by the Competition Bureau (“Bureau”) in 2001,³ and subsequent proposals from the federal government,⁴ the new cartel regime employs a two-track system featuring a *per se* illegal criminal offense for so-called “naked restraints” agreements and a civil “reviewable practice” for other horizontal agreements between actual or potential competitors. Backing up the new cartel offence are significantly increased penalties, with possible prison terms of up to 14 years for convicted individuals and fines of up to C\$25 million (per count charged⁵) for individuals and corporations. Canada has thus, at least on paper, adopted the most stringent anti-cartel regime in the world, combining a broad *per se* regime with severe criminal penalties.⁶ Proponents of the reforms had argued that Canada needed to replace its “undue lessening of competition” test with a *per se* cartel offense to keep up with its major trading partners in the US and EU,⁷ although this observation ignored the fact that US law has been moving away from a rigid “per se”/“rule of reason” dichotomy since the late 1970s,⁸ and that EC law neither condemns horizontal agreements on a *per se* basis nor imposes penal sanctions, much less combine the two.⁹

I. Overview of the New Cartel Offence

The amendments, which entered into force on March 12, 2010,¹⁰ substantially raise the stakes for cartel participants. The new cartel offense provides that:

45. (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
- (a) to fix, maintain, increase or control the price for the supply of the product;
 - (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
 - (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

This list of practices covers the three most demonstrably “hard-core” types of cartel conduct among “competitors” (which is defined to include potential competitors) — price-fixing, market/customer allocation, and output restriction. Notably, the new offense does not contain any reference to group boycotts, which had been one of the more controversial aspects of the original Private Member’s Bill¹¹ that initiated the reform process (in 2000) and the federal government’s follow-up *Discussion Paper* (in 2003).¹² The *Competition Act* maintains its separate, pre-existing *per se* offenses for bid-rigging¹³ and implementing a foreign-directed conspiracy in Canada.¹⁴ Horizontal agreements that fall outside these *per se* offenses are treated under the new civil “reviewable practice”¹⁵ if they are “likely to prevent or lessen competition substantially”.¹⁶

The new cartel provision also provides for the following

defense – which must be established by the accused on the balance of probabilities – relating to ancillary agreements:

(4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

(a) that person establishes, on a balance of probabilities, that

(i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and

(ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and

(b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

This defense is clearly modeled upon the “ancillary restraints” doctrine which originates from US antitrust law¹⁷ and has been adopted, *inter alia*, in the European Community.¹⁸ While there is substantial US case law, and some EC case law, that may serve as persuasive (if non-binding) point of reference, it remains to be seen how a Canadian court will interpret this provision. The Bureau has made some positive statements concerning its interpretation of the defense, including that “[t]here is no requirement under subsection 45(4) of the Act that the challenged restraint be the least restrictive alternative” and that it “will not ‘second guess’ the parties with reference to some other restraint that may have been less restrictive in some insignificant way.”¹⁹ These comments offer some comfort to potential joint venturers and would-be participants in other forms of legitimate horizontal collaborations. However, where there are “significantly less restrictive alternatives” available, the parties must demonstrate that these options were “inadequate or impractical” in order to meet the “reasonably necessary” test in s. 45(4)(a)(ii).

II. An Overbroad Definition of “Competitor”

An essential aspect of the new cartel offense, and one which will undoubtedly require interpretation and clarification from the judiciary, is the definition of “competitor” in new section 45(8) of the *Act*:

“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).

This definition appears to give considerable room for maneuver to the enforcement authorities as it extends beyond actual competitors to include potential new entrants or firms in neighboring markets, to the extent that it is “reasonable to believe” that the firms would be “likely to compete” in the future. It is not clear what standard will be employed to determine reasonable belief. While there may be cases in which proof that the parties were “competitors” would not present a challenge (*e.g.*, two airlines operating on the same city pair route), in a wide variety of instances – especially involving neighboring markets, new entrants, dual-distribution scenarios, or other potential competitors – proving competitor status could be more difficult and may require that questions of product and geographic market definition be addressed.

The Bureau has, in perhaps somewhat cavalier fashion, stated that:

[i]n determining whether parties to an agreement are competitors for the purpose of section 45, the Bureau is of the view that it is not required to engage in a detailed definition of the relevant market(s), in the sense of having to plead and prove the full nature and extent of the market and the participants within it.²⁰

However, this assertion remains to be tested; certainly, it is not binding on the courts. As a criminal offense, the Crown (as represented by the Public Prosecutions Service of Canada (“PPSC”)) carries the burden of proof and is required to prove *each element* of the conspiracy offense beyond a reasonable doubt. It is thus for a court to decide whether or not the PPSC has proved the parties’ “competitor” status to this standard and, in the authors’ view, the Bureau’s stated position seems overly optimistic.²¹ The new *per se* offense has eliminated the need to prove market power, but not necessarily all aspects of market definition.

