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Canada – Cartel Enforcement

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Canada has a long history of prosecuting cartel behaviour. Legislation to this effect was first enacted by the Canadian parliament in 1889, a year before the Sherman Act was passed in the United States. In 1892, Canada's competition legislation was incorporated into the Criminal Code, where it remained until 1960 and the enactment of the Combines Investigation Act. In 1986, Canada's competition legislation underwent substantial reform, with the passage of the current Competition Act (the Act).[1] Key changes included the decriminalisation of merger review and the shift from criminal sanctions against monopolies to non-criminal abuse of dominance provisions. However, cartel-like conduct remained subject to criminal sanction.

The Supreme Court of Canada has described the cartel prohibition as 'one of the pillars' of Canadian competition legislation and has stated that this prohibition is 'central to Canadian public policy in the economic sector'.[2] Various heads of Canada's Competition Bureau have also made it clear that combating cartels, both domestic and international, is a top-enforcement priority.[3] As a reflection of this commitment, there have been over 80 corporate and individual convictions or cartel-related offences in the past 15 years, involving fines of approximately C$250 million. Most notable in this regard were the convictions imposed in connection with the international bulk vitamins cartel, in which the aggregate fines levied against 12 corporations and three individuals exceeded C$95 million, including the largest-ever fine to be imposed against a single defendant (C$48 million).

Asian companies have been well represented in the ranks of those convicted of cartel offences in Canada. Approximately 25 per cent of the convictions imposed in the past decade in Canada have involved Asian-based entities, their Canadian affiliates or individual executives.[4] Moreover, the Competition Bureau continues to cooperate with its counterparts in Asian jurisdictions to investigate and prosecute cartel behaviour affecting their respective jurisdictions. Given both this history and the current enforcement environment in both Canada and Asia, it is important for Asian corporations and their advisers to have an understanding of Canada's cartel law and its potential implications for their businesses.

The cartel offence in Canada

The key criminal provision in the Act prohibiting cartel behaviour is currently section 45(1)(c), which makes it an indictable criminal offence to conspire or otherwise agree with another person to, among other things, prevent or lessen competition 'unduly' in the provision of a good or service in Canada. As such, section 45(1)(c) does not create a per se offence; a negative (undue) impact on competition must be demonstrated.[5] Examples of agreements or arrangements to which section 45(1)(c) may apply include those that fix, manipulate or manage prices; modify or eliminate rivalry for customers' business; limit or fix production quantities; allocate customers or territories; restrict or discourage new rivals from entering into the market; implement group boycotts; and coordinate or otherwise manage the granting of trade credit.[6]

Beginning in March 2010, however, new cartel provisions will come into force, creating a per se criminal offence for agreements between competitors to fix prices, affect production or supply levels of a product, or allocate sales, customers or territories.[7] Liability can still be avoided, however, if the agreement is ancillary to a broader agreement that does not contravene the new conspiracy offence and is necessary for giving effect to the objective of that broader agreement. At the same time, the Act will contain a new civil provision that applies to agreements between competitors that are not caught by the new per se offence but that have the effect of lessening or preventing competition substantially. Under this provision, the commissioner of competition can apply to the Competition Tribunal for a remedial order where an agreement between competitors is likely to have this effect in a market.[8]

Elements of the current cartel offence

As a matter of Canadian criminal law, the prosecution (or Crown) must prove each and every element of an offence beyond reasonable doubt for a court to render a guilty verdict. In *PANS*, the Supreme Court of Canada held that the following elements must be proven to establish the offence under section 45(1)(c): the existence of a conspiracy, combination, agreement or arrangement to which the accused was a party; that the conspiracy, combination, agreement or arrangement, if implemented, would likely prevent or lessen competition unduly (although it is not necessary to prove that the accused intended to lessen competition unduly); that the accused had the intention to enter into the agreement and had knowledge of the terms of that agreement; and that the accused was aware or ought reasonably to have been aware that the effect of the agreement would be to prevent or lessen competition unduly.

