

Immunity and Leniency Under Canada's New Cartel Regime

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Published as paper for the ABA/IBA International Cartel Workshop, Paris

I. Introduction

In March 2009 Canada radically overhauled its competition regime with the most significant reform of its *Competition Act*¹ in more than two decades.² Chief among those reforms was the complete redesign of the section 45 cartel offence, described by the Supreme Court of Canada as the “core”³ of the competition regime, into a two-track system featuring a *per se* illegal criminal offence for hard-core cartel agreements and a civil “reviewable practice” for other horizontal agreements. 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 charged) for individuals and corporations. Canada has thus, at least on paper, adopted one of the most stringent anti-cartel regimes in the world, combining a broad *per se* regime with severe criminal penalties.

These amendments, which will enter into force on 12 March 2010,⁴ have substantially raised the stakes for cartel participants who may face liability in Canada. More than ever, discovering anti-competitive conduct and securing immunity is critical, as the competition

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¹ R.S.C. 1985, c. C-34 [hereinafter the *Act*].

² See, generally, Neil Campbell & Sorcha O’Carroll, “The Americanization of Canada’s *Competition Act*”, forthcoming in *Canadian Business Law Journal* (March 2010). *Bill C-10* implemented a wide range of amendments to the cartel, merger review, pricing and distribution, and abuse of dominance provisions of *Act*.

³ *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 649 [hereinafter *PANS*].

⁴ S.C. 2009, c. 2, s. 444.

authorities take advantage of a simplified *per se* regime under which to prosecute cases, and offenders face substantially higher penalties. However, the reforms have created ambiguity concerning the scope and application of the new cartel offence. The Competition Bureau's ("Bureau") new leniency guidelines also leave considerable uncertainty as to how an applicant will be treated by the Bureau as investigator and the Department of Public Prosecutions ("DPP") as prosecutor. In light of disincentives created by the Bureau's enforcement track record in recent years, and the protections afforded to criminal accused under Canadian law, the decision whether or not to seek leniency is no longer nearly automatic. Where immunity is no longer available, the relative merits and demerits of admitting liability and pursuing leniency, instead of making the prosecution successfully prove each element of its case beyond a reasonable doubt, will be a more difficult decision.

II. Canada's New Cartel Regime: One Of The Strictest In The World

In March 2009, the Canadian Parliament passed arguably the most significant criminal law reforms to the *Competition Act* in its 120-year existence.⁵ Historically, section 45 of the *Act* (and its predecessor provisions) have prohibited various types of competitor agreements which lessen competition "unduly", thereby requiring the prosecution to define the relevant product and geographic markets, prove that the cartel participants possessed market power, and establish that their conduct was injurious to competition.⁶ The Competition Bureau had long argued⁷ that the "undueness" requirement hampered vigorous

⁵ Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related to fiscal measures*, 2nd Sess., 40th Parl., 2009 [hereinafter *Bill C-10*], subsequently S.C. 2009, c. 2.

⁶ See the discussion in *PANS*, *supra* note 3 at 652-657.

⁷ See, e.g., Harry Chandler & Robert Jackson, "Beyond Merriment and Diversion: The Treatment of Conspiracies Under Canada's Competition Act" (Remarks before the Roundtable on Competition Act Amendments, 25 May 2000). See also the following reform proposals: *A Plan to Modernize Canada's Competition Policy: Report of the Standing Committee on Industry, Science and Technology* (April 2002), and

cartel enforcement and, after many years of holding public consultations, commissioning reports, and lobbying for amendments to the cartel provisions of the *Act*, finally succeeded in its quest for a *per se* offence.

(1) The New Cartel Offence

The revised *Act* employs a two-track regime with a *per se* offence for hard-core cartel conduct and a civil “reviewable practice”⁸ for other horizontal agreements that are “likely to prevent or lessen competition substantially”.⁹ The new cartel offence 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 distinguishable types of “hard-core” cartel conduct: price-fixing, market/customer allocation, and output restriction. The *Act* also contains separate, pre-existing *per se* offences for bid-rigging¹⁰ and implementing a foreign-directed conspiracy in Canada.¹¹

Options for Amending the Competition Act: Fostering a Competitive Marketplace (June 2003), as well as the report of the Public Policy Forum, hired by the Competition Bureau to conduct national consultations on the proposals. All of the above materials are available online, at: <<http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/00243.html>>.

