Cartel Regulation

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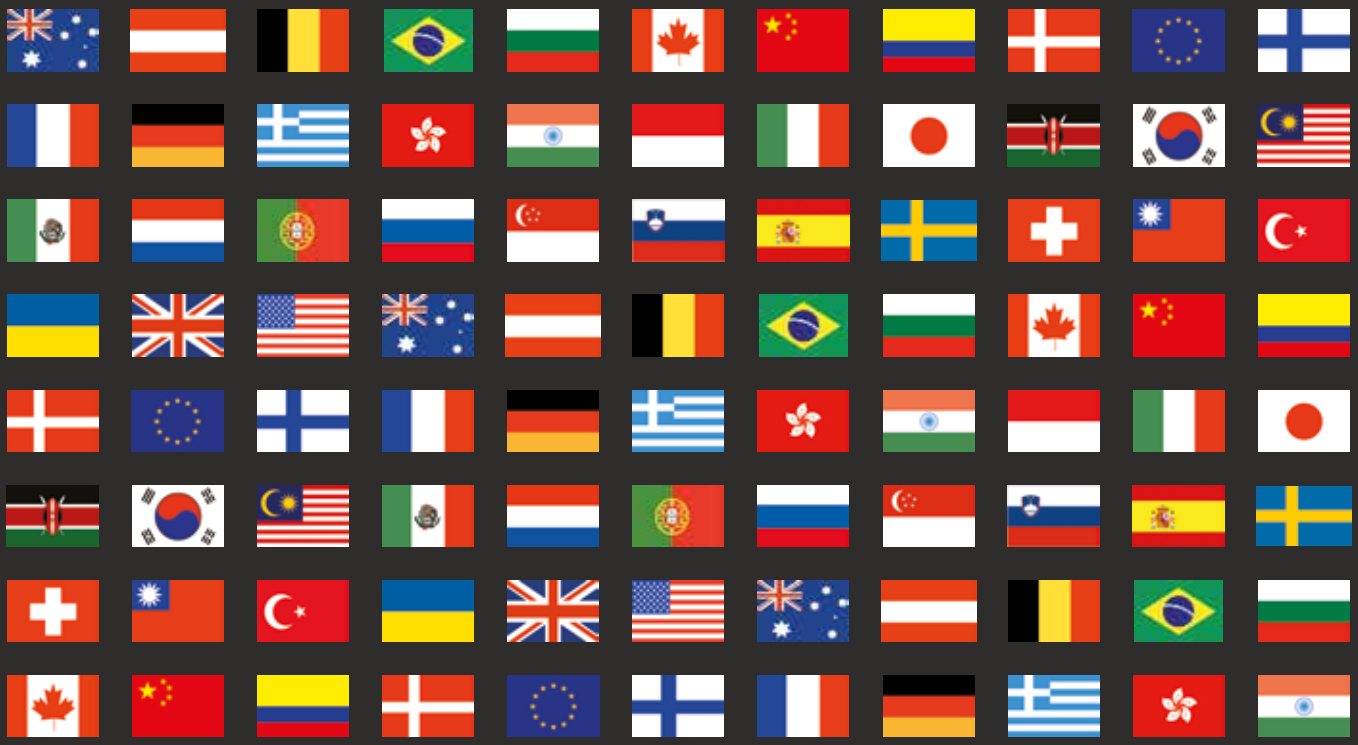

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GETTING THE DEAL THROUGH

Cartel Regulation 2019

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Preface

Cartel Regulation 2019

Nineteenth edition

Getting the Deal Through is delighted to publish the nineteenth edition of *Cartel Regulation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Belgium.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, A Neil Campbell of McMillan LLP, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
November 2018

Editor's foreword

A Neil Campbell
McMillan LLP

This 19th edition of *Cartel Regulation* provides the most current and comprehensive information available about anti-cartel laws and enforcement around the world.

Cartel regulation has globalised over the past two decades. The proliferation and modernisation of competition laws and institutions in both developing and developed countries has been a major contributor to this phenomenon. The International Competition Network (ICN) has also helped to invigorate global competition law enforcement since it was established in 2001, as outlined in the ICN chapter contributed by Simpson Thacher & Bartlett LLP.

Anti-cartel laws are one of the three core pillars of any competition regime, along with unilateral conduct provisions and merger control. Two key areas of consensus have fuelled the international expansion of cartel regulation:

- 'Cartels are bad' – there is now near universal acceptance that certain types of competitor coordination are so unlikely to have procompetitive or efficiency-enhancing benefits that they can safely be prohibited – and penalised severely – without the need for a case-specific assessment of anticompetitive effects.
- 'Leniency programmes work' – the US Department of Justice has been a leader in developing highly effective amnesty and leniency programmes by employing substantial 'carrot and stick' for cooperating parties. This approach continues to be embraced and refined by other jurisdictions around the world.

These two principles have effectively induced a degree of 'soft convergence' in international cartel enforcement. Nevertheless, there are enormous differences between specific regimes, many of which have significant implications in cross-border cases. The presence of criminal liability for corporations and individuals in some but not all jurisdictions adds further layers of complexity for cross-border cartel investigations and proceedings.

Cartel Regulation 2019 provides a detailed account of the state of play in this high-stakes field, including recent developments over the past year and an overview of future changes that may be expected in each jurisdiction. In addition to the in-depth coverage provided for 36 of the most active jurisdictions, this essential reference includes a global overview prepared by Morrison & Foerster. *Cartel Regulation 2019* includes a new country chapter on Belgium.

The structure of the deskbook continues to be based on a template that ensures consistent presentation and ready access to the relevant information about each subject from each individual jurisdiction. The country profiles include overview material on the legislation and enforcement institutions, information about the jurisdictional and substantive coverage of the regime and detailed discussions regarding the design and operation of immunity and leniency programmes as well as contested proceedings and penalties. In addition, private actions by affected customers and collective or class actions are now a prominent part of the landscape in many jurisdictions, and interfaces with agency proceedings are addressed as well.

The country chapters in *Cartel Regulation* are prepared by top experts in each jurisdiction. We are grateful for their efforts to provide thorough reports on their regimes, which include practical advice on how enforcement really works in practice and tips for 'getting the fine down'. I would also like to thank Dan White and his terrific *Getting the Deal Through* team at Law Business Research for all the work they do to produce this excellent annual volume.

If you have comments or suggestions that you would like us to consider for future volumes, I would be delighted to hear from you at +1 416 865 7025 or neil.campbell@mcmillan.ca.

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Canada

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Canada has one statute governing all aspects of competition law: the federal Competition Act (the Act). This statute is applicable throughout the country; there is no provincial or territorial competition legislation in Canada.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Act is administered and enforced by the Commissioner of Competition (the commissioner) who serves as the head of the Competition Bureau (the Bureau), a unit of the Ministry of Innovation, Science and Economic Development. The commissioner is responsible for investigating alleged breaches of the criminal provisions of the Act. The Cartels Directorate in the Bureau, consisting of the senior deputy commissioner, a deputy commissioner, two assistant deputy commissioners, and approximately 40 officers, investigates all matters relating to cartels, conspiracies and bid rigging.

Canada's attorney general has ultimate discretion and authority to initiate criminal proceedings under the Act. The discretion of the attorney general is exercised by the director of public prosecutions (DPP), who heads the Public Prosecution Service of Canada (PPSC). A team of approximately 15 lawyers from the PPSC are responsible for the conduct of prosecutions under the Act. Prosecutions are brought before the provincial or federal courts.

