Cops, Copperweld and Copping Out: 
Recent Amendments to Canada's Conspiracy Regime

- By -

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RECENT AMENDMENTS TO CANADA'S CONSPIRACY REGIME 

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I. INTRODUCTION

The amendments to Canada's conspiracy provision are part of a global trend towards stricter laws and increased sanctions for cartel conduct. Enforcement agencies recognize that agreements among competitors to fix prices, allocate markets, restrict output or rig bids can be among the most egregious forms of anti-competitive conduct. Consistent with these views, the past decade has been marked by a virtually universal movement towards increased sanctions against so-called "hard-core" cartel conduct. A recent study by the International Competition Network ("ICN") found that of 46 countries surveyed, 43 (or about 95%) of the jurisdictions either introduced or increased penalties against cartel conduct in the past ten years. During that same period, six jurisdictions, including Canada, amended legislation to impose *per se* prohibitions, making cartel conduct unlawful without proof of any anti-competitive effect.

In addition to greater penalties, there is also an increasing emphasis on individual sanctions for cartel conduct, such as prison terms and fines for employees who participate in cartels. As the Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division of the U.S. Department of Justice explained: "If the potential penalties that can be imposed upon cartel participants are not perceived as outweighing the potential rewards of participating in a cartel, then the fine imposed becomes merely part of the cost of doing business." Or, as one commentator noted:

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For the purse snatcher, a term in the penitentiary may be little more unsettling than basic training in the army. To the businessman, however, prison is the inferno, and conventional risk-reward analysis breaks down when the risk is jail. The threat of imprisonment, therefore, remains the most meaningful deterrent to antitrust violations.  

As a result, the U.S. Department of Justice "has steadfastly emphasized the importance of individual accountability to optimize deterrence of cartel conduct". Consistent with this objective, in 2009, U.S. courts incarcerated 80% of individuals charged with cartel conduct. In that same period, prison sentences for individuals found guilty of cartel conduct averaged 24 months, including one executive who was sentenced to 48 months for his role in a cartel to fix prices on certain shipping routes.

The recent amendments to Canada's conspiracy provision are consistent with this global trend towards stricter laws and increased individual sanctions for cartel conduct. In 2009, the Canadian government enacted sweeping reforms to the Competition Act (the "Act"), including amendments to the criminal conspiracy provision to create a per se criminal offence for certain agreements among competitors with substantial fines and potential terms of imprisonment for violations, as well as a civil provision to deal with other forms of strategic alliances and joint ventures. This paper provides a brief overview of the recent reforms to Canada's conspiracy provision and discusses certain additional reforms or other steps that may be taken to increase the effectiveness or predictability of the amended conspiracy regime, including a more liberal definition of affiliates and an active policy of intervention in private civil actions brought under the new section.

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3 "The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades", supra note 1.
4 Ibid.
6 R.S.C. 1985, c. C-34.
II. **A BRIEF HISTORY OF REFORM**

The recent reforms follow several decades of largely unsuccessful efforts to modernize the Act, including various proposals for reforms to the conspiracy provision. The first modern proposal for reform of the conspiracy provision was made by Presley Warner and Michael Trebilcock in a 1993 paper entitled "Rethinking Price-Fixing Law". In 2002, a Parliamentary Committee issued "A Plan to Modernize Canada's Competition Regime" proposing a wide range of amendments designed to improve and strengthen the Act, including revisions to the civil provisions, reform of the treatment of conspiracies, and decriminalization of a number of pricing practices. In 2003, the Competition Bureau (the "Bureau") commissioned three reports discussing whether reform of the conspiracy provision was required and suggesting various legislative models. In that same year, the Government of Canada retained the Public Policy Forum to conduct consultations with the public on proposed legislative changes to the Act, including reforms to the conspiracy provision. While many expressed agreement that the conspiracy provision needed to be modernized, there was significant disagreement during these consultations on the elements and language of any amended provision. In 2005, the Bureau formed a working group of lawyers and economists to assist the Bureau in reviewing various models for legislative reforms to the conspiracy provision.

