



## Joint Ventures Under the Competition Act

**John F. Clifford**

CBA Annual Competition Law Fall Conference

September 30, 2010

# The New *Competition Act*

- Since March 12, 2010, the *Act* has adopted a new dual-track approach to agreements between competitors (or potential competitors):
  - Section 45 criminal track for so-called “naked restraints” cartel conduct
    - *per se* unlawful
  - Section 90.1 civil track for other agreements
    - remedial orders possible if agreement prevents or lessens, or is likely to prevent or lessen, competition substantially

## Competitor Agreements – Criminal Track

- New *per se* illegal offence for agreements on prices, customer/market allocation, output levels
- Relates to agreements between “competitors” – broadly defined to include potential competitors (for the products covered by the agreement)
- Backed up by world’s highest cartel penalties
  - Up to 14 years prison for individuals
  - Up to \$25MM per charge for corporates
- Reverse onus ancillary restraints defence
- Potential for private actions for recovery of damages suffered by plaintiff(s)

# Competitor Agreements: Summary of Criminal Offence Amendments

Element	Pre-amendment Provision	Amended Provision	Implications
Conspiracy, agreement or arrangement	Between two or more “persons”	<b>Between two or more “competitors” with respect to a “product”</b>	Intended to remove vertical agreements and joint ventures, but some still may be caught  “Competitor” is broadly defined to “include” any person who is reasonably likely to compete in the absence of the agreement
Illegal Activity	Prove “undue lessening of competition”: <ul style="list-style-type: none"><li>• Market power</li><li>• Behaviour which injures competition</li></ul>	<b>Three specific prohibitions:</b> <ul style="list-style-type: none"><li>• Pricing arrangements</li><li>• Market, customer or territorial allocations</li><li>• Output restrictions</li></ul>	Removal of competitive effects test makes prosecutions easier  Some non-hard-core conduct may be caught
Ancillary Restraints Defence	None	<b>Reverse onus</b> <b>Tough “directly related and reasonably necessary” standard</b>	Difficult to be confident of availability in the absence of case law

# Competitor Agreements – Civil Track

- Cases brought by Bureau and heard by Tribunal; no private rights of access
- Bureau and Tribunal to assess potential SLC using merger review criteria
- Efficiencies defence based on merger review model
- Tribunal may issue behavioural orders to remedy SLC; no risk of fines
- No private actions

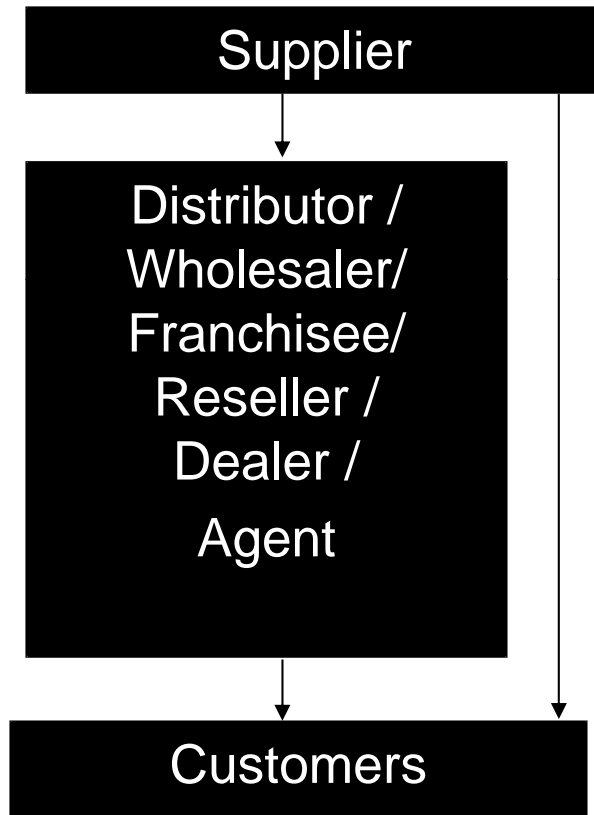
## Bureau's *Competitor Collaboration Guidelines – Positives*