Interestingly, the Bureau’s task will be assisted by the open-ended drafting, as the definition commences with the verb “includes” (instead of “means”). According to the common law of statutory interpretation, this indicates a Parliamentary intention that the definition is not exhaustive and may extend to parties that do not fall within the “reasonable to believe” test.²² All of the other definitions in the 2009 amendments to the *Act*, save the definition of “price” in the revised cartel offense and the definition of

“competitor” in the new reviewable practice regime for horizontal agreements, begin with the standard “means” definition. The use of the verb “includes” in new section 45(8) appears to be a deliberate attempt to preserve flexibility in applying the definition of “competitor” in future cases.

III. Higher Penalties and the Law of Unintended Consequences

The amendments substantially increased the range of penalties that can be imposed upon both individuals and corporations. Corporations and individuals face a 250 per cent increase in the maximum fines, up to C\$25 million per count charged from the former level of C\$10 million.²³ Moreover, individuals now face a maximum sentence of up to 14 years’ imprisonment, instead of five years under the prior regime. The possibility of 14-year prison terms for individuals is, on our review, the harshest potential criminal cartel penalty worldwide. (The maximum prison term for cartel violations in the United States, previously the highest, is 10 years.²⁴) Combined with the lower *per se* standard of liability, this provides investigators and prosecutors with increased leverage for negotiating guilty pleas and the ability to streamline evidence gathering efforts to focus on proof of the illegal agreement.

Conspiracy has thus been transformed into something that far surpasses a mere regulatory offense, even though it may once have been viewed as such in Canada and continues to be so treated in many jurisdictions outside North America. Although the Bureau had fought for years for stricter penalties and a *per se* cartel offense, the law of unintended consequences may have a role to play in future cartel cases. Conspiracy has joined the ranks of the most serious criminal offenses in Canada, as can be seen by comparing the new maximum penalty of 14 years’ imprisonment to other offenses under the *Criminal Code*:²⁵

- Assault (section 266): maximum five years’ imprisonment
- Assault with a weapon (section 267): maximum 10 years’ imprisonment
- Aggravated assault (section 268): maximum 14 years’ imprisonment
- Torture (section 269.1): maximum 14 years’ imprisonment

As a result of the high potential penalties, the longstanding rule of construction in criminal law that any textual ambiguity in penal legislation be resolved in favor of the accused is likely to become increasingly important.²⁶

As Lamer C.J.C has noted, “the *overriding principle* governing the interpretation of penal provisions is that any ambiguity should be resolved in a manner *most favourable to accused persons*.”²⁷ This principle has already been applied to offenses under the *Act*²⁸ and

it can be assumed that defense counsel will regularly raise this argument in contested cases under the new conspiracy offense. A judiciary that has generally been reluctant to convict white collar crimes, and one that is not well-versed in competition analysis, may continue to hesitate at conviction, with such stringent penalties causing judges to balk as they have done in some past cases.²⁹

Another unintended consequence that may frustrate the Bureau’s enforcement of the *Act* concerns the availability of conditional sentencing (*i.e.*, prison sentences served in the community). A bill presently before the federal Parliament, introduced by the governing minority Conservative Party as part of its “tough on crime” agenda, would eliminate the ability of judges to impose a conditional sentence on any person convicted of a crime which carries a maximum penalty of 14 years’ imprisonment or more — as the new cartel offense does.³⁰ The result, if the Bill is adopted, would be to guarantee that individuals convicted of a cartel offense will either spend time in a jail cell or receive only a fine as punishment: the halfway house of conditional sentencing will not be available. Although the Bill is clearly intended to score political points by targeting violent criminals — as the inclusion of the words “Serious and Violent Offenders” in its title demonstrates — this is yet another unintended consequence of equating cartellists with robbers, rapists and murderers. The potential chill effects on the Bureau’s Leniency Program³¹ are significant, as individuals involved in price fixing will no doubt balk at the potential of serving jail time despite co-operating and pleading guilty. The Bureau and the PPSC may be forced to take more individuals to trial or revert to using plea agreements that are limited to fines.