In 2007, the Ministers of Finance and Industry announced the creation of the Competition Policy Review Panel, comprised of senior business leaders charged with reviewing Canadian competition and foreign investment policies, with a view to making Canada more globally

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competitive. In conducting its review, the Panel heard from more than 150 individuals and organizations, received 155 written submissions, and commissioned more than 20 research papers. In its report, entitled "Compete to Win"12, the Panel found that innovation "underpins the fastest growing industries and high-wage jobs, provides the tools needed to compete in every business today and drives growth in all major countries and in every sector"13. However, the Panel also found that a major cause – if not the cause – of a growing productivity gap between Canada and other industrialized nations was a weak record of innovation. The Panel stated:

Much of Canada's poor productivity performance can be attributed to the comparatively poor performance of Canadian firms with respect to innovation. We rank poorly across almost all aspects of innovation: the creation of knowledge, the diffusion of knowledge, the transformation of knowledge and the use of knowledge through commercialization. This is seen by the Conference Board of Canada as "a serious weakness in Canada's overall performance and [an] alarming portent for the future". Other research also indicates that Canadian firms lag behind firms in other major industrialized countries on a number of measures of innovation.14

In the Panel's view, bridging this productivity gap required reforms to Canada's competition and foreign investment laws. The Panel found that effective competition laws "are key elements in ensuring the competitiveness and efficiency of the Canadian economy"15 and noted that "long-term improvements to Canada's productivity could be achieved by amending certain outmoded or ineffective provisions of Canada's competition laws"16. The Panel also found that the conspiracy provision was "out-of-step with similar laws of other developed countries" and that a more sophisticated approach was needed to review strategic alliances, as "criminal law is too blunt an instrument to deal with agreements between competitors that do not fall into the hardcore cartel category".17 Ultimately, the Panel recommended significant amendments to the

13 Ibid. at 92.
14 Ibid. at 18.
15 Ibid. at 53.
16 Ibid.
17 Ibid. at 59 and 60.
Act that were aimed at increasing its predictability and effectiveness, providing greater protection for Canadian consumers, and aligning the Act more closely with the laws of major trading partners – in particular, the United States.

III. **OVERVIEW OF AMENDMENTS TO THE COMPETITION ACT**

Consistent with the recommendations of the Panel, in January 2009 the Canadian Government tabled a series of amendments to Canada's competition legislation in the *Budget Implementation Act, 2009* ("Bill C-10"). Bill C-10 was passed into law on March 12, 2009, implementing the most significant reforms to the Act since 1986, including the following principal amendments:

(i) amendments to the criminal conspiracy provision to create a *per se* criminal offence for certain agreements among competitors with substantial increases to the applicable fines and potential terms of imprisonment, as well as a civil provision to deal with other forms of strategic alliances and joint ventures;

(ii) creation of a two-stage merger review process that is more closely aligned with the merger review process in the United States, including a new information-gathering mechanism similar to a U.S. "Second Request";

(iii) repeal of criminal offences dealing with pricing practices, and the creation of a civil review mechanism for resale price maintenance;

(iv) introduction of administrative monetary penalties that may be imposed by the Competition Tribunal on firms engaged in abuse of dominance; and

(v) significant increases to fines and other sanctions for misleading advertising and deceptive marketing practices, as well as allowing the Competition Tribunal to award restitution to victims of deceptive marketing.

This paper discusses the changes to the conspiracy provision and the potential impact of the proposed reforms on private civil actions. Proposals for additional amendments, or other steps directed at increasing the effectiveness or predictability of the amended conspiracy regime, are also discussed.
IV. CARTELS AND STRATEGIC ALLIANCES

Bill C-10 implemented significant changes to the criminal cartel provision in the Act to make certain types of agreements between competitors per se unlawful and to subject such agreements to very significant criminal sanctions. The goal of these reforms was to permit more effective prosecution of so-called "hard-core" cartel agreements, while not discouraging firms from entering into legitimate forms of collaboration, such as joint ventures and strategic alliances. Hard-core cartel agreements include agreements between competitors to fix prices, allocate markets or restrict output that are not in furtherance of any legitimate form of collaboration. Given their significant negative effects on the economy, detecting and prosecuting such cartels is the top enforcement priority for antitrust agencies in industrialized economies.