In practical terms, cartel prosecutions are initiated only upon the commissioner's recommendation to the DPP. Similarly, negotiated resolutions under the Bureau's immunity and leniency programmes (see question 27) are initially handled by the Bureau but ultimately concluded by the PPSC, with the Bureau's input.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

In March 2010 the former 'partial rule of reason' approach to criminal conspiracies in section 45 was replaced with a per se criminal offence to address hard-core cartel conduct. A civil 'reviewable practice' was added in section 90.1 to address other anticompetitive agreements between competitors. The amendments also raised the maximum penalties for cartels to a fine of C$25 million per count charged or up to 14 years in prison for the new conspiracy offence. The bid-rigging provision under section 47, which was also amended to include agreements to withdraw a previously submitted bid, carries the same imprisonment penalty or a fine at the discretion of the court.

In December 2009, the Bureau issued guidelines setting out its policy on competitor-collaboration agreements. These guidelines are discussed further below at question 33.

The Bureau conducted public consultations in October 2017 and May 2018 on proposed revisions to its immunity and leniency programmes. New policy documents introducing the revised immunity and leniency programmes were jointly released by the Bureau and the PPSC in September 2018. These changes are discussed further in questions 9, 19 and 24 to 33.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Section 45 of the Act forms the core of Canadian cartel law. It provides that any person who, with a competitor (or potential competitor) in respect of a particular product, conspires, agrees or arranges any of the following is guilty of an indictable offence:

- fixing, maintaining, increasing or controlling the price for the supply of the product;
- allocating sales, territories, customers or markets for the production or supply of the product; or
- fixing, maintaining, controlling, preventing, lessening or eliminating the production or supply of the product.

As a result, price fixing, market allocation and output restriction conspiracies are illegal per se in Canada. Previously, the Act prohibited only conspiracies that had serious or 'undue' competitive effects, as determined under a 'partial rule of reason' analysis. Notably, there is no statute of limitations for the conspiracy or bid-rigging offences. Thus the former provision remains applicable to conduct that occurred prior to March 2010.

As with most criminal offences, a conviction under the Act requires the prosecution to prove beyond a reasonable doubt both the actus reus and the mens rea of the offence. The actus reus is established by demonstrating that the accused was a party to a conspiracy, agreement or arrangement with a competitor to fix prices, allocate markets or customers, or lessen supply of a product in the manner described above. To establish the mens rea of the offence, the prosecution must demonstrate that the accused intended to enter into the agreement and had knowledge of its terms.

The Act also prohibits Canadian corporations from implementing directives from a foreign corporation for the purpose of giving effect to conspiracies entered into outside of Canada (section 46), and prohibits bid rigging (section 47). In the past, resale price maintenance had been a per se illegal criminal offence. In 2009 this offence was repealed and replaced with a civil 'reviewable practice' under section 76 of the Act.

Section 45 focuses on agreements among actual or potential competitors in the supply of products (defined to include goods and services) that involve price fixing, customer or market allocation, or output restriction. Despite some older reform proposals to the contrary, it does not address group boycotts. Potentially, it could catch other forms of cooperation among competitors, including joint ventures and strategic alliances. However, the Bureau has indicated in its guidelines on competitor collaborations that the conspiracy offence will be reserved for 'naked restraints' on competition. Commercial activities such as dual distribution, joint ventures and strategic alliances will, instead, be assessed under the reviewable practice provision in section 90.1. However, these guidelines are not determinative regarding the availability of private damages actions, as they are not binding upon a court (see question 22).

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

The Act creates two industry-specific offences, one for professional sports and the other for financial institutions. With respect to professional sports, the Act prohibits conspiracies to unreasonably limit the opportunities for any person to participate in a professional sport or to negotiate with the team or club of his or her choice in a professional league. Conspiracies among federal financial institutions are also per se illegal – no lessening of competition needs to be proven. Any agreement among such institutions with respect to interest rates, service charges, or the amount and conditions of loans is an offence. However, there are exceptions for the sharing of credit information and other matters.

Various sectors and activities are expressly excluded from the operations of the Act. These include labour relations, fishermen, shipping conferences, securities underwriting and amateur sport.

The Act now recognises the common law 'regulated conduct defence' under subsection 45(7). The new subsection provides that the rules and principles of the common law that render a requirement or authorisation by or under another act of parliament or provincial legislature a defence to prosecution under section 45 continue to apply.

6 Application of the law

Does the law apply to individuals or corporations or both?

The Act applies to both individuals and corporations. Charges are often laid against both a corporation and individuals such as its senior managers, officers or directors. On conviction, a person is subject to a fine of up to C$25 million or up to 14 years' imprisonment per count charged. Senior Bureau officials have noted in speeches that the Bureau will look for appropriate cases in which to prosecute individuals and recommend that the PPSC seek jail terms. The Bureau and PPSC have charged numerous individuals in an inquiry into retail gasoline prices in Quebec. Similarly, in an inquiry into chocolate confectionery, three senior officers were charged in parallel with charges against several companies, although the proceedings were subsequently stayed against all parties. In the past 10 years more than 100 individuals have been prosecuted.

The Superior Court of Quebec decision in the matter of *R v Pétroles Global Inc* is the first ruling in Canada regarding an organisation's criminal liability pursuant to section 22.2 of the Criminal Code. (An appeal to the Quebec Court of Appeal has been abandoned.) This provision incorporates amendments made to the Criminal Code in 2004 that were designed to facilitate the determination of criminal liability against corporations. The court held that corporate criminal liability may be established based on the actions of employees below the level of directors or the most senior executives if they have responsibility for the relevant decision-making.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

To take jurisdiction over activities occurring outside of Canada, a Canadian court must find that it has both subject-matter (or substantive) jurisdiction with respect to the alleged offence, and personal jurisdiction over the accused person.

Substantive jurisdiction

The Supreme Court of Canada's 1985 decision in *R v Libman* sets out the following test for substantive jurisdiction:

> *This country has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence here … all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada … it is sufficient that there be a 'real and substantial link' between an offence and this country.*

The issue of substantive jurisdiction over cartel conduct taking place outside Canada with effects in Canada has not been specifically canvassed in a contested criminal proceeding, although such conduct has formed the basis of numerous guilty pleas. Some uncertainty remains regarding the jurisdiction of Canadian courts over such conduct.

The commissioner has demonstrated a willingness to adopt an expansive interpretation of *Libman*. The Bureau's position is that a foreign cartel that affects Canadian customers triggers substantive jurisdiction. Bureau guidelines and document production orders in various cases confirm the Bureau's interest in claiming jurisdiction over indirect (as well as direct) sales into Canada. Foreign producers of fax paper, sorbates, bulk vitamins, automotive parts and numerous other products have pleaded guilty to violations under the former section 45 for price-fixing and market-allocation agreements that occurred wholly outside Canada but affected Canadian markets, prices and customers.

Personal jurisdiction

The general principle governing personal jurisdiction of a Canadian criminal court is that a person who is outside Canada and not brought by any special statute within the jurisdiction of the court is prima facie not subject to the process of that court. If there is no special statutory provision for the service of a summons outside the jurisdiction, then the court does not have jurisdiction and cannot try the accused, unless the person is present in Canada or voluntarily submits to the jurisdiction of the court. For persons who are not resident in Canada, a summons compelling attendance before a Canadian court cannot be served abroad for an offence under the Act. If no service has occurred, Canadian courts will not have personal jurisdiction.

