LEXOLOGY
Getting The Deal Through

CARTEL REGULATION

Canada

Contributing Editor

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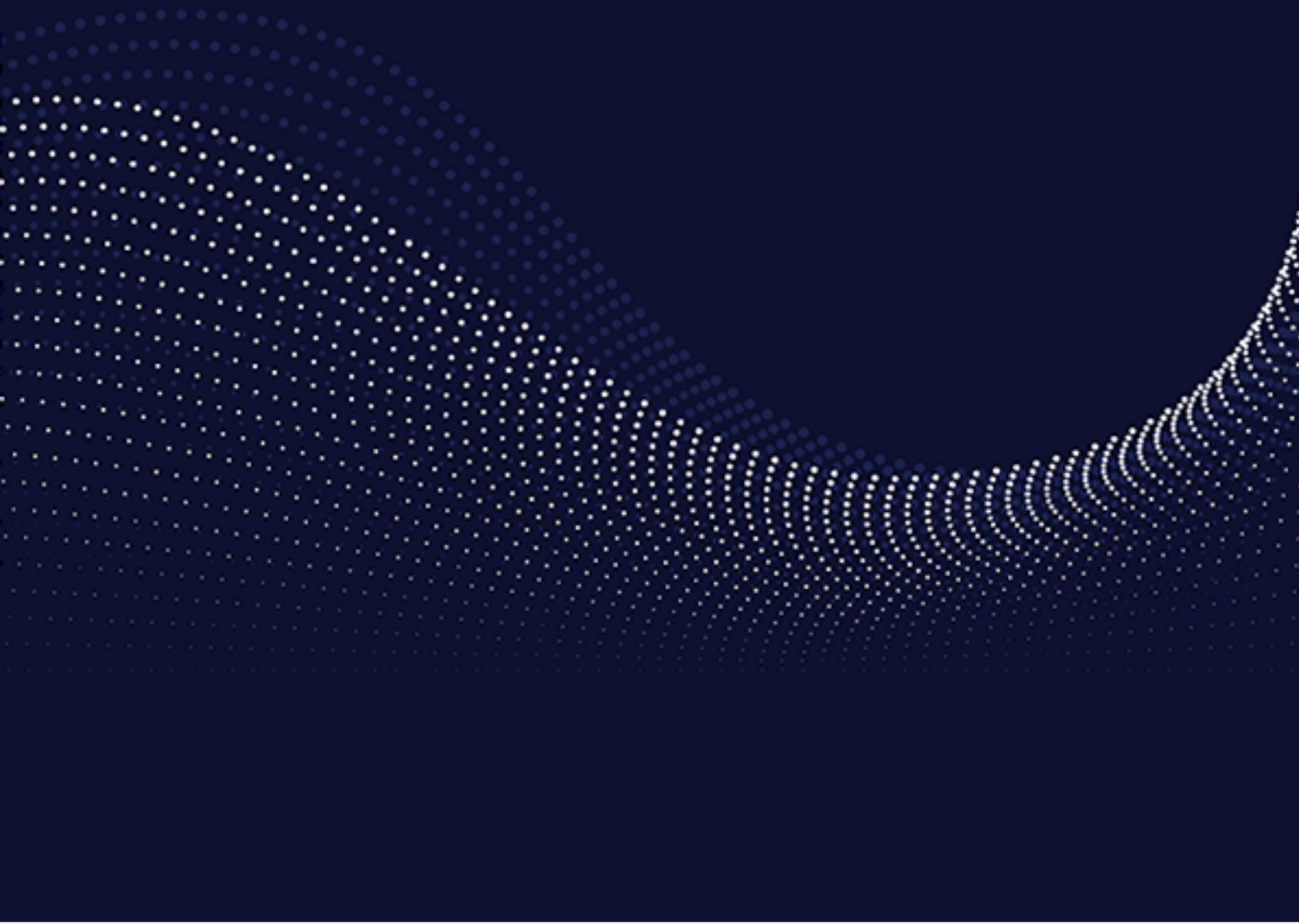

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LEGISLATION AND INSTITUTIONS

Relevant legislation
What is the relevant legislation?

Canada has one statute governing all aspects of competition law: the federal Competition Act (the Act). This statute is applicable throughout the country; there is no provincial or territorial competition legislation regulating cartel activity in Canada.

Relevant institutions
Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Act is administered and enforced by the Commissioner of Competition (the Commissioner) who serves as the head of the Competition Bureau (the Bureau). Administratively, the Commissioner and Bureau report to the Minister of Innovation, Science and Industry, but they have substantial independence on investigation and enforcement matters.

The Commissioner is responsible for investigating alleged breaches of the criminal provisions of the Act. The Cartels Directorate in the Bureau – consisting of the senior deputy commissioner, a deputy commissioner, two assistant deputy commissioners and approximately 40 officers – investigates all matters relating to cartels, conspiracies and bid rigging.

Canada's Attorney General has the ultimate discretion and authority to initiate and conduct criminal proceedings under the Act. The discretion of the Attorney General is exercised by the Director of Public Prosecutions (DPP), who heads the Public Prosecution Service of Canada (PPSC). A team of approximately 15 lawyers from the PPSC is responsible for the conduct of prosecutions under the Act. Prosecutions may be brought before the provincial or federal courts.

In practical terms, cartel prosecutions are initiated only upon the Commissioner's recommendation to the DPP. Similarly, negotiated resolutions under the Bureau's immunity and leniency programmes are initially handled by the Bureau, but ultimately concluded by the PPSC, with the Bureau's input.

Changes
Have there been any recent changes, or proposals for change, to the regime?

In March 2010, the former 'partial rule of reason' approach to criminal conspiracies in section 45 of the Act was replaced with a per se criminal offence to address hardcore cartel conduct. A civil 'reviewable practice' was added in section 90.1 to address other anticompetitive agreements between competitors. The amendments also raised the maximum penalties for the new conspiracy offence. The maximum penalties were further amended in 2023 to be

a fine at the discretion of the court or up to 14 years in prison. The bid rigging provision under section 47, which was also amended to include agreements to withdraw a previously submitted bid, carries the same imprisonment penalty or a fine at the discretion of the court.

In December 2009, the Bureau issued its Competitor Collaboration Guidelines, which set out its policy on competitor agreements, including how it will determine whether to pursue enforcement action under the criminal cartel or civil competitor agreement provisions. The Bureau released the revised Competitor Collaboration Guidelines in May 2021, which reflect the Bureau's enforcement experience since 2009 and several recent related court rulings.

In June 2022, the Act was amended to introduce a new criminal offence prohibiting no-poach and wage-fixing agreements between employers. This offence came into effect in June 2023.

Substantive law

What is the substantive law on cartels in the jurisdiction?

Section 45(1) of the Act forms the core of Canadian cartel law. It provides that any person who, with a competitor (which is defined to include a person who is likely to compete in the absence of an agreement) in respect of a particular product, conspires, agrees or arranges to engage in any of the following activities is guilty of an indictable offence:

- fixing, maintaining, increasing or controlling the price for the supply of the product;
- allocating sales, territories, customers or markets for the production or supply of the product; or
- fixing, maintaining, controlling, preventing, lessening or eliminating the production or supply of the product.

As a result, price-fixing, market allocation and output restriction conspiracies are illegal per se in Canada. Previously, the Act prohibited only conspiracies with 'undue' competitive effects, as determined under a 'partial rule of reason' analysis. Notably, there is no statute of limitations for conspiracy or bid rigging offences. Thus, the former provisions remain applicable to conduct that occurred prior to March 2010.

As with most criminal offences, a conviction under the Act requires the prosecution to prove beyond a reasonable doubt both the actus reus and the mens rea of the offence. The actus reus is established by demonstrating that the accused was a party to a conspiracy, agreement or arrangement with a competitor to fix prices, allocate markets or customers, or lessen the supply of a product in the manner described above. To establish the mens rea of the offence, the prosecution must demonstrate that the accused intended to enter into the agreement and had knowledge of its terms.