Canada first introduced criminal legislation against conspiracies to lessen competition in 1889 – one year prior to the enactment of the U.S. Sherman Act. Although the conspiracy provision had remained largely unchanged since its enactment 120 years ago, many considered the provision to be outdated and ineffective. Specifically, the conspiracy provision was drafted broadly enough to subject all forms of agreements that substantially lessened competition to the potential of criminal sanctions, including vertical agreements (agreements between customers and suppliers), joint ventures, research and development agreements, mergers, and strategic alliances. Further, courts interpreted the provision so as to prevent parties from defending their agreements on the basis that they were efficiency-enhancing.18

At the same time, the conspiracy provision did not permit effective prosecution of hard-core cartel conduct, such as agreements between competitors to fix prices. In order to secure a conviction with respect to even the most plainly anticompetitive agreement, the Crown was required to prove not only the existence of an agreement, but also that such agreement was likely to "unduly" lessen competition. Establishing an undue lessening of competition often required the court to resolve complex economic issues, such as defining the relevant market and predicting the impact of the agreement on competition. These concepts were difficult to establish beyond a reasonable doubt, the criminal evidentiary standard necessary for conviction. In fact, of

the 23 contested prosecutions brought since 1980 under the conspiracy provision, the Crown succeeded in only 3 cases and lost the remaining 20, many of these as a result of being unable to establish that the agreement unduly lessened competition.\(^\text{19}\)

Bill C-10 amended the conspiracy regime to create a civil provision to deal with joint ventures and other forms of competitor collaborations that do not constitute hard-core cartel agreements. Instead, these forms of collaboration are subject to review in circumstances where the agreement is likely to substantially lessen or prevent competition. In addition, parties are entitled to defend such agreements on the basis that the efficiencies likely to be generated are greater than the anticompetitive effect. Remedies that may be imposed by the Competition Tribunal under the civil provision are limited to prohibition orders and do not include fines or other sanctions.

Bill C-10 also amended the criminal conspiracy provision to limit the offence to those agreements between competitors to fix prices, allocate markets or restrict output. Consistent with the treatment of such agreements under section 1 of the Sherman Act, it is no longer necessary to demonstrate an anticompetitive effect (\(i.e.,\) proof that the conspiracy would prevent or lessen competition unduly) to secure a criminal conviction. The amendments also significantly increased the criminal sanctions available under the criminal cartel provision to a maximum fine of $25 million and/or terms of imprisonment of up to 14 years, elevating the offence to among the most serious criminal offences in Canada.

V. \textbf{Points of Convergence and Divergence with U.S. Regime}

Although it is reasonable to anticipate that when interpreting the amended conspiracy provision, Canadian courts will have regard to U.S. jurisprudence developed under the Sherman Act, it is also likely that Canadian treatment of agreements among competitors will continue to differ from the approach taken in the United States in some respects. The Canadian conspiracy offence has developed primarily through legislative amendments as opposed to jurisprudence, and the scope of its application is more clearly circumscribed by the wording of the Act. For example, although

\textit{Compete to Win}, supra note 12 at 115.
both Canada and the United States recognize an ancillary restraints defence for agreements between competitors, only the Canadian legislation explicitly codifies the defence. The ancillary restraints defence shields agreements from criminal prosecution where they are merely ancillary to, and reasonably necessary for a broader legitimate collaboration. For example, a non-compete clause in a merger agreement could be viewed as an agreement between competitors to allocate markets that would, strictly speaking, violate the *per se* prohibitions. However, because it is ancillary to a broader merger agreement, it may be insulated from criminal prosecution through the application of the ancillary restraints defence. The elements of the ancillary restraints defence are listed in subsection 45(4) of the Act:

45(4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

(a) that person establishes, on a balance of probabilities, that

(i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and

(ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and

(b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

Although not codified in the *Sherman Act*, the ancillary restraints defence is recognized in U.S. case law. In addition to the jurisprudence, the U.S. *Antitrust Guidelines for Collaborations Among Competitors* also recognize an ancillary restraints defence:

If … participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the

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agreement under the rule of reason, even if it is of a type that might otherwise be considered per se illegal.\footnote{Federal Trade Commission and U.S. Department of Justice, \textit{Antitrust Guidelines for Collaborations Among Competitors} (April 2009) at 8, online: Federal Trade Commission <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.} The Canadian ancillary restraints defence appears to be more liberal than the defence described in the U.S. \textit{Antitrust Guidelines for Collaborations Among Competitors}. Specifically, there is no requirement in Canada that the ancillary restraint be reasonably necessary to achieve pro-competitive benefits from an "efficiency-enhancing integration of economic activity". In contrast, the Bureau's \textit{Competitor Collaboration Guidelines}\footnote{Competition Bureau of Canada, \textit{Competitor Collaboration Guidelines} (23 December 2009), online: Competition Bureau <http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf>.} only require that the broader agreement not violate the \textit{per se} prohibitions, and there is no requirement for the broader agreement to be "efficiency-enhancing". In other words, it is only where "the alleged ancillary restraint is merely part of a broader price-fixing, market allocation or output restriction cartel"\footnote{\textit{Ibid.} at 15.} that the defence is unavailable.

There are also notable differences with respect to the treatment of agreements between competing purchasers, or so-called "buyer cartels". The Canadian criminal conspiracy provision does not appear to capture buyer cartel activity or other agreements between competitors with respect to the purchase of products\footnote{The new section 45(1)(a) of the \textit{Competition Act} makes explicit reference to "supply" and not "purchase" arrangements or agreements between competitors that fix, maintain, increase or control the price of a product.}, while such agreements are clearly capable of scrutiny under section 1 of the \textit{Sherman Act}. In fact, the Bureau's \textit{Competitor Collaboration Guidelines} explicitly state:

> The prohibition in paragraph 45(1)(a) applies to the price for the supply of a product, and not to the price for the purchase of a product. Accordingly, joint purchasing agreements – even those between firms that compete in respect of the purchase of products – are not prohibited by section 45…\footnote{\textit{Competitor Collaboration Guidelines, supra} note 22 at 11.}
In the United States, buying-side cartels are covered within the spectrum of conduct subject to *per se* prohibition under section 1 of the *Sherman Act*, in the same way seller cartels are prohibited. Indeed, one of the earliest cases brought under the *Sherman Act* involved a conspiracy among meat packers to reduce the price they paid for cattle. More recent decisions of U.S. courts have not made any distinction between seller cartels and buyer cartels in applying *per se* treatment for cartel activity.

VI. **A Canadian Copperweld Doctrine**

There are also differences in Canadian and U.S. treatment of agreements between affiliated or related entities. Although the amended conspiracy provision includes an explicit exception for agreements between affiliates, this exception is much narrower and more rigid than the exception for single economic entities recognized in U.S. jurisprudence. As a result of such inconsistencies, agreements between related entities that are not subject to scrutiny under section 1 of the *Sherman Act* may be unlawful in Canada. As discussed below, expanding the Canadian exception for affiliates to align more closely with the approach taken in the United States could provide increased certainty with respect to the application of the amended conspiracy provision.

Under U.S. law, the *Copperweld* doctrine provides that entities that act as a single economic entity are incapable of conspiring for the purpose of section 1 of the *Sherman Act*. Although *Copperweld* concerned an agreement between a parent and wholly-owned subsidiary, more recent decisions have expanded the application of the doctrine to other circumstances of common control or lack of economic independence, such as cooperatives, clubs and sports leagues.

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For example, in *Williams v. I.B. Fischer Nevada*[^32], the Court dismissed a private antitrust suit against a franchisor and franchisee by a terminated restaurant manager. The franchisor required all of its franchisees to consent to a "no switching" agreement, whereby the franchisees agreed not to offer employment to the manager of another franchise within six months of that manager's termination from employment. The plaintiff, a former manager, sued the franchisor and franchisee alleging that the agreement violated section 1 of the *Sherman Act*. The Court granted summary judgment against the plaintiff on the basis that the franchisor and franchisee formed a single economic entity incapable of conspiring. In affirming the decision, the 9th Circuit Court of Appeals held that based on a review of the particular facts of the case, the corporate entities were not "sufficiently independent of each other" so as to be capable of conspiring. Similarly, U.S. courts have held that an agreement between a manufacturer and distributor would not be subject to scrutiny under section 1 of the *Sherman Act* due to the control or significant influence exercised by the manufacturer over the distributor through the terms of the agreement and a minority interest.[^33]