The case of foreign corporations with no Canadian presence or assets in Canada is more complex. Where the accused is a corporation, notice (in the form of a summons to appear on indictment) must be served on the corporation pursuant to the Criminal Code by delivering it to 'the manager, secretary or other executive officer of the corporation or of a branch thereof' within the territory of Canada. Service upon the Canadian 'affiliate' of a foreign corporation is unlikely to be sufficient, given that an affiliate is a separate legal person and service outside of Canada on a foreign corporation is not specifically authorised. However, a corporation that does not have a branch in Canada may still be properly served if one of its executive officers is present in Canada to carry on the business of the corporation. If there is a Canadian affiliate of a foreign corporate conspirator, a prosecution may also be instituted against the local subsidiary under section 46 of the Act in respect of local implementation of the conspiracy, regardless of whether charges under section 45 are pursued against the foreign parent.

Extradition

Persons located in the US can be extradited to Canada pursuant to the Canada–US Extradition Treaty, which permits each state to request from the other extradition of individuals who are charged with, or have been convicted of, offences within the jurisdiction of the requesting state. While extradition will only be granted for offences punishable by imprisonment for a term of more than one year, the cartel and bid-rigging offences discussed above qualify because they provide for jail terms of up to 14 years. Extradition to Canada from the UK, or any other country that criminalises cartel activity and with which Canada has an extradition treaty, is also possible.

The procedure for extradition requires the Canadian government to make a formal request for extradition under the applicable treaty. The request documentation would have to include an arrest warrant. This procedure has been used for offences under the Act at least twice. In *Thomas Liquidation* – a misleading advertising case – the US authorities accepted a Canadian government request for extradition and issued a warrant for the arrest of an officer of the accused corporation who was individually charged under the Act. In a more recent case, three Canadians who operated a deceptive telemarketing scheme based in Toronto, which purported to offer credit cards to Americans for a fee but never delivered the cards, were extradited to the US and were sentenced by the US Federal Court in the Southern District of Illinois. This was the first time a Bureau investigation resulted in extradition.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Subsection 45(5) provides a defence for conduct that only affects customers or other parties outside of Canada:

> *No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada, unless the conspiracy, agreement or arrangement*
> *(a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;*
> *(b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or*
> *(c) is in respect only of the supply of services that facilitate the export of products from Canada.*

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

The Bureau routinely commences informal investigations in response to complaints by marketplace participants, its own analysis of public information, or the evidence of informants. If such an investigation leads the commissioner to believe, on reasonable grounds, that a criminal offence has been committed, the commissioner will launch a formal inquiry under section 10 of the Act. In addition, the commissioner is required to commence an inquiry in response to a directive from the Minister of Innovation, Science and Economic Development (the minister) or by an application under oath by six residents of Canada. Commencement of an inquiry empowers the commissioner to exercise formal powers, such as obtaining judicial orders to compel the production of evidence, search warrants and wiretap orders (see question 10).

After evidence is obtained during an inquiry, the commissioner decides whether to discontinue the inquiry or refer the case to the DPP for prosecution. Unlike many other jurisdictions, Canada has no statute of limitations for the prosecution of indictable offences (such as price fixing or bid rigging). There is thus no statutory deadline within which the commissioner and DPP must decide whether to bring charges against the members of a cartel. While some Bureau investigations have been resolved expeditiously (initiation to resolution in under two years), others have taken several years depending on the complexity of the investigation and the availability of investigative and prosecutorial resources.

If the inquiry is discontinued, the commissioner must make a written report to the minister that summarises the information obtained from the inquiry and the reasons for its discontinuance. The minister may accept the discontinuance or require the commissioner to conduct further inquiry. Although a directive from the minister or a 'six-resident application' cannot compel the commissioner to take any particular enforcement proceedings, the requirement of a written report to the minister upon the discontinuance of an inquiry ensures that the commissioner will closely examine the facts in such cases. Consequently, the target of the inquiry may be required to incur significant costs, uncertainty and inconvenience in connection with such an inquiry, even though no formal charges are ever laid.

As described further in question 2, where a matter is referred to the DPP, it will make an independent decision whether to lay charges and pursue a prosecution. In May 2010 the Bureau and the DPP issued a memorandum of understanding clarifying their respective roles in this process. These roles were further clarified in the September 2018 revisions to the immunity and leniency policies, which are discussed below in question 32. It is also worth highlighting that the PPSC is a co-author of the revised immunity and leniency policies, which represents a change from previous editions of the policies where the Bureau was the sole author. As a result of this development, there is additional certainty that the DPP, as the head of the PPSC, will not act in a manner contrary to these policies, which had been a potential concern in the past.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

During an inquiry, the commissioner has extensive (judicially supervised) powers to obtain information by means of search warrants, orders for the production of data and records, and even wiretaps. These statutory powers supplement information supplied voluntarily by marketplace participants, cooperating parties, or enforcement agencies in other jurisdictions. The Bureau sometimes issues voluntary requests for information or 'target letters' to companies that it believes may have relevant information, before resorting to the formal investigative powers described below.

Search warrants

Warrants to search the premises of a business or the home of an individual can be obtained by means of an ex parte application under section 15 of the Act. Under that section, the commissioner must establish that there are reasonable grounds to believe that a criminal offence has been committed and that relevant evidence is located on the premises to be searched. Preventing access to premises or otherwise obstructing the execution of a search warrant is a criminal offence and the commissioner may enlist the support of the police if access is denied.

The Act expressly provides for access to and the search and seizure of computer records, including applications to the court to set the terms and conditions of the operation of a computer system. Bureau investigators have downloaded data stored outside Canada in the course of searches of computer systems located in Canada, although there continues to be some controversy as to the precise limits of the authority granted by a warrant authorising a search of computer systems in a cross-border context.

Documents that are subject to solicitor–client privilege cannot be immediately seized by officers under a search warrant. The Act contains a special procedure for sealing such documents and for determining the validity of privilege claims within a limited time. The Act also contains a provision requiring the commissioner to report to the court to retain seized documents. Because the affected company or individual can ultimately request a retention or privilege hearing, and because evidence procured through an illegal search can be excluded at trial, the courts have ruled that search warrant orders cannot be appealed. However, such an order can be set aside in special circumstances such as a material non-disclosure or misrepresentation in the affidavit (known as an 'information to obtain') supporting the commissioner's ex parte application, or where the inquiry giving rise to the order has ended without the laying of criminal charges.

Wiretaps

The commissioner has the power to intercept private communications without consent through electronic means – in other words, to use a wiretap. This power is restricted to conspiracy, bid rigging and serious deceptive marketing investigations, and requires prior judicial authorisation. The first use of wiretaps as an investigative tool led to the laying of criminal charges under the deceptive telemarketing provisions of the Act, an area that has been the subject of vigorous enforcement activity on the part of the Bureau. Subsequently, extensive wiretap evidence has been used in the investigation and prosecution of retail gasoline price-fixing conspiracies in Quebec and Ontario, in which the Bureau recorded 'thousands' of telephone conversations using its wiretap powers.

Subpoenas

As an alternative (or in addition) to executing a search warrant, the commissioner may apply to a court pursuant to section 11 of the Act to require the production of documents and other records or compel a corporation to prepare written returns of information under oath, within a certain period of time. On a section 11 application, the commissioner need only satisfy the court that an inquiry has been initiated and that a person is likely to have relevant documents in his possession or control. Such subpoenas may be issued against targets of an investigation as well as other third parties who may have relevant information.