IV. Immunity Considerations Under the New Regime

More than ever, securing immunity under the new regime is critical. With a simpler *per se* offense to prosecute, dramatically higher penalties, and a publicly-stated goal to bring more cases,³² the Competition Bureau has raised the stakes on cartel participants. The PPSC has also demonstrated its prosecutorial zeal, having pursued multiple corporate and individual accused in the Québec retail gasoline price-fixing investigation, and appealing the sentence of one of the participants who had been granted a discharge by the trial court.³³ In the Bureau’s view, its immunity program is the “single most powerful means for detecting criminal activity” and its role in cartel enforcement is “unmatched”.³⁴

Fortunately for cartel participants, the Bureau has a long-established and well-understood immunity program. The Bureau deserves much credit for having consistently improved the transparency of its immunity program through a campaign of

public consultations and publishing explanatory materials.³⁵ The criteria for earning a recommendation for immunity are that:

- The applicant be the first to disclose illegal conduct of which the Bureau is unaware, or be the first party to provide evidence of conduct of which the Bureau is aware that leads to a referral of the matter to the PPSC.
- The applicant have terminated its participation in the illegal activity.
- The applicant not have coerced others to participate in the illegal activity.
- The applicant not have acted solely on its own (where there are no other parties involved in the conduct, the sole responsible party is not eligible for immunity).
- The party provide complete, timely and ongoing cooperation, at its own expense, throughout the Bureau's investigation and any subsequent prosecution.³⁶

Immunity applications (like leniency applications and prosecutions) are processed in a bifurcated manner, with the initial contact and issuance of a “marker” handled by the Bureau, and the ultimate decision to grant or refuse immunity made by the PPSC, albeit with input and recommendations from the Bureau. Where a party meets the above criteria, the Bureau will recommend to the PPSC that the party be granted immunity from prosecution. Given the bifurcated nature of the investigative and prosecutorial functions, the Bureau's recommendation is not binding upon the PPSC. However, immunity applicants can take comfort in the generally harmonious working relationship that appears to exist between the Bureau and the PPSC,³⁷ and certain positive statements in the *Federal Prosecution Service Deskbook*³⁸ and the recent Bureau-PPSC *Memorandum of Understanding*.³⁹ The valuable assistance that immunity applicants provide – as the first to notify the Bureau of the existence of a cartel, and first to cooperate by providing information that assists the ongoing investigation and, ultimately, the prosecution – suggests that their odds of receiving the coveted grant of immunity will be invariably high, despite the separation of functions between the Bureau and the PPSC. There is no reason to expect this to change under the new regime.

V. Leniency Considerations Under the New Regime

While the benefits of securing immunity appear to be more compelling than ever, the situation for subsequent parties is less certain. Discounts on the larger potential fines payable, and the possibility of avoiding harsh prison sentences for individuals, may induce participants to seek leniency in many cases. However, there may be some situations in which a “wait-and-see” approach is warranted.

According to the Bureau's latest draft *Leniency Bulletin*, the best possible outcome for a cooperating party (other than the immunity applicant) is a 50 per cent fine reduction which is available only to the first leniency applicant (*i.e.*, the second cooperating party) and only in cases of “exemplary cooperation”.⁴⁰ Subsequent applicants can expect to receive a maximum 30 per cent fine reduction, again in return for “exemplary” cooperation.⁴¹ Notably, there is some uncertainty regarding the calculation of the denominator, or base volume of affected commerce (“VOC”) figure, to which these discretionary percentages will be applied. In the authors' experience, negotiating the relevant VOC is among the most important tasks of defense counsel, and significant time may be spent in developing arguments and submissions in support of a downwards revision of the VOC figure.

The Bureau's *Revised Leniency Bulletin* also explicitly recognizes that later applicants may receive more lenient treatment than earlier applicants where they provide cooperation that is “of a significantly higher value”.⁴² An important implication of this approach is that it can undermine the race to cooperate. Where a party has access to witnesses or records not available to the Bureau, it may be prepared to take a wait-and-see approach, knowing that it can still seek to negotiate a significant cooperation discount if pleading guilty becomes its best outcome. With the higher penalties under the new regime, this may become more common.