The Supreme Court of Canada in *PANS* characterised section 45(1)(c) as mandating a 'partial rule of reason' inquiry. It operates according to a 'rule of reason' given that there is no per se violation. The rule of reason analysis is only 'partial', however, in that there is not a full-blown consideration of efficiencies. As the court stated, 'considerations such as private gains by the parties or counterbalancing efficiency gains to the public lie [...] outside of the inquiry under [section 45]. Competition is presumed by the Act to be in the public benefit'.

Agreement

With respect to the first element (the existence of an agreement), Canadian courts have held that the mere intention or design on the part of one or more parties to effect an anticompetitive agreement or arrangement, or even discussions to that effect, will not contravene section 45 so long as they do not culminate in an agreement. At the same time, however, once an agreement has been entered into, it is not necessary for the Crown to prove that the agreement was implemented or that steps were taken in furtherance of the agreement. In essence, 'the crime is in the conspiracy', not in the acts that it contemplates, although such acts may serve as evidence of the agreement.[9]

Undue lessening or prevention of competition

With respect to the second element (undue lessening or prevention of competition), the Supreme Court of Canada held in *PANS* that it is the combination of market power and injurious behaviour that makes a lessening or prevention of competition 'undue'; the greater the market power, the less injurious the behaviour need be, and vice versa. The assessment of market power is similar to that under other sections of the Act, including mergers and abuse of dominance, and involves considerations such as market definition and shares, number and size of competitors, barriers to entry, geographical distribution of buyers and sellers, product differentiation, countervailing power and cross-elasticity of demand. As to whether the parties' behaviour qualifies as 'injurious', agreements that involve price fixing, restrictions on output or market sharing will be viewed as constituting clearly injurious behaviour. Further, agreements in respect of product quality, service, promotional activity or innovation may also be injurious where such considerations are an important determinant of competitive rivalry.

Proof of the 'undueness' element of the conspiracy offence is often difficult. Recently, for example, the Bureau had a case dismissed at the preliminary inquiry stage when the Crown failed to satisfy the presiding judge that an arrangement between taxi companies to refrain from bidding on municipal contracts put up for tender had the effect of unduly preventing or lessening competition. In particular, the judge held that the prosecution had not set forth a clear definition of the relevant market or adequately demonstrated how the agreement would have an 'undue' impact on competition in that market. The preliminary inquiry judge's decision was upheld on review.[10]

Current defences and exemptions

The Act currently contains a number of exemptions to the conspiracy provisions, including, for example, if the agreement or arrangement relates to the exchange of statistics or credit information, cooperation in research and development or defining product standards. In general, these exemptions apply only if the agreement has no undue effect on competition in Canada with respect to prices, quantity or quality of production, markets or customers, or channels or methods of distribution. In addition, subject to certain exceptions, a party cannot be convicted under the conspiracy provisions if an agreement relates only to the export of products from Canada. The Act also provides a system for registering 'specialisation agreements' with the Competition Tribunal, which has the effect of exempting the application of section 45. Unfortunately, specialisation agreements are narrowly defined as agreements whereby each party agrees to discontinue producing an existing product. Thus, the exemption does not cover, for example, situations in which parties contemplate a broader degree of collaboration or seek an agreement with regard to anticipated or future products.

Section 45 also does not currently apply to agreements that are entered into by companies each of which is, in respect of every one of the others, an affiliate. This is analogous to the 'intra-enterprise' doctrine in US law. Criminal proceedings under section 45 are also precluded if civil proceedings have already been commenced under either the Act's abuse of dominance or merger provisions.

The new cartel offence

In March 2009, Canada's federal government passed legislation to make far-reaching amendments to the Act, including the conspiracy provisions.[11]

The legislation repeals the existing conspiracy provisions and replaces them with a per se criminal offence for agreements between competitors to fix prices, affect production or supply levels of a product, or allocate sales, customers or territories. Unlike the current conspiracy provision, the new offence does not require proof that the conspiracy, if implemented, would prevent or lessen competition unduly. However, liability can still be avoided if the agreement is ancillary to a broader agreement that does not contravene the new conspiracy offense and is necessary for giving effect to the objective of that broader agreement. Maximum penalties under the new provision are 14 years imprisonment and a C$25 million fine, up from the current maximum of five years and C$10 million.

