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COMPETITOR AGREEMENTS: INTERPRETING CRIMINAL CONSPIRACY IN A BLENDED CRIMINAL-CIVIL REGIME

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I. Introduction

Parliament enacted Canada's first antitrust statute in 1889,[2] one year before the U.S. Congress passed the *Sherman Act*.[3] The 1889 drafters roundly condemned collusive behaviour as "a crying and growing evil," "iniquitous," "pernicious," and "illegitimate."[4] They feared the large American trusts and recognized that Canada's protective tariff made certain industries particularly vulnerable to anticompetitive behaviour. But unlike their American counterparts, they did not criminalize all agreements in restraint of trade. As a result, Canada's antitrust laws were shaped by an economic threshold: an agreement's *undue* effect on competition.

One hundred and twenty years passed before Canada adopted the bifurcated *per se* and rule of reason approach to agreements in restraint of trade that American jurists had fashioned out of the *Sherman Act*'s stark prohibition.[5] The March 2010 amendments to section 45 of the *Competition Act*[6] and the introduction of section 90.1 are the most significant change to Canada's prohibition of agreements in restraint of trade in a generation. They largely complete the transition the *Competition Act* began in 1986: from a competition regime based on the criminal law to a blended criminal-civil regime founded on Parliament's legislative authority over the criminal law and trade and commerce in Canada.[7]

This paper traces the evolution of Canada's criminal prohibitions on the "hard core" cartel offences of price-fixing, market allocation, and big-rigging which are set out in sections 45 to 47 of the *Competition Act*. It briefly examines their origins in 1889, their inclusion in the *Competition Act* in 1986, and the calls for their amendment. It reviews the amendments to the *Competition Act* in 2010 and how they complete the transition of Canada's competition regime from its historical basis in the criminal law to mixed criminal-civil regime. Finally, it discusses how Parliament's creation of a dual criminal and civil regime to regulate agreements between competitors informs the appropriate

scope of the criminal conspiracy offence, sentencing principles, and the intent requirements for conviction under the new section 45.

II. The 1986 Act

Origins and Evolution (or lack thereof)

Commentators described the 1986 *Competition Act* (and its companion statute, the *Competition Tribunal Act*) as "a giant leap forward,"[8] a fundamental reformulation of the law,[9] and laws which "literally rewrote the book on competition law in Canada."[10] Together these Acts sharply departed from strict criminal prohibitions on anticompetitive behaviour – the historical foundation of competition regulation in Canada[11] – and transitioned Canada's regime to a blended criminal-civil approach.[12] A civil process to review mergers, abuse of dominant position cases and other matters replaced the existing criminal review process. The legislation also established the quasi-judicial Competition Tribunal to adjudicate the new civil matters. This was the "beginning of a new regulatory system… based on the federal power to regulate trade and commerce,"[13] a sharp contrast to the previously narrow criminal law basis.

In the midst of this "giant leap forward" to an increasingly civil regime, the criminal prohibitions against conspiracy and bid-rigging remained largely unchanged. Indeed, the conspiracy offence had changed so little in one hundred years that the 1889 drafters of Canada's first antitrust statute,[14] would have recognized their handiwork in the text of the "new" conspiracy provision, section 45 of the 1986 Act:[15]

1889 language (after it was incorporated into the Criminal Code)	Section 45 of the 1986 Act
Everyone is guilty of an indictable offence… who conspires, combines, agrees or arranges with any other person… unlawfully[16]… (c) to unduly prevent, limit, or lessen the manufacture or production of any article or commodity, or to unreasonably increase the price thereof; or (d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation, or supply of such an article or commodity.[17]	Every one who conspires, agrees or arranges with another person… (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof, (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance or persons or property... is guilty of an indictable offence…

The lack of change in 1986 was not for lack of trying. In 1971, Bill C-256 proposed to make ten types of horizontal agreements between competitors illegal *per se,* similar to American jurisprudence under the *Sherman Act* and as would become the case with respect to horizontal agreements between banks in the 1986 Act. However, the business community opposed the *per se* proposal and the government abandoned it.[18]

There was also no lack of condemnation for the harm caused by naked price-fixing and other types of horizontal agreements. In 1981, the Minister of Consumer and Corporate Affairs stated that the "evil of conspiracy is self-evident, and there is general agreement that what is needed is a strong criminal provision that will inhibit competitors from getting together to fix prices, allocate markets, retard technological advances, or otherwise harm competition."[19]

Yet the competitive effects test persisted in the new section 45. The Crown had to prove an agreement's undue effect on competition to convict. The modest amendments to the conspiracy offence in 1986 did little more than return the offence's historical breadth after two then recent Supreme Court of Canada decisions had imported new *mens rea* requirements into the offence.[20]