A cartel participant may also wish to delay pleading guilty and cooperating in order to assess the enforcers' level of commitment to seeking out and punishing *all* members of the alleged cartel. As past practice demonstrates, in various cases the Bureau/PPSC have secured guilty pleas from some – but not all – members of a cartel and have not pursued prosecutions against the remaining parties. A party that pleads out early, only to find that its competitors are not prosecuted, will consider the overall outcome to be a poor result; it is also problematic for the integrity and long-term viability of the Bureau's leniency program. Similarly, in some cases the perceived penalty levels for latecomers were not materially heavier than for the early cooperators. Such outcomes may send the unfortunate message, however unintentional, that there is value in declining, or at least in delaying, to cooperate. This is reinforced by the fact that those parties that do come forward and plead guilty in exchange for leniency will find themselves more vulnerable (including to joint and several liability for the total harm caused by the cartel) in the inevitable follow-on class actions, as the *Act* provides that a guilty plea will constitute *prima facie* evidence for a civil damages claim.⁴³

For example, in the polyester staple fibre investigation, the Canadian authorities secured a guilty plea from Arteva Specialties S.a.r.l. and a fine of C\$1.5 million. However, they subsequently did not secure guilty pleas from, or pursue prosecutions against, the

other parties named in the indictment and the guilty plea (*i.e.*, Wellman Inc. and Nan Ya Plastics Corporation).⁴⁴ Similarly, in the choline chloride investigation, the Bureau secured guilty pleas from Chinook Group Limited (C\$2.5 million), Akzo Nobel Chemicals BV (C\$1 million), BASF AG (C\$1 million) and Bioproducts Inc. (C\$600,000).⁴⁵ Two other parties named in the indictment and in the agreed statement of facts as members of the cartel, DuCoa Animal Health and UCB S.A., never pled guilty and were never prosecuted in Canada.

The authors are aware of other similar examples. While there is no statute of limitation for indictable offenses (including conspiracy) in Canada – and thus the theoretical possibility of the Bureau and PPSC resuming these cases – given the passage of time and declining quality of evidence it now seems extremely unlikely they will do so. In the absence of an unambiguous policy from the Bureau and PPSC to pursue *all* alleged members of a cartel once a guilty plea has been taken, the past practice of the agencies may have the unintended effect of encouraging parties to adopt a “wait-and-see” approach, to the detriment of the leniency program and effective cartel enforcement.

The absence of a clear policy from the Bureau regarding the treatment of individual employees may also discourage parties from coming forward, particularly where the culpable individuals are also the directing minds of the company. The past practice of extending immunity to a corporate applicant’s former directors, officers and employees has been replaced by a case-by-case approach. Similarly, in corporate leniency applications it is difficult to predict, based on the Bureau’s past practice, whether responsible individuals will be required to enter into separate guilty pleas or whether the overarching corporate plea will be considered sufficient. In the Québec retail gasoline cartel, for example, guilty pleas have been taken from 10 individuals and four companies to date.⁴⁶ Individual pleas have been required in various other cases. Conversely, carbonless paper is an example of a case where three Canadian companies pled guilty to price-fixing and market sharing and paid the maximum fines available under the *Act* (marking the first time maximum fines had been imposed⁴⁷), but

no guilty pleas were required in respect of any individuals. It is thus difficult for companies, and their advisors, to assess the potential liability of individual employees and predict whether or not guilty pleas will be required from them. This uncertainty, particularly in the new era of substantially increased prison terms, and coupled with the future possibility that conditional sentences will not be available to individuals,⁴⁸ may also discourage companies from coming forward to seek leniency.

VI. Conclusions

The Bureau has publicly stated its intention to bring more cartel cases and to test the boundaries of the new law.⁴⁹ While it may have greater prosecutorial success under the new regime, and will certainly have greater negotiating leverage, a *per se* offense does not guarantee convictions, as recent American prosecutions in the DRAM and marine hose cases demonstrate.⁵⁰ Although the removal of the undueness element from section 45 will facilitate more efficient and expedited investigations, proving the existence of an illegal agreement as well as the requisite knowledge/intent beyond a reasonable doubt has often proved difficult in the past, and the Bureau and PPSC must still overcome this hurdle in future cases.

Ultimately, the new cartel offense will need to be tested before the courts to resolve the many open questions concerning its application and scope. A critical determinant of the effectiveness of cartel enforcement under the new regime will be the response of the judiciary to the increased maximum penalties. Reluctance to convict persons in the absence of “smoking gun” evidence appears to have played a role in cases such as *Dave Spear*, *PANS II*, *Clarke Transport*, and *Bayda*. At a recent international cartel conference, the Commissioner noted that the Bureau is “looking for the right case to galvanize public opinion and bring the judges along.”⁵¹ Given that conspiracies, by their nature, are rarely susceptible to direct proof, the willingness of judges to draw inferences from circumstantial evidence – and send individuals to prison for potentially lengthy periods based on such inferences – will play a critical role in the new regime. ■

* The law as stated in this article is current to September 1, 2010.