Under subsection 11(2), a Canadian corporation that is an affiliate of a foreign corporation may be ordered to produce records held by its foreign affiliate. The precise scope of this 'long-arm' authority has not

been judicially determined, but it continues to be invoked in document production orders sought by the Bureau. The section 11(2) power was the subject of constitutional challenge by Toshiba in the *CRT* investigation and by Royal Bank of Scotland in the *Libor* investigation. In both cases, the litigation was settled before any final determinations on the provision's validity were made by a court.

Section 11 of the Act can also be used to compel witnesses who have relevant information to testify under oath for the purpose of answering questions related to the inquiry. Testimony obtained from a person under a section 11 order cannot be used against that person in any subsequent criminal proceedings. This limitation is consistent with decisions of the Supreme Court of Canada establishing use and derivative use immunity for persons compelled to give evidence under statutory powers of investigation. On the other hand, where an individual employee of a corporation has been compelled to give evidence under section 11, the evidence is generally considered admissible against the accused corporation.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

In international cartel cases, the Bureau will often cooperate closely with other competition agencies, either through formal procedures or informally.

Formal procedures involve the invocation of mutual legal assistance treaties (MLATs) with the US and other countries. While they have been used sparingly, the MLAT arrangements permit Canada and cooperating countries to undertake formal procedures in their own jurisdictions to obtain evidence for a foreign investigation. These arrangements also permit Canadian and other antitrust enforcement agencies to coordinate their enforcement activities, exchange confidential information and meet regularly to discuss case-specific matters.

The Bureau may also use competition cooperation agreements, such as those with the US, the EU, Australia, Brazil and others. In general, such agreements build upon the 1995 OECD Recommendation Concerning Co-operation between OECD countries and include provisions relating to notification and consultation when an investigation may affect the interests of another jurisdiction. However, these agreements generally do not provide for the exchange of documents or other evidence that is subject to domestic confidentiality protections, and they are therefore of limited use in cartel cases.

In practice, there may be wide-ranging informal contacts among Canadian and foreign investigative agencies on common issues during an inquiry even if confidential evidence is not exchanged. There has also been informal coordination of independent and parallel investigations into numerous international cartels. This has included parallel searches or other use of formal enforcement powers in several cases, including the investigation into air cargo surcharges. This form of cooperation has been very successful and is now the norm in investigations into cartels affecting North America. In addition, the Bureau now regularly requests that cooperating parties under its immunity and leniency programmes provide a 'waiver' allowing the Bureau to discuss common confidential information with the US Department of Justice and certain other cartel enforcement authorities.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

In light of the MLAT and other inter-agency cooperation discussed in question 11, a company defending a cartel investigation that has multi-jurisdictional implications, and particularly one involving the US or the EU, should be highly sensitive to the potential collaboration between the Bureau and the enforcement agencies in these jurisdictions. A coordinated defence strategy is increasingly critical, and the timing of approaches or responses to the authorities in each jurisdiction should be considered carefully. The exposure of key individuals to prosecution, and the lack of any limitation period for cartel conduct, in Canada are factors of particular concern in developing a comprehensive strategy.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

Cartel matters are prosecuted as indictable criminal offences. The charges are set out in an indictment and the accused must respond by entering a plea. In practice, many cases are resolved by negotiated plea agreements which are subject to court approval, as discussed further in questions 19 and 30.

If the accused pleads not guilty, a preliminary inquiry is held before a judge to determine whether there is sufficient evidence to order a trial. The DPP may and occasionally does skip this step by issuing a 'preferred indictment' and proceeding directly to trial.

Prosecutions may be brought in any of the regular provincial courts of superior jurisdiction or in the Federal Court – Trial Division. Procedure in these prosecutions is governed by the Criminal Code and, where matters are adjudicated in the provincial courts, the applicable court's rules of criminal procedure. Proceedings are normally undertaken in the provincial superior courts, which have well-established procedures for dealing with trials, evidence, custodial (and other) sentences, and other aspects of criminal proceedings.

Under the Act, a corporation has no right to a jury trial, although individuals may elect trial by jury.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

In cartel cases, as in most other criminal matters, the onus is on the prosecution to prove each element of the offence beyond a reasonable doubt. The ordinary rules of evidence in criminal proceedings generally apply, although the Act expressly provides for the admissibility of statistical evidence that might not be admitted in some other criminal cases.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Pursuant to subsection 45(3) of the Act, a court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties. However, the conspiracy, agreement or arrangement must be proved beyond reasonable doubt.

16 Appeal process

What is the appeal process?

There is an automatic right of appeal, by the accused person or the DPP, on any matter that involves a question of law alone, to the provincial court of appeal or the Federal Court of Appeal, as the case may be. An accused person may also, with leave of the court appeal against a conviction on any ground that involves a question of fact or a question of mixed fact and law. The decision of a court of appeal may be appealed to the Supreme Court of Canada, but only if the Supreme Court grants leave to do so. Sentencing decisions may also be appealed by the accused person or the DPP with leave of the court.

On the hearing of an appeal against conviction, the court of appeal may allow the appeal where it is of the opinion that the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence, on the ground of a wrong decision on a question of law, or on any ground there was a miscarriage of justice. The court of appeal may dismiss the appeal where the appeal is not decided in favour of the appellant on any ground mentioned above, that no substantial wrong or miscarriage of justice has occurred, or notwithstanding any procedural irregularity at trial the court of appeal is of the opinion that the appellant suffered no prejudice thereby. Where a court of appeal allows an appeal it will quash the conviction and direct a judgment of acquittal or order a new trial. If an appeal is from an acquittal, the court of appeal may order a new trial, or enter a verdict of guilty.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

Given their status as the most serious indictable offences under the Act, cartel prosecutions attract significant penalties – up to C$25 million per count charged for companies and for individuals up to a C$25 million fine or 14 years' imprisonment. There is no maximum fine for foreign-directed conspiracies or bid rigging. Courts have emphasised in both the competition law and general criminal law context that fines must be large enough to deter powerful companies and must not become simply a cost of doing business. C$10 million is the highest fine to date for a single count conspiracy under section 45. This amount (the previous statutory maximum) was imposed for the first time in January 2006 in the *Carbonless Paper* case, and again in 2012 (in respect of conduct occurring under the old offence) in the *Polyurethane Foam* case. The section 46 offence relating to implementing a foreign conspiracy in Canada carries no fine ceiling, and in 1999–2000 SGL Carbon AG and UCAR Inc agreed to pay fines of C$13.5 million and C$12 million respectively under that provision in the *Graphite Electrodes* case.

It is also possible for a prosecution to proceed with multiple counts, each constituting a separate offence. This can result in total fines in excess of the statutory maximum, which has occurred following guilty pleas in a number of cartel cases. These include some of the highest fines in the history of Canadian criminal law: C$50.9 million against F Hoffmann-La Roche for multiple conspiracies involving vitamin products; and C$30 million against Yazaki Corporation in April 2013 for bid rigging in the supply of wire harnesses (auto parts). The latter penalty is the highest fine ever imposed under the bid-rigging offence.

While the maximum prison sentences available under sections 45 (conspiracy) and 47 (bid rigging) of the Act are 14 years, the imposition of custodial sentences against individual cartel offenders to date has been relatively rare. Virtually all prison sentences for cartel conduct have been less than two years, with most of those sentences conditional (ie, to be served in the community). However, legislative amendments to the federal Criminal Code in 2012 have eliminated the availability of conditional sentencing for future section 45 and section 47 convictions.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Cartel cases are normally prosecuted under the criminal provisions of the Act and are primarily subject to the criminal sanctions of fines and imprisonment discussed in question 16. It is also common for the DPP to seek a prohibition order to prevent future repetition of the offence.