At the same time, the Act will contain a new civil provision that applies to agreements between competitors that are not caught by the new per se offence but that have the effect of lessening or preventing competition substantially. Under this provision, the commissioner of competition can apply to the Competition Tribunal for a remedial order where an agreement between competitors is likely to have this effect in a market.

Some of the current defences, including those available if the agreement or arrangement relates to the exchange of statistics or credit information, cooperation in research and development or defining product standards have been removed from the new cartel provisions. Other exceptions, including those for specialisation agreements, agreements between affiliates and agreements relating only to the export of products from Canada, will remain. Additionally, the new civil provision will include an 'efficiencies' defence, which can be relied on if the agreement has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the agreement.

The new conspiracy provisions will come into force in March 2010, one year after the amending legislation was enacted. While there is no indication that the new conspiracy provisions purport to apply retroactively, they will apply to agreements already in existence at the time the provisions come into force. During the one year transition period, parties may, at no cost, apply to the Bureau for an opinion on the applicability of the new conspiracy provisions to existing agreements, as if the agreement or arrangement had not yet been entered into.

Investigations and prosecutions

The Bureau has considerable powers at its disposal to investigate alleged conspiracies, such as the authority to obtain judicially authorised search warrants (including computer searches), document production orders, orders compelling testimony and written returns under oath, and wiretaps.[12] The Act also includes specific provisions designed to protect 'whistleblowers' and makes it an offence to obstruct a Bureau investigation.[13]

There are still many unresolved questions about the Bureau's ability to use its broad investigative powers against parties located outside Canada. For example, it is by no means clear that a judge would have the jurisdiction to issue one of these orders against an entity or individual not present in Canada. Quite apart from the jurisdictional issues, there also would be the practical difficulties of enforcing such an order even if it could be properly issued.[14] Another unresolved issue is the extent to which a search warrant may authorise the Bureau to use a Canadian company's computer system to access records located in the database of a foreign affiliate.

Although the Competition Bureau is responsible for investigating alleged conspiracies, it does not prosecute criminal violations of the Act. Prosecution is the responsibility of the Public Prosecution

Service of Canada (PPSC), which is headed by the director of public prosecutions (DPP).[15] The Bureau will refer criminal matters to the DPP, who then must decide whether it is in the public interest to commence proceedings. Prosecutions under the Act are brought in the regular criminal courts. Although the DPP has official carriage of these cases, Bureau officers will work closely with counsel for the DPP throughout the prosecution process.

There is no statute of limitations in Canada for indictable criminal offences, such as the conspiracy offence. Therefore, while a party could conceivably benefit from the passage of time to escape prosecution in other jurisdictions (such as the United States), the same party could still face prosecution in Canada under section 45.

Penalties and sentencing

Parties convicted of contravening section 45 are currently liable to a fine not exceeding C$10 million per count or to imprisonment for a term not exceeding five years, or to both. Under the new cartel offence, the maximum penalties will increase to C$25 million per count or 14 years' imprisonment, or both. Courts also may impose 'prohibition orders', which are judicial orders that forbid the repetition or continuation of the offence. Prohibition orders also may include 'prescriptive terms' requiring that positive steps be taken to ensure adherence with the law and the prevention of future offences (eg, the establishment of a compliance programme).

There has been a marked escalation in recent years in the quantum of corporate fines imposed in Canada for conspiracy offences. The Bureau also remains committed to pursuing sanctions against individuals, on the basis that holding corporate executives and employees personally responsible for anticompetitive conduct is the most effective way to deter such behaviour. Although the Bureau has stated that it will seek jail sentences against individuals in appropriate circumstances, the general reluctance of Canadian courts to sentence white-collar criminals to prison means that monetary fines are the most common type of sanction faced by corporate executives and employees for participating in unlawful cartels. Jail sentences are still imposed, however. For example, in late 2008, a 12-month sentence (to be served in the community) was imposed on a defendant after he pleaded guilty to engaging in price fixing in the retail gasoline market.[16] The Bureau is also committed to pursuing other avenues of establishing personal accountability, including obliging culpable employees to be dismissed or demoted and registering individuals convicted of cartel offences with the Canadian Police Information Centre in order to restrict their ability to travel across international borders.[17] Further, Canadian authorities have shown a willingness to extradite persons charged with competition law offences abroad. For example, in 2008, a US court sentenced the operator of a Canadian-based telemarketing scheme to 15 years in prison following that person's extradition from Canada.[18]