1. Bill C 10, *An Act to implement certain provisions of the budget tabled in Parliament on 27 January, 2009 and related to fiscal measures*, 2nd Sess., 40th Parl., 2009 [hereinafter *Bill C-10*]. Upon passage through Parliament, Bill C-10 subsequently became S.C. 2009, c. 2.
2. *An Act for the Prevention and Suppression of Combinations formed in Restraint of Trade*, 52 Vict. c. 41 (1889) [hereinafter the *Combinations in Restraint of Trade Act*].
3. See, A. Gourley, "A Report on Canada's Conspiracy Law: 1889-2001 And Beyond" (August 2001), available online at <<http://strategis.ic.gc.ca/pics/ct/gourleyrep.pdf>>; R.S. Russell, A.F. Fanaki & D.D. Akman, "Legislative Framework For Amending Section 45 of the Competition Act" (April 2001), available online at <<http://strategis.ic.gc.ca/pics/ct/russellrep2.pdf>>; and Y. Beriault, "Proposed Amendments to Section 45 of the Competition Act" (August 2001), available online at <<http://strategis.ic.gc.ca/pics/ct/tetrault.pdf>>.
4. See, e.g., House of Commons, Standing Committee on Industry, Science and Technology, "A Plan to Modernize Canada's Competition Regime" (April 2002), available online at <<http://cmte.parl.gc.ca/Content/HOC/committee/371/inst/reports/rp1032077/indurp08/indurp08-e.pdf>>; Government Response to the Report of the House of Commons Standing Committee on Industry, Science and Technology "A Plan to Modernize Canada's Competition Regime" (1 October 2002), available online at <<http://www.ic.gc.ca/eic/site/ic1.nsf/eng/001116.html>>; and Government of Canada, "Discussion Paper — Options for Amending the Competition Act: Fostering a Competitive Marketplace" (June 2003), available online at <<http://strategis.ic.gc.ca/pics/ct/02584e.pdf>> [hereinafter *Discussion Paper*].
5. For example, under the former \$10 million per count maximum, F. Hoffman-LaRoche Ltd. was convicted of eight counts of conspiracy and fined a total of \$50.9 million for its role in the bulk vitamins and citric acid cartels: see Competition Bureau, News Release, "Federal Court Imposes Fines Totalling \$88.4 Million For International Vitamin Conspiracies" (22 September 1999), available online at <<http://www.bureaudelaconurrence.gc.ca/eic/site/cb-bc.nsf/eng/00607.html>>.
6. The substantially-increased penalties are a particularly notable feature of the 2009 amendments, as this issue had not been canvassed in any of the public consultation processes since the government's 2003 Discussion Paper, and on that occasion the question related only to increasing the maximum fines, not the maximum prison sentences. See Public Policy Forum, *National Consultation on the Competition Act: Final Report* (8 April 2004) at 15, question 33, available online at <http://www.ppforum.ca/sites/default/files/competition_act_consultation.pdf>.
7. Competition Bureau, *Submission to the Competition Policy Review Panel* (11 January 2008), at 6-7, available online at <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02555.html>>.
8. See, e.g., *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (U.S.S.C.); *Nat. Society of Professional Engineers v. U.S.*, 435 U.S. 679 (1978) (U.S.S.C.); *Broadcast Music, Inc. v. Columbia Broadcasting*, 441 U.S. 1 (1979) (U.S.S.C.); *N.C.A.A. v. Bd. Of Regents of Univ. of Okl.*, 468 U.S. 85 (1984) (U.S.S.C.); *Cal. Dental Ass'n v. Federal Trade Com'n*, 526 U.S. 756 (1999) (U.S.S.C.); *Texaco Inc. v. Dogber*, 547 U.S. 1 (2006) (U.S.S.C.).
9. While Article 101(1) of the Treaty on the Functioning of the European Union (formerly Article 81(1) of the EC Treaty) prohibits certain horizontal agreements that are anti-competitive "by object", such agreements may nevertheless be justified where the efficiencies test under Article 101(3) is met. Other exceptions to *per se* illegality, such as the *de minimis* doctrine, also exist under EC law. See, e.g., Commission Notice on Agreements of Minor Importance OJ [2001] C 368/13.
10. S.C. 2009, c. 2, s. 444.
11. Bill C-472, *An Act to amend the Competition Act (conspiracy agreements and right to make private applications), the Competition Tribunal Act (costs and summary dispositions) and the Criminal Code as a consequence*, First Reading 6 April 2000, 2d Sess., 36th Parl., 48-49 Elizabeth II, 1999-2000, available online at <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2330828&Language=e&Mode=1&File=19>>.
12. *Supra* note 4, at 3.
13. *Competition Act*, R.S.C. 1985, c. C-34, s. 47 [hereinafter the "*Act*"]. The bid-rigging offense has also been expanded to cover agreements between parties responding to an invitation to tender, whereby one party agrees to withdraw a previously submitted bid. This amendment was made as a direct consequence of the outcome in *R. v. Rowe et al.* (2004), 29 C.P.R. (4th) 525 (2004) (Ont. S.C.) [hereinafter *Rowe*]. One of authors was counsel to a corporation and an individual accused in the Rowe case.
14. *Ibid.*, s. 46. This offence, which to our knowledge is unique to Canadian law, provides in part that:
[a]ny corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication [...] from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy [...] is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.