The Act also prohibits Canadian corporations from implementing directives from a foreign corporation for the purpose of giving effect to conspiracies entered into outside of Canada (section 46) and prohibits bid rigging (section 47). In the past, resale price maintenance had been a per se illegal criminal offence. In 2009, this offence was repealed and replaced with a civil 'reviewable practice' under section 76 of the Act.

Section 45(1) focuses on agreements among actual or likely competitors in the supply of products (defined to include goods and services) that involve price-fixing, customer or market allocation, or output restriction. Despite some older reform proposals to the contrary, it does not address group boycotts.

Several courts have confirmed that section 45(1) does not apply to any agreement between competitors relating to the purchase of goods or services.

Section 45(1) could potentially catch other forms of cooperation among competitors, including joint ventures and strategic alliances. However, the Bureau has indicated in its Competitor Collaboration Guidelines that the conspiracy offence will be reserved for 'naked restraints' on competition. Commercial activities such as dual distribution, group purchasing, joint ventures and strategic alliances will, instead, be assessed under the reviewable practice provision in section 90.1. These guidelines are not determinative regarding the availability of private damages actions, as they are not binding upon a court. However, a recent Federal Court decision has adopted this interpretation of section 45(1).

In June 2022, the Act was amended to introduce a new criminal offence in section 45(1.1) related to labour markets. It provides that an employer who conspires, agrees or arranges to engage in any of the following activities with another employer is guilty of an indictable offence:

- fixing, maintaining, decreasing or controlling salaries, wages or terms and conditions of employment; or
- not soliciting or hiring each other's employees.

Unlike the main conspiracy offence in section 45(1), which is limited to agreements between competitors, this new wage-fixing and no-poach offence applies to any employers regardless of whether they are competitors.

This new wage-fixing and no-poach offence came into force in June 2023. The Bureau published the enforcement guidelines on wage-fixing and no poaching agreements in May 2023 following a public consultation process.

Joint ventures and strategic alliances

To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

The Bureau's Competitor Collaboration Guidelines indicate that the criminal offence in section 45 of the Act will be reserved for agreements between competitors (or likely competitors) to fix prices, allocate markets or restrict output that constitute 'naked restraints' on competition. Other forms of competitor collaborations, including joint ventures and strategic alliances, may be subject to review by the Bureau as a 'reviewable practice' under section 90.1, which prohibits agreements only if they are found to be likely to substantially lessen or prevent competition in a market. Fines or other monetary penalties are not available under section 90.1. These guidelines are not determinative regarding the availability of private damages actions, as they are not binding upon a court. However, a recent Federal Court decision has adopted this interpretation of section 45(1).

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law
Does the law apply to individuals, corporations and other entities?

The federal Competition Act (the Act) applies to both individuals and organisations. An organisation is defined as:

- a public body, body corporate, society, company, firm, partnership, trade union or municipality; or
- an association of persons that:
    - is created for a common purpose;
    - has an operational structure; and
    - holds itself out to the public as an association of persons.

Charges may be laid against a corporation or other organisation as well as individuals involved in problematic conduct including senior managers, officers or directors.

Competition Bureau (the Bureau) personnel have indicated that the Bureau will look for appropriate cases in which to prosecute individuals and recommend that the Public Prosecution Service of Canada (PPSC) seek jail terms. For example, the Bureau and PPSC prosecuted numerous individuals in an inquiry into retail gasoline prices in Quebec. Similarly, in an inquiry into chocolate confectionery, three senior officers were charged in parallel with charges against the companies, although the proceedings were subsequently stayed against all parties for procedural reasons. In the past 10 years, more than 100 individuals have been prosecuted.

The Superior Court of Quebec decision *R v Pétroles Global Inc* is the first ruling in Canada regarding an organisation's criminal liability pursuant to section 22.2 of the Criminal Code (which applies to the criminal offences in the Act). This provision incorporates amendments made to the Criminal Code in 2004 that were designed to facilitate the determination of criminal liability against corporations. The court held that corporate criminal liability may be established based on the actions of employees below the level of directors or the most senior executives if they have responsibility for the relevant decision-making (eg, pricing of products).

Extraterritoriality
Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

To take jurisdiction over activities occurring outside of Canada, a Canadian court must find that it has both subject matter (or substantive) jurisdiction with respect to the alleged offence and personal jurisdiction over the accused person.

Substantive jurisdiction

The Supreme Court of Canada's 1985 decision in *R v Libman* sets out the following test for substantive jurisdiction:

> This country has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence here ... all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada ... it is sufficient that there be a 'real and substantial link' between an offence and this country.

The issue of substantive jurisdiction over cartel conduct taking place outside Canada with effects in Canada has not been specifically canvassed in a contested criminal proceeding. While such conduct has formed the basis of numerous guilty pleas, some uncertainty remains regarding the jurisdiction of Canadian courts over such conduct.

The Bureau has adopted an expansive interpretation of the ***Libman*** decision. The Bureau's position is that a foreign cartel that affects Canadian customers triggers substantive jurisdiction. Bureau guidelines and document production orders in various cases confirm the Bureau's interest in claiming jurisdiction over indirect (as well as direct) sales into Canada. Foreign producers of fax paper, sorbates, bulk vitamins, automotive parts and numerous other products have pleaded guilty to violations under the former section 45 for price-fixing and market allocation agreements that occurred wholly outside Canada but affected Canadian markets, prices and customers.

Personal jurisdiction

The general principle governing personal jurisdiction of a Canadian criminal court is that a person who is outside Canada and not brought by any special statute within the jurisdiction of the court is prima facie not subject to the process of that court. If there is no special statutory provision for the service of a summons outside the jurisdiction, then the court does not have jurisdiction and cannot try the accused unless the person is present in Canada or voluntarily submits to the jurisdiction of the court. For persons who are not resident in Canada, a summons compelling attendance before a Canadian court cannot be served abroad. If no service has occurred, Canadian courts will not have personal jurisdiction.

Where the accused is a corporation, notice (in the form of a summons to appear on indictment) must be served on the corporation pursuant to the Criminal Code by delivering it to 'the manager, secretary or other executive officer of the corporation or of a branch thereof' within the territory of Canada. Service upon the Canadian affiliate of a foreign corporation is unlikely to be sufficient, given that an affiliate is a separate legal person and service outside of Canada on a foreign corporation is not specifically authorised. However, a corporation that does not have a branch in Canada may still be properly served if one of its executive officers is present in Canada to carry on the business of the corporation.

If there is a Canadian affiliate of a foreign corporate conspirator, a prosecution may also be instituted against the local subsidiary under section 46 of the Act in respect of the local

implementation of the conspiracy. This offence may be prosecuted, regardless of whether charges under section 45 are pursued against the foreign parent.

Extradition

Persons located in countries that treat cartel conduct as criminal offences and that have extradition treaties with Canada can be extradited to Canada pursuant to the applicable extradition treaty (eg, the United States or the United Kingdom, among others). While extradition will only be granted for offences punishable by imprisonment for a term of more than one year, the cartel and bid rigging offences discussed above qualify because they provide for jail terms of up to 14 years.

The procedure for extradition requires the Canadian government to make a formal request for extradition under the applicable treaty. The request documentation would include an arrest warrant. This procedure has been used for offences under the Act at least twice. In a misleading advertising investigation involving Thomas Liquidation, US authorities accepted a Canadian government request for extradition and issued a warrant for the arrest of an officer of the accused corporation who was individually charged under the Act. In a more recent case, three Canadians who operated a deceptive telemarketing scheme based in Toronto, which purported to offer credit cards to Americans for a fee but never delivered the cards, were extradited to the United States and were sentenced by the US Federal Court in the Southern District of Illinois.

Export cartels
Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Subsection 45(5) provides a defence for conduct that only affects customers or other parties outside of Canada:

> No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada, unless the conspiracy, agreement or arrangement (a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product; (b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or (c) is in respect only of the supply of services that facilitate the export of products from Canada.

