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Joint Ventures and the *Competition Act's* New Conspiracy Offence

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Country update on Canada

Joint Ventures and the *Competition Act's* New Conspiracy Offence

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In March 2009, the Canadian Parliament passed legislation incorporating significant amendments to the *Competition Act* (the "Act"), including important changes to the Act's conspiracy offence.[5] The wording of the new conspiracy offence, which came into force on March 12, 2010, has raised questions about its potentially broad application, especially in relation to joint ventures and other legitimate collaborations between competitors.[6]

The new conspiracy offence establishes a *per se* criminal prohibition against agreements between competitors to fix prices, affect production or supply levels of a product, or allocate sales, customers or territories.[7] Maximum penalties under the new offence are 14 years imprisonment and a CDN$25 million fine per count, up from the previous maximums of five years and CDN$10 million per count. The new offence also contains several defences and exemptions. Most notably, it is not an offence if the impugned agreement is (i) "ancillary to" a broader or separate agreement that does not itself contravene the conspiracy provision, and (ii) is "directly related to and reasonably necessary for" giving effect to that broader or separate agreement.

Also as of March 12, 2010, all other agreements between competitors that have the effect of lessening or preventing competition substantially will now be dealt with under a new civil provision. The Competition Bureau ("Bureau") will be able to apply to the Competition Tribunal under this new provision for an order to remedy the effects of such agreements.

Various concerns have been raised about the new *per se* conspiracy offence, foremost among them that the offence may inadvertently criminalize joint ventures between competitors that involve coordination on pricing or other prohibited matters but that are entirely legitimate and even pro-competitive. Although one might presume that joint ventures of this kind should be protected under the ancillary restraints defence, the statute does not define the meaning of key concepts such as "ancillary to", "directly related to" and "reasonably necessary for". Accordingly, the scope of the defence will remain undefined until the courts are given the opportunity to consider and interpret it.

The Bureau has attempted to fill this void with the issuance of its *Competitor Collaboration Guidelines* (the "Guidelines"), which set out the Bureau's enforcement approach to the new criminal offence, including the ancillary restraints defence.[8] On the positive side, the Guidelines emphasize the Bureau's view that the new conspiracy offence is not intended to capture pro-competitive joint ventures and other legitimate collaborations between competitors. At the same time, it must be recognized that the Guidelines are not a binding statement of the law. Indeed, there have been several instances in which the Bureau departed from its enforcement guidelines in other areas when this suited its purposes. It also must be kept in mind that section 36 of the Act allows private parties to bring civil suits to recover for damages suffered as a result of conduct contrary to the Act's criminal provisions, including the conspiracy offence. Thus,

[5] Bill C-10, Budget Implementation Act, 2009, 2d Sess. 40th Parl., 2009, *available at* http://www2.parl.gc.ca/content/hoc/Bills/402/Government/C-10/C-10_4/C-10_4.PDF.
[6] See, *e.g.*, Canadian Bar Association National Competition Law Section, Submissions on Draft Enforcement Guidelines on Competitor Collaboration (August 2009), *available at*: http://www.cba.org/CBA/submissions/pdf/09-47-eng.pdf.
[7] *Competition Act*, R.S.C. 1985, c. c-34, s. 45.
[8] Competition Bureau, Competitor Collaboration Guidelines (December 23, 2009), *available at*: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html.

even if the Bureau is prepared to abide by its assurances in the Guidelines that joint ventures ought not be subject to criminal prosecution in Canada, it is entirely possible that civil plaintiffs (and the courts) will take a different view when it comes to damage claims or efforts to void agreements for illegality.

There are also difficulties with the Guidelines themselves. For example, the Guidelines state that a restraint is "ancillary" when it is functionally incidental or subordinate to the objective of some broader agreement.[9] This may be taking too narrow a view. While coordination on pricing or other matters may not always be the sole purpose of a joint venture, there may be examples of legitimate forms of collaboration where such forms of coordination are at the heart of the venture and not simply incidental or subordinate to the main purpose of the agreement.

Similarly, the Guidelines state that a restraint will not be considered "directly related to, and reasonably necessary for giving effect to" the objective of a joint venture agreement if the parties "could have achieved an equivalent or comparable arrangement through practical, significantly less restrictive means that were reasonably available to the parties at the time when the agreement was entered into". This means that the Bureau (and ultimately the courts) will be asked to second guess the joint venture parties and make judgments about the relative merits of various business strategies. This is not a simple task at the best of times, and may be made even more difficult by the fact that joint ventures often involve coordination at many levels, from research and development, through production to distribution, marketing and sales.

In short, the changes to Canada's conspiracy offence have opened up new uncertainties for joint ventures between competitors in Canada. Moreover, even if a joint venture is able to avoid both scrutiny and liability under the new criminal offence, it will still remain potentially subject to proceedings and remedies under the new civil provision governing anticompetitive agreements.