While significant doubt exists as to whether this provision would survive a constitutional challenge in a contested case, to date it has formed the basis for guilty pleas in several international cartel cases, including graphite electrodes, carbon brushes, vitamins, fax paper and chemical insecticides. While the section, on its face, applies only to corporations, the Bureau has publicly stated that "an individual could be convicted of aiding and abetting the commission of such an offence": see Competition Bureau, Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases (25 March 2009) [hereinafter Revised Leniency Bulletin], available online at <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03027.html>>. Under s. 21(1) of the Criminal Code of Canada, such an individual could be found to be a party to the section 46 offence and thus liable on conviction to the same penalty as the offending corporation (i.e., a fine in the discretion of the court).
15. Reviewable practices are subject to prohibition or other remedial orders. Abuse of dominance is also punishable by administrative monetary penalties, but the competitor agreements and other reviewable practice provisions are not.
16. *Competition Act*, s. 90.1. This provision is structured almost identically to the merger regime in ss. 92-96 of the *Act*.
17. See, e.g., the pioneering decision of Justice (and later Chief Justice and US President) Taft in *United States v. Addyston Pipe & Steel Co.*, 85 F.271 (6th Cir. 1898), aff'd 175 U.S. 211 (1899), which established an enormous body of follow-on case law. See also the US Department of Justice and Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors* (April 2000) at para 3.2, available online at <<http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>>.
18. See Commission Notice on restrictions directly related and necessary to concentrations, OJ C 56, 5.3.2005 at 24-31.
19. Competition Bureau, *Competitor Collaboration Guidelines* (23 December 2009) at 14, available online at <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapi/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/\\$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapi/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf)>.
20. *Ibid.*, at 12.
21. We believe that establishing "competitor" status, particularly in the case of potential competitors, will involve greater analytical complexity than the Bureau is willing to admit. For example, would large law and accounting firms be considered potential competitors? The question becomes more difficult if, for instance, a large accounting firm had considered entering the market for legal services, but opted instead to establish a "best friend" referral relationship with an external law firm. One might also consider the ready-mix concrete sector, in which the perishable nature of the product leads to narrow geographic markets. If two operators, for example, agreed to create a swap service to avoid having to establish more remote production facilities, would the *Act* treat them as potential competitors engaged in *per se* illegal market allocation? If, *ex ante*, they had independently considered, but ultimately abandoned, plans to establish such remote facilities, does the existence of such planning documents make them potential competitors? These will be complicated questions for the courts to answer, particularly in light of the substantial criminal penalties that hinge upon on the outcome.
22. See, e.g., *Yellow Cab v. Board of Ind. Relations*, [1980] 2 S.C.R. 761 at 768-69; *R. v. Charterways Transportation Ltd. et al.* (1981), 57 C.P.R. (3d) 230 at 240 (Ont. H.C.J.), aff'd [sub. nom. *R. v. Lorne Wilson Transportation Ltd. and Travelways School Transit Ltd.*] (1982), 67 C.P.R. (2d) 188 (Ont. C.A.); *Rowe*, *supra* note 13 at 529. (In *Rowe*, defence counsel used the "means"/"includes" distinction to argue successfully that the conduct charged did not fall within the scope of the bid-rigging offence).
23. The enforcement authorities are likely to continue their past practice of seeking multi-count indictments in order to surpass the fine cap where large volumes of commerce are affected.
24. *See Development and Promulgation of Voluntary Consensus Standards Act*, Pub.L. 108-237, Title II, § 215(a), 118 Stat. 668.
25. R.S.C. 1985, c. C-46.
26. See, e.g., *R. v. McLaughlin*, [1980] 2 S.C.R. 331 at 335, per Laskin C.J.C.: "the general rule [is] that in construing criminal statutes they should, where there is uncertainty or ambiguity of meaning, be construed in favour of rather than against an accused. In short, he must be brought fully within the statute and cannot be held guilty of a violation if it is only applicable in part." (emphasis added)
27. *R. v. McIntosh*, [1995] 1 S.C.R. 686 at 705 (emphasis added).
28. See, e.g., *R. v. Coastal Glass and Aluminum Ltd.* (1985), 8 C.P.R. (3d) 46 (B.C.S.C.) at 58-60, aff'd (1986), 11 C.P.R. (3d) 391 at 394 (B.C.C.A.).
29. See, e.g., *R. v. Dave Spear Ltd.* (1986), 11 C.P.R. (3d) 63 (Ont. S.C.) [hereinafter *Dave Spear*] (in which the court chose to interpret clear written and other evidence of a price-fixing agreement among numerous local auto body repair shops as mere conscious parallelism); the decision on retrial in *Canada v. Pharmaceutical Society* (Nova Scotia) (1993), 49 C.P.R. (3d) 289 (N.S.S.C.) [hereinafter *PANS II*] (in which the Court found a lack of *mens rea* to be fatal to the Crown's case); and *R. v. Bayda & Associates Surveys Inc.*