Industry-specific provisions
Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

Federal financial institutions

Federal financial institutions include federally regulated banks and authorised foreign banks, federal trust and loan companies, and federally incorporated and regulated insurance companies.

Section 49 of the Act specifically provides that, with some exceptions, federal financial institutions that make an agreement or arrangement with one another with respect to any of the following matters are guilty of an indictable offence:

- the rate of interest on a deposit;
- the rate of interest or the charges on a loan;
- the amount or kind of any charge for a service provided to a customer;
- the amount or kind of a loan to a customer;
- the kind of service to be provided to a customer; or
- the person or classes of persons to whom a loan or other service will be made or provided, or from whom a loan or other service will be withheld.

Section 49 also makes clear that every director, officer or employee of the federal financial institutions who knowingly made such an agreement or arrangement is also guilty of an indictable offence.

The maximum penalties for offences under section 49 are a fine of C$10 million per count and five years in prison.

Underwriting

The conspiracy offence in section 45 does not apply in respect of an agreement or arrangement between persons who ordinarily engage in the business of dealing in securities or between such persons and the issuer of a specific security (in the case of a primary distribution) or the vendor of a specific security (in the case of a secondary distribution) if the agreement or arrangement has a reasonable relationship to the underwriting of a specific security.

Amateur and professional sport

The Act as a whole, including section 45, does not apply in respect of agreements or arrangements between or among teams, clubs and leagues pertaining to participation in amateur sport.

In respect of professional sport, under section 48, any person who conspires, agrees or arranges with another person to limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional sport or to impose unreasonable terms or conditions on those persons who so participate, or to limit unreasonably the opportunity for any other person to negotiate with and, if an agreement is reached, to play for the team or club of his or her choice in a professional league is guilty of an indictable offence. The Federal Court of Canada concluded in *Mohr v National Hockey League* ***et al*** that this provision applies to intra-league, but not inter-league, agreements. This decision was recentlyupheld

by the Federal Court of Appeal, but an application has been made for leave to appeal to the Supreme Court of Canada.

The Bureau issued a statement in July 2022 indicating that it will not take enforcement action under this provision.

Airlines

The Canada Transportation Act was amended in 2018 to introduce a regime through which the Minister of Transport may authorise airline joint ventures if the Minister of Transport is satisfied that they are in the public interest. Under this new regime, an authorisation by the Minister of Transport has the effect of allowing parties to coordinate their activities and exempting an airline joint venture from the application of sections 45 (criminal conspiracy), 47 (bid rigging), 90.1 (civil competitor agreements) and 92 (mergers). The Commissioner provides input to the Minister of Transport regarding the assessment of any competition concerns.

Collective bargaining

The Act as a whole, including the conspiracy offence in section 45, does not apply in respect of collective bargaining activities of employees or employers.

No-poach and wage-fixing agreements

The newly enacted section 45(1.1) offence prohibits employee no-poach and wage-fixing agreements between employers, regardless of whether the employers are competitors.

Other buy-side agreements

Buy-side agreements for the purchase of products and services – other than the purchase of labour services in the employment context – are not subject to the conspiracy offence in section 45 of the Act. However, the Bureau may investigate such agreements as reviewable practices under section 90.1 of the Act and seek prohibition orders if anticompetitive effects are likely to occur.

Government-approved conduct

Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

A 'regulated conduct defence' was developed as a principle of statutory interpretation to avoid criminalising (1) a regulatory body exercising its authority under a validly enacted provincial legislation, or (2) regulated persons proceeding in accordance with such provincial regulation. Canadian courts have also occasionally applied the regulated conduct defence in the context of federal legislation. When the conspiracy provisions in section 45 were amended to create a per se offence in 2010, the regulated conduct defence, as it existed

in common law at the time, was retained by statutory language and was expressly extended to apply to conduct authorised by federal and provincial law.

INVESTIGATIONS

Steps in an investigation

What are the typical steps in an investigation?

The Competition Bureau (the Bureau) routinely commences informal investigations in response to complaints by marketplace participants, its own analysis of public information or the evidence of informants. If such an investigation leads the Commissioner of Competition (the Commissioner) to believe, on reasonable grounds, that a criminal offence has been committed, the Commissioner will launch a formal inquiry under section 10 of the federal Competition Act (the Act). In addition, the Commissioner is required to commence an inquiry in response to a directive from the Minister of Innovation, Science and Industry (the Minister) or by an application made under oath by six residents of Canada (a six-resident application). Commencement of an inquiry empowers the Commissioner to exercise formal powers, such as obtaining judicial orders to compel the production of evidence, search warrants and wiretap orders.

After evidence is obtained during an inquiry, the Commissioner decides whether to discontinue the inquiry or refer the case to the Director of Public Prosecutions (DPP) for prosecution. Unlike many other jurisdictions, Canada has no statute of limitations for the prosecution of indictable offences (such as price-fixing or bid rigging). There is thus no statutory deadline within which the Commissioner and DPP must decide whether to bring charges against the members of a cartel. While some Bureau investigations have been resolved expeditiously (initiation to resolution in under two years), others have taken several years, depending on the complexity of the investigation and the availability of investigative and prosecutorial resources.

If an inquiry is discontinued, the Commissioner must make a written report to the Minister that summarises the information obtained from the inquiry and the reasons for discontinuance. The Minister may accept the discontinuance or require the Commissioner to conduct further inquiries. Although a directive from the Minister or a six-resident application cannot compel the Commissioner to take any particular enforcement proceedings, the requirement of a written report to the Minister upon the discontinuance of an inquiry ensures that the Commissioner will closely examine the facts in such cases. Consequently, the target of the inquiry may be required to incur significant costs, uncertainty and inconvenience in connection with such an inquiry, even though no formal charges are ever laid.

If a matter is referred to the DPP, the DPP will make an independent decision on whether to lay charges and pursue a prosecution. In May 2010, the Bureau and the DPP issued a memorandum of understanding clarifying their respective roles in this process. These roles were further clarified in the September 2018 revisions to the immunity and leniency policies.

Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

During an inquiry, the Commissioner has extensive (judicially supervised) powers to obtain information by means of search warrants, orders for the production of data and records, and even wiretaps. These statutory powers supplement information supplied voluntarily by marketplace participants, cooperating parties or enforcement agencies in other jurisdictions. The Bureau sometimes issues voluntary requests for information or 'target letters' to companies that it believes may have relevant information before resorting to the formal investigative powers described below.

Search warrants

Warrants to search the premises of a business or the home of an individual can be obtained by means of an ex parte application under section 15 of the Act. The Commissioner must establish that there are reasonable grounds to believe that a criminal offence has been committed and that relevant evidence is located on the premises to be searched. Preventing access to premises or otherwise obstructing the execution of a search warrant is a criminal offence and the Commissioner may enlist the support of the police if access is denied.

The Act expressly provides for access to, and the search and seizure of, computer records, including applications to the court to set the terms and conditions of the operation of a computer system. Bureau investigators have downloaded data stored outside Canada in the course of searches of computer systems located in Canada, although there continues to be some controversy as to the precise limits of the authority granted by a warrant authorising a search of computer systems in a cross-border context.

Documents that are subject to solicitor–client privilege cannot be immediately seized by officers under a search warrant. The Act contains a special procedure for sealing such documents and for determining the validity of privilege claims within a limited time. The Act also contains a provision requiring the Commissioner to report to the court to retain seized documents. Because the affected company or individual can ultimately request a retention or privilege hearing, and because evidence procured through an illegal search can be excluded at trial, the courts have ruled that search warrant orders cannot be appealed. However, such an order can be set aside in special circumstances such as a material non-disclosure or misrepresentation in the affidavit (known as an 'information to obtain order') supporting the Commissioner's ex parte application, or where the inquiry giving rise to the order has ended without the laying of criminal charges.

