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# Canada: Cartel Regulation

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Hard-core cartels are subject to criminal prohibitions in Canada under the Competition Act (the Act), a federal statute that applies across Canada and, with very few exceptions, across all industries. The core prohibition is contained in section 45 (the general conspiracy provision), which was amended effective 12 March 2010. In addition, section 46 (implementing foreign conspiracy) and section 47 (bid rigging) may also be applicable depending on the circumstances.[1]

### Section 45 – conspiracy

Section 45 provides that:

- every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges:
  - to fix, maintain, increase or control the price for the supply of the product;
  - to allocate sales, territories, customers or markets for the production or supply of the product; or
  - to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product; and
- every person who commits an offence under the above-mentioned subsection is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding C$25 million, or to both.

Section 45 is a criminal offence and, as such, to obtain a conviction, the prosecution has the burden of proof to establish the offence 'beyond a reasonable doubt'.

Unlike its predecessor, section 45 is now:

- a per se offence – it no longer contains a requirement that the agreement or arrangement has prevented or lessened or is likely to prevent or lessen competition 'unduly';
- applicable only to horizontal agreements or arrangements (ie, agreements or arrangements among actual or potential competitors); and
- on its face, only applicable to horizontal agreements among sellers of products and services (ie, it does not apply to buying agreements).[2]

Recognising that the criminal prohibition in subsection 45(1) may have the unintended consequence of capturing competitor agreements that should not be condemned as per se illegal (eg, legitimate competitor collaborations and joint ventures, which may have pro-competitive effects), the Act provides for an 'ancillary restraint defence' (ARD). The ARD applies as a defence to a charge of conspiracy under subsection 45(1) where it can be established by an accused, on a balance of probabilities, that the competitor agreement is:

- ancillary to a broader or separate agreement or arrangement between the parties;
- is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and
- the broader or separate agreement or arrangement, considered alone, does not contravene subsection 45(1).

### Section 46 – implementing foreign conspiracy

Section 46 makes it a criminal offence for a corporation carrying on business in Canada to implement any foreign directive intended to give effect to a conspiracy entered into outside of Canada that would contravene section 45 of the Act if such conspiracy had been entered into in Canada.[3] Corporations convicted under section 46 are subject to criminal fines, which are at the discretion of the court.

Note that only corporations may be found liable under section 46. In contrast to the position under section 45, directors and officers of a corporation may not be found liable under section 46, although they may be liable under the aiding and abetting and counselling provisions of the Criminal Code.[4]

Section 46 is targeted specifically at international cartel activities affecting Canada and permits the application of the Act even in situations where the actual conspirators are not located in Canada. The Canadian corporation is not required to have actual knowledge of the foreign conspiracy. While there have been convictions by way of guilty pleas under section 46, there is serious debate as to whether section 46 would survive constitutional scrutiny insofar as it can result in the conviction of a Canadian subsidiary for a criminal offence where the directors and officers of such subsidiary may not have had a guilty mind.

### Section 47 – bid rigging[5]

Bid rigging is a criminal offence defined by section 47 of the Act and will be found to exist when each of the following four elements is satisfied:

- there was a call for tenders;
- there was an agreement between two or more bidders where:
  - one or more agreed to not submit a bid or to withdraw a bid, or
  - two or more submitted bids that were arrived at by agreement or arrangement;
- bids were submitted in response to the call for tenders; and
- the person who called for the tenders was not made aware of any agreement or arrangement, at or before the time when bids were submitted.

Conviction for bid rigging under section 47 carries penalties of imprisonment for up to 14 years or a fine or both, at the discretion of the court.

Note that there are certain exceptions and defences to the above provisions. For example, there is a regulated conduct defence which may be available where conduct under investigation has been prescribed (or in some cases merely authorised) under lawful legislation. Also, there is a limited export cartel defence to prosecution under section 45.

Further, the Commissioner of Competition (the Commissioner) may have resort to section 90.1 of the Act where she determines that the conduct under review does not merit the imposition of criminal sections, or where the criminal sections are not available. In December 2009, the Competition Bureau (the Bureau ) issued detailed Competitor Collaboration Guidelines that discuss the

Bureau's approach to assessing collaborations between competitors.[6] The guidelines provide detailed guidance as to when the Bureau is likely to take enforcement action under section 45 (or other criminal provisions of the Act) versus section 90.1 or other civil provisions of the Act.