- (1997), 78 C.P.R. (3d) 203 (Alta. Q.B.) [hereinafter *Bayda*] (in which, among other things, the Court found, despite significant documentary and economic evidence to the contrary, that the accused had not reached an agreement to fix prices in the market for real property land survey reports).
30. See Bill C-16, *Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act*, First Reading 22 April 2010, 3rd Sess., 40th Parl., Elizabeth II, 2010, available online at <http://www2.parl.gc.ca/content/hoc/Bills/403/Government/C-16/C-16_1/C-16_1.PDF>. While it is too early to gauge the support for this Bill, a virtually-identical predecessor introduced in 2009 before Parliament was prorogued earned a clear majority of votes after its First Reading. See Bill C-42, *Ending Conditional Sentences for Property and Other Serious Crimes Act*, First Reading 15 June 2009, 2nd Sess., 40th Parl., Elizabeth II, 2009, available online at <http://www2.parl.gc.ca/content/hoc/Bills/402/Government/C-42/C-42_1/C-42_1.PDF>.
 31. *Supra* note 14.
 32. See, e.g., the recent speeches of the Commissioner of Competition, in which she proclaimed that the Bureau “needs to initiate responsible cases more often” and “must not be intimidated by the fear of losing”: Speech of Commissioner Melanie L. Aitken to the Canadian Bar Association Competition Law Section Annual Conference (25 September 2009), available online at <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03138.html>>; and Speech of Acting Commissioner Melanie L. Aitken to the Canadian Bar Association Competition Law Section 2009 Spring Forum (12 May 2009), available online at <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03066.html>>.
 33. See Competition Bureau, Québec Gas Cartel Update, available online at <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03162.html>>.
 34. Competition Bureau, Information Bulletin, *Immunity Program Under the Competition Act* (August 2009) at para 2, available online at <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03155.html>> [hereinafter *Immunity Program*].
 35. While the Bureau’s practices in respect of immunity developed significantly during the 1990s, it published the first formal Information Bulletin detailing the policies of its immunity program in 2000. This was followed by a “Responses to FAQs” document in 2003, and a revised and expanded FAQs document in 2005. In 2006 it opened a public consultation on various aspects of the immunity process, and subsequently issued a revised Information Bulletin in 2007. In August 2009 it issued an updated version of the Bulletin, noting that “[r]egular reviews and adjustments are essential to ensure that the Program keeps pace with changes that affect its ability to continue delivering significant value to the Bureau” (at para 2). The present Immunity Program FAQs are available online at <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02928.html>>.
 36. *Immunity Program*, *supra* note 34 at 5-6.
 37. To the best of the authors’ knowledge, there has been no instance in which a Bureau recommendation as to immunity or leniency has been refused by the PPSC.
 38. The *Deskbook* states that “Crown counsel should, where reasonably possible, solicit and weigh the views of those involved in the Crown’s case—in particular, the victim (where there is one) and the investigating agency”: see Department of Justice Canada, *Federal Prosecution Service Deskbook*, Ch. 20, S. 20.3.8.1 (emphasis added).
 39. *Memorandum of Understanding Between the Commissioner of Competition and the Director of Public Prosecutions* (May 2010), available online at <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Protocole-entente-Memorandum-of-Understanding.pdf>>.
 40. *Revised Draft Leniency Bulletin*, *supra* note 14 at para 80.
 41. *Ibid.*, at para 85.
 42. *Ibid.*, at para 87.
 43. *Competition Act*, s. 36(2).
 44. See Competition Bureau, News Release, “Competition Bureau Nets \$1.5 Million Fine in Polyester Staple Fibre Price Fixing Conspiracy” (29 August 2003), available online at <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00312.html>>.
 45. See Competition Bureau, News Release, “Competition Bureau Investigation Nets \$600,000 Fine from Bioproducts Incorporated” (19 August 2003), available online at <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00311.html>>.
 46. See Competition Bureau, “Gas Prices – Guilty Pleas”, available online at <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03079.html>>.
 47. See Competition Bureau, News Release, “Competition Bureau Investigation Leads to Record Fine in Domestic Conspiracy” (9 January 2006), available online at <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02018.html>>.
 48. See the discussion at note 30 *supra*. It is notable that in the ongoing investigation and prosecutions related to the Québec retail gasoline market, four individuals have received custodial sentences, and all of these sentences are to be served conditionally, in the community. It is doubtful whether these individuals would have agreed to plead guilty had the possibility of conditional sentencing not existed.
 49. See, e.g., Speech of Commissioner of Competition Melanie L. Aitken to the Canadian Bar Association Spring Competition Law Conference (17 May 2010), available online at <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03247.html>>.
 50. See *U.S. v. Gary Swanson*, Case Number 06-692, U.S. District Court for the Northern District of California, 7 March 2008. Despite securing guilty pleas (and fines in excess of US\$730 million) from the four companies that participated in the DRAM cartel, the U.S. Department of Justice prosecution against Gary Swanson, a former Senior Vice-President of Sales for Hynix Semiconductor America Inc., resulted in a mistrial. See also *U.S. v. Northcutt*, Case Number 07-60220CR, U.S. District Court for the Southern District of Florida, 10 November 2008. In that case, the US DOJ had several co-operating witnesses from the alleged cartel who pled guilty and testified against the two accused at trial, but the jury nevertheless returned an acquittal.
 51. The comments were made by Commissioner Aitken during the “Enforcers Roundtable” at the ABA/IBA 2010 International Cartel Workshop (Paris, 12 February 2010).