Wiretaps

The Commissioner has the power to intercept private communications without consent through electronic means (ie, using a wiretap). This power is restricted to conspiracy, bid rigging and serious deceptive marketing investigations, and requires prior judicial authorisation. The first use of wiretaps as an investigative tool led to the laying of criminal charges under the deceptive telemarketing provisions of the Act, an area that has been the subject of vigorous enforcement activity on the part of the Bureau. Subsequently, extensive wiretap evidence has been used in the investigation and prosecution of retail gasoline

price-fixing conspiracies in Quebec and Ontario, in which the Bureau recorded thousands of telephone conversations.

Subpoenas

As an alternative (or in addition) to executing a search warrant, the Commissioner may apply to a court pursuant to section 11 of the Act to require the production of documents and other records or compel a corporation to provide written returns of information (ie, responses to questions in writing) under oath, within a certain period of time. On a section 11 application, the Commissioner need only satisfy the court that an inquiry has been initiated and that a person is likely to have relevant documents in their possession or control. Such subpoenas may be issued against targets of an investigation as well as other third parties who may have relevant information. The June 2022 amendments to the Act clarify that a person outside Canada who carries on business in Canada or sells products into Canada may also be subject to such subpoenas.

Under subsection 11(2), a Canadian corporation that is an affiliate of a foreign corporation may be ordered to produce records held by its foreign affiliate. The precise scope of this long-arm authority has not been judicially determined, but it continues to be invoked in document production orders sought by the Bureau. The section 11(2) power was the subject of a constitutional challenge by Toshiba in the ***Cathode Ray Tubes*** investigation and by Royal Bank of Scotland in the ***Libor*** investigation. In both cases, the litigation was settled before any final determinations on the provision's validity were made by a court. The June 2022 amendments to the Act now extend this long-arm authority to include written returns of information under oath.

Section 11 of the Act can also be used to compel witnesses who have relevant information to testify under oath for the purpose of answering questions related to the inquiry. Testimony obtained from a person under a section 11 order cannot be used against that person in any subsequent criminal proceedings. This limitation is consistent with the decisions of the Supreme Court of Canada establishing use and derivative use immunity for persons compelled to give evidence under statutory powers of investigation. On the other hand, where an individual employee of a corporation has been compelled to give evidence under section 11, the evidence is generally considered admissible against the accused corporation.

INTERNATIONAL COOPERATION

Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

In international cartel cases, the Competition Bureau (the Bureau) will often cooperate closely with other competition agencies, either through formal procedures or informally.

Formal procedures involve the invocation of mutual legal assistance treaties (MLATs) with the United States and other countries. While they have been used sparingly, MLAT arrangements permit Canada and cooperating countries to undertake formal procedures in their own jurisdictions to obtain evidence for a foreign investigation. These arrangements

also permit Canadian and other competition agencies to coordinate their enforcement activities, exchange confidential information and discuss case-specific matters.

The Bureau may also use competition cooperation agreements, such as those with the agencies in the United States, the European Union, Australia, Brazil and others. In general, such agreements build upon the 1995 Organisation for Economic Co-operation and Development (OECD) recommendation concerning cooperation between OECD countries, and include provisions relating to notification and consultation when an investigation may affect the interests of another jurisdiction. However, these agreements generally do not provide for the exchange of documents or other evidence that are subject to domestic confidentiality protections and they are, therefore, of limited use in cartel cases.

In practice, there may be wide-ranging informal contacts among Canadian and foreign investigative agencies on common issues during an inquiry even if confidential evidence is not exchanged. There have also been instances of informal coordination of independent and parallel investigations into numerous international cartels. Parallel searches or other formal enforcement powers have been coordinated in several cases, including the investigation into air cargo surcharges. This form of cooperation has been very successful and is now common in investigations into cartels affecting North America. In addition, the Bureau regularly requests that cooperating parties under its immunity and leniency programmes provide a waiver allowing the Bureau to discuss confidential information with the US Department of Justice and certain other cartel enforcement authorities.

Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

In light of the MLATs and other inter-agency cooperation, a company defending a cartel investigation that has multi-jurisdictional implications, particularly one involving the United States, United Kingdom or the European Union, should be highly sensitive to the potential collaboration between the Bureau and the enforcement agencies in these jurisdictions. A coordinated defence strategy is critical and the timing of approaches or responses to the authorities in each jurisdiction should be considered carefully. The exposure of key individuals to prosecution and the lack of any limitation period for cartel conduct in Canada are factors of particular importance in developing a comprehensive strategy.

CARTEL PROCEEDINGS

Decisions

How is a cartel proceeding adjudicated or determined?

Cartel matters are prosecuted as indictable criminal offences. The charges are set out in an indictment and the accused must respond by entering a plea. In practice, many cases are resolved by negotiated plea agreements that are subject to court approval.

If the accused pleads not guilty, a preliminary inquiry is held before a judge to determine whether there is sufficient evidence to order a trial. The Director of Public Prosecutions (DPP) may and occasionally does skip this step by issuing a 'preferred indictment' and proceeding directly to trial.

Prosecutions may be brought in any of the regular provincial courts of superior jurisdiction or in the Federal Court. Procedure in these prosecutions is governed by the Criminal Code and the applicable court's rules of criminal procedure. Proceedings are normally undertaken in the provincial superior courts, which have well-established procedures for dealing with trials, evidence, custodial and other sentences, and other aspects of criminal proceedings.

Under the federal Competition Act (the Act), a corporation has no right to a jury trial. However, individuals may elect for trial by jury.

Burden of proof

Which party has the burden of proof? What is the level of proof required?

In cartel cases, as in most other criminal matters, the onus is on the prosecution to prove each element of the offence beyond a reasonable doubt. The ordinary rules of evidence in criminal proceedings generally apply. However, the Act expressly provides for the admissibility of statistical evidence that might not be admissible in other types of criminal cases.

Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Pursuant to section 45(3) of the Act, a court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties. However, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

Appeal process

What is the appeal process?

There is an automatic right of appeal, by the accused person or the DPP, on any matter that involves a question of law alone, to the provincial appellate court or the Federal Court of Appeal, as the case may be. An accused person may also, with leave of the court, appeal against a conviction on any ground that involves a question of fact or a question of mixed fact and law. The decision of a court of appeal may be appealed to the Supreme Court of Canada, but only if the Supreme Court grants leave to do so. Sentencing decisions may also be appealed by the accused person or the DPP with leave of the court.

On the hearing of an appeal against conviction, the court of appeal may allow the appeal where it is of the opinion that the verdict should be set aside on any of the following grounds:

- it is unreasonable or cannot be supported by the evidence;
- there was an incorrect decision on a question of law; or
- there was a miscarriage of justice.

The court of appeal may dismiss the appeal where: the appeal is not decided in favour of the appellant on any ground mentioned above; no substantial wrong or miscarriage of justice has occurred, even if one of the grounds of appeal is established; or, notwithstanding any procedural irregularity at trial, the court of appeal is of the opinion that the appellant suffered no prejudice thereby. Where a court of appeal allows an appeal, it will quash the conviction and direct a judgment of acquittal or order a new trial. If an appeal is from an acquittal, the court of appeal may order a new trial or enter a verdict of guilty.

SANCTIONS

Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

Conspiracy and bid rigging are the most serious indictable offences under the federal Competition Act (the Act) and are subject to significant penalties – criminal fines with no statutory maximum or up to 14 years of imprisonment. There is also no maximum fine for foreign-directed conspiracies. Courts have emphasised, in both the competition law and general criminal law contexts, that fines must be large enough to deter large and powerful companies and must not become simply a cost of doing business.

To date, C$10 million is the highest fine for a single count conspiracy under section 45 of the Act. This amount (the previous statutory maximum) was imposed for the first time in January 2006 in the ***Carbonless Paper*** case and again in 2012 (in respect of conduct occurring under the old offence) in the ***Polyurethane Foam*** case. The section 46 offence relating to implementing a foreign-directed conspiracy in Canada has never had a statutory maximum fine. In 1999–2000, SGL Carbon AG and UCAR Inc agreed to pay fines of C$13.5 million and C$12 million respectively under that provision in the ***Graphite Electrodes*** case.