Although, as noted above, the law permits courts to impose substantial prison sentences where the law has been violated, to date such sentences are only rarely imposed and have been relatively modest. Courts, however, have imposed significant criminal fines on those convicted of the cartel provisions of the Act.

## Criminal investigations

### The enforcers and enforcement structure

The Competition Bureau, the head of which is the Commissioner of Competition, is the Canadian governmental agency that administers and, along with the Public Prosecution Service of Canada, enforces the Act. In the context of cartels, investigations are conducted by the Criminal Matters Branch of the Bureau. Where the Commissioner concludes that a criminal offence under the Act has been committed, a recommendation is made to the director of public prosecutions (the DPP) – the head of the Public Prosecution Service of Canada – that charges be laid.

The DPP fulfils the responsibilities of the Attorney General of Canada in the discharge of his criminal law mandate by prosecuting criminal offences under federal jurisdiction. It is the DPP who is ultimately responsible for initiating and conducting prosecutions under the criminal provisions of the Act.[7] Such criminal prosecutions can take place before the superior court of a province or the Federal Court of Canada, although the Federal Court of Canada cannot conduct jury trials.

### Investigative tools

In the exercise of its investigative function, the Bureau has a variety of tools at its disposal, most notably section 11 orders, search warrants and wiretaps.

### Section 11 orders

Orders made pursuant to section 11 of the Act can be sought ex parte by the Commissioner in the course of a formal inquiry commenced under section 10 of the Act. It is a powerful investigative tool that has been used by the Commissioner in the context of civil inquiries (eg, mergers and abuse of dominance), as well as criminal inquiries (eg, cartel investigations). Section 11 orders are essentially subpoenas, which are obtained and used by the commissioner to obtain information in the possession of a person (including a corporation) that is likely to have information that is relevant to a matter under inquiry.

Information can be obtained upon the issuance of a section 11 order in the following ways:

- oral examinations, under oath, of individuals on any matter that is relevant to the inquiry;
- the production of records, including electronic records; and
- written returns requiring a person to create or prepare detailed information under oath and provide it to the Commissioner.

Also, subsection 11(2) explicitly contemplates an order compelling a Canadian corporation to produce records in the possession of the corporation's Canadian or foreign affiliates where the issuing judge is satisfied that such affiliate has records that are relevant to the inquiry. As such, under subsection 11(2), the Commissioner can seek a court order requiring a Canadian subsidiary to produce records of its foreign parent or sister companies.

Furthermore, subsection 11(3) states that persons are not excused from complying with an order on the grounds that their testimony, records or written returns may incriminate them; however, the section goes on to stipulate that any such testimony or return cannot be used against the individual that provided it in any criminal proceeding against that individual. It is noteworthy that subsection 11(3) does not explicitly state that a 'record' produced by an individual cannot be used against that person in a criminal proceeding, nor does it provide such individual with derivative use immunity[8] in relation to his or her testimony or written return. In addition, subsection 11(3) does not preclude the use of an individual's testimony or written return against third parties, including, for example, that individual's corporate employer.

Section 19 of the Act sets out the procedure for dealing with records required to be produced, but that are subject to claims of solicitor-client privilege.

It should be noted, however, that the constitutionality of the use of section 11 (including subsection 11(2)) in a criminal cartel investigation is currently being challenged.

### Search warrants

The Act also authorises the Commissioner to apply ex parte to a judge for a warrant allowing officers of the Bureau to conduct searches and seizures, including searches of computer systems and seizure of electronic records. Prior to issuing a warrant, a judge has to be satisfied that there are 'reasonable and probable grounds' to believe that one of the Act's provisions has been or is about to be breached and that there will be relevant evidence on the premises being searched.[9]

A search warrant issued to the Bureau will be very specific. If correctly issued, it will list the individuals who are permitted to conduct the search, the information that is being sought and the specific premises they are allowed to search. While a search warrant authorises the Bureau to enter and search premises, examine records or other things named in the warrant and copy or seize them, it does not entitle Bureau officers to interview company representatives.

