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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. In March 2010, significant amendments to the Act's cartel prohibition came into force with the introduction of a per se criminal offence for certain 'hard-core' cartel behaviour and a new civil provision governing other agreements between competitors that are likely to prevent or lessen competition substantially.

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 (the 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 90 corporate and individual convictions for cartel-related offences in the past 15 years, resulting in fines of approximately C$260 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. Moreover, the 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 new conspiracy offence in Canada

In March 2009, Canada's federal government passed legislation to make far-reaching amendments to the Act, including the conspiracy offence.[4] The new conspiracy offence came into force in March 2010, one year after the amending legislation was enacted, and applies to all ongoing conduct or conduct initiated after that date.[5]

The new provision, found in section 45(1) of the Act, makes it a per se criminal offence for competitors to enter into agreements:

- to fix, maintain, increase or control the price for the supply of a product;
- to allocate sales, territories, customers or markets for the production or supply of a product; or
- to fix, maintain, control, prevent, lessen or eliminate the production or supply of a product.

Unlike the previous offence, the new conspiracy offence does not require proof that the agreement, if implemented, would prevent or lessen competition unduly. The elimination of the requirement to prove market impact represents a fundamental shift in the nature of Canada's conspiracy offence and is intended to make it easier for the authorities to prosecute cartel activity in and affecting Canada.

Agreement

The new conspiracy offence will still require proof beyond a reasonable doubt (the criminal standard of proof in Canada) of an agreement involving one of the prohibited categories of conduct. Canadian courts have held that the mere intention or design on the part of one or more parties to effect an anti-competitive agreement or arrangement, or even discussions to that effect, will not contravene section 45 as long as they do not culminate in an agreement. However, an agreement can be inferred on the basis of circumstantial evidence.[6] Moreover, once an agreement has been entered into, it is not necessary for the prosecution (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' and not in the acts that it contemplates, although such acts may serve as evidence of the agreement.

Defences and exemptions

Liability can be avoided under the new conspiracy offence if it can be established that:

- the impugned agreement is ancillary to a broader or separate agreement that includes the same parties;
- the impugned agreement is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement; and
- the broader or separate agreement, considered alone, does not contravene the conspiracy offence.

In addition to the ancillary agreement defence, the new conspiracy offence will not apply to agreements between affiliates. This is analogous to the 'intra-enterprise' doctrine in US law. The new offence also does not apply, subject to certain exceptions, if an agreement relates only to the export of products from Canada. Criminal proceedings under section 45 are also precluded if civil proceedings have already been commenced under the Act's price maintenance, abuse of dominance, merger or civil provisions governing agreements between competitors.

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.

Finally, it should be noted that the amendments that introduced the new conspiracy offence also repealed certain defences that had applied previously. For example, there is no longer an express defence for agreements relating to the exchange of statistics or credit information; measures to protect the environment; research and development; and defining product standards. That said, this defence was limited in that it only applied if the agreement in question did not have an undue effect on competition.

The new civil provision

In addition to the new criminal offence, the Act now contains a new civil provision that applies to agreements between competitors that are not caught by the new per se offence but have the effect of lessening or preventing competition substantially. Applications under this new provision are brought by the commissioner of competition to the Competition Tribunal; private applications are not permitted. Relief is limited to an order requiring the parties to cease engaging in the impugned conduct or, on consent, to taking any other action. The new civil provision includes 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.

Bureau guidelines

Given the very recent coming into force of the new conspiracy offence and civil provision for agreements among competitors, there is no case law interpreting these provisions. To help fill that void, at least as an interim matter, the Bureau has issued Competitor Collaboration Guidelines setting out its views and enforcement approach.[7] For example, the Competitor Collaboration Guidelines emphasise that the Bureau only intends to apply the new conspiracy offence to 'categories of agreements that are so likely to harm competition and to have no pro-competitive benefits that they are deserving of prosecution without a detailed inquiry into their actual competitive effects'. With this in mind, the Competitor Collaboration Guidelines provide examples of types of restraints that the Bureau will generally not assess under the new criminal offence, although they may be subject to review under the new civil provision. These include non-compete clauses found in an employment agreement; agreements for the sale of assets or shares between parties; agreements among competitors to charge a common price in a blanket licence agreement for artistic works; agreements to abstain from making material changes to a business pending consummation of a merger; non-compete obligations between the parent undertakings and a joint venture, where such obligations correspond only to the products, services and territories covered by the joint venture agreement; dual-distribution arrangements; franchise agreements; commercialisation and joint-selling agreements; information sharing agreements; research and development agreements; and joint purchasing agreements. It must be recognised, however, that the Competitor Collaboration Guidelines do not have the force of law and are not binding on the courts or private plaintiffs. For example, private parties will still be free to bring claims for violations of the criminal offence with respect to all forms of agreements, even those the Bureau may decide not to pursue as criminal offences as an enforcement matter.

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.[8] The Act also includes specific provisions designed to protect 'whistle-blowers' and makes it an offence to obstruct a Bureau investigation.[9]

There are still many unresolved questions about the Bureau's ability to use its broad investigative powers against parties located outside Canada. It is by no means clear, for example, that a judge would have the jurisdiction to issue one of these orders against an entity or individual not present in Canada. Apart from the jurisdictional issues, there also would be the practical difficulties of enforcing such an order even if it could be properly issued.[10] 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 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).[11] 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$25 million per count, to imprisonment for a term not exceeding 14 years, or to both. These sanctions were increased in 2010 from the previous maximums of C$10 million per count and five years' imprisonment. 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). Sanctions under the civil provision are limited to prohibition orders or other actions, if agreed to by the person required to take such action.