⁸ Reviewable practices are subject to prohibition or other remedial orders. Some are also punishable by administrative monetary penalties (although the competitor agreements provision is not).

⁹ *Competition Act*, *supra* note 1, section 90.1. The provision governing non-hard-core competitor agreements is structured almost identically to the merger regime in ss.92-96 of the *Act*.

¹⁰ *Ibid.*, section 47. The bid-rigging offence 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

(2) A Broad Definition of “Competitor”

A critical aspect of the new cartel offence, and one which will undoubtedly require interpretation and clarification from the Canadian 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 manoeuvre to the enforcement authorities as it extends beyond actual competitors to include potential new entrants or firms in neighbouring 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.

Furthermore, the definition commences with the verb “includes” (instead of, for example, “means”). This indicates a Parliamentary intention that the definition is not

amendment was made as a direct consequence of the outcome in *R. v. Rowe et al.*, 29 C.P.R. (4th) 525 (2004) (Ont. S.C.) [hereinafter *Rowe*]. Two of the authors of this paper were counsel to one of the corporate and one of the individual accused in the *Rowe* case.

¹¹ *Ibid.*, section 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.” Significant doubts exist among many members of the competition bar in Canada as to whether this provision would survive a constitutional challenge in a contested case, but 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) at footnote 9, available online at: <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03027.html>>. Under section 21(1) of the *Criminal Code of Canada*, such an individual could be found to be a party to the offence of conspiracy under the *Competition Act*, and thus liable on conviction to the same penalty as the offending corporation (*i.e.*, a fine in the discretion of the court).

exhaustive and may extend to parties that do not fall within the “reasonable to believe” test.¹² All of the other definitions in the amendments to the *Act*, save the definition of “price” in the revised cartel offence and the definition of “competitor” in the new reviewable practice regime for horizontal agreements, begin with the standard “means” definition. We assume that the use of the verb “includes” in new section 45(8) was deliberate, in order to preserve flexibility in applying the definition of “competitor” in future cases.

(3) Significantly Increased Penalties

In addition to expanding the scope of the cartel offence by introducing *per se* liability, *Bill C-10* substantially increased the range of penalties to be imposed upon conviction. Individuals now face a maximum sentence of up to 14 years' imprisonment (instead of 5 years under the prior regime). Corporations and individuals face a 250% increase in the maximum fines — up to C\$25 million from the former level of C\$10 million per count charged. We expect the enforcement authorities will also continue their past practice of seeking multi-count indictments in order to surpass the fine cap where large volumes of commerce are affected. The possibility of 14-year prison terms for individuals is the harshest potential criminal penalty we are aware of worldwide. (The maximum prison term for cartel violations in the United States, previously the highest, is 10 years.¹³) Combined with the lower *per se* standard of liability this represents a formidable new tool for investigators and prosecutors, providing them with increased leverage for negotiating guilty pleas and — by

¹² See, e.g., *Yellow Cab v. Board of Ind. Relations*, [1980] 2 S.C.R. 761 at 768-69; (S.C.C.); *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 10 at 529. In *Rowe*, the authors used the “means”/“includes” argument successfully in the defence of a contested bid-rigging case.

¹³ See Development and Promulgation of Voluntary Consensus Standards Act, Pub.L. 108-237, Title II, § 215(a), 118 Stat. 668.

eliminating the need to prove “undueness” — enabling the Bureau to streamline its evidence-gathering efforts to focus on proof of the illegal agreement.