Before seizing the records, the Bureau officers must provide the party being searched with a reasonable opportunity to claim solicitor-client privilege in respect of any of the records to be seized. Section 19 of the Act (which is also applicable in the context of a section 11 order) sets out the procedure for dealing with records to which a claim of solicitor-client privilege is made.

### Wiretaps

The Act also enables the Commissioner to utilise judicially authorised wiretaps in respect of certain criminal offences, including conspiracies and bid rigging. In order to obtain a wiretap, the Commissioner must submit a sworn affidavit in accordance with the requirements of subsection 185(1) of the Criminal Code. The affidavit must set out certain information, including:

- the facts relied on to justify the belief that the authorisation should be given, together with particulars of the alleged offence;
- the type of private communication proposed to be intercepted;
- particulars with respect to the individuals whose communications will be intercepted; and
- how and where the officers propose to accomplish the interception.

The issuing judge must be satisfied that granting the authorisation is in the best interests of the administration of justice; that other inves-

tigative procedures have been tried and failed; and that the matter is of such urgency that it would be impractical for the officers to carry out the investigation without the assistance of the wiretap.

## Immunity/leniency programmes

In a Canadian competition law context, conceptually, 'immunity' and 'leniency' are treated differently. 'Immunity' refers to complete immunity from prosecution (ie, no criminal charges are laid), whereas 'leniency' refers to lenient or more favourable treatment (eg, reduced penalties) in return for a guilty plea and cooperation.

### Immunity programme

The Bureau refers to the immunity programme, which was formally launched in September of 2002, as the 'single most powerful means of detecting criminal activity'. Although it has evolved over time, the essence of the programme has remained the same.

Under the current immunity programme,[10] a party implicated in activity in contravention of any of the criminal provisions of the Act may apply for immunity. While the application for immunity is made to the Bureau, the Bureau only makes a recommendation to the DPP that immunity be granted. Ultimately, it is the DPP who will make the grant of immunity upon the Bureau's recommendation.

The Bureau may recommend a grant of immunity in the following two scenarios:

- where the Bureau is unaware of an offence in relation to a particular product or service and the party is the first to disclose it; or
- where the Bureau is aware of an offence and the party is the first to come forward, before there is sufficient evidence to warrant a referral of the matter to the DPP.

In addition, generally speaking, in order to qualify for immunity, an applicant must:

- be the first to disclose the illegal activity to the Bureau;
- terminate its participation in the illegal activity;
- not have coerced others to be party to the illegal activity; and
- cooperate in a timely manner, at its own expense, with the Bureau's investigation and any subsequent prosecution by the DPP of other cartel participants.

If a company qualifies for immunity, all current directors, officers and employees who admit their involvement in the illegal anti-competitive activity as part of the corporate admission, and who provide complete, timely and ongoing cooperation, will also typically qualify for the same recommendation for immunity. Former directors, officers and employees who offer to cooperate with the Bureau's investigation may also qualify for immunity, although such determination is made on a case-by-case basis.

### Leniency programme

The Bureau's Bulletin on the Leniency Program (Leniency Bulletin) and its accompanying FAQs articulate the Bureau's policy and enforcement approach in respect of leniency and sentencing.[11] As with the case of immunity, the Bureau can only recommend that leniency be granted; the ultimate decision rests with the DPP.

Where the party under investigation cannot take advantage of the immunity programme (eg, because it is not the first to disclose the illegal conduct to the Bureau), it may be possible to seek leniency. In order to qualify for leniency, an applicant must:

- terminate its participation in the illegal conduct;
- agree to cooperate fully and in a timely manner, at its own expense, with the Bureau's investigation and any subsequent prosecution by the DPP of other cartel participants; and
- agree to plead guilty.

According to the Leniency Bulletin, the first leniency applicant is eligible to receive:

- a reduction of 50 per cent of the fine that would have otherwise been recommended; and
- a recommendation that no separate charges be laid against the party's current directors, officers or employees who agree to cooperate with the investigation in a full and timely fashion

The second leniency applicant may receive a reduction of 30 per cent of the fine that would have otherwise been recommended.

Subsequent leniency applicants may also receive a reduction of the fine that would have otherwise been recommended. The actual amount of the reduction will depend on when the applicant sought leniency compared to the second-in applicant and the timeliness of its cooperation.