It is also possible for a prosecution to proceed with multiple counts, each constituting a separate offence. This can result in total fines in excess of the statutory maximum, which has occurred following guilty pleas in a number of cartel cases. These include some of the highest fines in the history of Canadian criminal law:

- C$50.9 million against F Hoffmann-La Roche for multiple conspiracies involving vitamin products;
- C$30 million against Yazaki Corporation in April 2013 for bid rigging in the supply of wire harnesses (auto parts) – the highest fine ever imposed under the bid rigging offence; and
- C$50 million against Canada Bread Company for multiple counts of price-fixing conspiracy involving fresh commercial bread.

While the maximum prison sentences available under sections 45 (conspiracy) and 47 (bid rigging) of the Act are 14 years, the imposition of custodial sentences against individual

cartel offenders to date has been relatively rare. Virtually all prison sentences for cartel conduct have been less than two years, with many of those being 'conditional' sentences (ie, to be served in the community). However, legislative amendments to the Criminal Code in 2012 eliminated the availability of conditional sentencing for future convictions.

Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Cartel cases are normally prosecuted under the criminal provisions of the Act and are primarily subject to the criminal sanctions of fines and imprisonment. It is also common for the Director of Public Prosecutions (DPP) to seek a prohibition order to prevent the future repetition of the offence, as was the case in several recent domestic cartel prosecutions in the construction industry.

For competitor collaboration cases that do not involve hardcore cartel conduct, the reviewable practice provisions in section 90.1 permit the Competition Bureau (the Bureau) to pursue a prohibition order against the conduct in question. Alternatively, it might be possible for the Commissioner of Competition (the Commissioner) to bring an application under the joint abuse of dominance provisions in the non-criminal part of the Act. Such applications would be heard before the Competition Tribunal, an administrative body that considers the evidence on a civil standard of a balance of probabilities. Since 2009, the Competition Tribunal can impose administrative monetary penalties under the abuse of dominance provision of the Act of up to C$10 million for the first order and up to C$15 million for subsequent orders. In contrast, fines are not available for competitor agreements reviewable practice.

To date, there have been very few competitor agreement reviewable practice or joint dominance cases. They have all been settled with consensual remedial agreements.

Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The Criminal Code enumerates a range of binding sentencing principles and factors. They provide considerable latitude and the determination of a sentence is ultimately a matter at the discretion of the court.

The aggravating and mitigating factors to be considered when sentencing organisations (including corporations) include:

- any advantage realised by the organisation as a result of the offence;
- the degree of planning involved in carrying out the offence, and the duration and complexity of the offence;
- whether the organisation has attempted to conceal or convert its assets to show that it is not able to pay a fine or make restitution;

- the impact that the sentence would have on the economic viability of the organisation and the continued employment of its employees;
- the cost to public authorities of the investigation and prosecution of the offence;
- any regulatory penalty imposed on the organisation or one of its representatives in respect of the conduct that formed the basis of the offence;
- whether the organisation was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
- any penalty imposed by the organisation on a representative for their role in the commission of the offence;
- any restitution that the organisation is ordered to make or any amount that the organisation has paid to a victim of the offence; and
- any measures that the organisation has taken to reduce the likelihood of it committing a subsequent offence.

The Bureau's 2018 leniency policy establishes a framework for determining the recommendation that it will make to the DPP regarding the fine to be sought in cases involving cooperating parties. The policy uses an initial starting point of 20 per cent of the volume of commerce affected by the cartel in Canada – 10 per cent is viewed as a proxy for the overcharge from the cartel activity and 10 per cent is viewed as a deterrent. If the overcharge can be calculated based on compelling evidence, the 10 per cent proxy will be replaced by the actual overcharge. Cooperation discounts (up to 50 per cent) and any aggravating or mitigating factors are then applied to the base fine. In addition to the aggravating and mitigating factors set out above, the 2018 leniency policy notes that the existence of a credible and effective corporate compliance programme will serve as a mitigating factor in the calculation of the fine amount.

Prior to the 2018 leniency policy, the 50 per cent cooperation discount, which was automatic, was only available to the first leniency applicant, with subsequent leniency applicants only eligible for discounts up to 30 per cent. The updated leniency policy permits a cooperation credit of up to 50 per cent for every leniency applicant, which is dependent on the value (including timeliness) of the leniency applicant's cooperation.

These criteria and the Bureau recommendations are not binding on the DPP when negotiating a guilty plea, nor are they binding on the DPP when making submissions on the appropriate sentence after obtaining a conviction at trial. However, they are given significant consideration, particularly since the Public Prosecution Service of Canada is a co-author of the 2018 revised immunity and leniency policies.

If a guilty plea is negotiated with the DPP, it will usually include an agreement upon a joint submission to the court as to the proper penalty. The court is not bound by such a recommendation, but will not reject it unless it is either contrary to the public interest or brings the administration of justice into dispute.

Compliance programmes

Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Under the 2018 revised Immunity and Leniency Program, if the Bureau is satisfied that a compliance programme in place at the time the offence occurred was credible and effective, consistent with the approach set out in the Bureau's Bulletin on Corporate Compliance Programs, the Bureau will treat the compliance programme as a mitigating factor when making its recommendation regarding sanctions to the DPP.

Director disqualification

Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Individuals could be prohibited from serving as corporate directors or officers pursuant to a judicial order pursuant to section 34 of the Act. The maximum duration of such orders cannot exceed 10 years.

Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

A revised integrity regime was put in place by the Canadian government in 2015. The regime applies to procurement and real property transactions undertaken by federal government departments and agencies. A supplier is ineligible to do business with the Canadian government if it, or a member of its board of directors, has been convicted of bid rigging or any other anticompetitive activity under the Act or a similar foreign offence. If a supplier is charged with an offence, it may also be suspended from doing business with the government pending the outcome of the judicial proceedings.

Where an affiliate of a supplier has been convicted of such an offence, an assessment will be made to determine if there was any participation or involvement from the supplier in the actions that led to the affiliate's conviction. If so, the supplier will be rendered ineligible.

A supplier convicted of an Act offence will be ineligible for 10 years, but may have its ineligibility period reduced by five years if it demonstrates that it cooperated with law enforcement authorities or has undertaken remedial action to address the wrongdoing. An administrative agreement would then be imposed to monitor the supplier's progress.

Exceptions to the ineligibility policy may apply in circumstances in which it is necessary to the public interest to enter into business with a supplier that has been convicted. Possible circumstances necessary to the public interest could include:

- no other supplier is capable of performing the contract;
- an emergency;
- national security;
- health and safety; and

- economic harm to the financial interests of the Canadian government and not of a particular supplier.

In March 2018, the Canadian government announced that the integrity regime will be enhanced to introduce greater flexibility in debarment decisions and increase the number of triggers that can lead to debarment (including the addition of more federal offences, certain provincial offences, foreign civil judgments for misconduct, and debarment decisions of provinces, foreign jurisdictions and international organisations). A proposed draft of the revised Ineligibility and Suspension Policy was released for public consultation in the autumn of 2018. To date, it has not been finalised.

Many provincial (and also municipal) governments have established their own rules governing debarment from their procurement processes. For example, the Quebec Integrity in Public Contracts Act prohibits a corporation convicted of price-fixing or bid rigging under the Act in the previous five years from entering into contracts with public bodies or municipalities.

Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

Once proceedings have been initiated under the criminal provisions in Part VI of the Act (including sections 45, 46 and 47 of the Act), proceedings under the various civil reviewable practices provisions cannot be brought on the basis of substantially the same facts (and vice versa). The choice of which enforcement track to pursue is a matter of discretion for the Commissioner and DPP.

The Bureau's Competitor Collaboration Guidelines, which were updated in 2020, indicate that hardcore cartel conduct normally will be prosecuted criminally and that other types of competitor collaboration normally will be dealt with under the section 90.1 civil reviewable practice. However, at the initial stage of an investigation, the Bureau may proceed with both the criminal and civil tracks of the investigation in parallel, until it has adequate information to decide which track is more appropriate.