A. Neil Campbell, McMillan LLP

Tel: (416) 865-7025 • Fax: (416) 865-7048 • E-mail: neil.campbell@mcmillan.ca

Neil is a partner in McMillan's Competition and International Trade groups. He is also the Chair of the Market Surveillance Panel for the Ontario wholesale electricity markets. Neil's competition law practice focuses on merger clearances under the *Competition Act*; reviews under the *Investment Canada Act*; representation in cartel, abuse of dominance and other competition law proceedings; and advising on marketing, distribution, grey marketing and joint venture issues. His trade law practice includes anti-dumping and subsidy proceedings; NAFTA, WTO, and other trade agreement matters; export/import controls and trade sanctions; foreign corrupt practices; investor-state disputes; and lobbying on trade policy issues. Neil has particularly extensive experience in the financial services, pharmaceuticals and chemicals, food and beverage, energy and natural resources, transportation, broadcasting and information technology industries. Member of the American Bar Association Antitrust Law Section and its International Task Force. He is also co-Chair of the International Bar Association Antitrust Committee. Neil completed a doctorate in competition law (University of Toronto, 1993). He is ranked as one of the "Top 25 Global Competition Lawyers" in the Expert Guide's *The Best of the Best*.



Casey W. Halladay, McMillan LLP

Tel: (416) 865-7052 • Fax: (416) 865-7048 • E-mail: casey.halladay@mcmillan.ca

Casey is an international business lawyer whose practice focuses on competition law and antitrust. He has earned a broad range of experience in this field, having practiced with leading competition law firms in Toronto, Washington and London. He has represented clients on numerous merger, cartel and abuse of dominance/monopolization matters before the Canadian Competition Bureau, the US Federal Trade Commission, the US Department of Justice, the UK Office of Fair Trading, and the European Commission. He has also served as international coordinating counsel in merger transactions before the national competition authorities of Austria, Brazil, China, Germany, Greece, Italy and Poland. Casey earned his LLB, *summa cum laude*, from the University of Ottawa and his LLM from the Harvard Law School, where his LLM paper on competitor collaborations under the US *Sherman Act* was chosen as a finalist in the international Swope Antitrust Writing Competition. A native speaker of English, Casey also speaks Italian and French, and has a conversational grasp of Russian and Bulgarian. He is a member of the Bars of Ontario, New York, and England and Wales.