For competitor collaboration cases that do not fall into the traditional hard-core cartel pattern, the section 90.1 reviewable practice provisions permit the Bureau to pursue a prohibition order against the conduct in question. (Fines are not available.) Alternatively, it might be possible for the commissioner to bring an application under the joint abuse of dominance provisions in the non-criminal part of the Act. Such applications would be heard before the Competition Tribunal, an administrative body that considers the evidence on a civil standard of a balance of probabilities. Since 2009, the Competition Tribunal can impose administrative monetary penalties under the abuse of dominance provision of the Act of up to C$10 million for a first order and of up to C$15 million for subsequent orders.

To date there have been very few section 90.1 or joint dominance cases, and they have all been settled with consensual remedial agreements.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

While the federal Criminal Code enumerates a range of binding sentencing principles, they provide considerable latitude and the determination of sentence is ultimately a matter for the discretion of the court. In addition to sentencing principles, the Criminal Code provides the following list of aggravating and mitigating factors to be considered when sentencing organisations (ie, corporations):

- any advantage realised by the organisation as a result of the offence;
- the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
- whether the organisation has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;
- the impact that the sentence would have on the economic viability of the organisation and the continued employment of its employees;
- the cost to public authorities of the investigation and prosecution of the offence;
- any regulatory penalty imposed on the organisation or one of its representatives in respect of the conduct that formed the basis of the offence;
- whether the organisation was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
- any penalty imposed by the organisation on a representative for their role in the commission of the offence;
- any restitution that the organisation is ordered to make or any amount that the organisation has paid to a victim of the offence; and
- any measures that the organisation has taken to reduce the likelihood of it committing a subsequent offence.

The Bureau's September 2018 leniency policy establishes a framework for determining the recommendation that it will make to the DPP regarding the fine to be sought in cases involving cooperating parties. The policy uses an initial starting point of 20 per cent of the volume of commerce affected by the cartel in Canada. Of this 20 per cent starting point, 10 per cent is viewed as a proxy for the overcharge from the cartel activity and 10 per cent is viewed as a deterrent. If the precise overcharge can be calculated on the basis of compelling evidence, then the 10 per cent proxy will be replaced by the actual overcharge. Cooperation discounts (up to 50 per cent) and any aggravating or mitigating factors are then applied to the base fine. In addition to the aggravating and mitigating factors set out above, the September 2018 leniency policy notes that the existence of a credible and effective corporate compliance programme will serve as a mitigating factor in the calculation of the fine amount.

Prior to the September 2018 leniency policy, the 50 per cent cooperation discount, which was automatic, was only available to the first leniency applicant, with subsequent leniency applicants only eligible for discounts up to 30 per cent. The updated leniency policy permits a cooperation credit of up to 50 per cent for every leniency applicant, which is dependent on the value of the leniency applicant's cooperation. See questions 24 and 25 for additional details on the new immunity and leniency policies.

While these criteria and the Bureau recommendations are given significant consideration in the negotiation of guilty plea arrangements, they are not binding on the DPP or on the court when a guilty plea is presented to the court for acceptance. Nor would they bind the DPP when making submissions on an appropriate sentence after obtaining a conviction at trial.

If a guilty plea is negotiated with the DPP, it will usually include agreement upon a joint submission to the court as to the proper penalty. The court is not bound by this recommendation, but will not reject it unless it is either contrary to the public interest or brings the administration of justice into dispute.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

A new Integrity Regime was put in place by the Canadian government in July 2015. The regime applies to procurement and real property transactions undertaken by federal government departments and agencies.

A supplier is ineligible to do business with the government of Canada if it, or a member of its board of directors, has been convicted of bid rigging or any other anticompetitive activity under the Competition Act or a similar foreign offence. Where an affiliate of a supplier has been so convicted, an assessment will be made to determine if there was any participation or involvement from the supplier in the actions that led to the affiliate's conviction. If so, the supplier will be rendered ineligible. If a supplier is charged with an offence, it may also be suspended from doing business with the government pending the outcome of the judicial proceedings.

A supplier convicted of a Competition Act offence will be ineligible for 10 years, but may have its ineligibility period reduced by five years if it demonstrates that it cooperated with law enforcement authorities or has undertaken remedial action to address the wrongdoing. An administrative agreement would then be imposed to monitor the supplier's progress.

Exceptions to the policy may apply in circumstances in which it is necessary to the public interest to enter into business with a supplier that has been convicted. Possible circumstances necessary to the public interest could include:

- no other supplier is capable of performing the contract;
- an emergency;
- national security;
- health and safety; and
- economic harm to the financial interests of the government of Canada and not of a particular supplier.

In March 2018, the federal government announced that the Integrity Regime will be enhanced to introduce greater flexibility in debarment decisions and increase the number of triggers that can lead to debarment (including the addition of more federal offences, certain provincial offences, 'foreign civil judgments for misconduct' and debarment decisions of provinces, foreign jurisdictions and international organisations). The government announced that the enhanced Integrity Regime will be reflected in a revised Ineligibility and Suspension Policy, which will be released on 15 November 2018, and will come into effect on 1 January 2019.

Provincial (and also municipal) governments may also establish rules governing debarment from their procurement processes. For example, the Quebec Integrity in Public Contracts Act prohibits a corporation convicted of price fixing or bid rigging in the previous five years from entering into contracts with public bodies or municipalities.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Once proceedings have been initiated under the criminal provisions in Part VI of the Act, proceedings under the various civil reviewable practices provisions cannot be brought on the basis of substantially the same facts (and vice versa). The choice of which track to pursue is a matter of enforcement discretion for the Commissioner and the DPP. As noted in question 4, the Bureau has issued guidelines indicating that hard-core cartel conduct normally will be prosecuted criminally and that other types of competitor collaboration normally will be dealt with under the section 90.1 civil provisions.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Section 36 of the Act grants private parties the right to recover in the ordinary civil courts any losses or damages suffered as a result of a breach of the criminal provisions of the Act, as well as their costs of investigation and litigation. Only single damages are available. The Act expressly provides that a prior conviction for an offence is, in the absence of any evidence to the contrary, proof of liability. However, there are no conditions precedent to a private action under the Act, and the absence of a conviction, or even the refusal of the commissioner to commence an inquiry, does not bar or provide a valid defence to such an action.

Both direct and indirect purchasers may bring private claims in Canada. The passing-on defence is not permitted. The Supreme Court of Canada held in 2013 that the possibility of double recovery is an issue to be dealt with when assessing damages at trial, and should not be a bar to indirect purchaser claims.

There is no private right of action in relation to the civil provisions of the Act. However, in some situations private parties may be able to use section 36 to bring a private action in respect of an alleged breach of the conspiracy or bid-rigging provisions even if it involves conduct that the Bureau, as a matter of enforcement discretion, would treat under the civil rather than criminal track.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Class actions are available, and are now a virtual certainty in multiple provinces in Canada after (and often before) a conviction under the Act in situations where cartel activity may have occurred. A vigorous and effective plaintiffs' bar has evolved in Canada, often acting in conjunction with US plaintiffs' counsel in cross-border cases. Claims are normally brought in provincial courts – most typically in British Columbia, Ontario, and Quebec – rather than the Federal Court. These provincial regimes follow an 'opt-out' model that allows individual purchasers to choose not to participate in a class action and proceed with their own individual claims. However, there is no formal procedure for consolidating parallel actions brought in multiple provinces.