III. Immunity and Leniency Considerations

(1) Immunity

More than ever, securing immunity under the new regime is critical. With a simpler *per se* offence to prosecute under, much higher penalties, and a publicly-stated goal to bring more cases,¹⁴ the Competition Bureau has raised the stakes on cartel participants. The DPP has also demonstrated its prosecutorial zeal, having pursued dozens of corporate and individual accused in the Quebec gasoline price-fixing case appealing the sentence of one of the participants who had been granted a discharge by the trial court.¹⁵ 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”.¹⁶

Fortunately for cartel participants (and their counsel), Canada 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

¹⁴ 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>>.

¹⁵ See Competition Bureau, *Quebec Gas Cartel Update*, available online at: <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03162.html>>.

¹⁶ 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 the *Immunity Program*]. The corresponding Immunity Program FAQs are also available online, at: <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02928.html>>.

public consultations and publishing explanatory materials.¹⁷ The criteria for earning a recommendation for immunity are as follows:

- 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 DPP.
- That the applicant have terminated its participation in the illegal activity.
- That the applicant not have coerced others to participate in the illegal activity.
- That 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.
- That the party provide complete, timely and ongoing cooperation, at its own expense, throughout the Bureau's investigation and any subsequent prosecution.¹⁸

If a party meets these criteria, the Bureau will recommend to the DPP that the party be granted immunity from prosecution. However, given the bifurcated nature of the investigative and prosecutorial functions in Canada, the Bureau's recommendation is not binding upon the DPP. While immunity applicants can take comfort in the generally harmonious working relationship that appears to exist between the Bureau and the DPP, and certain positive statements in the Federal Prosecution Service Deskbook,¹⁹ the decision to grant immunity ultimately belongs to the DPP. The valuable assistance that immunity

¹⁷ While the Bureau's practices in respect to 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).

¹⁸ *Immunity Program*, *supra* note 15 at 5-6.

¹⁹The 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*, Chapter 20, Section 20.3.8.1 (emphasis added).

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 investigation and prosecution — suggests that their odds of receiving the coveted grant of immunity are high, despite the separation of functions between the Bureau and the DPP. Whether or not this is equally true for leniency applicants is considered in greater detail in below.

(2) Leniency

While the benefits of securing immunity appear to be more compelling than ever, the situation for subsequent parties is less clear-cut. Uncertainty surrounding the granting and magnitude of leniency, the enforcement authorities' mixed track record in pursuing cases against all of the alleged cartel participants, uncertainty regarding the scope and application of the new offence and possible jurisdictional defences may — at least in some cases — encourage parties to adopt a “wait and see” approach in respect of the Bureau's investigation.

(a) Uncertainty Concerning the Availability of Leniency

It is not clear whether the sentencing reductions available to leniency applicants will be compelling. The best possible outcome is a 50% fine reduction, which is available only to the first leniency applicant (*i.e.* second cooperating party, the first having received immunity) and only in cases of “exemplary cooperation”.²⁰ Subsequent applicants can expect to receive a maximum 30% fine reduction, but again only in cases of “exemplary” cooperation. There is also uncertainty regarding the base on which these discretionary percentages will be applied.

²⁰ Competition Bureau, *Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases* (25 March 2009) at para. 80, available online at: <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03027.html>> (emphasis added) [hereinafter the *Revised Leniency Bulletin*].

The *Revised Draft Guidelines* also explicitly recognize that later applicants may receive more lenient treatment than earlier applicants where they provide cooperation that is “of a significantly higher value”.²¹ Where a party has access to witnesses or records not available to the Bureau, it may be prepared to take a wait-and approach knowing that it can still seek a significant cooperation discount.