The relatively unchanged conspiracy offence left many commentators unhappy. One commentator called it "an appalling concession to the business community."[21] Another urged a *per se* approach as both practical, because it provided certainty and would simplify prosecutions, and philosophically defensible, because price-fixing and market sharing agreements were clear assaults on the free enterprise system.[22] Twenty years later, then Interim Commissioner Aitken would describe the unchanged conspiracy prohibition in section 45 as "ineffective and badly out of step with that of our major trading partners."[23]

According to the Commissioner[24] and other commentators,[25] section 45 was both too narrow and too broad. It made prosecuting naked price-fixing agreements too difficult, making Canada an "outlier around the world."[26] But at the same time, section 45 criminalized or potentially criminalized what one commentator described as "socially beneficial cooperative arrangements."[27] The resulting chill deprived Canadians of the benefits of some joint business action. Thus, those seeking reform urged a hybrid criminal-civil system along the lines of the American bifurcated *per se* and rule of reason approach.

Not everyone thought the unchanged conspiracy offence was a bad thing. Although he made no comment on its propriety, in *Nova Scotia Pharmaceutical Society* ("*PANS*"), Gonthier J. described the offence as "somewhere on the continuum between a per se rule and a rule of reason,"[28] in other words, a classically Canadian middle-of-the-road approach to economic policy. His Honour

also commented that requiring the Crown to establish on an objective view of the evidence that the accused intended to lessen competition unduly "surely does not impose too high a burden on the Crown."[29]

Those opposed to a *per se* approach argued that change was not necessary because section 45 operated well under the framework Gonthier J. developed in *PANS* both from an economic perspective[30] and with respect to convictions for "hard core" cartel behaviour.[31] After 1986 and continuing after *PANS*, the Crown secured dozens of convictions, mostly as a result of guilty pleas,[32] and over $100 million in fines[33] calling into question characterizations of section 45 as "ineffective."

Establishing Undueness: PANS and its aftermath

Admittedly, despite the record fine amounts and the total number of convictions, the Crown had a losing record in contested conspiracy cases following the 1986 Act and the Supreme Court of Canada's seminal decision in *PANS* in 1992.[34] Described as the "most significant development for Canadian conspiracy law" in the years after 1986,[35] *PANS* laid out a framework for proving i) an undue effect on competition and ii) the intent required to justify a criminal conviction.

First, writing for the Court, Gonthier J. considered the "undueness" requirement and rejected arguments that it was unconstitutionally vague. His Honour reasoned that analysis of an undue effect on competition had two components: the applicable market structure (a prerequisite of which was the definition of the relevant market) and the behaviour of the accused.[36] In Gonthier J.'s view, a conviction required proof of some market power and some behaviour likely to injure competition and it is "the combination of the two that makes a lessening of competition undue."[37]

However, the Crown did not have to prove an accused's subjective intent to unduly lessen competition.[38] Gonthier J. held that proof of a subjective element and an objective element sufficed. First, the Crown had to prove the accused's subjective intent to enter into the agreement with knowledge of its terms. It was then reasonable to conclude the accused intended to carry out the agreement's terms unless there was contrary evidence.[39] Second, the Crown had to establish "that on an objective view of the evidence adduced the accused intended to lessen competition unduly."[40]

As noted, some thought the *PANS* approach effective, but the fact remained that post-*PANS* the Crown convicted in only one case, *R. v. Perreault*,[41] a conspiracy case involving driving school services in Sherbrooke, Quebec. In contrast, the Crown failed to convict in four cases: the merits decision in *PANS*[42] (for

failure to establish the objective intent to unduly lessen competition); *R. v. Clarke Transport Canada et al.* [43] (for failure to establish the relevant market); *R. v. Bayda and Associates Survey Inc.*[44] (for failure to establish an agreement); and *R. v. Bugdens Taxi*[45] (for failure to establish the relevant market and uncertainty regarding the implementation of the agreement).

Whether the Crown would have secured convictions in these four cases with a *per se* offence is debatable. The evidentiary problems that plagued some of them, such as the Crown's inability to prove an agreement in *Bayda*, are also fatal to conviction for a *per se* offence.

Nor is it surprising that the Crown would lose some litigated cases. Accused are likely to plead guilty in the face of a strong case against them and contest only cases in which they believe they can avoid conviction.[46] The Crown is unlikely to indict in weak cases. Thus, strong arguments on both sides typify litigated cases and the Crown cannot be certain of conviction, no matter how strong the language of the statutory offence.

Nevertheless, the Crown's poor record in litigated cases supported calls for reform on the basis that it was too hard to convict under section 45. Amendments finally arrived in 2010.

III. The 2010 Amendments

Further transition towards a civil regulatory system

On March 12, 2009, Parliament passed Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*. Included in the omnibus Bill C-10 were significant amendments to the *Competition Act,* including those to section 45 which came into force on March 12, 2010 (the "2010 Amendments").[47]

Reminiscent of 1986, commentators greeted the 2010 Amendments with strong words: "the most significant amendments to the *Competition Act* in more than two decades,"[48] "sweeping changes,"[49] and "a fundamental shift in one of the cornerstones of Canadian competition law."[50] For proponents of the American approach to agreements in restraint of trade, the 2010 Amendments brought the long-advocated-for bifurcated *per se* and rule of reason approach.