To date, most cases have been resolved through settlements, which are subject to the approval of the court to ensure they are fair, reasonable and in the best interests of the proposed class. In recent class proceedings involving the foreign exchange markets, 12 defendants have thus far agreed to settlements which collectively exceed C$107 million. More recently, plaintiffs have announced a settlement of C$517 million in a long-running class action against Microsoft, but it has not yet been brought forward for court approval.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Bureau has an immunity programme whereby a company or individual implicated in cartel activities may offer to cooperate with the Bureau and request immunity. The term 'immunity' refers to a grant of full immunity from prosecution by the DPP on recommendation by the Bureau. As of September 2018, the first party to come forward where the Bureau is unaware of an offence, or before there is sufficient evidence for a referral of the case to the DPP for possible prosecution, is eligible for a grant of interim immunity. The applicant must have terminated its participation in the illegal activities and must not have coerced others to participate in the illegal activities. The grant of interim immunity is a conditional immunity agreement that sets out the applicant's ongoing cooperation and full disclosure obligations that must be fulfilled in order for the DPP to finalise the immunity agreement.

Pursuant to the grant of interim immunity, the applicant will need to provide complete, timely and ongoing cooperation throughout the course of the Bureau's investigation and subsequent prosecutions. This entails full, frank and truthful disclosure of non-privileged information and records. The applicant's counsel will first proffer what records, evidence or testimony can be provided. Once a grant of interim immunity is concluded with the DPP, witnesses will be interviewed and they may subsequently be called to testify in court proceedings.

As of September 2018, if a company qualifies for immunity, all current directors, officers and employees that desire immunity will need to demonstrate their knowledge of or participation in the unlawful conduct and their willingness to cooperate with the Bureau's investigation. If they do so, they will also receive immunity provided they offer complete and timely cooperation. Former directors, officers and employees of the company who admit their knowledge of or participation in

an offence under the Act may also be given immunity in exchange for cooperation, provided they are not currently employed by another member of the cartel that is being investigated. This determination is to be made by the Bureau on a case-by-case basis.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

The Bureau has created a leniency programme that complements its immunity programme for candidates that are not eligible for a grant of interim immunity. The Bureau will recommend to the DPP that qualifying applicants be granted recognition for timely and meaningful assistance to the Bureau's investigation. An agreement to plead guilty and cooperate can earn a leniency applicant a reduction of up to 50 per cent of the fine that would otherwise have been recommended by the Bureau to the DPP. At the request of the first leniency applicant (ie, the first cooperating party after the immunity applicant) that is a corporate applicant the Bureau will also recommend to the DPP not to charge the directors, officers or employees of the applicant who admit knowledge of or participation in the unlawful conduct and are prepared to cooperate.

Providing all leniency applicants with the ability to receive a reduction of up to 50 per cent of the fine that otherwise would have been recommended is a new development in the September 2018 leniency programme. Previously, only the first-in leniency applicant was eligible for this 50 per cent reduction, which was automatic, with subsequent applicants only eligible for a fine reduction of up to 30 per cent. In the new programme, the percentage of the fine reduction is to be determined having regard to the extent that the leniency applicant's cooperation adds to the Bureau's ability to advance its investigation and pursue other culpable parties. The Bureau will take into account a number of factors, including the timing of the leniency application (relative to other parties in the cartel as well as relative to the stage of the Bureau's investigation), the timeliness of disclosure, the availability, credibility and reliability of witnesses, the relevance and materiality of the applicant's records, and any other factor relevant to the development of the Bureau's investigation into the matter. An additional fine reduction credit of 5 to 10 per cent is available to a party eligible for 'immunity plus' (see question 26).

All leniency applicants must meet the requirements of the programme, which are similar to those of the immunity programme, including full, frank, timely and truthful cooperation.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

A party will not be eligible for immunity if the Bureau has been made aware of the offence by another, earlier applicant for immunity in respect of the same alleged cartel conduct. However, the second party to offer to cooperate will, as a practical matter, be considered for favourable treatment and may, if the first party fails to fulfil the requirements of the immunity programme, be able to request immunity at that time.

Under the Bureau's September 2018 leniency programme, the timing of the leniency application is an important consideration in the determination of the percentage fine reduction that will be available to the applicant. In the previous version of the leniency programme, there was more certainty as the second party benefited from a penalty reduction of 50 per cent of the fine that would otherwise be recommended, but the new programme has made it clear that the extent of the applicant's cooperation will be one of the factors to be considered in this determination. The first-in leniency applicant will be able to obtain protection for its employees from prosecution, so long as they admit knowledge or participation in the unlawful conduct and are prepared to cooperate in a timely fashion with the Bureau's investigation in an ongoing manner. Other conspirators who seek to resolve their exposure later in the investigation will have progressively less ability to negotiate favourable fine reductions, unless they are able to demonstrate a higher value associated with their cooperation. In addition, second and subsequent leniency applicants will have less ability to negotiate favourable terms in connection with the exposure of individuals to potential prosecution.

The concept of 'immunity plus' is also addressed in the leniency programme. Parties that are not the first to disclose conduct to the Bureau may nonetheless qualify for additional favourable treatment if they are the first to disclose information relating to another offence for which they may receive immunity. If the company pleads guilty to the first offence for which it has not been granted immunity, its disclosure of the second offence will be recognised by the Bureau and the DPP in their sentencing recommendations with respect to the first offence, resulting in an additional 5 to 10 per cent discount off the corporate fine for the first offence and potentially additional favourable treatment for individuals.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

There are no deadlines for approaching the Bureau. However, the available benefits decline for subsequent cooperating parties as noted in question 26. To increase its likelihood of obtaining immunity or leniency, a party should approach the authorities as soon as legal counsel has information indicating that an offence may have been committed.

A 'marker' can be obtained that will allow counsel time to complete a full investigation. Once a marker is granted, the applicant has 30 calendar days to provide the Bureau a detailed proffer describing the illegal activity, its effects in Canada and the supporting evidence. If an applicant fails to provide its proffer within 30 days, or within any extended period of time agreed by the Bureau, the marker will automatically lapse. The marker can also be cancelled if the proffer is incomplete or insufficient. In situations involving multiple jurisdictions, a party whose business activities have a connection to Canada should consider contacting the Bureau either prior to, or immediately after, approaching foreign competition law authorities.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

A participant in the Bureau's immunity or leniency programmes must provide 'full, complete, frank and truthful disclosure of all non-privileged information, evidence and records in its possession, under its control or available to it, wherever located, that in any manner relate to the anticompetitive conduct for which immunity is sought'. Participants must also take all lawful measures to secure the cooperation of current and former directors, officers and employees for the duration of the Bureau's investigation and any ensuing prosecutions, including appearing for interviews and potentially providing testimony in judicial proceedings. All such cooperation efforts are at the cooperating party's own expense.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The Bureau treats as confidential any information obtained from a party requesting immunity or leniency. The only exceptions to this policy are when disclosure:

- is required by law;
- is necessary to obtain or maintain the validity of a judicial authorisation for the exercise of investigative powers;
- is for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
- is agreed to by the cooperating party;
- has already been made public by the party;

- is necessary for the administration or enforcement of the Act; or
- is necessary to prevent the commission of a serious criminal offence.

In addition, unless required by law or on consent, the Bureau will not inform other competition agencies with which it may be cooperating of the identity of an immunity or leniency applicant.

