

COMPETITION AND FOREIGN INVESTMENT LAW IN CANADA
PAPER 1.1

Canada's New Criminal Conspiracy Law: US-Style Two-Track Regime, Hard Core Offences & Fines Up To \$25 Million

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**CANADA’S NEW CRIMINAL CONSPIRACY LAW:
US-STYLE TWO-TRACK REGIME, HARD CORE OFFENCES
& FINES UP TO \$25 MILLION¹**

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I. Overview

Sweeping amendments were recently passed that will significantly amend the criminal conspiracy provisions of the federal *Competition Act* (the “Act”),² which are frequently referred to as a “cornerstone” of Canadian competition law.³

The recent amendments were a result of a federally appointed Competition Policy Review Panel (the “Review Panel”) that issued a report in 2008 intended to enhance Canada’s international competitiveness.⁴ The Competition Review Panel recommended, among other things, to repeal Canada’s existing conspiracy provisions and replace them with a new two-track regime with new *per se* criminal offences to address “hard core” cartel agreements and a second track with civil provisions to deal with other (non-hard core) types of agreements between competitors that may in some cases result in anti-competitive effects.⁵ Many of the Review Panel’s recommendations were adopted last year (and swiftly passed) in a federal budget Bill.⁶

Some of the principal rationales for amending Canada’s conspiracy law included to align Canada’s regime with other major jurisdictions (notably the US),⁷ that a single (i.e., the former) criminal cartel provision was potentially too inclusive and risked chilling non-hard-core agreements and arrangements⁸ and that the burden to establish a criminal cartel under the existing rules was too

2 RSC 1985, c. C-34.

3 See, for example, the Supreme Court of Canada in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 (S.C.C.) at 648. See also Government of Canada, Competition Policy Review Panel, *Final Report: Compete to Win* (June 2008) at 58 (hereinafter “Competition Panel Final Report”). Canada has had criminal cartel rules since the late 19th century, with Canada’s first competition law legislation being passed in 1889 (a year before the American Sherman Act was passed in the US). A criminal conspiracy (commonly referred to as a “cartel”) often involves an agreement between competitors to fix prices, restrict output, allocate markets or rig bids for the provision of goods or services. Cartels are said to harm competition in that they result in higher prices, lower quality or restricted product choice.

4 Competition Panel Final Report, *ibid.*

5 See Competition Panel Final Report, *supra*, at 61, 127. While the Competition Bureau has been supporting amendments to Canada’s criminal conspiracy provisions for some time (based on the argument that the bar to enforce the previous provision was unduly high, as a result of the former competitive effects test), there has been significant debate among the competition law bar as to the ability to effectively codify *per se* criminal offences without resulting in offences which are overly inclusive (i.e., which catch pro-competitive or neutral conduct).

6 The recent sweeping amendments to the Act were passed as part of a recent budget Bill (the *Budget Implementation Act*), which received Royal Assent on March 12, 2009.

7 See Competition Panel Final Report, *supra*, at 58 where the Competition Review Panel stated: “[t]he conspiracy provisions are often described as the ‘cornerstone’ of the *Competition Act* because they address cartel behaviour such as agreements between competitors to fix prices, allocate markets or customers, or limit production. These forms of illegal collaboration between competitors are particularly damaging to the competitive process because they reduce the normal economic incentives created by competitive markets to reduce costs and innovate, key factors that influence productivity. This is particularly of concern, given that many cartels are international in scope and substantive differences in the laws of the various countries that are affected by the same cartel can give rise to enforcement complications, particularly between Canada and the U.S.”

8 See Competition Panel Final Report, *supra*, at 58-59: “[a]t the same time, criminal law is too blunt an instrument to deal with agreements between competitors that do not fall into the ‘hardcore’ cartel category, such as restrictions on advertising or strategic alliances, but that may harm competition nonetheless. A more sophisticated economic approach to address the latter has been advocated by the Bureau and other experts to deal with this category of agreements between competitors.”

high.⁹ All of these stated rationales had been the subject of significant debate by competition lawyers and enforcement officials for some years.

As of March 12, 2010, Canada now has a dual-track criminal conspiracy regime with “*per se*”¹⁰ criminal offences for “hard core” criminal agreements (i.e., price fixing, market division/allocation and supply restriction agreements) and a second civil track for non-hard core agreements that may prevent or lessen competition substantially in one or more relevant markets (and which may apply to, for example, a number of types of vertical agreements, such as joint venture, franchise, licensing and dual distribution agreements). While the burden to establish a criminal offence under the former will be significantly lower (while at the same time with increased penalties), the burden under the latter will be higher requiring a higher degree of economic analysis akin to Canada’s existing substantive merger control regime.

The amendments to Canada’s conspiracy provisions are part of broader overall sweeping changes to the Act that included:

Mergers. The adoption of a new US-style two-stage merger notification and review regime, together with increased Competition Bureau (the “Bureau”) powers to request additional information from merging parties, increased filing requirements and amplified penalties for non-compliance.

Bid Rigging. A new criminal bid rigging offence.

False or Misleading Representations. Significantly increased penalties for false or misleading representations including “administrative monetary penalties” (essentially civil fines) of up to \$750,000 for individuals and \$10 million for corporations.

Criminal Pricing Provisions. The repeal of key criminal pricing provisions, including the criminal predatory pricing and price maintenance provisions (and the replacement of the former criminal price maintenance provision with a new civil provision).

Abuse of Dominance. The introduction for the first time in Canada of significant civil fines for abuse of dominance of up to \$10 million (\$15 million for subsequent orders).

The changes to Canada’s conspiracy law is a landmark change from the former regime that made it an indictable criminal offence to conspire or otherwise agree with another person to (among other things) prevent or lessen competition “unduly” in providing goods or services in Canada (i.e., a single track with a reasonably significant competitive effects test).