There are no formal sentencing guidelines in Canada pursuant to which penalties for conspiracy and other criminal offences under the Act may be determined. Rather, the courts are guided by the general principles of sentencing as set out in the Criminal Code (which apply to all criminal offences) and by certain principles developed by the case law specifically in relation to competition law offences. Among the considerations that courts will take into account in this regard are: the need to maintain and encourage competition; the objective of deterring both the specific accused and the general public from committing the offence; that the sentence must be severe enough so as not to be regarded as 'merely a licence fee'; and that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the accused. Additional specific factors include the duration of the offence; the accused's role in the offence; the market share of the accused; and the potential harm to consumers.[19]

The Bureau's approach to sentencing in cartel cases is set out in a draft information bulletin that was issued in April 2008.[20] Apart from the general principles set out above, the key factor that the Bureau will consider in recommending a sentence to the DPP is the overall economic harm that was caused. 'Economic harm' is not limited to an effect on prices. According to the Bureau, cartels also can have a general, negative economic impact by reducing competition and inhibiting innovation.

Since it is generally difficult to quantify the degree of economic harm caused by a cartel, the Bureau will typically use as a proxy the 'volume of commerce' in Canada affected by the cartel multiplied by an 'overcharge' factor. To ensure adequate deterrence, the Bureau generally starts with an overcharge factor of 20 per cent as its multiplier. However, the Bureau may use a different figure as a starting point where, in the Bureau's judgment, a 20 per cent multiplier either would significantly overstate or understate the economic harm done.

There may be cases where the proxy calculation of a percentage of volume of commerce is not suitable to approximate the economic harm caused by the cartel in Canada. For example, this may occur where the cartel participant agreed to refrain from doing business in Canada and thus had no Canadian volume of commerce. In those circumstances, the Bureau will consider other factors in order to arrive at an amount representative of the economic harm caused by the cartel participant. These factors include the size of each cartel participant, the Canadian volume of commerce of the other participants, and historic market share figures.[21]

The Bureau's sentencing recommendations will also reflect aggravating or mitigating circumstances for each potential accused, including: recidivism; coercion or instigation; large corporate size or market share; the degree of planning, covertness and complexity; obstruction; the duration of the conspiracy; the nature of the victims; involvement of senior officers; cooperation with authorities; acceptance of responsibility; and restitution of the victims.

In keeping with its commitment to individual sanctions, when developing sentencing recommendations for individuals, the Bureau will have regard to factors such as:

- the degree to which the individual personally profited from the offence (including salary, bonuses and career enhancement);
- sanctions, if any, against the individual for participating in other cartels or the same cartel in another jurisdiction;
- any other punishment (such as loss of employment); and
- ability to pay.

The Bureau may recommend prison sentences where the individual:

- was the primary instigator of the cartel;
- used coercion or otherwise encouraged compliance with the illegal arrangement;
- obstructed the Bureau's investigation;
- gained personal benefit from the unlawful conduct; or
- is a recidivist.

As a practical matter, virtually all penalties imposed in Canada for conspiracy and related offences under the Act are the product of plea negotiations between the accused and the Competition Bureau or the DPP. That is because contested prosecutions involving these offences are exceedingly rare. Although the courts retain the ultimate jurisdiction to reject any penalty that the parties propose, joint submissions on penalty are almost always accepted.

