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**Cuffs and Compliance: A 5-year
Retrospective of Criminal Anti-
Cartel Competition Law
Enforcement in Canada**

Grant LoPatriello
Competition Bureau Canada

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I. INTRODUCTION

Enforcing the criminal anti-cartel provisions of Canada's *Competition Act* (the "Act")² has been a dynamic undertaking for the Competition Bureau (the "Bureau") over the last five years. However, despite the significant transformation to the landscape of both the Act itself and the *Criminal Code*,³ the Bureau's willingness to vigorously and consistently enforce the Act's criminal anti-cartel provisions remains unwavering. This short article examines the dynamism of criminal anti-cartel competition law enforcement in Canada from 2009 to present and highlights a number of significant changes in the law and policy that have shaped that landscape.

II. LEGISLATIVE CHANGES

In what was arguably the most significant change affecting criminal anti-cartel competition law enforcement in Canada in more than a century, the *Competition Act* was amended in 2009⁴ to alleviate the prosecution from satisfying an onerous economic test under section 45—the Act's price-fixing, market allocation, and output restriction prohibitions. The test required the prosecution to prove an undue lessening of competition on the criminal standard: beyond a reasonable doubt. Among other things, the test had been described as "the greatest obstacle to a successful conviction"⁵ under section 45.⁶ Accordingly, a *per se* criminal offense was introduced to replace the test, and to better address this egregious anticompetitive conduct.

In 2009, the Act was also amended to increase the liability associated with these criminal offenses. Indeed, the maximum penalty for an offence under section 45 increased from a term of imprisonment not exceeding five years to a term not exceeding 14 years, and from fines not exceeding C\$10 million to fines not exceeding C\$25 million.

¹ Grant LoPatriello, DEA (*Montpellier*), JD (*Osgoode*), ACI Arb is a Competition Law Officer at Canada's Competition Bureau. The views and opinions expressed in this article are entirely those of the author and do not represent any policies or procedures of the Competition Bureau, the Department of Justice, or the Public Prosecution Service of Canada. The Bureau accepts no responsibility for any errors or omissions that may appear in this document. The author wishes to thank Sharon Burnett, Emily Earnshaw, Mike Hollingworth, Kristen Pinhey, and Jeanne Pratt for their contributions.

² R.S.C. 1985, c. C-34.

³ R.S.C. 1985, c. C-46.

⁴ The current section came into force in March 2010. Conduct carried out prior to March 2010 is assessed pursuant to the criminal provision that existed at the time.

⁵ Parliament, House of Commons Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime*, 8 OFFICIAL REPORT OF DEBATES (HANSARD) 94 (9 April 2002).

⁶ See also Robert S. Russell, Adam F. Fanaki, & Davit D. Akman, *Legislative Framework for Amending Section 45 of the Competition Act*, BORDEN LADNER GERVAIS LLP 61 (11 April 2001).

These increased penalties are consistent with the maximum penalties for other serious offenses under the *Criminal Code*, such as fraud. As Crampton C.J. suggests in obiter in *R. v. Maxzone Auto Parts (Canada) Corp.*,⁷ “price fixing agreements, like other forms of hard core cartel agreements, are analogous to fraud and theft. They represent nothing less than an assault on our open market economy.”⁸ Moreover, “price fixing and other hard core cartel agreements therefore ought to be treated at least as severely as fraud and theft, if not even more severely than those offences.”⁹

Accordingly, the magnitude of these increased penalties has not only served to underscore the egregiousness of these offenses, but has also increased one of the incentives for parties to seek lenient treatment and, where available, immunity. In a similar vein, the maximum penalty for bid-rigging increased from a term of imprisonment not exceeding five years to a term not exceeding 14 years. Fines imposed at the discretion of the Court remain unchanged for rigging bids.

Another significant change has impacted the legislative landscape of criminal anti-cartel competition law enforcement in Canada. The *Safe Streets and Communities Act*¹⁰ amended the *Criminal Code* in 2012 to eliminate reference to “serious personal injury offences” and has restricted the availability of conditional sentences for offenses for which the maximum term of imprisonment is 14 years or life. In other words, the *Criminal Code* no longer permits judges to impose conditional sentences, such as community service or house arrest, on individuals found guilty of an offense under either section 45 or 47 of the Act. Instead, the Court is obligated to impose a custodial sentence. As will be discussed in more detail below, this important amendment has contributed to the Bureau’s rigorous approach to criminal law enforcement.

