

GLOBAL COMPETITION REVIEW

The international journal of competition policy and regulation

The Asia-Pacific Antitrust Review

A Global Competition Review special report
published in association with:

Davies Ward Phillips & Vineberg LLP

Canada: Cartels

Mark Katz, Richard Elliott and Elisa Kearney

2008



THE QUEEN'S AWARDS
FOR ENTERPRISE
2006

Cartel Enforcement in Canada: What Asian Companies Should Know

Mark Katz, Richard Elliott and Elisa Kearney

Davies Ward Phillips & Vineberg LLP

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, and still remains, subject to criminal sanction.

The key criminal provision in the Act prohibiting cartel behaviour is 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.² 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.³

The Supreme Court of Canada has described the conspiracy provision as 'one of the pillars' of Canadian competition legislation and has stated that this provision is 'central to Canadian public policy in the economic sector'.⁴ Various heads of Canada's Competition Bureau have also made it clear that combating cartels, both domestic and international, is a top-enforcement priority.⁵ As a reflection of this commitment, there have been almost 80 corporate and individual convictions under section 45 and related provisions in the past 15 years, involving fines of close to 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.⁶ 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.

Elements of the conspiracy 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 anti-competitive 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.⁷

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.⁸

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.⁹ The Act also includes specific provisions designed to protect 'whistleblowers' and makes it an offence to obstruct a Bureau investigation.¹⁰

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.¹¹ 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).¹² 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 liable to a fine not exceeding C\$10 million per count or to imprisonment for a term not exceeding five years, or to 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 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. 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.¹³

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.¹⁴

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.

Generally speaking, the Competition Bureau and the DPP will take the negotiating position that any monetary fine should be calculated as a percentage of the accused's sales of the relevant product in Canada over the period of the offence (the 'relevant volume of commerce'). Experience over the past few years indicates that a proposed fine of approximately 20 per cent of the relevant volume of commerce will be the general starting point in plea negotiations. This can vary upwards or downwards depending upon the presence of mitigating or aggravating factors (eg, the timing and degree of cooperation offered by the accused). In addition, there may be cases in which taking a percentage of the accused's relevant volume of commerce is considered to be insufficient, for example, where the conspiracy involved an agreement not to sell into Canada and thus there is no relevant volume of commerce to use as a benchmark. In those cases, the Bureau and DPP will insist on a fine that is sufficiently large in the circumstances to send the appropriate deterrence 'message'.¹⁵

The Bureau has stated that it is developing sentencing and leniency guidelines to ensure greater consistency and transparency in its approach. These guidelines are expected to be released for consultation at some point in 2008.

Defences and exemptions

The Act 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 45.¹⁶ 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 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.

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.¹⁷ 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/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 programme

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 received over 40 immunity applications 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 2007.¹⁸

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).¹⁹ 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.

The immunity application process will normally consist of the following steps:

- the 'initial contact' with the Bureau, otherwise known as placing the 'marker', which involves the disclosure of sufficient information, usually in hypothetical terms, for the Bureau to confirm that the party is 'first in';
- the 'proffer', which involves providing the Bureau with a more detailed description of the activity for which immunity is sought, usually within 30 days of the 'marker';
- the 'immunity agreement' (conditional on the party continuing to provide full, frank and truthful disclosure), which involves the negotiation of the terms pursuant to which immunity will be granted by the DPP; and
- the 'full disclosure' stage, at which the Bureau will expect to receive full, frank and truthful disclosure of the nature of the offence (and any other offences), through the production of documents, witness interviews, etc, on the understanding that the Bureau will not use this information against the party unless the party fails to comply with the terms of the immunity agreement.

Importantly, the Bureau will not insist that immunity applicants make their proffer in written form. This is to avoid potential disclosure issues for immunity applicants in any follow-on civil litigation.²⁰ However, the Bureau may request an interview with one or more witnesses, or an opportunity to view certain documents prior to recommending that the DPP grant immunity. The Bureau also offers the possibility of 'immunity plus' (ie, even if an applicant is not qualified to obtain immunity with respect to offence A, it may be 'first in' and qualify for immunity in respect of offence B).

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.

The Bureau's position regarding confidentiality in immunity situations differs from its approach to confidentiality in other circumstances. Outside of the immunity context, the Bureau will not seek the consent of a party to disclose information if it believes that disclosure is necessary for the 'administration and enforcement' of the Act. Similarly, the Bureau will not share information provided by an immunity applicant with foreign antitrust enforcement agencies without an express waiver from the applicant, which it will usually request. This difference in approach demonstrates the importance accorded by the Bureau to immunity applications. However, this special protection only applies to immunity applicants who are 'first in' and does not assist cartel participants who may come forward subsequently to cooperate.

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. As noted above, the Bureau currently employs a loosely case-driven, ad hoc approach to 'leniency'. However, it is in the process of developing guidelines which should be released for consultation in 2008.

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.²¹

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.