Extraterritorial jurisdiction

The territorial scope of section 45 has not been definitively determined by the courts, because foreign-based cartel participants often voluntarily attorn to the jurisdiction of Canada's courts as part of negotiated resolutions with the Bureau. That said, one decision has taken a broad view of the extent of substantive jurisdiction under section 45. In that case, a motion was brought by the defendants to challenge a class action commenced in relation to the bulk vitamins conspiracy.[22] Five foreign defendants argued (among other things) that the court lacked jurisdiction because the agreements in question were made outside of Canada. The court rejected this argument and held that the language of section 45 is not expressly limited to conspiracies within Canada and that a conspiracy that injures Canadians can give rise to liability in Canada even if the conspiracy was entered into abroad. This decision is consistent with the enforcement position of the Bureau and DPP, which is that section 45 applies regardless of whether an agreement was entered into in Canada so long as its effects are felt or were intended to be felt in Canada. It must be emphasised, however, that this issue is yet to be properly litigated.

Even if there is broad substantive jurisdiction under section 45, there are significant questions about whether a Canadian court could assert personal jurisdiction over a foreign entity with no presence in Canada, but whose conduct may have had effects inside Canada. For example, the general rule is that criminal process (eg, an indictment) cannot be served on a party outside Canada, unless expressly authorised by enabling legislation. Since the Act does not appear to authorise extraterritorial service of criminal process, there are serious doubts about whether the Bureau or DPP could indict a foreign party with no presence in Canada. Again, as a practical matter, these issues are often avoided by foreign entities voluntarily attorning to Canadian jurisdiction as part of their settlements.

The Competition Bureau's immunity and leniency programmes

The Bureau's success in obtaining cartel convictions in recent years is due in large part to the availability of its immunity programme, which encourages cartel participants to disclose their illegal conduct in exchange for potential immunity from prosecution. To illustrate, the Bureau has stated that it has received about eight to 10 immunity applications per year since its immunity programme was formally established in 2000.

The Bureau's immunity programme is loosely modelled on the US amnesty programme and is also broadly similar to the leniency programmes in jurisdictions such as Australia, New Zealand, Japan and South Korea. The Bureau's immunity programme is described in an Information Bulletin, which was revised in October 2007.[23]

Requests for immunity are made to the Bureau, which then decides whether to recommend to the DPP that the request be granted. All else being equal, the Bureau will provide a positive recommendation to the DPP where a party is the first to come forward with evidence of an offence of which the Bureau is unaware, or is the first to bring forward evidence of an offence of which the Bureau is aware but has not yet obtained sufficient proof to warrant a criminal referral. However, being 'first-in' to the authorities in another jurisdiction will not be sufficient in and of itself to permit a party to take advantage of the Bureau's immunity programme.

There are additional specific requirements that a party seeking immunity must fulfil: the party must take effective steps to terminate its participation in the illegal activity; the party must not have taken steps to coerce unwilling participants to engage in the cartel; the party must reveal any and all offences under the Act in which it may be involved (ie, not only the specific offence at issue in the immunity application); the participant must provide full, frank and truthful disclosure of all the evidence and information known or available to it or under its control with respect to these offences; and the party must agree to provide timely, full and continuous cooperation to the authorities for the duration of the Bureau's investigation and any ensuing prosecutions (for corporate applicants, this means taking all lawful measures to promote the continuing cooperation of directors, officers and employees).[24] Failure to comply with any of these requirements may result in the DPP revoking immunity and a subsequent party being entitled to claim immunity instead.

When a company qualifies for immunity, its present directors, officers and employees who admit their involvement in the illegal activity and who provide complete and timely cooperation will also qualify for immunity. However, past directors, officers and employees will be considered on a case-by-case basis.

Immunity requests are treated as highly confidential by the Bureau and the DPP. As a general rule, the identity of a party requesting immunity, and any information obtained from that party, will not be disclosed except where:

- there has already been public disclosure by the party;
- disclosure is for the purpose of the administration and enforcement of the Act and the party has provided its consent;
- disclosure is required by law; or
- disclosure is necessary to prevent the commission of a serious criminal offence.