For the second and any subsequent leniency applicant, current and former directors, officers, employees and agents may be charged depending on their role in the offence. Directors, officers, employees and agents who are charged but who cooperate fully may be eligible to receive a lenient treatment recommendation from the Bureau.

## International cooperation

Enforcement of Canadian competition law, particularly in relation to cartel enforcement, continues to benefit from a high degree of international cooperation. Indeed, such cooperation appears to have strengthened over the past several years, particularly through the auspices of the International Competition Network. There is an especially close working relationship between the Bureau and antitrust authorities in the US and the EU.

Canada has signed 36 mutual legal assistance treaties (MLATs) with other governments, including the US, the UK, Germany, France, Italy, Australia and South Korea. The MLATs provide that either signatory to the treaty can request certain assistance of the other party. This assistance can include executing searches and seizures, taking evidence, locating or identifying persons and serving documents.

In addition, Canada has entered into 11 agreements with other jurisdictions in relation to cooperation in respect of the enforcement of competition laws, including agreements with the US, the EU, the UK, Brazil, Korea and Japan.

## Recent enforcement activities

Cartel enforcement has been, and remains, a high priority for the Commissioner and the Bureau. The Bureau's cartel investigations have resulted in numerous guilty pleas which have brought significant fines and, in some cases, imprisonment to those accused. These investigations relate to both domestic and international cartel activity.

On the domestic front, in March 2012, a series of Ontario gasoline retailers pleaded guilty to fixing the price of gasoline in Brockville and Kingston, Ontario. The companies that pleaded guilty were fined a total of more than C$2 million. These pleas were followed by another company pleading guilty of fixing gas prices in Belleville, Ontario less than a month later, and receiving a fine of C$500,000. In a similar case, from 2009 to 2012, 27 individuals and seven companies pleaded guilty to charges that stem from the Bureau's investigation into a price-fixing cartel in relation to retail gasoline in Quebec. Fines from this investigation now total over C$3 million and six of the 13 individuals have been sentenced to terms of impris-

onment totalling 54 months. The investigation and prosecution of this case continues with other individuals and companies having been charged under section 45 of the Act.

Recently, on the international cartel front, Maxzone Auto Parts (Canada) Corp pleaded guilty to fixing the price of aftermarket automotive replacement lights in Canada, and was fined C$1.5 million. In 2011, Kason Industries Inc pleaded guilty and was fined C$250,000 for conspiring to allocate customers for the sale of refrigeration and food service equipment components in Canada and the United States. A year earlier, in 2010, the Bureau's investigations revealed that Embraco North America Inc and Panasonic Corporation conspired with other competitors to fix the price of hermetic refrigeration compressors that were sold to a refrigerator and freezer manufacture in Canada. Both Embraco and Panasonic pleaded guilty to these charges in 2010 and were fined C$1.5 million each. In 2009 and 2010, the Bureau's investigation into an international air cargo cartel also yielded numerous guilty pleas to price-fixing charges from several international airlines. The fines from this investigation now total more than C$17 million. Further, between 2008 and 2010, guilty pleas were obtained from two chemical manufacturers, Akzo Nobel and Solvay Chemicals, for fixing the prices of hydrogen peroxide in Canada. This investigation was triggered by activity that took place from 1998 through 2001, and fines from the resulting charges totalling C$5.65 million.

The Bureau has also demonstrated a recent commitment to the enforcement of the bid-rigging provisions under the Act. Les Entreprises Promécanic Ltée pleaded guilty to three charges of bid-rigging and was fined C$425,000 for its involvement in an agreement to rig bids in Montreal, Quebec, for private sector residential high-rise building ventilation contracts. Criminal charges were also laid against six companies and five individuals accused of rigging bids for municipal and provincial sewer service contracts in Montreal, Quebec. In this regard, MSC Réhabilitation Inc pleaded guilty for its participation in bid-rigging 12 calls for tender and received a fine of C$75,000 and a three-year court order.

## Civil actions for damages

### Section 36 of the Act

Consideration should also be given to the availability to plaintiffs of private enforcement in respect of alleged cartel activity. Subsection 36(1) of the Act provides for a civil remedy to 'any person who has suffered loss or damages' as a result of a breach of certain enumerated sections of the Act, including section 45, set out above. If liability is proven, an amount equal to the loss suffered is payable together with an amount in respect of costs of investigation. Notably, the Act only provides for single damages, rather than the treble damages available in the US.[12] It is common practice for cases brought pursuant to subsection 36(1) to also include claims for common law damages based on civil conspiracy, restitutionary relief and punitive damages.