Prior to the amendments, Canada had a “partial rule of reason” standard, which meant that no agreements were *per se* illegal and that some consideration of the purpose(s) and potential effects of an agreement were taken into consideration. This was in contrast to the United States, which has for more than a century had a two-track cartel regime under the *Sherman Act*—a *per se* track for “hard

9 See Competition Panel Final Report, *supra*, footnote 63: “[a] number of experts have noted the large number of guilty pleas and significant fines the government has secured over the past decade under the existing conspiracy provisions as an argument for retaining the existing law. Statistics compiled by the Bureau have shown that in 23 contested proceedings under this section conducted since 1980, the Crown has failed to secure a conviction in all but three cases. Moreover, in the period between 1993 and 2001, 88 percent of the fines imposed under the conspiracy provision received were as a result of guilty pleas in international cartel cases where the Canadian resolution was preceded by or contemporary with resolution in other jurisdictions.”

10 The term “*per se*” in relation to competition law offences means that in order to establish an offence it is not necessary to show that an agreement or other law conduct had any adverse effect on a relevant market (i.e., no competitive effects test).

core” agreements (sometimes referred to as “naked restraints”) and a second “rule of reason” track which requires that the potential pro- and anti-competitive effects of a challenged agreement be considered.¹¹

Canadian cartel cases in the past few years have involved a wide variety of suppliers including in relation to gasoline,¹² air cargo services,¹³ rubber and chemicals,¹⁴ polychloroprene rubber,¹⁵ roofing contracting services,¹⁶ hydrogen peroxide,¹⁷ graphite electrodes,¹⁸ and isostatic graphite¹⁹ among others.

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- 11 The Supreme Court of Canada held that Canada’s former criminal conspiracy provision required that four elements be established as follows: (i) the existence of an agreement to which the accused was a party, (ii) that the agreement, if carried out, would be likely to prevent or lessen competition unduly, (iii) that the accused intended to enter into the agreement and had knowledge of its terms and (iv) that the accused was aware (or ought to have been aware) that the effect of the agreement would be to prevent or lessen competition “unduly.” See *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 (S.C.C.). As a result of the recent amendments, and in particular the removal of the competitive effects test, there will likely now only be two elements to be established: (i) the existence of an agreement and (ii) intent.
- 12 In a recent Quebec gasoline price fixing case, relating to price fixing of gasoline at the pump at Victoriaville, Thetford Mines, Magog and Sherbrooke, charges were laid against eleven companies and thirteen individuals. Six of the companies pleaded guilty with fines totalling over Cdn. \$2.7 million and six individuals being sentenced to a total of 54 months in prison. See Competition Bureau, News Release, “Tenth Individual Sentenced in Quebec Price-Fixing Cartel,” December 7, 2009. See also Department of Justice, Competition Law Division, Litigation Status Report, December 9, 2009.
- 13 In a recent air cargo price fixing cartel British Airways, Air France, KLM, Martinair and Qantas pleaded guilty to fixing air cargo surcharges for shipments on certain routes from Canada (with fines totalling over Cdn. \$14.6 million). See Competition Bureau, News Release, “Fourth Guilty Plea in Air Cargo Price-Fixing Conspiracy,” July 7, 2009. See also Department of Justice, Competition Law Division, Litigation Status Report, December 9, 2009.
- 14 The Bayer Group pleaded guilty and was fined \$3.645 million in 2007 for its role in three international price-fixing conspiracies in the rubber and chemicals industry. Bayer AG was fined \$2.9 million for its part in the rubber chemicals conspiracy and \$400,000 for its role in a nitrile rubber conspiracy. Bayer Corporation was fined \$345,000 for participating in a conspiracy to fix the price of aliphatic polyester polyols. See Competition Bureau, News Release, “Du Pont Performance Elastomers Fined \$4 Million for its Role in an International Price Fixing Agreement,” September 2, 2009; Competition Bureau, News Release, “Bayer Group Fined \$3.645 Million for its Role in Three International Cartels,” October 30, 2007.
- 15 In 2007, Du Pont Performance Elastomers LLC (“DPE”) pleaded guilty and was fined \$4 million for its role in an international criminal conspiracy to fix prices of polychloroprene rubber. Between August 1999 and April 2002, DPE and its co-conspirators agreed to fix the prices of polychloroprene rubber sold in North America.
- 16 In a recent case involving the Saskatchewan Roofing Contractors Association, the Bureau obtained a prohibition order against the Saskatchewan Roofing Contractors Association for alleged conspiracy and criminal bid rigging offences under the Act, in relation to bids in response to a request for tenders for a roofing project. See Competition Bureau, News Release, “Competition Bureau Obtains Court Order Against the Saskatchewan Roofing Contractors Association,” June 22, 2009.
- 17 See Competition Bureau, News Release, “Akzo Nobel Chemicals International BV Fined \$3.15 Million for its Role in an International Cartel,” November 21, 2008. In this case, Akzo Nobel Chemicals pleaded guilty to criminal charges for fixing the price of hydrogen peroxide sold in Canada and was fined Cdn. \$3.15 million by the Federal Court.
- 18 See Competition Bureau, News Release, “SEC Carbon Pleads Guilty to Conspiracy,” November 9, 2007. In this case, SEC Carbon Limited of Japan pled guilty to participating in a cartel and was fined \$250,000 by the Federal Court of Canada. In this case, the world’s major graphite electrode manufacturers agreed to fix the prices and volumes sold in various markets and to divide world markets. Nippon Carbon Co., UCAR

Several of the key impacts of these fundamental changes to Canada’s criminal conspiracy regime include increasing the risk to smaller market players (i.e., as a result of eliminating the competitive effects test for three types of hard core anti-competitive agreements), increasing the risk of engaging in “hard core” anti-competitive conduct generally (e.g., bare price fixing, market allocation agreements or supply restriction agreements), lowering the bar for the Bureau and private plaintiffs to establish the elements of section 45 and altering the analytical framework for the review of some common forms of commercial agreements (e.g., franchise, license, dual distribution and joint venture agreements).