Even if a party does not qualify for full immunity for prosecution, it still may be able to obtain more lenient treatment in terms of reduction in penalty. The Bureau's leniency approach is set out in a draft bulletin on Sentencing and Leniency in Cartel Cases (a revised draft bulletin is expected to be published by April 2009).[25]

According to the Draft Bulletin, the Bureau will recommend leniency where the DPP has not yet filed criminal charges against the party, and where the party has terminated its participation in the illegal activity, cooperates with the Bureau's investigation and any subsequent prosecution, and admits guilt. The timeliness of the party's cooperation and the value of the evidence offered will be important considerations in determining the level of reduction. The first party eligible for a leniency recommendation will generally receive a reduction of up to 50 per cent of the fine that otherwise would have been recommended and subsequent applicants up to 30 per cent.

International cooperation

Canada has entered into several state-to-state treaties and inter-agency agreements to promote and facilitate cooperation in, among other things, cartel investigations. For example, Canada has agreements of this kind with Australia, New Zealand, Japan and, most recently, South Korea. The Bureau has used these mechanisms to request the production of evidence located in other jurisdictions and to request assistance to compel the attendance of witnesses for examination under oath.

Cooperation between the Bureau and its counterpart agencies also takes place at a more informal level (eg, coordinating simultaneous investigations in several jurisdictions). A well-publicised example of this type of effort took place in February 2006 when the Bureau, South Korea's Fair Trade Commission, the European Commission and the Antitrust Division of the US Department of Justice coordinated their investigations into the cargo operations of certain airlines.[26]

Private actions

Section 36 of the Act provides a statutory right of civil action to claim damages and costs for losses suffered as a result of criminal conduct under the Act, such as conduct covered by the conspiracy provisions. Although treble damages are not available, the potential exposure for cartel participants remains considerable, particularly in view of the growing number of class action proceedings that are being commenced in respect of cartel offences. For example, class actions have been brought in Canada against parties having participated in cartels affecting products such as lysine, citric acid, bulk vitamins, biotin, methionine, niacin, choline chloride, nucleotides, sodium erythorbate, sorbates, MSG and carbonless sheets, among other products. Recently, class action proceedings were filed against parties alleged to have participated in cartels affecting airfreight cargo shipping services and chocolate confectionery. However, no contested class action claim involving an international cartel has yet been certified, let alone gone to trial. To the extent that any certification has been granted, it has been in the context of settlement rather than contested litigation.

It should be noted that 'indirect' purchaser claims are technically permissible under Canadian law. However, indirect purchaser class actions will only be certified if it can be demonstrated on a class-wide basis that a portion of the alleged overcharge was passed on to all members of the putative class. The plaintiff has the onus of demonstrating harm on a class-wide basis, and can do so only by establishing pass through to the indirect class, which is a fairly high hurdle to meet.[27] In practice, therefore, indirect claims are brought in conjunction with direct purchaser claims rather than on a stand-alone basis.

Notes

1 RSC 1985, c C-34.

2 *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at 648 [hereinafter *PANS*].

3 See, eg, Melanie L Aitken, interim commissioner of competition, address to the Northwinds Professional Institute 2009 Competition Law and Policy Forum (February 12, 2009), available at www.competitionbureau.gc.ca. The Competition Bureau is the federal government agency that investigates allegations of anticompetitive behaviour in Canada. The Bureau is headed by the commissioner of competition, who is responsible for the administration and enforcement of the Act.

4 Two Japanese companies pleaded guilty to cartel offences in Canada in 2007. As noted above, Ibiden pleaded guilty in September 2007 to aiding and abetting a conspiracy involving isostatic graphites. It was fined C$50,000. On 9 November 2007, the Competition Bureau announced that SEC Carbon Ltd had pleaded guilty to participating in a global conspiracy affecting the sale of graphite electrodes in Canada. Specifically, SEC Carbon had agreed to refrain from selling graphite electrodes into Canada between 1992 and 1997 to support the cartel. The company was fined C$250,000.

5 It should be noted that section 45(1)(b) makes it an offence to 'enhance unreasonably' the price of a product. The Bureau has expressed the view that this creates a separate offence under section 45 that does not require the demonstration of an undue lessening or prevention of competition. The Bureau alleged violations of both sections 45(1)(b) and (c) as the basis for obtaining search warrants in a recent cartel investigation. To date, however, no prosecution has been brought on the basis of section 45(1)(b).