The single enterprise exception is one of the issues that will be considered by the U.S. Supreme Court in *American Needle, Inc. v. National Football League*[^34]. American Needle, a manufacturer of sportswear, previously held a non-exclusive license to manufacture and distribute products, including the NFL's team names and logos. In 2000, the NFL granted an exclusive license to Reebok. American Needle responded by challenging the agreement between the NFL and Reebok on the ground that it violated section 1 of the *Sherman Act*. The Court of Appeals rejected the claim on the basis that the NFL acted as a single enterprise with respect to certain types of arrangements, such as the agreement for merchandising subject to challenge. The decision of the Supreme Court in this case is expected in June of this year.

In contrast, the exception for agreements among affiliated entities found in the Canadian conspiracy provision is significantly narrower than the equivalent defence for single economic entities in the United States. Paragraph 45(6)(a) of the Act contains an explicit exception for

[^34]: *Supra* note 31.
agreements that are "entered into only by companies each of which is, in respect of every one of
the others, an affiliate". For corporations, the term affiliate is defined in the Act to be a parent
and wholly-owned subsidiary, or two subsidiaries that are controlled by the same parent, with
control being defined as direct or indirect ownership of shares "to which are attached more than
fifty per cent of the votes that may be cast to elect directors of the corporation".35

There are two aspects of the exception for affiliates in the Canadian conspiracy provision that are
notable. First, the exception is only applicable to agreements between "companies" that are
affiliated and does not include other non-corporate relationships, such as partnerships. Second,
the Canadian definition of affiliate only recognizes one form of control – control through the
ownership of a majority of voting shares – and not other forms of control that do not require
majority share ownership, such as the control held by a significant, but minority shareholder, or
entities that are controlled through contractual arrangements, such as the franchise or distribut-
ion agreements described above. As a consequence, agreements among entities that form part of a
single economic unit may be considered illegal in Canada, whereas they would benefit from the
application of the Copperweld doctrine in the United States.

The Competitor Collaboration Guidelines published by the Bureau recognize that the exception
for agreements between affiliates found in paragraph 45(6)(a) applies "only to companies, and
not partnerships, trusts or other non-corporate entities or individuals". However, the Guidelines
go further to state that "the Bureau will consider the nature of any common control or
relationship between the parties when determining whether referral of an agreement for
prosecution is appropriate". As such, the Bureau remains open to considering broader forms of
affiliation or common control, such as those recognized under the Copperweld doctrine, when
determining whether a matter should be referred for prosecution. Nevertheless, there remains a
risk that arrangements between entities within a single enterprise that fall outside of the strict
definition of "affiliates" found in paragraph 45(6)(a) of the Act may still be subject to challenge
in private civil actions, including claims by third parties seeking to recover damages suffered as a
result of unlawful agreements, or claims by one of the contracting parties seeking to avoid the
agreement on the basis of illegality. Such agreements are subject to private actions where they

35 Competition Act, supra note 6, subsection 2(2) and 2(4).
have not been referred for prosecution by the Commissioner and even though they are unlikely to limit or prevent competition as the parties are not acting as separate decision-making centres on the matters at issue but rather form part of a common enterprise.

It may be argued that unaffiliated firms participating in sports leagues, franchise or distribution relationships fall outside of the conspiracy provision on the basis that these parties are not "competitors" for the purpose of section 45. The requirement that firms be competitors may provide a court with some discretion to exempt arrangements between firms that are affiliates or firms that form part of a common enterprise, but which do not benefit from the affiliate exception. In evaluating this issue, it is important to note that the definition of "competitor" found in section 45 includes firms that compete at the time of the agreement and those firms that would be likely to compete in the absence of the agreement. Although it may be possible to establish that firms which form part of a single economic entity are not competitors with respect to the subject-matter of the agreement, it is more difficult to establish that they are not likely to compete in the absence of the agreement. The issue of whether agreements between firms forming a single economic entity may be exempted on the basis that they are not competitors is, at best, uncertain.