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 anti-competitive 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 2008 and 2009, 10 individuals were sentenced to terms of imprisonment totalling 54 months (to be served in the community) following guilty pleas related to engaging in

price fixing in the retail gasoline market.[12] 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, to restrict their ability to travel across international borders.[13] Furthermore, 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.[14] The new, increased, maximum penalties for violations of the conspiracy offence signal a likely desire by the government for courts to impose higher fines and stricter sentences in the future.

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. Considerations the courts will take into account in this regard include 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 to 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.[15]

The Bureau's approach to sentencing in cartel cases is set out in a draft information bulletin issued in March 2009.[16] Apart from the general principles set out above, the key factor 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 can also 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.[17]

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; early termination of conduct; 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 role and level of participation of the individual;
- 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.[18] 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, holding 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 positions of the Bureau and DPP, which are 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. It is described in an Information Bulletin, which was revised in August 2009.[19]

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).[20] 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 current 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 necessary to obtain or maintain the validity of a judicial authorisation for the exercise of investigative powers or for securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
- the party has provided its consent to the disclosure;
- 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 may still 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.[21]

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 interagency 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, the Korea 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.[22] These investigations have since resulted in multiple guilty pleas and fines under the Act.[23]

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 actions were filed against parties alleged to have participated in cartels affecting airfreight cargo shipping services and chocolate confectionery.

In 2009, two contested class actions involving international cartels were certified in Canada.[24] These cases marked the first times that such certification had been granted in Canada.[25] Additionally, these are also the first decisions by a Canadian court in a contested case certifying price-fixing class actions on behalf of classes that include indirect purchasers. Previous cases[26] involving price-fixing claims by indirect purchasers had denied class certification on the ground that plaintiffs had failed to adduce sufficient evidence to support a methodology for calculating harm on a class-wide basis. The decisions are currently under appeal. If not overturned, they could significantly broaden the scope for indirect purchaser price-fixing class actions in Canada.

Notes

1 RSC 1985, c C-34.

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

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

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

5 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 may also 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. See *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.

6 Section 45(3) of the Act.

7 Competition Bureau, Competitor Collaboration Guidelines (23 December 2009), available at www.competitionbureau.gc.ca.

8 In its investigation of price fixing in the retail petroleum market in parts of Canada, for example, 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.

9 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 conspiracy offence.

10 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.

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

12 Competition Bureau, 'Tenth Individual Sentenced in Quebec Price-fixing Cartel' (7 December 2009), available at www.competitionbureau.gc.ca.

13 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.

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

15 See for example, *R v Mitsubishi Corporation*, supra, note 5.

16 Competition Bureau, Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases (25 March 2009), available at www.competitionbureau.gc.ca.

17 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.

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Davies Ward Phillips & Vineberg LLP is an integrated firm of more than 240 lawyers with offices in Toronto, Montréal and New York. The firm is focused on business law and is consistently at the heart of the largest and most complex commercial and financial matters on behalf of its clients, regardless of borders.

Davies' competition and foreign investment review practice is widely recognised as one of the leading practices in the Canadian marketplace. Our lawyers advise a wide range of international and domestic clients on the full spectrum of competition and foreign investment review matters, including mergers and acquisitions, joint ventures and other forms of competitor collaborations as well as competition aspects of strategic commercial activities, including trade practices, pricing policies, marketing, distribution and relationships with customers and competitors. We also represent clients in civil and criminal, as well as class action matters, in various Canadian courts and before the Competition Tribunal, including dealing with the defence of cartel, abuse of dominance and other Competition Bureau investigations. Our practice is also a recognised leader in advising foreign-based and Canadian clients on the application of the Investment Canada Act (ICA) as well as the application of various other laws that restrict foreign ownership in specific industries.

18 *VitaPharmCanada Ltd v F Hoffman-La Roche Ltd*, (2002) 20 CPC (5th) 351.

19 Competition Bureau, Bulletin on the Immunity Program under the Competition Act (August 2009), available at www.competitionbureau.gc.ca. See also, Competition Bureau, Immunity Program Responses to Frequently Asked Questions, available at www.competitionbureau.gc.ca.

20 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.

21 Supra note 16.

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

23 Competition Bureau, 'British Airways Pleads Guilty in Air Cargo Price-fixing Conspiracy' (30 October 2009), available at www.competitionbureau.gc.ca.

24 *Irving Paper Limited et al v Atofina Chemicals Inc et al*, [2009] OJ No 4021 (Ont SCJ) and *Pro-Sys Consultants Ltd v Infineon Technologies AG et al*, 2009 BCCA 503.

25 To the extent that certification had been granted previously, it had been in the context of settlement rather than contested litigation.

26 See, for example, *Chadha v Bayer Inc* (2003), 223 DLR (4th) 158.

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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 practice. He has advised domestic and international clients on a wide variety of competition law matters including mergers and acquisitions, criminal cartel investigations, joint ventures, abuse of dominance, distribution and pricing practices, misleading advertising and compliance. Mark has appeared at every level of court in relation to competition matters, 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. He 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 advising Australian-headquartered global packaging manufacturer Amcor Ltd in its acquisition of certain Alcan Packaging operations from Rio Tinto plc for approximately US$2 billion; Wells Fargo & Company in connection with its acquisition of Wachovia Corporation in a deal valued at US$11.7 billion; Google in connection with its proposed services agreement with Yahoo!; Dubai Ports World in connection with its acquisition of P&O; Xstrata plc in connection with its acquisition of of Falconbridge Ltd; and Stolt-Nielsen SA in connection with the resolution of an investigation by the Competition Bureau into alleged anti-competitive 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.

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