III. RIGOROUS APPROACH TO ENFORCEMENT

The foregoing legislative changes signal the seriousness of white-collar crime and the Government of Canada’s eagerness to eradicate it. If the Bureau obtains evidence that implicates individuals in criminal anticompetitive conduct, it has indicated that it will not hesitate to recommend to the Public Prosecution Service of Canada (the “PPSC”), where appropriate, that those individuals be charged. The Bureau has also indicated that while it understands that its rigorous approach may result in a greater number of fully contested cases, the recent legislative amendments require an aggressive stance be taken with individuals who are implicated in cartels.

As evidenced by some of the Bureau’s recent cases, the Bureau is more frequently recommending jail time for individual conspirators. For example, in the ocean freight shipping case, two individuals received two concurrent conditional sentences ranging from 3 to 4 months and community service ranging from 20 to 30 hours. In June 2013, charges were laid against three individuals for their alleged role in fixing the price of chocolate confectionary products in Canada between 2002 and 2008. And, more recently, criminal charges were laid against seven individuals in two cases involving public procurement.

⁷ 2012 FC 1117.

⁸ *Id.* at ¶54.

⁹ *Id.* at ¶56.

¹⁰ S.C. 2012, c. 1.

Further, in the retail gasoline sector, one of the accused corporations was found guilty at the conclusion of a fully contested section 45 case.¹¹ The Quebec retail gas investigation is significant not only because 39 individuals had been charged, but because the Superior Court of Quebec made a pronouncement on section 22.2 of the *Criminal Code*—finding that a territorial manager was a “senior officer,” thereby making the organization party to the offense through the manager’s actions.¹²

The Bureau’s targeted and principled approach to criminal law enforcement, however, is not limited to investigating individuals. It is continuing to pursue corporate criminals rigorously, both domestically and internationally. In the last five years, the Bureau has charged numerous companies, and has collected more than C\$100 million in fines. Of course, the Bureau does not operate in isolation. It enjoys the benefit of its many close relationships with key law enforcement agencies across the globe. At present, Canada has in place more than 35 mutual legal assistance treaties, 50 extradition treaties, and 10 state-to-state cooperation agreements, agency-to-agency arrangements, and memoranda of understanding.

At home, the Bureau has worked closely with domestic police forces and has signed memoranda of understanding or similar agreements with a number of federal and provincial government departments and agencies, including the PPSC and Public Works and Government Services Canada. These memoranda promote cooperation and collaboration by providing for the sharing of information and best practices.

In addition to seeking assistance from other law enforcement agencies—foreign and domestic—the Bureau has signaled that it is committed to using its entire suite of formal tools to detect and investigate cartel activity, including: the Immunity and Leniency Programs, production orders, searches, wiretaps, and requests pursuant to mutual legal assistance treaties. As highlighted in Table 1 below, the Bureau has, in the last five years, successfully sought production orders, search warrants, and wiretap orders to advance almost 20 complex criminal anti-cartel investigations, further demonstrating its commitment to employing these formal powers in a targeted and principled manner. The success in either administering or obtaining these tools is owed, in large part, to the Bureau’s strong partnership with the PPSC.¹³

¹¹ *R. c. Pétroles Global inc.*, 2013 QCCS 4262.

¹² The decision of the Superior Court of Quebec is likely to be appealed.

¹³ While the Bureau is responsible for investigating criminal anti-cartel conduct and administering its Immunity and Leniency Programs, the PPSC is responsible for prosecuting alleged offenders, as well as granting immunity and negotiating plea agreements for parties seeking lenient treatment.

Table 1:¹⁴

	Markers Granted		Formal Powers Exercised			Penalties	
	Immunity	Leniency	Production Orders	Search Warrants	Wire Tap Targets	Convictions Registered	Fines Imposed
2009	9	3	0	5	0	14	15,380,000.00
2010	65	20	0	10	47	5	8,050,000.00
2011	60	40	31	19	3	6	795,000.00
2012	14	12	0	8	0	30	22,533,500.00
2013	95	24	1	27	17	12	46,536,000.00
2014	93	23	0	20	0	6	10,875,000.00
Total	336	122	32	89	67	73	104,169,500.00

The Bureau has also signaled that, where appropriate, it is committed to resolving cases by means alternative to prosecution and immunity agreement. Alternative Case Resolution (“ACR”) addresses non-compliance, while supporting the effective and efficient use of the Bureau’s resources. Types of ACR include: information letters and visits, warning letters, undertakings, and subsection 34(2) prohibition orders. Since 2009, the Bureau has employed numerous ACRs.