II. New Hard Core Criminal Cartel Offences (Section 45)

As a result of the recent amendments, three categories of agreements are now “*per se*” criminal offences under s. 45—that is, the act of certain forms of anti-competitive agreements will be presumed to be illegal without any requirement to prove any anti-competitive effects on a relevant market (or markets). All other forms of agreements among competitors will potentially be subject to review under a second and separate non-criminal reviewable matters provision.

Under the new criminal provisions, the following three types of agreements will be *per se* illegal: (a) agreements to fix, maintain, increase or control the price for the supply of a product (price fixing agreements); (b) agreements to allocate sales, territories, customers or markets for the production or supply of a product (market allocation agreements); and (c) agreements to fix, maintain, control, prevent, lessen or eliminate the production or supply of a product (supply restriction agreements). Interestingly, the new criminal conspiracy provisions omit any express reference to group boycotts which, together with bid rigging, has traditionally completed the traditionally core group of “hard core” anti-competitive forms of agreements (though the language of the new supply restriction offence is broad enough to theoretically cover concerted refusals to deal in some instances).

“Competitor” is defined broadly to include both actual and potential competitors (i.e., “a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement”). As such, agreements and arrangements between parties that are not actual competitors may also potentially be caught in some cases.

It is also worth noting that while the previous conspiracy provisions applied to both vertical and horizontal agreements (e.g., supplier-distributor-consumer *and* competitor-competitor agreements), the new criminal provisions are restricted to horizontal agreements between competitors (and potential competitors). In this regard, the ambit of the new conspiracy provisions has been narrowed. Moreover, based both on the language of the new provisions as well as the Bureau’s new enforcement guidelines, it appears that in most instances allegedly anti-competitive vertical arrangements and agreements will be more likely to be reviewable under the new (s. 90.1) and existing civil provisions of the Act (e.g., the abuse of dominance provisions) and not under the new s. 45.

While the impact of the new two-track regime is relatively clear in some cases (e.g., for hard core anti-competitive conduct), the potential implications for a variety of commercial agreements and arrangements is less clear at this point. For example, there is currently debate as to the application of the new hard core provisions to commercial agreements including joint venture, franchise, licensing and dual distribution agreements and, in particular, whether such agreements will be dealt with by the Bureau (and Canadian courts) under the criminal or civil track. In this regard, while the Bureau has issued enforcement guidelines that indicate that it will deal with such agreements in most cases under

Inc., SGL Carbon Aktiengesellschaft, Tokai Carbon Co., Ltd., Mitsubishi Corporation and two former UCAR International Inc. Executives were previously fined a total of nearly Cdn. \$25 million.

19 In 2007, Ibiden Company Limited of Japan pleaded guilty to aiding and abetting a conspiracy to fix the price of isostatic graphite. The Federal Court of Canada fined the company \$50,000. See Competition Bureau, News Release, “Japanese Company Pleads Guilty to Price Fixing,” September 19, 2007.

the civil track (discussed in more detail below), the Bureau's guidelines are not law and not binding and, as such, there is no assurance that Canadian courts or private plaintiffs in competition law private actions will necessarily follow the same approach.

III. New Civil Provision (Section 90.1)

Under the recently amended Act, agreements among competitors that are not caught by the three new hard-core criminal offences will potentially be subject to review under a new civil reviewable matters provision (i.e., non-hard core agreements which may, nevertheless, have the effect of preventing or lessening competition substantially in one or more relevant markets).

Types of agreements that may be subject to review under the new civil provision may include non-compete, research and development, joint purchasing, joint production, joint selling and commercialization, information sharing, franchise, licensing and dual distribution agreements.

Under this recently enacted provision, which is the second part of the new two-track conspiracy regime, the Competition Tribunal will have the power, on application by the Commissioner of Competition (the "Commissioner"), to make remedial orders where it is established that an agreement prevents or lessens (or is likely to prevent or lessen) competition in one or more relevant markets. In this regard, the new civil provision for anti-competitive agreements will be more akin to substantive merger review under the Act's existing pre-merger notification provisions. Unlike the new criminal provisions, however, no monetary penalties may be imposed and private parties will not have any private right of action. As such, the potential exposure for organizations under the new civil provisions will be lower.

IV. Defences

As a result of the recent amendments, a new ancillary restraints defence has been created as a defence to the new criminal offences. This defence will apply where it can be shown that: (i) the agreement is ancillary to a broader or separate agreement that includes the same parties; (ii) the agreement is directly related to, and reasonably necessary for giving effect to, the objective of the broader or separate agreement; and (iii) the broader or separate agreement does not itself constitute an offence under s. 45.

In addition, as part of the enactment of the new civil s. 90.1, a new efficiencies defense has been introduced that will apply where an agreement has resulted in (or is likely to result in) efficiency gains that are greater than, and will offset, the adverse effects of an impugned agreement (i.e., any prevention or lessening of competition that will result or is likely to result from the agreement). In this regard, the new civil provision dealing with non-criminal anti-competitive agreements will be more closely aligned with the existing merger provisions of the Act, which already contains an efficiencies defense.

Certain pre-existing defenses that will remain unchanged include the affiliate defense,²⁰ a defense for specialization agreements and for agreements relating only to the export of products.²¹

20 The Act provides that the criminal conspiracy provisions do not apply to agreements entered into by companies that are affiliates (which is the Canadian parallel to the U.S. intra-enterprise doctrine), which is meant to reflect the concept that agreements between entities that are in essence a single legal entity should not be condemned. See Act, s. 45(6).

21 Act, s. 45(5).

V. Penalties & Enforcement

The penalties for contravention of the criminal conspiracy provisions have now been significantly increased with fines of up to \$25 million (per count) and/or imprisonment for up to 14 years (increased from the previous \$10 million and/or five years imprisonment).