Sections 45 and 36(1) have been relied on in numerous class actions that seek recovery for alleged cartel activity. In many instances such proceedings are commenced after convictions or similar class actions in the US. To date, there has not been a trial in Canada in respect of a cartel class action. However, there have been numerous settlements, often entered into following a settlement in similar class action proceedings in the US.

Private proceedings must be brought within two years of either the day on which the conduct was engaged in or the day on which any criminal proceedings are 'finally disposed of', whichever is later.[13] Given that it is often not known if or when criminal proceedings will be commenced, this provision can arguably provide for an expansive limitation period. For example, if a criminal proceeding were commenced more than two years after a day conduct was engaged in, the civil limitation period could arguably be 'refreshed'.

### The current Canadian landscape

Key issues in Canadian class actions involving cartel allegations have included:

- the evidentiary standard a court will require in order to be satisfied that an action should be certified;
- the extent to which indirect purchasers will be able to pursue claims; and
- the role of restitutionary remedies in cartel class actions.

Until recently, the leading case in the area was *Chadha v Bayer*.[14] In that case, which by the certification stage included only a claim on behalf of indirect purchasers, the Ontario Court of Appeal carefully considered with approval the approach taken in the US in *In re Linerboard Litigation*.[15] The Ontario court held that whether such a case should be certified depended on whether the plaintiff could demonstrate class-wide harm and a methodology for proving class damages. In the absence of such a methodology, given that subsection 36(1) requires that the person seeking a remedy has suffered a loss, an individual inquiry would be required with respect to each class member to determine liability. Given such extensive individual inquiries, a class proceeding would not be the preferable procedure for the resolution of the dispute.[16]

Subsequent to *Chadha*, several cases were certified in the context of the mandated court approval of settlements, but until recently there had not been a further contested certification motion. However, in the last few years there has been significant activity with respect to cartel class actions and evidentiary issues relating to such proceedings and similar actions pursuant to the Act.[17]

Significantly, in recent years both Ontario and British Columbia courts have certified cartel class actions.

In the *DRAM*[18] case in British Columbia, certification was initially denied. However, on appeal, the British Columbia Court of Appeal reversed, and for the first time in Canada a cartel case was certified on behalf of classes of direct and indirect purchasers. Leave to appeal the decision to the Supreme Court of Canada was sought and denied.

The *DRAM* decision signalled the beginning of a comparatively relaxed certification standard in respect of cartel class actions in Canada. In *DRAM*, claims of both direct and indirect purchasers were permitted to proceed in the same case. The Court also permitted the case to go forward on common issues relating to restitutionary remedies, which focus on disgorgement of a defendant's gains rather than compensation to the plaintiffs. Damages aggregation provisions in the applicable class proceedings statute were also used to ground common issues for the class.

The *Hydrogen Peroxide*[19] case in Ontario – which also involved direct and indirect purchasers – was also certified. Leave to appeal that decision was denied. In the *Hydrogen Peroxide* case, the court held that it was not necessary to conduct a rigorous analysis of the expert evidence at the certification stage in order to determine whether there was a credible and plausible methodology to prove harm on a class-wide basis. Rather, the plaintiff need only demonstrate that such a methodology may exist.

The approach of the Ontario court was in stark contrast to the view taken in the parallel *Hydrogen Peroxide* action in the US,[20] in which the US Court for the Third Circuit held that the court below

had not conducted a sufficiently rigorous analysis of the expert evidence and remanded the matter back for determination on the basis of such an analysis. Interestingly, the same expert provided the opinion in both the Canadian case and the US case; however, each country's court reviewed the evidence on markedly different standards.

The seminal decisions in *DRAM* and *Hydrogen Peroxide* resulted in a much lower bar for certification of cartel class actions in Canada. In 2010, Canadian courts continued to exhibit a fondness for expanding the availability of civil remedies to plaintiffs in competition class actions. In *Quiznos*,[21] the plaintiff alleged that franchisees were charged non-competitive prices for supplies that they were obliged to pay pursuant to their franchise agreements. Certification was denied at first instance on the basis that the plaintiff had failed to prove a workable method for calculating what the franchisees would have paid in the absence of any competition related offences. The Divisional Court overturned that ruling and granted certification. The Ontario Court of Appeal upheld the decision of the Divisional Court, holding that the plaintiff need only demonstrate a 'reasonable likelihood' that damages could be proven on an aggregate basis was necessary to attain class certification status.