PRIVATE RIGHTS OF ACTION

Private damage claims

Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Section 36 of the federal Competition Act (the Act) grants private parties the right to recover in ordinary civil courts any losses or damages suffered as a result of a breach of the

criminal provisions of the Act, as well as their costs of investigation and litigation. Only single damages are available.

The Act expressly provides that a prior conviction for an offence is, in the absence of any evidence to the contrary, proof of liability. However, there are no conditions precedent to a private action under the Act and the absence of a conviction, or even the refusal of the Commissioner of Competition to commence an inquiry, does not bar or provide a valid defence to such an action.

Both direct and indirect purchasers may bring private claims in Canada. The passing-on defence is not permitted. The Supreme Court of Canada held in 2013 that the possibility of double recovery is an issue to be dealt with when assessing damages at trial and should not be a bar to indirect purchaser claims.

In the 2019 decision in *Pioneer Corp v Godfrey*, the Supreme Court of Canada held that umbrella purchaser claims are permitted under section 36 of the Act, as the provision offers a cause of action to 'any person who has suffered loss or damage as a result of' cartel conduct. The court rejected the argument that such claims should be barred for subjecting defendants to 'indeterminate liability'. However, the claimant will need to establish causation and injury, which may be difficult in practice,

There is no private right of action in relation to the competitor agreements reviewable practice in section 90.1 of the Act. However, in some situations, private parties have attempted to use section 36 to bring a private action in respect of an alleged breach of the conspiracy or bid rigging provisions in respect of conduct that the Competition Bureau, as a matter of enforcement discretion, would treat under the civil rather than criminal track. A recent Federal Court decision has held that section 45(1) is limited to naked restraints on competition, which would limit the scope of the private right of action to the same conduct.

Class actions

Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions are available and are now a virtual certainty in multiple provinces in Canada after (and often before) there is a conviction or guilty plea under the cartel provisions in the Act. A vigorous and effective plaintiffs' bar has evolved in Canada, often acting in conjunction with US plaintiffs' counsel in cross-border cases. Claims are normally brought in provincial courts – most typically in British Columbia, Ontario and Quebec.

Class actions may be brought on the basis of classes defined by reference to customers located in the province in question, However, several provinces including Ontario and British Columbia allow nationwide class actions to be brought in their courts. Class actions may also be initiated on a national basis in the Federal Court.

Canada's class action regimes all follow an opt-out model that allows individual purchasers to choose not to participate in a class action and proceed with their own individual claims. However, opt-outs are relatively rare in competition class actions in Canada.

There is no formal procedure for consolidating or coordinating parallel actions brought in multiple courts. To facilitate the management of multi-jurisdictional class actions

by making use of existing class action legislations and rules of civil procedure, the Canadian Bar Association developed the Canadian Judicial Protocol for the Management of Multi-jurisdictional Class Actions in 2011, which was revised in 2018. This protocol has been adopted by courts in several provinces and has mainly been used for approvals of settlements.

To date, most cases have been resolved through settlements, which are subject to court approval to ensure that they are fair, reasonable and in the best interests of the proposed class. The largest single settlement to date involved a long-running class action against Microsoft for C$517 million. In class proceedings involving the foreign exchange markets, 13 defendants have thus far agreed to settlements, which collectively exceed C$110 million. In international auto parts conspiracies, the plaintiffs have so far entered into settlements with 37 defendants, totalling approximately C$138 million.

COOPERATING PARTIES

Immunity

Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Competition Bureau (the Bureau) has an immunity programme whereby a company or individual implicated in cartel activity may offer to cooperate with the Bureau and request immunity. The term 'immunity' refers to a grant of full immunity from prosecution by the Director of Public Prosecutions (DPP) on recommendation by the Bureau. The first party to come forward where the Bureau is unaware of an offence, or before there is sufficient evidence for a referral of the case to the DPP for possible prosecution, is eligible for a grant of interim immunity. The applicant must have terminated its participation in illegal activities and must not have coerced others to participate in illegal activities. The grant of interim immunity is a conditional immunity agreement that sets out the applicant's ongoing cooperation and full disclosure obligations that must be fulfilled for the DPP to finalise the immunity agreement.

Pursuant to the grant of interim immunity, the applicant will need to provide complete, timely and ongoing cooperation throughout the course of the Bureau's investigation and subsequent prosecutions. This entails full, frank and truthful disclosure of non-privileged information and records. The applicant's counsel will first proffer what records, evidence or testimony can be provided. Once a grant of interim immunity is concluded with the DPP, witnesses will be interviewed and they may subsequently be called to testify in court proceedings.

If a company qualifies for immunity, all current directors, officers and employees that desire immunity will need to demonstrate their knowledge of or participation in the unlawful conduct and their willingness to cooperate with the Bureau's investigation. If they do so, they will also receive immunity provided they offer complete and timely cooperation. Former directors, officers and employees of the company who admit their knowledge of or participation in an offence under the federal Competition Act (the Act) may also be given immunity in exchange for cooperation, provided that they are not currently employed by another member of the cartel that is being investigated. This determination is to be made by the Bureau and DPP on a case-by-case basis.

Subsequent cooperating parties

Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

The Bureau has created a leniency programme that complements its immunity programme for candidates that are not eligible for a grant of immunity. The Bureau will recommend to the DPP that qualifying applicants be granted a resolution that reflects favourable treatment for timely and meaningful assistance to the Bureau's investigation. A prompt agreement to plead guilty along with valuable cooperation can earn a leniency applicant a reduction of up to 50 per cent of the fine that would otherwise have been recommended by the Bureau to the DPP. At the request of the first leniency applicant (ie, the first cooperating party after the immunity applicant) that is a corporate applicant, the Bureau will also recommend to the DPP not to charge the directors, officers or employees of the applicant who admit knowledge of or participation in the unlawful conduct and are prepared to cooperate.

Providing all leniency applicants with the possibility to receive a reduction of up to 50 per cent of the fine that otherwise would have been recommended is a key change made to the leniency programme in 2018. Under the prior programme, only the first-in leniency applicant was eligible for this 50 per cent reduction, which was automatic, with subsequent applicants only eligible for a fine reduction of up to 30 per cent. The percentage of each applicant's fine reduction is now determined having regard to the extent that the leniency applicant's cooperation adds to the Bureau's ability to advance its investigation and pursue other culpable parties. The Bureau will take into account a number of factors, including:

- the timing of the leniency application (relative to other parties in the cartel as well as relative to the stage of the Bureau's investigation);
- the timeliness of disclosure;
- the availability, credibility and reliability of witnesses;
- the relevance and materiality of the applicant's records; and
- any other factor relevant to the development of the Bureau's investigation into the matter.

An additional fine reduction credit of 5 to 10 per cent is available to a party eligible for 'immunity plus' where a subsequent cooperating party also brings the Bureau information about additional conduct (eg, time periods, products and geographies) that were not covered by the original immunity applicant.

All leniency applicants must meet the cooperation and other requirements of the programme, which are similar to those of the immunity programme. Most importantly, they must provide full, frank, timely and truthful cooperation until the Bureau investigation and any DPP prosecution of other cartel participants have been completed.

Going in second

How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

A party will not be eligible for immunity if the Bureau has been made aware of the offence by an earlier applicant for immunity in respect of the same alleged cartel conduct. However, the second party to offer to cooperate will, as a practical matter, be considered for favourable treatment and may, if the first party fails to fulfil the requirements of the immunity programme, be able to request immunity at that time.

The timing of the leniency application is an important consideration in the determination of the percentage of the fine reduction that will be available to the applicant. The first-in leniency applicant will be able to obtain protection for its employees from prosecution, provided that they admit knowledge or participation in the unlawful conduct and are prepared to cooperate in a timely fashion with the Bureau's investigation. Other conspirators who seek to resolve their exposure later in the investigation will be progressively less able to negotiate favourable fine reductions unless they are able to demonstrate a higher value associated with their cooperation. In addition, second and subsequent leniency applicants will have less ability to negotiate favourable terms in connection with the exposure of individuals to potential prosecution.