Moreover, the enforcement of the criminal conspiracy provisions remain a top enforcement priority for the Bureau²² and over the past 15 years there have been more than 80 convictions for cartel offences in Canada with total fines imposed of more than \$250 million (though such fines are relatively modest in comparison to other major jurisdictions, notably in relation to recent European cartel cases).

Recent penalties imposed against single corporate parties have ranged from several hundred thousand dollars to more than \$40 million in one notable case.²³ In one case (the international bulk vitamins cartel) total fines were imposed on twelve companies and several individuals of more than \$95 million. Recent penalties imposed against individuals have ranged from \$10,000 to \$250,000. In one recent case, involving a Quebec gasoline cartel, six companies and ten individuals pleaded guilty with fines totaling over \$2.7 million, with six individuals being sentenced to a total of 54 months imprisonment.²⁴

The pre-existing director and officer liability and other potential penalties remain unchanged. For example, Canadian courts may also issue so-called “prohibition orders” against companies or individuals prohibiting the continuation or repetition of an offence or ordering that steps be taken to avoid future offences and comply with the law (e.g., ordering the implementation of corporate compliance programs).

As a practical matter, however, contested criminal conspiracy proceedings are uncommon in Canada and most penalties arise as a result of plea negotiations between the Bureau and accused.²⁵ Moreover, while the imposition of prison sentences for parties that have engaged in cartel conduct has similarly been relatively rare, the Bureau is showing an increased disposition to seeking imprisonment for defendants in cartel cases. For example, in the recent Quebec gasoline cartel case, six individuals were sentenced to a total of 54 months imprisonment.²⁶

22 For example, the new Commissioner of Competition, Melanie Aitkin, recently stated: “The Bureau is committed to uncovering such anti-competitive agreements that harm Canadians, and taking criminal action against the conspirators.” Competition Bureau, News Release, “British Airways Pleads Guilty in Air Cargo Price-Fixing Conspiracy,” October 30, 2009. The Commissioner also recently stated: “Prohibiting cartels is at the core of competition enforcement and is the Bureau’s top priority.” Competition Bureau, News Release, “Fourth Guilty Plea in Air Cargo Price-Fixing Conspiracy,” July 7, 2009. See also Competition Bureau, Annual Report of the Commissioner of Competition for the Year Ending March 31, 2008 at 10; Melanie Aitken, interim Commissioner of Competition, address to the Northwinds Professional Institute 2009 Competition Law and Policy Forum (February 12, 2009).

23 The single largest fine to date against one defendant in Canada was Cdn. \$48 million in the vitamins cartel.

24 Department of Justice, Competition Law Division, Litigation Status Report, December 9, 2009.

25 In Canada, while courts have the final jurisdiction to accept or reject penalties recommended by parties, joint penalty submissions are usually accepted. An important motivator for plea negotiations is often to avoid individual penalties and imprisonment.

26 See Competition Bureau, “Individual Sentenced in Quebec Price-Fixing Cartel,” August 31, 2009. See also Department of Justice, Competition Law Division, Litigation Status Report, December 9, 2009. In addition, recently in 2008 a one year sentence to be served in the community was imposed on a defendant that plead guilty in a retail gasoline price fixing case. See Competition Bureau, News Release, “Third Individual Pleads Guilty in Quebec Gasoline Cartel Case,” October 31, 2008.

With respect to sentencing, the Bureau has recently issued a *Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases* that sets out its guidelines for determining what penalties to recommend for conspiracy offences.²⁷

VI. Immunity & Leniency Programs

The Bureau has a formal immunity program that is intended to encourage participants in criminal cartels to disclose their illegal conduct to potentially receive complete immunity from prosecution.²⁸ Immunity refers to a grant of full immunity from prosecution under the Act (in contrast to leniency, discussed below). The Bureau's immunity program is set out in its *Immunity Program Information Bulletin* (the "Immunity Bulletin"),²⁹ which outlines the Bureau's current approach to recommending immunity for companies and individuals that admit to having committed criminal offences under the Act (and cooperate in the investigation and prosecution of offences).³⁰

Under the Bureau's immunity program, the first party to disclose to the Bureau a criminal offence that is not yet detected by the Bureau (of which the Bureau is aware of but does not yet have sufficient evidence to warrant a criminal referral to the DPP) may receive immunity from prosecution from the Director of Public Prosecutions (the "DPP"). Immunity applications are made to the Bureau, which determines whether to recommend to the DPP, which has the sole authority to grant immunity to a party implicated in a criminal offence under the Act,³¹ to grant the request.

In general, a party may receive immunity where: (i) the party is the first to disclose the offence to the Bureau and the Bureau is unaware of the offence or (ii) the party is the first to disclose an offence that the Bureau is aware of, but has insufficient evidence to warrant a referral to the DPP.³²

Other requirements that a party must satisfy in order to successfully obtain immunity include: (a) terminating its participation in the illegal activity, (b) it cannot have coerced others to be a party to the illegal activity, (c) providing complete, timely and ongoing cooperation including: (i) disclosing all offences under the Act in which it may be involved (i.e., not limited to only criminal conspiracy offences),

27 Competition Bureau, *Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases* (March 25, 2009). In making sentencing recommendations for individuals, the Bureau states at 15 that it will consider a number of factors including the following: (a) the degree to which the individual personally profited from the offence, (b) sanctions against the individual for participating in other conspiracies (or the same conspiracy in another jurisdiction), (c) any other punishment and (d) the ability to pay. With respect to prison sentences, the Bureau states that it will consider making a recommendation for a prison sentence where a person: (a) was a principal instigator or leader of a conspiracy, (b) was coerced or encouraged compliance with the illegal conspiracy, (c) obstructed the investigation, (d) personally benefited from the conduct or (e) is a repeat offender.

28 The Bureau's immunity program, for example, recently led to the Bureau's investigation in a recent air cargo price fixing cartel involving British Airways, KLM, Air France and Martinair, which resulted in over Cdn. \$14 million in fines being imposed. See Competition Bureau, News Release, "Air Carriers Plead Guilty to Price-Fixing Conspiracy," June 26, 2009. The Bureau's immunity program was also used in the recent Quebec gas price fixing cartel. See Competition Bureau, News Release, "Competition Bureau Uncovers Gasoline Cartel in Quebec," June 12, 2008.