Greater certainty could be achieved by broadening the definition of affiliates to incorporate the following elements:

(i) replacing the word "companies" in paragraph 45(6)(a) with "persons", thereby broadening the exception so that it applies to non-corporate forms of affiliation; and

(ii) amending subsection 2(2) of the Act to include a broader category of non-corporate forms of affiliation, such as control under a single trust.

A more difficult issue is whether subsections 2(2) and 2(4) of the Act should be amended to incorporate principles akin to a Copperweld doctrine by referencing additional forms of control apart from the ownership of a majority of voting shares. Consistent with the reference in the title of this paper to "copping out", it is beyond the scope of this paper to provide a detailed examination of this issue or to suggest specific language for an amendment. However, the
general concept is to incorporate an exception to section 45 for agreements between parties that are under common *de facto* control, as opposed to limiting the exception to circumstances of common *de jure* control. The concept of *de facto* control has been recognized in other federal legislation. For example, subsection 2(1) of the *Telecommunications Act*\(^{36}\) defines "control" to mean "control in any manner that results in control in fact, whether directly through the ownership of securities or indirectly through a trust, agreement or arrangement, the ownership of any body corporate or otherwise". It is true that such an amendment would reduce the certainty found in the current exception for affiliated entities and may, in certain cases, require a factual examination into the particular relationships between the parties. However, broadening the affiliate exception would also reflect the reality that in these circumstances of common control, agreements between the parties are unlikely to impact upon competition as the parties are not separate competitors but rather form part of a single enterprise.

VII. **Impact on Private Civil Actions**

Any person who has suffered damages as a result of an agreement that contravenes either the conspiracy or other criminal provision of the Act may recover such losses through a private action before a civil court under section 36 of the Act. Such proceedings are frequently structured as class actions seeking substantial damages. Much has been written on the potential impact of the recent amendments to the conspiracy provision on the scope of private civil actions under the Act.\(^{37}\)

There is a valid debate on the issue of whether the amendments to the conspiracy provision will expand or restrict the category of agreements which can be subject to private civil actions in Canada. Prior to the amendments, a broad range of agreements could potentially contravene the criminal conspiracy provision, including merger agreements, joint ventures, and vertical arrangements, where such agreements unduly lessened competition. The recent amendments narrow the conspiracy provision to specific types of agreements, namely agreements between

\(^{36}\) S.C. 1993, c. 38.

\(^{37}\) See, for example: McCarthy Tétrault, "Government Enacts Sweeping Changes to Canada's Competition and Foreign Investment Laws" (13 March 2009), online: McCarthy Tétrault <http://www.mccarthy.ca/article_detail.aspx?id=4420>. 
competitors to fix prices, allocate markets and restrict output and that are naked restraints on competition which are not ancillary to lawful arrangements.

At the same time, the amendments potentially expand the scope of the conspiracy provision to capture agreements that are naked restraints on competition but which are not likely to unduly lessen competition. Some have expressed concern that the amendments will expand the scope of private civil actions by allowing for claims with respect to agreements which do not have a material impact on competition. For example, as one commentator states:

With respect to private actions commenced under the conspiracy provisions of the Act, private action activity may increase following the coming into force of new U.S.-style "per se" criminal cartel rules in March, 2010. This is because, whereas formerly private plaintiffs, as well as the Competition Bureau (the "Bureau"), were required to establish anti-competitive effects as a key element of a conspiracy offence (i.e., that the alleged illegal conduct prevented or lessened competition "unduly" in one or more relevant markets), this competitive effects test has now been removed from three forms of "hard core" criminal cartel offences as follows: price fixing, market allocation and output restriction agreements. The key impact of this amendment is that both private plaintiffs and the Bureau will have a lower burden to establish these three forms of "hard core" criminal cartel conduct.38

Although the amendments removed from section 45 the requirement to establish that the agreement resulted in a significant anti-competitive effect, proof of loss or harm is still required to establish liability under section 36 of the Act.39 As such, proving some degree of anti-competitive effect will remain necessary in claims under section 36 of the Act.