The concept of immunity plus is also addressed in the leniency programme. Parties that are not the first to disclose conduct to the Bureau may nonetheless qualify for additional favourable treatment if they are the first to disclose information relating to another offence for which they may receive immunity. If the company pleads guilty to the first offence for which it has not been granted immunity, its disclosure of the second offence will be recognised by the Bureau and the DPP in their sentencing recommendations with respect to the first offence, resulting in an additional 5 to 10 per cent discount in the corporate fine for the first offence and potentially additional favourable treatment for individuals.

Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

There are no deadlines for approaching the Bureau. However, immunity is only available to the first qualifying applicant and the available benefits decline for subsequent cooperating parties. To maximise the likelihood of obtaining immunity or a substantial leniency discount, a party should approach the Bureau as soon as legal counsel has information indicating that an offence may have been committed.

A marker can be obtained that will allow counsel time to complete an investigation as to whether an offence has been committed. Once a marker is granted, the applicant has 30 calendar days to provide the Bureau with a detailed proffer describing the illegal activity, its effects (with a focus on Canada, in international cases) and the supporting evidence. If an applicant fails to provide its proffer within 30 days or within any extended period of time agreed by the Bureau, the marker will automatically lapse. The marker can also be cancelled if the proffer is incomplete or insufficient. In situations involving multiple jurisdictions, a party whose business activities have a connection to Canada should consider contacting the Bureau in parallel with, or promptly after, approaching foreign competition law authorities.

Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

A participant in the Bureau's immunity or leniency programmes must provide a:

> full, complete, frank and truthful disclosure of all non-privileged information, evidence and records in its possession, under its control or available to it, wherever located, that in any manner relate to the anticompetitive conduct for which immunity is sought.

Participants must also take all lawful measures to secure the cooperation of current and former directors, officers and employees for the duration of the Bureau's investigation and any ensuing prosecutions, including appearing for interviews and potentially providing testimony in judicial proceedings. All such cooperation efforts are at the cooperating party's own expense.

Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The Bureau treats as confidential any information obtained from a party requesting immunity or leniency. The only exceptions to this policy are when disclosure:

- is required by law;
- is necessary to obtain or maintain the validity of a judicial authorisation for the exercise of investigative powers;
- is for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
- is agreed to by the cooperating party;
- has already been made public by the cooperating party;
- is necessary for the administration or enforcement of the Act; or
- is necessary to prevent the commission of a serious criminal offence.

In addition, unless required by law or on consent, the Bureau will not inform other competition agencies with which it may be cooperating of the identity of an immunity or leniency applicant. However, as part of an immunity or leniency applicant's ongoing cooperation, absent compelling reasons, the Bureau will expect the applicant to provide its consent in the form of a waiver allowing communication of information with jurisdictions to which the

applicant has made similar applications for immunity or leniency. Such waivers are expected to be provided promptly and cover both substantive information and procedural matters.

Where third parties (eg, plaintiffs in private or class actions) seek access to the Bureau's file, the Bureau's policy is to provide confidential information from immunity or leniency applicants only in response to a court order. In the event of such an order, the Bureau will take all reasonable steps to protect the confidentiality of such information, including by seeking a protective order from the court.

Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

While the Bureau may make recommendations to the DPP with respect to the severity of any penalty or obligation to be imposed on parties that cooperate in cartel investigations (and those that do not), the DPP retains the ultimate discretion concerning decisions to prosecute, negotiation of plea bargains and sentencing submissions presented in court.

The DPP and defence counsel may make recommendations but cannot fetter the sentencing discretion of the court. In practice, plea bargains with joint recommendations on sentencing have almost always been accepted. Case law strongly favours acceptance of joint recommendations, which can only be refused where the court's acceptance of the recommended sentence would bring the administration of justice into disrepute or otherwise be contrary to the public interest (eg, *R v Maxzone Canada Corporation*).

Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

If a company qualifies for immunity, all present directors, officers and employees who admit their knowledge of or participation in the illegal activity as part of the corporate admission, and who provide complete, timely and ongoing cooperation, will qualify for immunity. Agents of a company and past directors, officers and employees who admit their knowledge of or participation in the illegal activity and who offer to cooperate with the Bureau's investigation may also qualify for immunity. However, this determination will be made on a case-by-case basis and immunity is not automatic for agents or past employees. Even if a corporation does not qualify for immunity (eg, if it coerced others to participate), its past or present directors, officers and employees who come forward with the corporation to cooperate may nonetheless be considered for immunity as if they had approached the Bureau individually.

At the request of the applicant, the Bureau will recommend that no charges be brought against current employees of the second cooperating party (the first leniency programme applicant) who admit their knowledge of or participation in the illegal activity. Former employees are likely to be protected as well if they admit their involvement, assuming

no other contrary factors exist (eg, subsequently working for another party to the cartel). Subsequent cooperating parties may be able to obtain protection for some of their directors, officers and employees, but these determinations will be made on a case-by-case basis.

While immunity or leniency may be revoked where a party fails to comply with the immunity or leniency programme requirements, the revocation generally will only apply to the non-cooperating party. A company's immunity or leniency can be revoked while its cooperating directors, officers, employees and agents retain their protection. Likewise, an individual's immunity can be revoked while the individual's employer retains its immunity or leniency (provided that it has discharged its obligation to take all lawful measures to attempt to secure the individual's cooperation).

Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The immunity and leniency processes typically involve the following steps.

Initial contact and marker

Anyone may initiate a request for immunity or leniency in a cartel case by communicating with the Deputy Commissioner of Competition – Cartel Directorate or their designate. Very basic information about the industry or product will need to be provided, usually through a hypothetical oral disclosure by legal counsel, to determine whether the Bureau is already investigating the matter. The party may be granted a marker to secure its place in the programme and will normally be asked to confirm its participation in the immunity or leniency programme within four business days of receiving a marker.

Following confirmation of a marker, the Bureau will expect the applicant to perfect its marker by proceeding promptly to provide a proffer. The usual deadline is 30 days, although extensions to provide additional information emerging from an ongoing internal investigation may be given in appropriate circumstances (eg, complex ongoing cross-border investigations).

Proffer

If the party decides to proceed with the immunity or leniency application, it will need to provide a detailed description of the illegal activity and disclose sufficient information for the Bureau to determine whether it might qualify for immunity or leniency. This is normally done by way of a privileged and confidential proffer by legal counsel that describes the conduct and the potential evidence that the cooperating party can provide.

At the proffer stage, the Bureau may request an interview with one or more witnesses, or an opportunity to view certain documents, prior to recommending that the DPP provide a grant of interim immunity or leniency. The Bureau also seeks information during the proffer stage about the volume of commerce affected by the cartel in Canada.

If the Bureau determines that the party demonstrates its capacity to provide full cooperation and that it meets the requirements of the applicable programme, it will present all relevant proffered information and a recommendation regarding the party's eligibility to the DPP. The DPP will then exercise its independent discretion to determine whether to provide the party with a grant of interim immunity or leniency, as the case may be.

Grant of interim immunity or leniency

If the DPP accepts the Bureau's recommendation, the DPP will issue a grant of interim immunity or enter into a plea agreement with the party that will include all of the party's continuing obligations.

Full disclosure and cooperation

After the party receives a grant of interim immunity or enters into a plea agreement with the DPP, it will be required to provide full disclosure and cooperation with the investigation and any ensuing prosecution of other parties.

Immunity agreement (for the immunity programme only)

Once a party has satisfied all of its obligations under the grant of interim immunity, the Bureau will recommend to the DPP to finalise the grant of immunity to the applicant. The grant of immunity ordinarily will not be finalised until either the statutory period for any filing of a notice of appeal has lapsed in the case of any related criminal prosecution or the Commissioner of Competition and DPP have no reason to believe that further assistance from the applicant could be necessary.