29 Competition Bureau, *Bulletin, Immunity Program under the Competition Act* (August, 2009) (the "Immunity Bulletin").

30 As a practical matter, the decision of whether to commence a prosecution rests with the Director of Public Prosecutions ("DPP"). Similarly, the Commissioner of Competition may recommend that the DPP grant immunity to the first party that comes forward and satisfies the Bureau's immunity program criteria, but the DPP has the ultimate jurisdiction to accept or reject the Commissioner's recommendation.

31 The DPP's policy regarding the granting of immunity is set out in the *Federal Prosecution Service Deskbook*.

32 Immunity Bulletin, *supra*, Section C.

(ii) providing full, complete, frank and truthful disclosure of all non-privileged information relating to anti-competitive conduct in relation to which immunity is sought and (iii) taking all lawful measures to secure the cooperation of current directors, officers and employees for the duration of the investigation.³³

In addition to the Bureau's immunity program, parties that do not qualify for full immunity may nevertheless be able to qualify for leniency for cooperating with the Bureau's investigation. In this regard, the Bureau has recently issued new draft guidelines that set out the factors it considers in making a recommendation to the DPP for lenient treatment of individuals or business organizations implicated in criminal cartel offences under the Act ("Leniency Guidelines").³⁴ The Bureau's Leniency Guidelines set out the roles of the Bureau, DPP and courts in sentencing, outlines the general sentencing principles on the basis of which the Bureau makes leniency recommendations to the DPP and establishes the eligibility conditions for participating in the Bureau's Leniency Program.

VII. Enforcement & New Enforcement Guidelines

A. Enforcement Overview

The Bureau has wide enforcement powers under the Act. These include the power to obtain search warrants (including computer searches and electronic records),³⁵ compulsory production orders,³⁶ orders compelling written returns and oral testimony³⁷ and in some cases the ability to obtain wiretaps.³⁸ Moreover, as discussed above, cartels, and in particular currently domestic cartels, remain a top enforcement priority for the Bureau.³⁹

33 With respect to director and officer liability, if a company qualifies for immunity, all current directors, officers and employees that admit their involvement in the illegal anti-competitive activity as part of the corporate admission, and that provide complete, timely and ongoing cooperation, also qualify for the same recommendation for immunity. Former directors, officers and employees that offer to cooperate with a Bureau investigation may qualify for immunity (the Bureau makes such determinations on a case-by-case basis).

34 Competition Bureau, Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases (March 25, 2009).

35 Act, s. 15. Section 15 outlines the Commissioner's powers of search and seizure, under which the Commissioner may apply to a judge of a superior or county court on an *ex parte* basis for a search warrant, authorizing the Commissioner or any person named in the search warrant, to conduct a search of premises and as well the power to copy or seize "records" (as defined in the Act). In addition, s. 16 of the Act sets out the Commissioner's powers to search computer systems. The Bureau's approach to the use of ss. 15 and 16 of the Act, relating to search warrants, is set out in its Information Bulletin, Section 15 & 16 of the Competition Act (April 25, 2008). In one recent cartel investigation relating to retail gasoline in Quebec, the Bureau used search warrants and wiretaps as part of its investigation. See Competition Bureau, News Release, "Competition Bureau Uncovers Gasoline Cartel in Quebec" (June 12, 2008).

36 Act, s. 11. See also Competition Bureau, Information Bulletin on Section 11 of the Competition Act (2005).

37 Act, s. 11.

38 Under s. 183 of the *Criminal Code*, the Commissioner may seek authorization to intercept a private communication to investigate conspiracy (s. 45), bid rigging (s. 47) and deceptive telemarketing (s. 52.1) offences under the Act.

39 For example, the new Commissioner of Competition, Melanie Aitkin, recently stated: "The Bureau is committed to uncovering such anti-competitive agreements that harm Canadians, and taking criminal action against the conspirators." Competition Bureau, News Release, "British Airways Pleads Guilty in Air Cargo Price-Fixing Conspiracy," October 30, 2009. The Commissioner also recently stated: "Prohibiting cartels is at the core of competition enforcement and is the Bureau's top priority." Competition Bureau, News Release, "Fourth Guilty Plea in Air Cargo Price-Fixing Conspiracy," July 7, 2009.

In Canada, the investigation of criminal conspiracies is the responsibility of the Bureau, while prosecutions are the responsibility of the Public Prosecution Service of Canada (the “PPSC”) that is headed by the DPP.⁴⁰ Where there is sufficient evidence of an offence, the Bureau may refer the matter to the DPP, which has the sole authority to determine whether to commence criminal proceedings.⁴¹

B. New Competitor Collaboration Guidelines

On December 23, 2009, the Bureau issued its final *Competitor Collaboration Guidelines* (“Collaboration Guidelines”).⁴² The Collaboration Guidelines, issued to coincide with the coming into force of Canada’s new criminal conspiracy rules and which replace the Bureau’s earlier Strategic Alliances Guidelines, set out the Bureau’s enforcement approach to Canada’s new two-track criminal conspiracy regime under ss. 45 and 90.1 of the Act.

I. General Analytical Framework

With respect to determining whether to evaluate agreements under the criminal or civil track, the Bureau indicates in its new *Competitor Collaboration Guidelines* that only naked restraints (i.e., bare price fixing, market allocation and supply restriction agreements) will be reviewed under the new criminal cartel provisions (s. 45). With respect to the process for review of agreements under s. 45 (hard-core criminal offences), the Bureau indicates that it will take the following approach: (i) determine whether to review the agreement/arrangement under the criminal or civil provisions, (ii) if reviewing an agreement under s. 45, determine whether in its view the new ancillary restraints defense applies, (iii) where it determines that the ancillary restraints defense applies, it may still seek a remedy under the civil provision (s. 90.1) or (iv) refer the matter to the DPP for prosecution.