Possible reforms

The Competition Bureau is considering possible amendments to the Act's conspiracy provisions. The Bureau's view is that section 45 should be narrowed to make participation in hard-core cartels (ie, agreements among competitors to fix prices, allocate markets or restrict output) a per se criminal offence, while all other types of agreements among competitors will be dealt with under the Act's civil provisions to the extent that they may raise competition issues. The Bureau completed a series of 'technical roundtables' on the topic in 2007 and has also made submissions to this effect to a

federal panel that is reviewing Canada's competition policies.²² That said, previous Bureau proposals to introduce a per se cartel offence generated substantial opposition and were not adopted.

Notes

- 1 RSC 1985, c C-34.
- 2 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).
- 3 The Act contains several additional criminal offences that can extend to cartel behaviour. These include bid rigging; price maintenance (which includes horizontal conduct); and 'foreign directives'. Bid rigging and price maintenance are both per se offences. 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, Iridium 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.
- 4 *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at 648 [hereinafter PANS].
- 5 See (eg, Sheridan Scott, Commissioner of Competition, *Looking Forward: The Bureau Priorities for 2007-2008*, 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.
- 6 Two Japanese companies pleaded guilty to cartel offences in Canada in 2007. As noted above, Iridium 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.
- 7 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.
- 8 *R v Bugdens Taxi*, available at www.canlii.org.
- 9 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/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.
- 10 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.

- 11 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.
- 12 The PPSC is independent of the Federal Department of Justice and reports to parliament through the attorney general of Canada.
- 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 See for example, *R v Mitsubishi Corporation*, supra, note 3.
- 15 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.
- 16 The Competition Tribunal is a specialised administrative body established to adjudicate applications with respect to the Act's civil provisions (eg, mergers and abuse of dominance). The Tribunal is comprised of judges of the Federal Court of Canada and non-judicial, lay experts.
- 17 *VitaPharm Canada Ltd v F Hoffman-La Roche Ltd*, (2002) 20 CPC (5th) 351.
- 18 The Bureau initiated a process in 2006 to revise its immunity programme to address issues that had arisen since the programme was adopted in 2000 and to achieve greater consistency with the programmes of other jurisdictions, such as the United States and EC. The Bureau issued a revised version of the Information Bulletin describing its immunity programme on 10 October 2007, as well as a backgrounder explaining the changes that were made. The Bureau also released an amended set of responses to 'frequently asked questions' about the immunity programme. All of these materials are available at www.competitionbureau.gc.ca. See also the Canadian Department of Justice's Federal Prosecution Service Deskbook, part VII, chapter 35, available at www.canada.justice.gc.ca.
- 19 Immunity applicants should also expect to be asked if they are or were involved in any non-competition offences which could impact negatively on their credibility as witnesses.
- 20 Other competition authorities have adopted similar policies with respect to paperless immunity applications. For example, the Australian Competition and Consumer Commission also no longer requires that immunity applications be made in writing. By way of contrast, Japan's recently adopted leniency programme takes a more restrictive approach. The initial immunity application must be made to the Japan Fair Trade Commission in writing by facsimile. However, subsequent disclosure may be made orally if the JFTC is satisfied that there is indeed a risk of civil discovery in other jurisdictions.
- 21 See, for example, Denyse Mackenzie, *International Cartel Enforcement Sans Frontières*, Insight International Competition Law Conference (May 2006), available at www.competitionbureau.gc.ca.
- 22 On 12 July 2007, the Canadian government announced the creation of a competition policy review panel tasked with reviewing key elements of Canada's competition and investment policies. The panel is expected to report back to the minister of industry on behalf of the government by 30 June 2008.



44th Floor
1 First Canadian Place
Toronto, Ontario
Canada M5X 1B1
Tel: +1 416 863 0900
Fax: +1 416 863 0871
info@dwpv.com
www.dwpv.com

Davies Ward Phillips & Vineberg LLP, with over 235 lawyers, practises nationally and internationally from offices in Toronto, Montreal and New York, and an affiliate in Paris. Davies is focused on business law and practice areas where we can be best-in-class. This allows us to maintain consistently high quality and bring the most creative and efficient solutions to our clients' critical matters.

Davies' competition and foreign investment review group advises clients on the full spectrum of competition and foreign investment review matters, including mergers and acquisitions, joint ventures, competition aspects of strategic commercial activities, abuse of dominance, cartels, trade practices, pricing policies, relationships with customers and competitors, marketing and distribution, compliance training and dealing with Competition Bureau investigations. We also represent clients in civil and criminal proceedings, as well as class action matters, in various Canadian courts and before the Competition Tribunal. Members of the group are also extensively involved in policy development and advocacy efforts through both Canadian and international organisations. Our lawyers also have developed specialised experience in many industries where competition issues are interrelated with other legal or regulatory concerns, including telecommunications, financial services, resources, energy and transportation.

Mark Katz • Tel: +1 416 863 5578 • mkatz@dwpv.com
Richard D Elliott • Tel: +1 416 863 5506 • relliott@dwpv.com
Elisa Kearney • Tel: +1 416 367 7450 • ekearney@dwpv.com