Similar outcomes favourable to plaintiffs resulted in *Microsoft*[22] and *High Fructose Corn Syrup* (*HFCS*).[23] However, appeals in those cases were heard consecutively by the British Columbia Court of Appeal and the decisions were released together. A majority of the British Columbia Court of Appeal held in both cases that defendants in price-fixing cases have no passing on defence available to them and indirect purchasers have no cause of action in price fixing conspiracy claims. A dissenting judge in both cases was of the view that while there is no passing on defence, claims of indirect purchasers should not be precluded.

In contrast, in *Option Consommateurs v Infeon Technologies AG* (*Quebec DRAM*),[24] the Quebec Court of Appeal expressly adopted the dissenting opinion in *HFCS* and *Microsoft* and certified a class of direct and indirect purchasers of *DRAM*. In Ontario, the court granted certification in the *LCD* case,[25] finding that a class containing only some of a larger group of direct and indirect purchasers was appropriate for certification. However, leave to appeal that decision was granted in November 2011.[26] In doing so, the Court noted the conflict between *HFCS* and *Microsoft* on the one hand, and the Quebec Court of Appeal's decision in *Quebec DRAM*, on the other. The court further noted that the availability of the passing on defence in price-fixing class actions warranted review by an appellate court in Ontario and that the issue of whether indirect purchasers have a cause of action is in a state of uncertainty. The hearing of the appeal has not yet been scheduled.

On 1 December 2011, the Supreme Court of Canada granted leave to appeal in *HFCS* and *Microsoft*.[27] On 17 May 2012, the court also granted leave to appeal in *Quebec DRAM* and ordered that the appeal be heard together with the appeals in *HFCS* and *Microsoft*.[28] The appeals are tentatively scheduled to be heard in October 2012. How the court decides those cases could have a significant impact on claims brought pursuant to section 36 of the Act.

The certification threshold in cartel class actions is now much lower in Canada. It remains to be seen whether such certified cases will be able to proceed through common issues trials on the merits given these issues or whether it will become apparent over time that there is not sufficient commonality for such actions to actually proceed to trial on a class basis. Moreover, later this year, the Supreme Court of Canada will consider the availability of the passing on defence and the validity of indirect purchaser claims. The court's decision in this regard could have a significant impact for both plaintiffs and defendants. If the court concludes that pass on is not available as a defence, the certification of direct purchaser claims will be greatly simplified. If the Supreme Court holds that indirect purchasers do not have a cause of action, some plaintiffs will be precluded from bringing claims under section 36 of the Act.

## Notes

1 In addition, section 49 of the Act contains a specific per se prohibition against certain types of agreements between federal financial institutions, although it has rarely been used.

2 Agreements or arrangements among competitors that do not fall within the ambit of section 45 (eg, legitimate competitor collaborations and joint ventures), may nevertheless be subject to civil administrative review by the Competition Tribunal under section 90.1 of the Act. In such circumstances, however, such an agreement can only be subject to a remedial order by the Competition Tribunal if it results in, or is likely to result in, a substantial prevention or lessening of competition.

3 Section 46 provides as follows: '(1) Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.'

4 Criminal Code, sections 21 and 22.

5 Section 47 provides: '(1) In this section, 'bid-rigging' means:
(a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request, or
(b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,
where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is submitted or withdrawn, as the case may be, by any person who is a party to the agreement or arrangement.'

6 The Competitor Collaboration Guidelines can be found online at: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html.

7 In May 2010, the DPP and the Commissioner entered into a memorandum of understanding with respect to the investigation and prosecution of offences under the Act, among other statutes.

8 Derivative use immunity would exclude evidence that is discovered as a result of the immunized testimony and which would not have been discovered but for that immunised testimony.

9 Warrantless searches are also authorised by the Act where, by reason of exigent circumstances (eg, where delay would result in the loss or destruction of evidence) it would not be practical to seek judicial authorisation.