DEFENDING A CASE

Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The Director of Public Prosecutions (DPP) is required to provide to a person accused of a criminal offence all relevant information, whether or not the DPP intends to introduce it into evidence and whether it is inculpatory or exculpatory. The DPP has some discretion as to the timing of the disclosure where necessary for the protection of witnesses or a continuing investigation, but must disclose this information before the trial.

This disclosure obligation begins at the outset of the prosecution (ie, the first court appearance) and continues until the end of the proceedings. The right to receive disclosure of all relevant information from the DPP is protected by the Canadian Constitution and a violation of this right can lead to an abuse of process action, in which the court can stay the criminal proceedings and acquit the defendant.

Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

As individual employees and the corporation can both be charged with an offence under the federal Competition Act, conflicts of interest can potentially arise if legal counsel acts for both the corporation and employees that are also targets of an investigation or prosecution. For example, an employee may wish to obtain immunity in exchange for testimony that includes evidence contrary to the interests of the corporation, or the corporation may wish to claim that the employee's actions were not authorised by management. This is less of a concern when employees are not being targeted personally in the investigation and are providing cooperation pursuant to the corporation's participation in the immunity or leniency programme.

Legal counsel for a corporation must caution employees that they act for the corporation and, if such employees believe that their interests may conflict with the corporation's interests, they should obtain independent legal advice. Counsel for the corporation will be free to act for both the corporation and the employee if they both consent to a waiver of potential conflicts of interest and confidentiality arrangements between them. However, the Competition Bureau (the Bureau) investigators or DPP prosecutors may resist joint representation if there is a risk of divergent interests.

Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Affiliated companies normally do not require separate representation.

There is a potential for conflicts of interest among multiple corporate defendants that are not affiliates during Bureau investigations and prosecutions, as well as in civil litigation where there are potential cross-claims between co-defendants. However, on occasion, law firms have acted for multiple defendants where the defendants have consented, and appropriate confidentiality screens and conflict management arrangements have been established.

As a matter of current practice, the DPP will be unlikely to participate in joint resolution discussions involving multiple parties.

Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

A corporation can indemnify an employee for legal costs and fines incurred as a result of a criminal investigation or conviction. While most indemnity agreements or insurance policies contain exclusions for deliberate wrongdoing, there is no law prohibiting such indemnification if the corporation chooses to do so. Nevertheless, there has been at least

one instance in which a convicting court ordered a corporation not to pay the fine imposed on an individual employee.

Taxes

Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Fines and penalties can be categorised as follows: (1) judicial (imposed by a court of law for a breach of any public law); and (2) statutory (imposed as a result of the application of statutes (eg, the federal Competition Act)).

Damages include a payment in settlement of a damages claim to avoid or terminate litigation, even where there was no admission of any wrongdoing.

Paragraph 18(1)(a) of the Income Tax Act provides that, in calculating a taxpayer's income from a business or property, no deduction shall be made in respect of an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property. Fines, penalties and private damages payments may be deducted from a taxpayer's income if they are incurred for the purpose of gaining or producing income.

As stated by the Supreme Court of Canada in *65302 British Columbia Ltd v Canada*, 'if the taxpayer cannot establish that the fine was in fact incurred for the purpose of gaining or producing income, then the fine or penalty cannot be deducted'.

For purposes of establishing whether a fine or penalty has been incurred for the purpose of gaining or producing income, the taxpayer:

- need not have attempted to prevent the act or omission that resulted in the fine or penalty; and
- need only establish that there was an income-earning purpose for the act or omission, regardless of whether that purpose was actually achieved.

The Supreme Court of Canada, in the same case, also stated that: 'it is conceivable that a breach could be so egregious or repulsive that the fine subsequently imposed could not be justified as being incurred for the purpose of producing income'. The court did not, however, give any further guidance in this respect, other than to indicate that 'such a situation would likely be rare'.

International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

It is possible that the Bureau may investigate and seek to prosecute individuals who also have exposure in other jurisdictions, assuming it can obtain personal jurisdiction over them. For example, in the *Vitamins* case, the Canadian authorities negotiated guilty pleas with fines

(but no custodial penalties) with three executives of F Hoffmann-La Roche that were also prosecuted in the United States.

the Bureau will take into account sales from foreign cartel participants to Canadian customers. It has also expressed the view that indirect sales into Canada made by a cartel participant can be taken into account when asserting jurisdiction or imposing penalties. This gives rise to the possibility of double jeopardy in international cartel cases. In its leniency programme FAQs, the Bureau indicates that:

> [W]here cartel members are penalized in another jurisdiction for the direct sales that led to the indirect sales into Canada, the Bureau may consider, on a case-by-case basis, whether the penalties imposed or likely to be imposed in the foreign jurisdiction are adequate to address the economic harm in Canada from the indirect sales.

Section 718.21 of the Criminal Code requires a sentencing court to take into consideration whether the organisation was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct. It has not been conclusively determined whether this provision should be interpreted as applying only to other sanctions imposed in Canada, or whether fines paid in other jurisdictions can also be considered. However, an obiter comment in a 2012 Federal Court sentencing decision (***R v Maxzone Canada Corporation***) suggested that the mere fact that a company or individual had been penalised in another jurisdiction should not be considered relevant when determining a sentence in Canada.

Getting the fine down

What is the optimal way in which to get the fine down?

In Canada, plea negotiations in criminal matters are a well-recognised and accepted practice. The single most effective consideration in negotiating a favourable plea agreement and sentencing recommendation is the stage in the investigation at which the party decides to come forward and provides cooperation to the Bureau. Even where there are serious aggravating elements – instigation, multiple charges, obstruction or previous convictions – if the party comes forward before the investigation is complete and at an early enough stage to provide valuable assistance to the investigators for the prosecution of other parties, a significant fine reduction and possibly also leniency for exposed individuals may be negotiated.

Other substantive factors may also be important elements in a negotiated settlement of the company's exposure to prosecution, including:

- the quality of the cooperation;
- the capacity to pay a fine;
- the existence or lack of an effective corporate compliance programme;
- the degree of management awareness of the actions of individual participants; and
-

passive or reluctant participation as opposed to involvement in the instigation of the offence.

UPDATE AND TRENDS

Recent cases

What were the key cases, judgments and other developments of the past year?

In *Mohr v National Hockey League et al*, the Federal Court of Canada concluded that section 45 of the federal Competition Act (the Act) does not apply to agreements between buyers of a product or service, which was subsequently upheld by the Federal Court of Appeal. This is consistent with the Competition Bureau's (the Bureau) statement in November 2020 clarifying that no-poach, wage-fixing and other buy-side agreements are not subject to the criminal offence in section 45 of the Act. This decision has been upheld on appeal.

In *Difederico et al v Amazon.com, Inc. et al*, the Federal Court of Canada clarified that the mens rea elements of the section 45 conspiracy offence requires proof of (1) subjective intention to enter into the agreement and knowledge of its terms, and (2) an objective intention to do one or more of things described in section 45(1)(a)-(c), namely price-fixing, output restriction and market allocation.

The Bureau released Enforcement Guidelines on wage-fixing and no-poaching agreements in May 2023 in advance of the coming into force of the wage-fixing and no-poaching provisions in section 45(1.1) in June 2023. Among other things, the enforcement guidelines clarified that the Bureau considers one-way no-poaching agreements (ie, where one party agrees not to hire or solicit the employees of the other, with no corresponding commitment from the other party) to be outside the scope of the prohibition against no-poaching agreements.

Regime reviews and modifications

Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

Recent amendments to the Act in June 2022 introduced a new offence against wage-fixing and no-poach agreements between employers, came into effect in June 2023. The Bureau published the Enforcement Guidelines on wage-fixing and no poaching agreements in May 2023.

The Canadian government conducted a broad consultation about competition law reform in 2023, which considered possible changes in the provisions related to cartels and other competitor agreements. Further amendments to the Act may be proposed following the consultation.