- Generally helpful and provide useful guiding principles in the absence of case law:
  - Joint ventures/strategic alliances/buying groups to be reviewed on civil track if SLC is “likely”
  - Dual distribution and franchise agreements “will generally” be assessed under civil track
  - Vertical agreements to be assessed under Part VIII provisions and not section 45
  - Trade association conduct subject to section 45

## Bureau's *Competitor Collaboration Guidelines* – Negatives

- Not binding – no legal force or effect
- Equivocal language in various places (e.g., re potential competitors) preserves Bureau's ability to take action against JVs or other strategic alliances under criminal track
- Do not prevent class actions plaintiffs from bringing section 36 claims based on non-hard-core conduct arguably caught by the expansive language of the new section 45

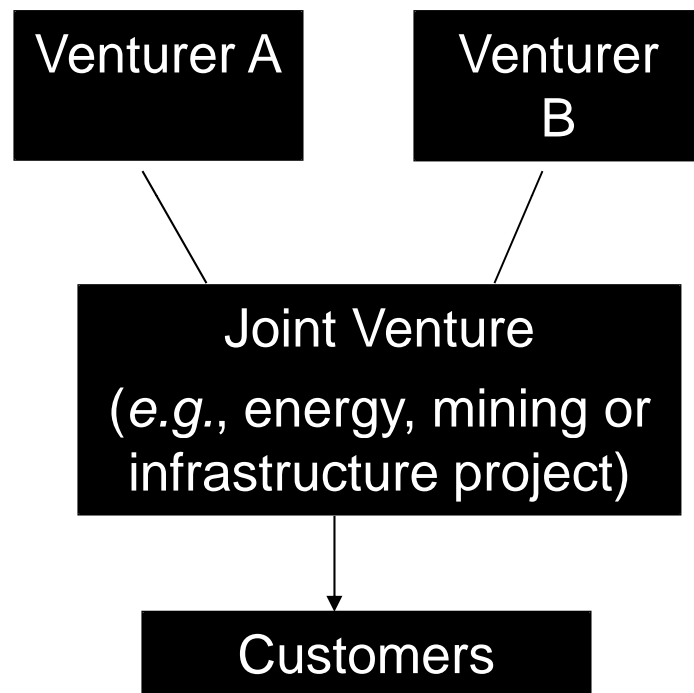
# Competitor Agreements: Dual Distribution Must Be Carefully Structured



- Implications:
  - Resellers may be actual or potential “competitors”
  - Price restriction, allocation or output restriction provisions may violate offence unless ancillary restraint defence applies
  - Bureau *Guidelines* suggest should be treated as a reviewable practice, but private plaintiffs may characterize as criminal to support private (class) action



# Competitor Agreements: Joint Ventures Must Be Carefully Structured



- Implications:
  - Co-venturers often will be “competitors”
  - Involvement of co-venturers in agreements or governance decisions that restrict the JV’s pricing, markets or output may violate offence unless ancillary restraint defence applies
  - Bureau *Guidelines* suggest should be treated as a reviewable practice, but private plaintiffs may characterize as criminal to support private (class) action

# Competitor Agreements: Joint Ventures Must Be Carefully Structured

- Avoid (or embed safety valves in) price, allocation and output provisions to avoid illegal restrictions
- Maximize potential availability of the ancillary restraints defence:
  - Set out legitimate objectives in recitals
  - Retain documentation regarding necessity of restrictions and inadequacy of alternatives
- Emphasize efficiencies and legitimate nature of commercial activity in all written and oral communications



Questions about joint ventures under the new regime? Please contact:

**John F. Clifford**

+1.416.865.7134

[John.Clifford@mcmillan.ca](mailto:John.Clifford@mcmillan.ca)