10 The immunity programme is set out in the Bureau's Immunity Program Bulletin (7 June 2010) and 'Responses to Frequently Asked Questions', both of which can be found online at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html and www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03250.html.

11 The Leniency Bulletin (29 September 2010) and the FAQs can be found

online at: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02816.html.

12 Section 36 provides: '(1) Any person who has suffered loss or damage as a result of:

(a) conduct that is contrary to any provision of Part VI; or

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act, may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

(2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part VI or convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI or failed to comply with an order of the Tribunal or another court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in the action.

(3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.

(4) No action may be brought under subsection (1):

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from:

(i) a day on which the conduct was engaged in, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of, whichever is the later; and

(b) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from

(i) a day on which the order of the Tribunal or court was contravened, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of, whichever is the later.'

13 Subsection 36 (4) of the Act.

14 *Chadha v Bayer*, (2003), 63 OR (3d) 22 (CA).

15 *In Re Linerboard Antitrust Litigation*, 203 FRD 197 (ED Pa., 2001); affirmed 305 F3d 145 (CA3 Pa., 2002)

16 Class Proceedings Act, 1992, SO 1992, chapter 6, subsection 5(1).

17 Notably, there have been a number of certifications of class proceedings brought pursuant to price maintenance provisions in the former Competition Act. As a result of the changes in 2010 to the Act, resale price maintenance cases no longer give rise to a remedy under section 36.

18 *Pro-Sys Consultants Ltd v Infineon AG*, (2008) 98 BCLR (4th) 272, leave to

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Fasken Martineau is a leading international business law and litigation firm of more than 650 lawyers with offices In Canada, the UK, France and South Africa. Our practice includes every sector of business, industry and government. We provide strategic and thoughtful advice in virtually all areas of business law to a broad range of clients, including close to half of the Fortune 100 companies. We work with corporate clients, government agencies, regulatory authorities, non-profit bodies and individual clients.

Our international excellence, sector expertise and integrity have earned us numerous prestigious accolades such as being named a top corporate dealmaker by Lexpert; consistently distinguished in the Canadian Legal Lexpert Directory, the prestigious Chambers Global Guide to the World's Leading Lawyers, the International Financial Law Review's Guide to the World's Leading Financial Law Firms and The International Who's Who of Business Lawyers.

Our antitrust/competition and marketing law group in Canada has extensive experience and expertise in all areas of Canadian competition law, including in relation to mergers and acquisitions, criminal matters, pricing and distribution issues, marketing and advertising, competition law litigation, exploitation of intellectual property rights and issues relating to abuse of dominant position. We provide advice, assistance and representation to clients in designing, negotiating and implementing transactions, commercial relationships and advertising and marketing programmes and competition law compliance programmes, and in responding to actions and initiatives of third parties whose interests may be adverse to those of our clients. We have considerable experience in representing clients in connection with criminal investigations and prosecutions under the Canadian Competition Act, as well as in relation to competition law class actions.

appeal denied, [2010] SCCB 794 (*DRAM*).

19 *Irving Paper v Atofina Chemicals Inc et al*, [2008] OJ No. 1427, leave to appeal denied 2010 ONSC 2705 (*Hydrogen Peroxide*).

20 *In Re Hydrogen Peroxide Antitrust Litigation*, 240 FRD 163, reversed 552 F.3d. 305 (3rd Cir. 2008).

21 *Quizno's Canada Restaurant Corporation v 2038724 Ontario Ltd*, 2010 ONCA 266.

22 *Pro-Sys v Microsoft*, 2010 BCSC 285, 2011 BCCA 186.

23 *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2010 BCSC 922, 2011 BCCA 187.

24 *Option Consommateurs v Infeon Technologies AG*, [2011] Q.J. No. 16769 (C.A.)

25 *Fanshawe College v LG Philips*, 2011 ONSC 2484.

26 Unreported decision issued by the Divisional Court on November 21, 2011.

27 [2011] S.C.C.A. No. 2036 (Sun-Rype) and [2011] S.C.C.A. No. 396 (Microsoft).

28 [2012] S.C.C.A. No. 20.

**Huy A Do**
Fasken Martineau DuMoulin LLP

Huy Do is a partner of Fasken Martineau. Huy practises antitrust/competition and foreign investment law, having been seconded to the Competition Bureau in 2002. He has extensive experience dealing with the merger notification and review processes under the Competition Act and the Investment Canada Act, as well as the civil and criminal provisions of the Competition Act.