With respect to private actions, the Bureau's policy is to provide confidential information only in response to a court order. In the event of such an order, the Bureau will take all reasonable steps to protect the confidentiality of the information, including by seeking a protective order from the court.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

While the Bureau may make recommendations to the DPP with respect to the severity of any penalty or obligation to be imposed on parties that cooperate in cartel investigations (and those that do not), the DPP retains the ultimate discretion concerning decisions to prosecute, negotiation of plea bargains and sentencing submissions presented in court.

As discussed in question 19, the DPP and defence counsel may make recommendations but cannot fetter the sentencing discretion of the court. In practice, plea bargains with joint recommendations on sentencing have almost always been accepted. The common law encourages courts to accept joint recommendations, which can only be refused where the court's acceptance of the recommended sentence would 'bring the administration of justice into disrepute' or otherwise be contrary to the public interest.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

If a company qualifies for immunity, all present directors, officers and employees who admit their knowledge of or participation in the illegal activity as part of the corporate admission, and who provide complete, timely and ongoing cooperation, will qualify for immunity. Agents of a company and past directors, officers and employees who admit their knowledge of or participation in the illegal activity and who offer to cooperate with the Bureau's investigation may also qualify for immunity. However, this determination will be made on a case-by-case basis and immunity is not automatic for agents or past employees. Even if a corporation does not qualify for immunity – for example, if it coerced others to participate – past or present directors, officers and employees who come forward with the corporation to cooperate may nonetheless be considered for immunity as if they had approached the Bureau individually.

At the request of the applicant, the Bureau will recommend that no charges be brought against current employees of the second cooperating party (the first leniency programme applicant) who admit their knowledge of or participation in the illegal activity. Former employees are likely to be protected as well if they admit their involvement, assuming no other contrary factors (eg, subsequently working for another party to the cartel) exist.

Subsequent cooperating parties may be able to obtain protection for some of their directors, officers and employees, but these determinations will be made on a case-by-case basis. While immunity or leniency may be revoked where a party fails to comply with the immunity or leniency programme requirements, the revocation generally will only apply to the non-cooperating party. A company's immunity or leniency can be revoked while its cooperating directors, officers, employees and agents retain their protection. Likewise, an individual's immunity can be revoked while the individual's employer retains its immunity or leniency (provided it has discharged its obligation to take all lawful measures to attempt to secure the individual's cooperation).

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The immunity and leniency processes typically involve the following steps.

Initial contact and marker

Anyone may initiate a request for immunity or leniency in a cartel case by communicating with the deputy commissioner of competition – cartel directorate or their designate. Very basic information about the industry or product will need to be provided, usually through a hypothetical oral disclosure, to determine whether the Bureau is already investigating the matter. The party may be granted a 'marker' to secure its place in the queue, and will normally be asked to confirm its participation in the immunity or leniency programme within four business days of receiving a marker.

Following confirmation of a marker, the Bureau will expect the applicant to perfect its marker by proceeding promptly to provide a proffer. The usual deadline is 30 days, although extensions to provide additional information emerging from an ongoing internal investigation may be given in appropriate circumstances.

Proffer

If the party decides to proceed with the immunity or leniency application, it will need to provide a detailed description of the illegal activity and to disclose sufficient information for the Bureau to determine whether it might qualify for immunity or leniency. This is normally done by way of a privileged proffer by legal counsel that describes the conduct and potential evidence. At this stage the Bureau may request an interview with one or more witnesses, or an opportunity to view certain documents, prior to recommending that the DPP provide a grant of interim immunity or leniency. Recently, the Bureau has also been placing an emphasis on receiving information during the proffer stage about the volume of commerce affected by the cartel in Canada.

If the Bureau determines that the party demonstrates its capacity to provide full cooperation and that it meets the requirements of the applicable programme, it will present all relevant proffered information and a recommendation regarding the party's eligibility to the DPP. The DPP will then exercise its independent discretion to determine whether to provide the party a grant of interim immunity or leniency, as the case may be.

Grant of interim immunity or leniency agreement

If the DPP accepts the Bureau's recommendation, the DPP will issue a grant of interim immunity or enter into a plea agreement with the party that will include all of the party's continuing obligations.

Full disclosure and cooperation

After the party receives an grant of interim immunity or enters into a plea agreement with the DPP, it will be required to provide full disclosure and cooperation with the investigation and any ensuing prosecution of other parties (see question 28).

Immunity agreement (for the immunity programme only)

Once a party has satisfied all of its obligations under the grant of interim immunity, the Bureau will recommend to the DPP to finalise the grant of immunity to the applicant. The final grant of immunity will not ordinarily be finalised until either (i) the statutory period for any filing of a notice of appeal has lapsed in the case of any related criminal prosecution or (ii) the commissioner and the DPP have no reason to believe that further assistance from the applicant could be necessary.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

After the 2009 legislative amendments, the Bureau issued its competitor-collaboration guidelines in December 2009, an updated immunity bulletin in June 2010, a revised and updated leniency bulletin in September 2010, and revised immunity and leniency FAQ documents in September 2013. A public consultation regarding the

immunity programme was initiated in October 2017. The Bureau invited comments in May 2018 regarding revised immunity and leniency programmes. The revised immunity and leniency programmes were released in September 2018. These revised programmes have also incorporated the prior 'FAQ' bulletins under the immunity and leniency programmes.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The DPP is required to produce to the defence all relevant information, whether or not the DPP intends to introduce it into evidence and whether it is inculpatory or exculpatory. The DPP does have discretion to withhold information as to the timing of the disclosure where necessary to protect the identity of an informer or a continuing investigation. The discretion must also be exercised with respect to the relevance of information. This disclosure obligation begins at the outset of the prosecution at the first appearance and continues until the end of the proceedings. A violation of this constitutional right can lead to an abuse of process action, in which the court can stay the criminal proceedings and acquit the defendant.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

As individual employees and the company can both be charged with an offence under the Act, there is a potential conflict of interest if counsel acts for both the company and any employees that are also targets of an investigation or prosecution. For example, an employee may wish to obtain immunity in exchange for testimony which includes evidence contrary to the interests of the corporation, or the corporation may wish to claim that the employee's actions were not authorised by management. This is less of a concern when employees are not being targeted personally in the investigation and are providing cooperation pursuant to the company's participation in the immunity or leniency programme.

Counsel for a corporation must caution employees that he or she acts for the company alone and, if they believe that their interests may conflict with the company's, they should obtain independent legal advice. Counsel for the company will be free to act for both the corporation and the employee, if they both consent to a waiver of the potential conflict of interest and confidentiality arrangements as between them. However, the Bureau investigators or DPP prosecutor may resist joint representation if there is a risk of divergent interests.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Affiliated companies normally do not require separate representation.

There is a potential for conflicts of interest among multiple corporate defendants (who are not affiliates) during Bureau investigations and prosecutions, as well as in civil litigation where there are potential cross-claims between codefendants. However, on occasion, law firms have acted for multiple defendants where the defendants have consented and appropriate confidentiality and conflict management arrangements have been established between lawyers at the firm engaged in the matters. These arrangements have usually occurred where the parties concerned have been involved in related conspiracies, but the defendants were not in a situation of actual conflict.

As a matter of current practice, the DPP will be unlikely to participate in joint resolution discussions involving multiple parties.