At the present time, there is no jurisprudence interpreting the amended section 45. However, the recent decision of the Ontario Superior Court in Rogers Communications Inc. v. Shaw Communications Inc.40 provides a good example of the types of arguments that are likely to be considered by a court in proceedings brought under the amended conspiracy provision. That case concerned an application for an interlocutory injunction preventing Shaw from acquiring a cable

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39 Pro-Sys Consultants Ltd. v. Infineon Technologies AG, 2009 BCCA 503 (CanLII) at para. 19.
business on the basis that it was bound by a restrictive covenant which prohibited it from acquiring a cable business in Ontario, Quebec or Atlantic Canada. Shaw argued, among other things, that the restrictive covenant was not enforceable as it contravened section 45 of the Act. Although the amendments to section 45 were not enacted as at the date of the hearing, the parties also made submissions on whether the agreement would violate the amended conspiracy provision. On this issue, Justice Newbould stated that even if the agreement violated the conspiracy provision, the Court would also have to consider whether the restrictive covenant would benefit from the ancillary restraints defence:

Rogers asserts that the non-competition covenants will not be contrary to the new legislation. It refers to an "ancillary agreement" defence to section 45 that states that it is not an offence if the agreement under attack is ancillary to a separate agreement and reasonably necessary for giving effect to the objective of that separate agreement. Shaw says that defence is not available because the non-competition covenants were not necessary to give effect to the objectives of the agreement to swap cable assets. Rogers also contends that it is much more likely that the non-competition covenants would be considered by the Bureau under the civil review provisions of section 90.1 and that the covenants would not contravene those provisions because of an "efficiency defence" when it is found that the gains in efficiency will be greater than, and will offset, the effects of any prevention of lessening of competition. Shaw says that the provisions of section 90.1 would be breached.\footnote{Ibid. at para. 58.}

Justice Newbould declined to determine the issue of whether the ancillary restraints defence applied, but did find that the submissions on this issue raised a serious issue to be tried. However, Justice Newbould found that there was "a good case" that the restrictive covenant contravened section 45 as it existed prior to amendment. In this regard, Justice Newbould held that the restrictive covenant not only unduly restrained competition between the parties in the purchase of cable television businesses, it "eliminated" competition contrary to then paragraph 45(1)(d) of the Act. Although further jurisprudence will clarify these issues, the decision of Justice Newbould is consistent with the view that the recent amendments to section 45 have narrowed the scope for potential civil liability by focusing the provision on certain types of agreements and by introducing a statutory defence for ancillary restraints that did not exist in the predecessor provision.
VIII. A POLICY OF ACTIVE INTERVENTION

Although the Competitor Collaboration Guidelines assist Canadian businesses and their advisors in understanding how the Bureau intends to apply the amended conspiracy provision, the Guidelines cannot substitute for jurisprudence developed through contested litigation. Judicial analysis and interpretation of legislation is a centrepiece of the common law system and a critical source of direction to the broader public on the application of the law. The concern over the absence of jurisprudence from contested proceedings has been recognized in respect of the merger and abuse of dominance provisions of the Act:

There is … very little in the way of developed case law in Canada when it comes to mergers and abuse of dominance. To a large degree, the application of the merger and abuse of dominance provisions is now a function of what the Competition Bureau says these provisions mean – whether in published guidelines or as part of the informal exercise of bureau discretion – and not the result of tribunal jurisprudence. This lack of tribunal oversight and jurisprudence is probably the biggest disappointment in the Act's evolution since 1986 from a public policy perspective.42

Despite the general acknowledgment of the value of jurisprudence from contested proceedings, it is unlikely that a fully contested criminal trial will be held under the amended criminal conspiracy provision for, at least, several years. The amended conspiracy provision is only applicable to agreements entered into or continued after the coming into force of the conspiracy provision in March 2010. Cartel agreements are often detected only several years after the implementation of the agreement, and even if a cartel is detected, it typically takes several years to investigate, assemble the evidence, and deal with preliminary proceedings prior to trial. This makes fully contested criminal proceedings under the conspiracy provision a rare occurrence. As such, it is possible that the initial jurisprudence interpreting the amended conspiracy provision will result from contested proceedings in private civil actions and not criminal proceedings. As noted above, section 36 of the Act creates a private right of action for any person who has suffered damages as a result of an agreement that contravenes the conspiracy or other criminal provision of the Act.