Given that there no Canadian case law yet to interpret the new cartel rules or ancillary restraints defense, American jurisprudence will likely be important in the first few years to give shape to Canada’s new regime. In this regard, the US has had a two-track criminal cartel regime for over a century, with hard core agreements reviewed under a *per se* rule (encompassing for the most part bare price fixing agreements, and to a lesser extent other forms of naked restraints) with other non-hard core agreements analyzed under a second separate “rule of reason” approach that considers both the pro- and anti-competitive effects of challenged agreements.

Unlike Canada’s new regime, however, which has now expressly codified a two-track approach to criminal conspiracies, the US has over a century of case law that has interpreted its s. 1 of the *Sherman Act*, which does not explicitly set out the categories of proscribed agreements.

2. Section 45—Hard Core Anti-competitive Agreements

The Bureau indicates in its new Collaboration Guidelines that s. 45 will be reserved for the review of hard core agreements (i.e., price-fixing, market allocation and supply restriction agreements between competitors and potential competitors) while other types of agreements, such as joint venture agreements, will potentially be subject to review under the new civil provisions.

40 The PPSC was recently created by the Director of Public Prosecutions Act in 2006. Its mandate is to initiate and conduct prosecutions under federal jurisdiction and to intervene in cases affecting prosecutions and investigations. The PPSC is independent of the Department of Justice Canada and reports to Parliament through the Attorney General. The PPSC is headed by the Director of Public Prosecutions.

41 Criminal prosecutions are brought in Canadian criminal courts and, while the PPSC has official responsibility for the carriage of criminal competition matters, the Bureau will typically work alongside the PPSC during a criminal prosecution.

42 Competition Bureau, *Competitor Collaboration Guidelines* (December 23, 2009).

With respect to the existence of an agreement, the Bureau confirms existing case law (e.g., that there must be a “meeting of minds,” that informal or covert arrangements may be caught, a cartel may be proven whether or not the arrangement has been implemented and that an agreement may be established based on only circumstantial evidence). With respect to one of the most difficult and controversial areas of criminal cartels—i.e., “tacit agreements” or “conscious parallelism”—the Bureau takes the position that “parallel conduct coupled with facilitating practices, such as sharing competitively sensitive information ... may be sufficient to prove that an agreement was concluded between parties.” With respect to determining whether parties are competitors for the purposes of s. 45, the Bureau confirms that the impugned agreement must be in relation to a product in relation to which the parties compete or are likely to compete.⁴³

With respect to trade associations, the new Collaboration Guidelines indicate that there may be increased exposure for associations that facilitate anti-competitive agreements. In this regard, the Bureau states that “rules, policies, by-laws or other initiatives enacted and enforced by an association with the approval of members who are competitors, are considered by the Bureau to be agreements between competitors for the purpose of section 45.” The Bureau’s position that trade associations that facilitate anti-competitive agreements may be parties to the agreement is noteworthy for at least several respects: first, there is little actual authority for this proposition (as opposed to the Bureau’s non-binding enforcement guidelines); second, it is not clear that most (if not all) trade associations could be considered to actually compete (or potentially compete) with their members in order to fall within the new narrower horizontal prohibition under the new s. 45.

With respect to dual distribution agreements, the Bureau indicates that it will review such agreements (i.e., arrangements where a supplier may compete with one or more of its distributors) under the civil provisions of the Act rather than under the criminal provisions.

Finally, the Bureau indicates that it will generally not review the following types of common commercial ancillary restraints under the criminal provisions, but rather under the civil provisions: (i) non-compete clauses in employment agreements or asset/share agreements, (ii) agreements not to make material changes to a business prior to completing a merger and (iii) non-compete agreements between joint venture partners, where the restraint relates only to the products, services or territories covered by the joint venture. As discussed above, however, while the Bureau’s new guidelines are helpful and give some comfort in relation to the approach to many common forms of commercial agreements, its guidelines are not law and non-binding and, therefore, the Bureau may itself deviate from the guidelines. Moreover, private parties and Canadian courts are, in any event, not bound by the Bureau’s non-binding guidelines.

43 One of the most challenging issues likely to be faced by competition counsel will be what arguments can be made in situations of common control or where individuals or entities may reasonably be considered to be a single legal entity (and, therefore, that the conspiracy provisions should not apply). Whereas the US has developed an intra-enterprise doctrine, under which entities that are in fact a single legal entity may be immune from the application of the Sherman Act, it remains to be seen whether a similar doctrine will develop in Canada. This is key considering that the exceptions under s. 45, including the pre-existing bright line exception for agreements between affiliates, are relatively narrow and do not provide express exceptions for agreements in other types of commercial arrangements (e.g., for principals and agents, partnerships, etc.). The Bureau does indicate, however, that there may be some latitude for arguing that parties in other types of commercial relationships may, despite the existence of an express exception, nevertheless be considered by the Bureau to be a single economic entity (which was not present in the Bureau’s earlier draft guidelines): “[p]arties should note that this exception applies only to companies, and not partnerships, trusts or other non-corporate entities or individuals, *although the Bureau will consider the nature of any common control or relationship between the parties when determining whether referral of an agreement for prosecution is appropriate.*” (emphasis added)

3. Section 90.1—Non-hard Core Anti-competitive Agreements

With respect to the application of the new civil provision (section 90.1) for non-hard-core anti-competitive agreements, the Bureau states that in general agreements that fall within this new provision will be reviewed in a manner consistent with mergers under its existing *Merger Enforcement Guidelines* (“MEGs”). For example, the Bureau adopts very similar market share safe harbors for the new s. 90.1 to those set out for merging parties in its MEGs.⁴⁴

Moreover, the Bureau sets out a similar analytical framework to that in the MEGs for mergers for considering whether parties possess market power, with relevant factors including parties’ market shares, the likelihood of entry, foreign competition, barriers to entry and innovation. The Bureau also indicates that, in general, the new civil provision will be used to review six common forms of commercial agreements: (i) commercialization agreements, (ii) information sharing agreements, (iii) research and development agreements, (iv) joint production agreements, (v) joint purchasing agreements and (vi) non-compete agreements.⁴⁵

VIII. Private Actions & Class Actions

A. Overview

Private parties may commence three different types of proceedings under the Act: (i) private damages actions for violations of the criminal provisions of the Act (e.g., criminal conspiracy); (ii) private actions for breaches of court or Tribunal orders made under the Act; and (iii) “private access” proceedings, whereby private parties have a limited right to make applications to the Tribunal for remedial orders in relation to certain civil reviewable matters (e.g., orders to cease or modify conduct).