These tools, together with the formal powers noted above, enable criminal investigators to conduct their investigations in a manner that is appropriately aggressive to the criminal nature of the conduct at issue.

IV. VIGOROUS APPLICATION OF IMMUNITY & LENIENCY PROGRAMS

The Competition Bureau’s Immunity and Leniency Programs continue to be some of the most effective tools for detecting and investigating criminal anticompetitive conduct in Canada. The effectiveness of these programs was demonstrated in early 2013, when two Japanese suppliers of motor vehicle components were fined C\$35 million by the Ontario Superior Court of Justice for their participation in bid-rigging conspiracies.

Despite the many successes of these programs, they can present challenges owing to the tension between the timely cooperation obligations and the desire to minimize exposure to criminal convictions and follow-on class actions. In the past, immunity and leniency applicants have not always adhered strictly to their timely cooperation obligation under the programs. The Bureau has taken a vigorous approach in its application of the Immunity and Leniency Programs. It has been guided by the principle that no one has the right to retain the immunity or leniency privilege without delivering on their end of the bargain. In that regard, the Bureau has cancelled markers where there has not been a sufficient proffer of information within that specified timeframe.

¹⁴ These figures are current as at August 1, 2014.

Moreover, marker extensions will only be granted on a principled basis. Parties seeking extensions to complete their proffers should be prepared to provide the following: information on the status of their internal investigation, a detailed proposed work plan for the completion of the proffer, and an update on the status of their cooperation with other agencies.

To solidify the rigor with which the Bureau applies its Immunity and Leniency Programs, it revised the Immunity and Leniency FAQs in 2010 and again in 2013. Although the programs themselves have not changed, the FAQs provide stronger and more precise language on a number of subjects, including markers, fines, and waivers.

V. OUTREACH & TRANSPARENCY

The Competition Bureau strives to be as transparent as possible to provide a level of certainty and predictability in its approach to criminal law enforcement, both for business and the legal community. To that end, the Bureau undertook a great deal of effort (thanks in large part to the cooperation of stakeholders) to introduce and revise guidance on the substantial 2009 amendments, including the *Competitor Collaboration Guidelines*.

Today, the Bureau continues to consult interested parties in developing and refining the policies and procedures that touch upon the administrative and substantive rights of parties during its criminal investigations. Such consultations afford both counsel and their clients certainty in respect of the Bureau's approach to law enforcement.

What is more, the Bureau continues to work closely with other government departments and law enforcement agencies to create awareness of Canada's criminal anti-cartel competition laws, and to promote compliance with those laws. In recent years, the Bureau has delivered outreach presentations to a variety of police forces and anti-corruption officials in Canada.

The Bureau has also made strides to connect with the general public. In Spring 2013, the Bureau announced its Criminal Cartel Whistleblower Initiative (the "Initiative"), publicizing the Act's long-standing whistleblower protections. The Initiative highlights the role of employees in reporting their employer's criminal anticompetitive conduct and explains the criminal sanctions that may flow from any retributive action taken by the employer.

And, on March 24, 2014, as part of Canada's fraud prevention month, the Bureau launched its first annual anti-cartel day, which was aimed at increasing awareness among businesses about how to avoid engaging in cartel activity, such as price-fixing and bid-rigging.

VI. CONCLUSION

Attacking cartels remains a top priority for the Competition Bureau. While the *Competition Act* has transformed significantly over the last five years, its transformations support the Bureau's vigorous and consistent approach to enforcing sections 45 and 47 of the Act in the case of egregious cartel activity.

The vigor of the Bureau is not only evident through its treatment of individuals implicated in such activity, but it is also reflected in the Bureau's steadfast application of its Immunity and Leniency Programs. In order to ensure the effective administration of these programs, the Bureau will continue to collaborate with partners and other interested parties, as such collaboration undoubtedly benefits all Canadian consumers.