Although meritorious private litigation can play a key role in establishing jurisprudence under the amended conspiracy provision, there is a concern at this early stage of the law with allowing such jurisprudence to develop without any involvement by either the Director of Public Prosecution or the Commissioner of Competition. Private parties may not have the same incentives with respect to ensuring that the law remains effective in future prosecutions. Although unusual, the Bureau has intervened in private civil proceedings where the decision of a court may impact upon the effective enforcement of the Act. For example, the Bureau sought and was granted intervenor status in a Federal Court of Appeal case involving drug manufacturers, Apotex and Eli-Lilly. The Bureau intervened on the basis that the trial court's ruling "would have resulted in a serious weakening of the *Competition Act*'s ability to deal with cases where companies acquired patents, possibly with the effect of lessening competition"$^{43}$. Sheridan Scott, then Commissioner of Competition, described the following concerns as motivating the intervention before the Federal Court of Appeal:

> If this interpretation had stood, the capacity of the *Competition Act* to deal with cases involving intellectual property, for example, where a company buys up all the competing intellectual property thereby creating a true monopoly, would have been seriously compromised, and the effects may have carried over to other forms of property and related laws.$^{44}$

Similar interventions are common in private antitrust proceedings in the United States, where the Department of Justice often submits *amicus* briefs in private litigation in order to influence the interpretation of the law by the court. In the past ten years, the U.S. Department of Justice has submitted *amicus* briefs in 27 cases before appellate courts and in 22 cases before the U.S. Supreme Court, including notable antitrust cases such as *American Needle, Inc. v. National Football League*, *Pacific Bell Telephone Company, dba AT&T California, et al. v. linkLine*.

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Communications, Inc., et al., Leegin Creative Leather Products, Inc. v. PSKS, Inc., and Bell Atlantic Corp. v. William Twombly, et al. 45

The Bureau should consider an active intervention policy with respect to early decisions by the civil courts that interpret the amended conspiracy provision, even where such proceedings are at the trial level. Such interventions may be particularly important where parties are asserting positions that threaten to expand the scope of section 45 to include competitively benign agreements or render the amended conspiracy provision ineffective. Assessing whether intervention is appropriate will require a balancing of the resource constraints on the Bureau and the private nature of the dispute between the parties with the potential impact of a decision by a civil court which interprets section 45 in a manner that has undesirable consequences. In addition, the Bureau need not seek full party status in such proceedings, but it may seek to confine its role to acting as an amicus curiae to the court, similar to the role of the U.S. Department of Justice in the cases described above.

IX. CONCLUSION

In recent years, various jurisdictions have implemented stricter laws and intensified enforcement efforts against cartels, resulting in significant sanctions against both companies and individuals. Consistent with this trend, the 2009 reforms have elevated conspiracy to among the most serious criminal offences in Canada. In addition, the reforms have aligned Canada's competition regime more closely with that of the United States, yet the Act retains a number of uniquely Canadian aspects. While even greater convergence in some areas (such as the legal treatment of affiliates and other relationships of common control) would lead to increased certainty and lower costs of compliance for businesses operating in both jurisdictions, continued divergence between Canadian and U.S. competition laws also carries certain benefits. Among other things, divergence allows for experimentation across jurisdictions on the ideal manner of handling difficult competition issues, such as resale price maintenance or information requests in merger reviews. In this light, complete convergence between the competition laws of Canada and the United States Department of Justice, "Antitrust Division Workload Statistics (FY 2000 - 2009)", online: United States Department of Justice <http://www.justice.gov/atr/public/workstats.htm>.
United States is neither a likely nor desirable outcome. Furthermore, while the amendments have introduced considerable alignment between the two jurisdictions, the amended provisions of the Act have not yet been subject to judicial interpretation. As such, it is still too early to discern whether greater divergence will emerge as the new provisions are applied and developed in the context of future cases.