B. Private Damages Actions

Under s. 36 of the Act, any person that has suffered actual loss or damage as a result of a contravention of the criminal provisions of the Act may commence a private damages action.⁴⁶ Class actions are also possible for violations of the criminal provisions of the Act and have been commenced in relation to a wide variety of products.⁴⁷

44 “The Commissioner will not challenge an agreement under section 90.1 on the basis of: (i) a concern related to the exercise of market power by the parties to the agreement where the market share held by the parties represents less than 35% of the relevant market; or (ii) a concern related to a coordinated exercise of market power by firms in the relevant market where the share of the four largest firms in the relevant market is less than 65%, or the share of the parties to the agreement is less than 10% of the relevant market.”

45 These six forms of agreements generally fall into two categories: (i) non-hard-core horizontal agreements whose effects require closer scrutiny (i.e., agreements other than bare price fixing, market allocation and supply restriction agreements) and (ii) agreements that fall entirely outside the language of the new s. 45 (e.g., upstream joint purchasing agreements).

46 Unlike the US, however, only single as opposed to treble damages are available to successful plaintiffs in damages actions commenced under s. 36. Other criminal offences under which private actions can be commenced include the foreign-directed conspiracy offence (s. 46), bid-rigging (s. 47) and criminal misleading advertising (s. 52), and deceptive telemarketing (s. 52.1).

47 Class actions have recently been commenced in relation to air cargo shipping services, hydrogen peroxide and dynamic random access memory. Previous competition law class actions have been commenced in relation to, among other products, citric acid, bulk vitamins, carbonless sheets, niacin, nucleotides, sodium erythorbate, MSG, sorbates, methionine, biotin and lycine.

Private competition law actions in Canada have typically been commenced in the following contexts:

- Consumers alleging damages as a result of a conspiracy between suppliers, many of which in the past have involved international price fixing conspiracies (e.g., a price fixing conspiracy relating to a product or key input in violation of s. 45 of the Act).
- Consumers alleging damages as a result of misleading advertising claims (e.g., false or misleading claims in relation to a product, investment, other business opportunity, etc.).
- Competitors alleging damages based on misleading claims made by a competitor or alleged conspiracy entered into among other competitors.

Private parties do not have a right to commence private actions for breaches of the civil “reviewable matters” provisions of the Act, which include the merger, abuse of dominance, price maintenance and civil misleading advertising sections.

Private damages actions may be commenced in provincial superior courts or the Federal Court. As the Federal Court has limited jurisdiction, plaintiffs that wish to rely on causes of action in addition to those under the Act—for example, common law causes of action—must commence their proceedings in provincial superior court.

To determine whether a Canadian court has jurisdiction in cases involving alleged international conduct, such as international price fixing conspiracies, Canadian courts have generally employed the “real and substantial connection test.” Under this test, if a conspiracy has anti-competitive effects in Canada, a Canadian court likely will have jurisdiction, even where a conspiracy is formed abroad.

The limitation period during which plaintiffs must commence a private action under the Act is two years from the later of: (i) the day on which the relevant anti-competitive conduct was engaged in or (ii) the day when any criminal proceedings were “finally disposed of.”

To succeed in a private damages action, a private plaintiff must establish the elements of the alleged criminal offence and actual damages as a result of the defendant’s conduct. [I’ve taken this out—while this was true in the past, I just did some work on a contracts file where I looked at a SCC case that held that there is now only one civil burden—on balance, period. So this older authority may not be right.]

The absence of a prior criminal conviction does not act as a bar to parties commencing private actions. Evidence of a prior criminal conviction, unless rebutted, is proof that the defendant engaged in the impugned conduct.

Private damages actions also may be brought on a class basis in those provinces that have passed class action legislation. The test for certification of a class action in most provinces is as follows: (a) the pleadings of notice of application disclose a cause of action, (b) there is an identifiable class of two or more persons, (c) the claim of the class members raises common issues, (d) a class proceeding is the preferable procedure for the resolution of the common issues, and (e) there is a representative plaintiff that: (i) would fairly and adequately represent the class, (ii) has produced a workable plan for advancing the proceedings on behalf of the class and of notifying class members of the proceeding, and (iii) with respect to the common issues, does not have interests that may conflict with other members of the class.

Private parties do not have a right to commence private actions for breaches of the civil “reviewable matters” provisions of the Act, which include the merger, abuse of dominance, price maintenance and civil misleading advertising sections.

Private parties may, however, bring a private action for breaches of a court or Tribunal order made under the Act.

C. “Private Access” Proceedings

Private parties also have a limited right to make applications to the Tribunal (not the courts) for remedial orders in relation to the refusal to deal, exclusive dealing, tied selling, market restriction, and recently enacted civil price maintenance provisions of the Act. The application may be brought only with leave. The leave application must be brought within one year following the end of the conduct.

These private access rights were introduced in 2002 to allow small and medium sized firms to challenge allegedly harmful conduct to their businesses under provisions which have not historically been enforcement priorities for the Bureau. Since the private access provisions were introduced, approximately eleven leave applications have been commenced, the majority of these applications have been commenced under the refusal to deal provisions of the Act in relation to terminations of supply (i.e., distributors seeking re-supply for terminated supply, which can be an alternative remedy in addition to any available contractual remedies).