Update and trends

The Competition Bureau's and the PPSC's new immunity and leniency programmes were released in September 2018 and are discussed in detail throughout this chapter.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

It is possible for a corporation to indemnify an employee for legal costs and fines incurred as a result of a criminal investigation or conviction. While most indemnity agreements or insurance policies contain exclusions for deliberate wrongdoing, there is no law prohibiting such indemnification if the corporation chooses to do so. However, there has been at least one instance in which a convicting court ordered a corporation not to pay the fine imposed on an individual employee.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Fines and penalties can be categorised as follows:

- judicial – these are imposed by a court of law for a breach of any public law; and
- statutory – these are imposed as a result of the application of statutes (for example, the Competition Act).

Damages include a payment in settlement of a damages claim to avoid or terminate litigation, even where there was no admission of any wrongdoing.

Paragraph 18(1)(a) of the Income Tax Act provides that, in calculating a taxpayer's income from a business or property, no deduction shall be made in respect of an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property. As stated by the Supreme Court of Canada in *65302 British Columbia Ltd*: 'if the taxpayer cannot establish that the fine was in fact incurred for the purpose of gaining or producing income, then the fine or penalty cannot be deducted.'

For purposes of establishing whether a fine or penalty has been incurred for the purpose of gaining or producing income:

- the taxpayer need not have attempted to prevent the act or omission that resulted in the fine or penalty; and
- the taxpayer need only establish that there was an income-earning purpose for the act or omission, regardless of whether that purpose was actually achieved.

In the *65302 British Columbia Ltd* decision, the Supreme Court of Canada also stated that: 'it is conceivable that a breach could be so egregious or repulsive that the fine subsequently imposed could not be justified as being incurred for the purpose of producing income.' The court did not, however, give any further guidance in this respect, other than to indicate that 'such a situation would likely be rare'.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

It is possible that the Bureau may investigate and seek to prosecute individuals who also have exposure in other jurisdictions, assuming it can obtain personal jurisdiction over them. For example, in the *Vitamins* case the Canadian authorities negotiated guilty pleas with fines (but no custodial penalties) with three executives of F Hoffmann-La Roche that were also prosecuted in the US.

Similarly, the Bureau will take into account sales from foreign cartel participants to Canadian customers. It has on past occasions expressed the view that it can take into account indirect sales into Canada made by a cartel participant when asserting jurisdiction or imposing penalties. A possibility therefore exists for such 'double jeopardy' in

international cartel cases. In its leniency programme FAQs, the Bureau indicates that:

> *[W]here cartel members are penalised in another jurisdiction for the direct sales that led to the indirect sales into Canada, the Bureau may consider, on a case-by-case basis, whether the penalties imposed or likely to be imposed in the foreign jurisdiction are adequate to address the economic harm in Canada from the indirect sales.*

Section 718.21 of the Criminal Code requires a court sentencing a corporation to take into consideration whether the organisation was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct. It has not been conclusively determined whether this provision should be interpreted as applying only to other sanctions imposed in Canada, or whether fines paid in other jurisdictions can also be considered. However, an obiter comment in a 2012 Federal Court sentencing decision (*R v Maxzone Canada Corporation*) suggested that the mere fact that a company or individual had been penalised in another jurisdiction should not be considered relevant when determining a sentence in Canada.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

In Canada, plea negotiations in criminal matters are a well-recognised and accepted practice. The single most effective consideration in negotiating a plea agreement and sentencing recommendation is the stage in the investigation at which the party decides to come forward. Even where there are serious aggravating elements – instigation, multiple charges, obstruction or previous convictions – if the party comes forward before the investigation is complete and at an early enough stage to provide valuable assistance to the investigators for the prosecution of other parties, a reduced fine or leniency for exposed individuals (or both) may be negotiated. Other substantive factors may also be important elements in a negotiated settlement of the company's exposure to prosecution, including the capacity to pay a fine, the existence or lack of an effective corporate compliance programme, the degree of management awareness of the actions of individual participants and passive or reluctant participation as opposed to instigation of the offence.

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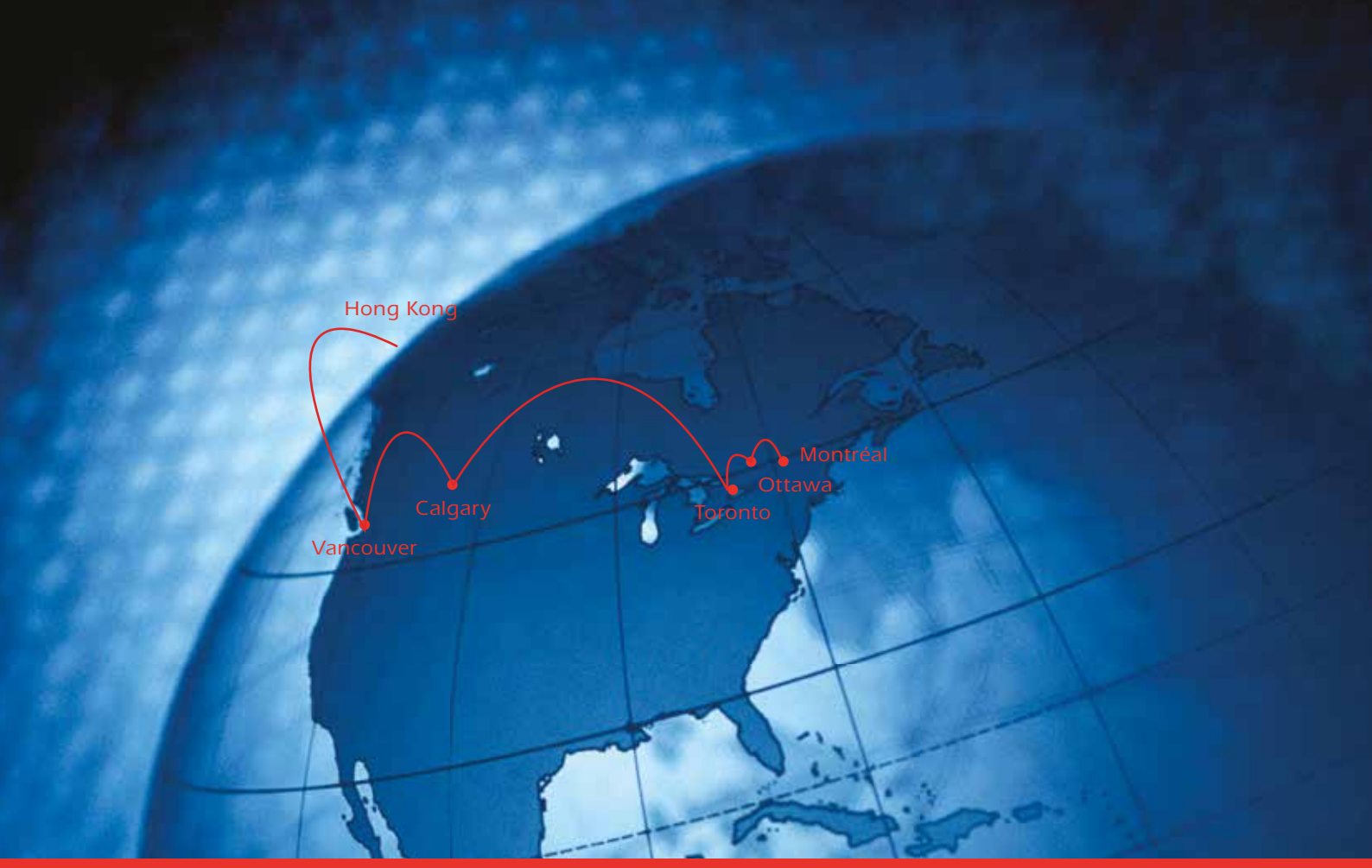

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