Huy has provided competition law advice in respect of numerous mergers, as well as in respect of reviewable practices and criminal matters under the Competition Act. He also contributed in the preparation of a report to the commissioner of competition on amending the conspiracy section (s45) of the Competition Act. In addition, during his time at the Competition Bureau, Huy was involved in the investigations and prosecutions of hard-core cartels and other anti-competitive conduct under the criminal provisions of the Competition Act.

Huy has served as a non-governmental adviser to the International Competition Network. He is ranked in *Chambers Global 2010 – Guide to the World's Leading Lawyers*, in the competition/antitrust section, as well as the 2010 *PLC Which Lawyer?* handbook as a leading lawyer in Canada in competition/antitrust.

**Anthony F Baldanza**
Fasken Martineau DuMoulin LLP

Tony Baldanza is chair of Fasken Martineau's antitrust/competition and marketing law group and a partner of the firm. He practises business law, with a focus on competition law and foreign investment law.

Tony provides advice and representation in relation to mergers, criminal matters including cartels, and restrictive trade practices. In his merger practice, Tony has handled merger transactions in a wide range of industries, and regularly assists clients in clearing such transactions through: the Canadian Competition Bureau pursuant to the Competition Act; the Investment Review Division of Industry Canada and Cultural Sector Investment Review pursuant to the Investment Canada Act; Transport Canada pursuant to the Canada Transportation Act; and, along with counsel in other jurisdictions, the competition law/antitrust authorities of other jurisdictions.

Tony serves as chair of the Foreign Investment Review Committee of the Canadian Bar Association's section on Competition Law and is a past chair of the section's Mergers Committee. He also serves as vice chair of the Competition Policy Committee of the Canadian Chamber of Commerce. Tony is a frequent speaker at professional seminars and conferences on a wide range of competition law and foreign investment law topics, including conferences sponsored by the ABA, the CBA, the Association of Corporate Counsel, the Ontario Bar Association, the BC Bar Association, Federated Press and Insight. His articles have been published by these organisations and by various other publications including *Canadian Business Law Reports*, *Global Competition Review*, *Metropolitan Corporate Counsel*, *Mergers and Acquisitions in Canada* and *CCH Commercial Times*. He has also co-authored the 'Competition Law' chapter in *Doing Business In Canada* and a chapter on mergers in *Fundamentals of Canadian Competition Law*.

Tony is listed in a wide range of reports and surveys as one of Canada's leading competition law lawyers. These publications include *Chambers Global: The World's Leading Lawyers*; *The International Who's Who of Business Lawyers*; *Practical Law Company Cross-border Handbooks – Competition Handbook*; *Global Counsel Competition Law Handbook*; and *The Legal Media Group Guide to the World's Leading Competition and Antitrust Lawyers*.

**Laura F Cooper**
Fasken Martineau DuMoulin LLP

Laura Cooper is a partner of Fasken Martineau. She is engaged in the practice of commercial litigation with particular emphasis on class actions. Laura serves as vice chair of the litigation department of Fasken Martineau. She is co-chair of the firm's class actions practice group and a member of the firm's antitrust/competition and marketing practice group. Laura has represented clients in a variety of class actions involving antitrust, securities, product liability and employment matters. In particular, Laura has extensive experience in class actions involving international and cross-border cartels. She currently acts on cartel class actions with respect to LCD, CRT, SRAM and flash memory, hydrogen peroxide and filters.

**Paul J Martin**
Fasken Martineau DuMoulin LLP

Paul Martin is a senior partner in the Toronto office of Fasken Martineau and practises in the area of litigation and dispute resolution. He is one of Canada's leading class action defence counsel and is co-chair of the firm's class actions practice group. Paul's practice includes competition litigation with an emphasis on cartels and other criminal matters. In the cartel area, his representative matters have included well-known proceedings concerning vitamins, rubber chemicals, hydrogen peroxide, filters, air cargo, air passenger, packaged ice, high fructose corn syrup and carbon collectors. He is a frequent lecturer at continuing legal education programmes, particularly in areas relating to competition law, class proceedings and cross-border litigation.


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