The Bureau/DPP relationship in leniency situations is also a source of uncertainty. As in the immunity context, the Bureau handles the investigatory role in cartel cases, and is the sole point of contact for securing “markers” and undertaking the proffer process. However, only the DPP can negotiate a plea agreement. The Bureau’s leniency policies, as explained in its revised draft Information Bulletin on leniency and in its Immunity Program, explain that:

- “Where a party does not qualify for immunity, but the party co-operates with the Bureau, the Bureau *may* recommend that the DPP grant *some form of leniency*”;²²
- “Recommendations by the Bureau *do not bind* the DPP or the courts”;²³
- “Only [DPP] counsel can engage in discussions regarding charges, penalties or any other elements that form part of, or impact in any way, a plea agreement.”²⁴

Thus, unlike the situation facing immunity applicants, there is no clear test for whether subsequent applicants will receive leniency. It is possible that the Bureau may have gathered enough evidence from its immunity applicant to bring a case against the other cartel members, thereby negating the value of further cooperation from one or more leniency applicants. This is especially true under the new cartel regime, where the Bureau and DPP no longer face the significant evidentiary burden of having to proving the illegal agreement’s

²¹ *Ibid.*, at para. 87.

²² *Immunity Program*, *supra* note 16 at 3 (emphasis added).

²³ *Revised Leniency Bulletin*, *supra* note 19 at para. 18.

²⁴ *Ibid.*, at para. 17.

“undue” effects on competition, and thus less time and effort should be required for evidence-gathering.

The bifurcated nature of the investigative and prosecutorial functions in the leniency context also differs from the immunity context because leniency applicants may have less strategic significance to the enforcement authorities than the party who was first-in. While one would expect the Bureau's leniency recommendations to be favourably considered by the DPP, the *Revised Leniency Bulletin* contemplates that all of the initial steps of the process (e.g., securing a marker, developing and presenting a proffer, interviewing witnesses and providing assistance) are conducted with the Bureau and not the DPP.²⁵ To date, the DPP has not made any statement endorsing the policies set out by the Bureau in its *Revised Leniency Bulletin*, despite the requests of third-party commentators during the public consultation process.²⁶

Given the bifurcated relationship between the Bureau and the DPP, there is no guarantee that the DPP will accept the Bureau's recommendations with respect to appropriate fine and penalty levels. As the DPP's decision on whether or not to enter into a plea agreement comes relatively late in the cooperation process, a leniency applicant has no choice but to proceed in good faith in the hope that the Bureau will make and the DPP accept sufficiently positive leniency and penalty recommendations, recognising that, effectively, the “genie is out of the bottle” in respect of its participation in the cartel. As noted by the

²⁵ Among other things, the *Revised Leniency Bulletin* notes that “Bureau officers will typically lead the fact-gathering portions of the process such as the proffer and witness interviews”, and that the DPP counsel “will not engage themselves in the investigation”: *ibid.* at para. 17.

²⁶ See Comments of the Canadian Bar Association (July 2008) at 2, available online at: <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02727.html>>; Comments of the American Bar Association (14 July 2008) at 4, available online at: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02725.html>; and Comments of the International Bar Association (undated) at 6, available online at: <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02726.html>>.

Bureau, while parties may withdraw from the leniency process at any time before signing the plea agreement — or, conversely, may be denied leniency by the DPP — without any of the information they have provided being used directly against them, “the Bureau is free to use information provided by an applicant to pursue its investigation and may use evidence directly or indirectly derived therefrom in any subsequent prosecution.”²⁷ It remains to be seen whether the uncertainty created by the bifurcated Bureau/DPP relationship and the delayed timing of the determination of the magnitude of leniency will discourage some parties from coming forward to seek leniency now that penalty levels have increased.

(b) *Unintended Effects of the Bureau's Enforcement Record*

Another factor which may bear upon a party's decision to seek leniency is the Bureau's level of commitment to seeking out and punishing *all* members of the alleged cartel. As past practice demonstrates, in various cases the Bureau has secured guilty pleas from some — but not all — significant members of a cartel and has not pursued prosecutions against the remaining parties. In some other cases, the perceived penalty levels for latecomers were not materially heavier than for the early cooperators. Such outcomes effectively reward those who do not come forward early and send the unfortunate message, however unintentional, that there may be 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 may find themselves more vulnerable (including to joint and several liability) in the inevitable follow-on class actions than those who have not admitted liability.

²⁷ *Revised Leniency Bulletin*, *supra* note 19 at para. 124.