6 The Act currently contains several additional criminal offences that can extend to cartel behaviour. These include bid rigging and 'foreign directives'. Bid rigging is a per se offence. The scope of the bid rigging provision was recently increased as part of broad Competition Act amendments to include the withdrawal of a bid. The foreign directive provision makes it an offence for a corporation carrying on business in Canada to implement a directive or instruction from a person outside Canada to give effect to a foreign conspiracy that would be illegal in Canada. The offence can occur even if directors or officers in Canada were unaware of the foreign conspiracy. This happened to executives of Morganite Canada, who were convicted even though they were simply implementing directives of an affiliate in Wales and were unaware of any illegal agreement. Cartel participants also may find themselves charged under various 'inchoate offences' in the Criminal Code. For example, Mitsubishi Corporation was fined in 2005 for 'aiding and abetting' the implementation of a foreign-directed conspiracy in Canada contrary to section 21 of the Criminal Code. *R v Mitsubishi Corporation* (2005), 40 CPR (4th) 333 (Ont SCJ). Similarly, Ibiden Co Ltd was fined in September 2007 for aiding and abetting a conspiracy to fix the price of isostatic graphites, a fine grain carbon product. Until recent amendments, price maintenance was also a criminal offence. That provision was repealed, however, and price maintenance is now dealt with as a 'reviewable' civil provision. Unlike other civil provisions in the Competition Act, under the new price maintenance provision private parties are also allowed to apply to the Competition Tribunal for remedies.

7 Bill C-10, Budget Implementation Act, 2009, 2nd Sess, 40th Parl, 2009.

8 The Competition Tribunal is a specialised administrative body established pursuant to the Competition Tribunal Act, RSC 1985, c 19 (2nd Supp). Broadly speaking, its mandate is to adjudicate applications brought under the Act's civil 'reviewable practices' provisions. These include matters such as abuse of dominance, mergers, certain types of distribution practices (eg, exclusive dealing and tied selling) and, as of 12 March 2010, agreements among competitors that do not involve a per se criminal offence but that substantially prevent or lessen competition.

9 Section 45(2.1) of the Act expressly permits a court to infer the existence of a conspiracy from circumstantial evidence, although the existence of the conspiracy must still be proven beyond a reasonable doubt. This provision will remain after the new cartel provisions take effect.

10 *R v Bugdens Taxi*, available at www.canlii.org.

11 Supra note 7.

12 For example, in its investigation into price fixing in the retail gasoline market in parts of Canada, the Bureau employed wiretaps along with search warrants and other investigative tools. See Competition Bureau, 'Competition Bureau Uncovers Gasoline Cartel In Quebec' (12 June 2008), available at www. competitionbureau.gc.ca. For additional discussion of the Bureau's approach to these enforcement powers, see its Information Bulletin on section 11 of the Act (document production orders, compulsory testimony and written returns under oath) and its draft Information Bulletin on sections 15 and 16 of the Act (search and seizures). Both documents are available at www.competitionbureau.gc.ca.

13 Obstruction is also an offence under the Criminal Code. In 2004, for example, The Morgan Crucible Company was fined for wilfully providing false and incomplete evidence to Bureau officials investigating an international cartel involving carbon brushes and current collectors. More recently, criminal charges for obstruction and destruction of documents were brought against an individual who allegedly removed and destroyed papers from his agenda that were relevant to a Bureau investigation. The maximum penalties for obstruction have recently been increased as part of the same amendments that will usher in the new cartel offence.

14 Note, however, that an order for the production of documents against a corporation in Canada may extend to non-Canadian affiliates of that corporation. See subsection 11(2) of the Act. Canada is also party to various mutual assistance treaties and cooperation agreements pursuant to which it may seek the aid of competition enforcement agencies in other jurisdictions to gather evidence on its behalf.

15 The PPSC is independent of the Federal Department of Justice and reports to parliament through the attorney general of Canada.

16 Competition Bureau, 'Third Individual Pleads Guilty in Quebec Gasoline Cartel Case' (31 October 2008), available at: www.competitionbureau.gc.ca.