To grant leave in a private access application, the Tribunal must have “reason to believe that the applicant is directly and substantially affected by any practice [under the refusal to deal, exclusive dealing, tied selling, market restriction or price maintenance provisions] that could be subject of a [Tribunal order].”

Under the private access provisions of the Act, the available remedy is a Tribunal remedial order (e.g., for a supplier to commence supply on “usual trade terms” in the case of a refusal to deal). Private parties are not entitled to seek damages and costs may only be awarded in the discretion of the Tribunal.

In addition, private parties that have been granted leave from the Tribunal to commence private access applications may also file consent agreements with the Tribunal. Once filed with the Tribunal, consent agreements have the force of a Tribunal order.

D. Impact of Amendments on Private Actions

The amendments to the Act make it easier for private plaintiffs to succeed because the amendments have removed the anti-competitive effects element of the conspiracy offence. Prior to the amendments, a private plaintiff asserting a claim based on an alleged agreement to fix prices, for example, would have to establish both an agreement to fix prices and that the alleged agreement prevented or lessened competition “unduly” in one or more relevant markets (i.e., that the agreement had anti-competitive effects on one or more relevant markets). As a result of the amendments, a private plaintiff now only needs to establish one of the three types of proscribed agreements under s. 45 (i.e., a price-fixing, market allocation or supply restriction agreement) between two or more actual or potential competitors, intent and that the conduct has caused actual loss or damage. There is now no need to show any anti-competitive effects to succeed.

Additionally, recent class action jurisprudence suggests that it may be easier in the future to bring class actions on behalf of larger classes of plaintiffs. In late 2009, courts in Ontario and BC separately certified classes in cases involving allegations of price fixing. In each case, the court certified the class despite the inclusion of indirect purchasers (which has historically proved to be a significant barrier to certification).⁴⁸

48 See *Irving Paper Ltd. v. Atofina Chemicals Inc.*, [2009] O.J. No. 4021 (S.C.J.); *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503.

IX. Impacts of Amendments on Trade Associations

As a result of the recent amendments, the impact of the criminal conspiracy provisions on Canadian trade associations is also now more significant.⁴⁹ In general, some of the types of association activities that can raise competition law issues include those dealing with pricing, customers, territories, market shares, terms of sale and advertising. Some of the specific types of trade association activities that may either lead to greater competition law risk (or require alternate analysis under the new criminal conspiracy rules) include: (i) association fee guidelines, (ii) membership restrictions and association discipline, (iii) bylaws and rules relating to key aspects of competition between members, and (iv) conduct between members that could result in the formation of price fixing, market allocation or supply restriction agreements (including as a result of exchanges of competitively sensitive information among members).

One of the primary reasons that the activities of trade associations and their members will be impacted is that under the new criminal conspiracy rules, it will be possible to establish a criminal price fixing, market allocation or supply restriction offence without the necessity of showing any anti-competitive effects on a relevant market (i.e., as discussed above, the previous competitive effects test has been removed from the criminal provisions).

At the same time, for agreements and arrangements involving trade associations and their members that do not clearly fall into the three new categories of “hard core” cartel offences, a more sophisticated and economics-oriented analysis will be required in some cases (i.e., to determine whether a particular agreement or arrangement falls within the new ancillary restraints defense or, alternatively, should be reviewed under the new civil s. 90.1).

Finally, the Bureau has recently issued draft enforcement guidelines dealing specifically with trade association activities (*Draft Information Bulletin on Trade Associations*) (the “Association Guidelines”).⁵⁰ According to the Bureau, the new guidelines are “meant to provide information and guidance on how the Act could apply to activities conducted by trade associations and their members that may raise concerns under the Act” and “provides an overview of the key provisions which could apply to these activities, and best practices that trade associations can adopt to avoid contravening the Act.”⁵¹

While the Association Guidelines set out the Bureau’s position on the application of the Act overall to trade association activities, the application of the criminal conspiracy provisions to trade association activities are a key component of the new guidelines. In this regard, the Association Guidelines outline the elements to establish an offence under s. 45, set out examples of association conduct that can in some instances potentially raise competition law issues under the Act (e.g., information sharing, association meetings, membership restrictions, fee guidelines, etc.) and provide guidelines for trade association compliance programs including illustrative past trade association cases.

While the new draft guidelines provide insight into the Bureau’s enforcement approach to trade association activities, they also signal a more formalized enforcement approach to its application of the Act to association activities.

49 There are no specific provisions of the Act dealing with trade associations. However, some of the general provisions that are particularly relevant to trade association activities include the criminal conspiracy, bid rigging, misleading advertising, bid rigging and abuse of dominance provisions—all of which have recently changed.

50 Competition Bureau, Bulletin, *Draft Information Bulletin on Trade Associations* (October 24, 2008).

51 Competition Bureau, News Release, “Competition Bureau Seeks Comments on Draft Trade Associations Bulletin,” October 24, 2008.

X. Conclusion

The recent amendments to the Act are highly significant and change the playing field for Canadian firms and international firms doing business in Canada. Some of the specific impacts include:

- Increasing the potential liability associated with “hard core” cartel conduct (i.e., price fixing, market allocation and supply restriction agreements) as a result of the lower burden to establish a criminal cartel.
- Affecting the drafting and review of common types of commercial agreements, including joint venture, strategic alliance, dual distribution, franchise and license agreements.
- Impacting the activities of Canadian trade associations and their members, particularly activities in relation to pricing, marketing and advertising and membership criteria.
- Potentially leading to an increase in private actions and class actions under the Act as a result of removing the competitive effects test from s. 45.
- Increasing compliance costs for companies as a result both of the substantive changes and risk of significantly increased penalties.
- Requiring Canadian competition counsel and the Bureau to engage in a more economic-based approach to reviewing agreements and commercial arrangements between competitors (and potential competitors).