For example, in the polyester staple fibre investigation, the Bureau and Department of Justice (“DOJ”, the DPP’s predecessor) 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 (Wellman Inc., and Nan Ya Plastics Corporation).²⁸

Similarly, in the choline chloride investigation, the Bureau and DOJ 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).²⁹ 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 offences (including conspiracy) in Canada — and thus the theoretical possibility of the Bureau and DPP resuming these cases — given the passage of time it now seems extremely unlikely they will do so. In the absence of an unambiguous policy from the Bureau and DPP 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 obvious detriment of the leniency program and effective cartel enforcement.

²⁸ 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>>.

²⁹ 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>>.

The absence of a formal, or informal, 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. 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 recent Quebec retail gasoline cartel, for example, guilty pleas have been taken from 10 individuals and 4 companies to date.³⁰ Individual pleas have been required in various other cases. Conversely, carbonless paper is an example of a case where three 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 imposed.³¹ Despite all of the companies being located in Canada, thereby eliminating any jurisdictional concerns, 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, may also discourage companies from coming forward to seek leniency.

(c) *Uncertainty Concerning the Scope of the New Offence*

Uncertainty surrounding the scope and application of the new cartel offence may also discourage some parties from coming forward. Despite the *per se* nature of the new provision, fresh statutory language creates opportunities for defendants to test each element

³⁰ See Competition Bureau, News Release, "Tenth Individual Sentenced in Quebec Price-Fixing Cartel" (7 December 2009), available online at: <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03168.html>>.

³¹ 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>>.

of the prosecution's case. For example, despite the apparent breadth of the prohibition involving parties having agreed to "fix, maintain, control, prevent, lessen or eliminate the production or supply of [a] product", there may be some fact patterns in which it is unclear whether they have done so (*e.g.*, where the actual agreement was concluded in different terms but had such effects).

Another key area is the new ancillary restraints defence in subsection 45(4), which requires that the parties prove on the balance of probabilities that the impugned agreement is ancillary, directly related, and reasonably necessary to give effect to the objectives of a broader agreement between the parties that does not violate section 45(1). Determining whether or not an ancillary restraint is "reasonably necessary" to give effect to the "objectives" of a broader agreement seems a likely candidate for judicial consideration in future cases, particularly given the possibility that the enforcement authorities may question on an *ex post* basis whether or not less restrictive alternatives were available to the parties when the agreement was formed.³²

More fundamentally, the conspiracy offence now requires that a defendant have committed one of the proscribed acts in agreement or arrangement with a "competitor". As discussed above, although the legislation appears to employ a broad definition of what constitutes a competitor, the enforcement authorities must still prove that the parties to the agreement or arrangement were competitors or were "likely to compete" in respect of the product in question. While there may be cases in which proof that the parties were

³² See Competition Bureau, *Competitor Collaboration Guidelines* (23 December 2009) at 18, available online at: <<http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html>>. The Bureau notes that "[w]here there are significantly less restrictive alternatives available to the parties, the parties must demonstrate that the other alternatives were inadequate or impractical, or that such alternatives would not allow the parties to achieve the objective of the agreement. If the parties could have achieved an equivalent or comparable arrangement through practical, significantly less restrictive means that were reasonably available to the parties at the time when the agreement was entered into, then the Bureau will conclude that the restraint was not reasonably necessary."

“competitors” would not present a challenge, in a wide variety of instances (especially involving neighbouring markets, new entrants or other potential competitors) proving competitor status would be more difficult to achieve and may require that questions of product and geographic market definition be addressed.

The Bureau has, in 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.³³

However, this statement is not binding on the courts. Quite to the contrary, as a criminal (and indictable) offence, the DPP carries the burden of proof and is required to prove each element of the conspiracy offence beyond a reasonable doubt. It is thus for a court to decide whether or not the Bureau has proved the parties’ “competitor” status to this standard and, in the authors’ view, the Bureau’s stated position seems overly optimistic.³⁴ The new *per se* offence has eliminated the need to prove market power, but not necessarily all aspects of market definition.