17 The penalties in a 2006 domestic cartel prosecution are worth noting in this regard. In that case, key personnel involved in the impugned conduct were ordered removed from their positions, leading the commissioner to comment that 'corporate executives and employees [should be] on notice that they are accountable for their actions.' Competition Bureau News Release, 'Competition Bureau Investigation Leads to Record Fine in Domestic Conspiracy' (9 January 2006), available at www.competitionbureau.gc.ca.

18 Competition Bureau, '15 Years in Jail for Canadian Extradited to US in Deceptive Telemarketing Case' (18 December 2008), available at: www.competitionbureau.gc.ca.

19 See for example, *R v Mitsubishi Corporation*, supra, note 6.

20 Competition Bureau, Draft Information Bulletin on Sentencing and Leniency in Cartel Cases (28 April 2008), available at www.competitionbureau.gc.ca.

21 In the graphite electrode conspiracy, for example, both Tokai Carbon Co Ltd and Nippon Carbon Co Ltd supported the parties' price-fixing scheme in Canada by agreeing not to sell their product into the Canadian market. Tokai pleaded guilty and was fined C$250,000, while Nippon paid C$100,000 following its own guilty plea, even though neither had any 'relevant volume of commerce' in Canada.

22 *VitaPharm Canada Ltd v F Hoffman-La Roche Ltd*, (2002) 20 CPC (5th) 351.

23 Competition Bureau, Bulletin on the Immunity Program under the Competition Act (October 2007), available at www.competitionbureau.gc.ca. See also, Competition Bureau, Immunity Program Responses to Frequently Asked Questions, available at www.competitionbureau.gc.ca.

24 Immunity applicants should also expect to be asked if they are or were involved in any non-competition offences that could impact negatively on their credibility as witnesses.

25 Supra note 20.

26 See, for example, Denyse Mackenzie, International Cartel Enforcement Sans Frontières, Insight International Competition Law Conference (May 2006), available at www.competitionbureau.gc.ca.

27 *Pro-Sys Consultants Ltd v Infineon Technologies AG*, 2008 BCSC 575.

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Jim Dinning is an associate in the Toronto office of Davies Ward Phillips & Vineberg LLP, where he is a member of the firm's competition and foreign investment review group. Jim has experience in a variety of competition law areas, including mergers, cartel and abuse of dominance investigations and misleading advertising matters. Notably, Jim was involved in the representation of BHP Billiton in its proposed acquisition of Rio Tinto Group, the Wells Fargo & Company acquisition of Wachovia Corporation in a deal valued at US$11.7 billion and he participated in matters relating to Canada Pipe Co Ltd's defence of abuse of dominance proceedings brought by the Competition Bureau.

Mark Katz
Davies Ward Phillips & Vineberg LLP

Mark Katz is a partner in the Toronto office of Davies Ward Phillips & Vineberg LLP, where he is a member of the firm's competition and foreign investment review group. Mark has advised domestic and international clients on a wide variety of competition law matters such as mergers and acquisitions, criminal cartel investigations, joint ventures, abuse of dominance, distribution and pricing practices, misleading advertising and compliance. Mark also has appeared at every level of court in relation to competition matters, up to and including the Supreme Court of Canada and has acted as counsel on several leading cases before the Competition Tribunal, including the first abuse of dominance and merger cases heard by that body. Mark also provides advice with respect to the application of the Investment Canada Act.

Some of the public matters in which Mark has been involved include the Wells Fargo & Company acquisition of Wachovia Corporation in a deal valued at US$11.7 billion; the acquisition by Dubai Ports World of P&O; the acquisition by Xstrata Plc of Falconbridge Ltd; acting as counsel to Google Inc in connection with its proposed services agreement with Yahoo! Inc; and acting as counsel to Stolt-Nielsen SA in connection with the resolution of an investigation by the Competition Bureau into alleged anticompetitive conduct in the supply of parcel tanker shipping services. Mark is an active member of several professional organisations, including the Canadian Bar Association's competition law section and the antitrust and international sections of the American Bar Association.