Both the ancillary restraints defence and the “competitor” debate highlight a broader point, concerning the effects of ambiguity in penal legislation. While the Bureau has fought

³³ *Ibid.*, at 12.

³⁴ In the authors’ view, 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, the 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 this fact help to 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.

for years for stricter penalties and a *per se* cartel offence, the new section 45 now takes its place among the most serious criminal offences in Canada as can be seen by comparing the new cartel provision maximum penalty of 14 years imprisonment to other offences under Canada's *Criminal Code*:

- Assault (section 266): maximum 5 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

Conspiracy is thus far from a mere regulatory offence, even though it may once have been viewed as such in Canada and continues to be so treated in many jurisdictions outside North America. As a result, the textual ambiguities highlighted above are complicated by the longstanding rule in Canadian criminal law that any ambiguity in penal legislation be resolved in favour of the accused. As stated by a former Chief Justice of the Supreme Court of Canada:

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.³⁵

Even more compelling are the remarks of Justice Lamer, a subsequent Chief Justice of Canada, who indicated that “the *overriding principle* governing the interpretation of penal provisions is that any ambiguity should be resolved in a manner *most favourable to accused persons*.”³⁶ Under the old regime, this principle had already been applied to *Competition Act*

³⁵ *R. v. McLaughlin*, [1980] 2 S.C.R. 331 at 335, per Laskin C.J.C.

³⁶ *R. v. McIntosh*, [1995] 1 S.C.R. 686 at 705 (emphasis added).

offences.³⁷ In the new regime of significantly increased penalties the rule is even more relevant, and it can be assumed that defence counsel will raise this argument regularly in contested cases under the new section 45. It may be that the law of unintended consequences will ultimately play a role in the Bureau's successful campaign for stronger penalties, by requiring stricter standards of proof.

(d) *Jurisdictional Uncertainty*

In light of higher potential penalties, international firms who are considering a wait-and-see approach in lieu of a leniency application are also likely to take a close look at the ability of the enforcement authorities to assert subject matter and personal jurisdiction effectively.

The general test for subject matter jurisdiction is whether the conduct has a "real and substantial connection to Canada".³⁸ During the 1990s, the Bureau adopted a US-style view that competition law violations which negatively affect Canadian customers meet this test, even if the conduct occurs abroad and does not specifically target Canada. Indeed the authors are aware of investigations underway where the competitive harm only arose in respect of indirect downstream sales (*i.e.*, there were no direct sales to Canadian consumers). The Bureau's broad approach has been the basis for guilty pleas, but has not been adjudicated in contested prosecutions.³⁹

³⁷ 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.)

³⁸ *R. v. Libman*, [1985] 2 S.C.R. 178.

³⁹ For a more detailed discussion, see Neil Campbell & William Rowley, "Jurisdiction and Litigation Developments in Canadian Competition Law", Paper Presented to the New York City Bar Antitrust Committee (6 October 2004), available online at: <<http://www.mcmillan.ca/Upload/Publication/JurisdictionalLitigationDevelopments.pdf>>.

The Canadian enforcement authorities also face practical hurdles to asserting personal jurisdiction over non-resident individuals (although extradition is a possibility from some countries) or corporations.⁴⁰ The foreign-directed conspiracies offence in section 46 of the *Act* may provide an alternative where sales were made through a Canadian subsidiary of a conspirator. However, in the absence of such an entity we expect the higher penalties will cause parties to consider refusing to attend and plead in Canada.

IV. Conclusions

2010 will witness the launch of a new and stricter cartel regime in Canada, backed up by an enforcement agency vowing to bring more cases. *Per se* liability and increased penalties will significantly raise the stakes for cartel participants in Canada, with the clear result that securing immunity will become more valuable than ever. However, we expect that uncertainties and ambiguities created by the new provisions, and Canadian enforcement agencies' policies and practices, may encourage a "wait and see" approach among some of the losers in the race for immunity. Developments in Canada will thus bear close watching, as the courts, agencies and competition bar work through the initial cases to determine the scope and application of the new regime.

⁴⁰ *Ibid.*, at 4-10.