For that reason, the 2010 Amendments continued the process the 1986 Act had begun. That is, to migrate Canada's competition regulation and enforcement regime away from its historical foundation on the criminal law to a civil regime based on Parliament's trade and commerce power. Whereas the 1986 Act had left the criminal conspiracy provision unchanged, the 2010 Amendments reduced the scope of the criminal offence and created a civil review

regime for many agreements between competitors. Three fundamental changes demonstrate this shift.

First, the criminal conspiracy offence applies to a much narrower subset of agreements. Only agreements between competitors to fix prices, allocate markets or restrict output are now criminal under section 45(1).[51] However, each is now criminal *per se*. The Crown does not need to prove the agreement's competitive impact (i.e., that it unduly lessened or prevented competition). At the same time, penalties for violations of section 45 have risen dramatically. Those convicted are now subject to fines up to $25 million (from $10 million) and 14 years in prison (from five years). The maximum prison term for bid-rigging (s. 47) has also risen to 14 years from 5, although the fine remains in the discretion of the court.

Second, there are several defences to the *per se* offence which further narrow the scope of the criminal prohibition.[52] The most significant defence is the ancillary agreements defence in section 45(4). An accused will avoid conviction if it demonstrates on a balance of probabilities that the agreement that would otherwise contravene section 45(1) is:

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

According to the Competition Bureau, examples of such ancillary agreements include non-competition clauses in employment agreements or asset sale agreements, certain non-compete obligations between parents in joint ventures, and agreements to charge a common price in a blanket license agreement for artistic works.[53]

Third, the competitive impact analysis now occurs under a civil review regime under the new section 90.1. Section 90.1 applies to *any* agreement between competitors.[54] However, the Competition Tribunal may only order a remedy if it finds that the agreement prevents or lessens, or is likely to prevent or lessen, competition in a market substantially.[55] Section 90.1(2) contains a non-exhaustive list of factors that the Tribunal may have regard to in its analysis, as in the merger review context.[56] Section 90.1(4) requires the Tribunal to consider efficiencies produced by the agreement. Although it has yet to be tested, on its face, section 90.1 appears to provide a more flexible and contextual framework for analysis of non-"hard core" agreements in restraint of trade than the old

section 45 did and implicitly recognizes that many agreements between competitors are economically beneficial.

The Immunity and Leniency Programs

Amidst the fundamental changes to the statutory scheme resulting from the 2010 Amendments, the Competition Bureau's formal Immunity and Leniency Programs continue to apply to criminal offences under the *Competition Act*.

The Bureau's current Immunity Program formalizes a procedure in place since 1991. The Bureau has published both a formal bulletin[57] and answers to frequently asked questions[58] to clarify the program's terms, process, and application. Likewise, the Bureau now has a formal bulletin[59] setting out its Leniency Program and responses to frequently asked questions.[60]

Underpinning both programs is an exchange: a potential offender provides the Bureau with information on a confidential basis about the offence and cooperates with the Bureau's investigation in return for immunity or a significantly reduced sentence. Immunity and leniency grants target secretive cartels which are often difficult to discover and prosecute. The programs create strong incentives for cartel participants to blow the whistle on cartels and assist timely and effective prosecution.

The Immunity/Leniency scheme rewards timely reporting of a potential offence. The first industry participant to bring the potential offence to the Bureau's attention secures an immunity marker. All those who follow secure leniency markers according to the order in which they contacted the Bureau. Assuming the immunity applicant complies with the various requirements of the Immunity Program, it will secure immunity from prosecution for itself and its employees. Likewise, the first-in leniency applicant will be eligible for a fine reduction of 50% and immunity for its employees. Subsequent leniency applicants are eligible for lower fine reductions and their employees may face prosecution.

Both programs appear successful.[61] The strong incentives to self-report, participate in the Immunity or Leniency process, and provide the Bureau with information and documents relating to the potential offence have produced multiple guilty pleas and significant fines.

The success of the Bureau's Immunity and Leniency programs means that the Bureau possesses more information than ever before about alleged cartel activity. Immunity and Leniency applicants have strong incentives to give the Bureau as much information as quickly as possible to secure immunity for individuals and significant fine reductions for the corporation. Rising sentences

may encourage an even faster race for markers and an even greater amount of information disclosure.

However, increasingly, the amount of information the Bureau possesses and how that information is made public causes distress and frustration.

As part of its investigation, the Bureau often uses information provided by immunity and leniency applicants to secure search warrants or production orders under section 11 of the *Competition Act*. The informations to obtain sworn in support of search warrants and the affidavits sworn in support of section 11 orders are filed with the court. Although the Crown files most under seal, informations to obtain often become public after the Bureau completes the search. The Bureau maintains that it must unseal the court file after the search because of the Supreme Court of Canada's seminal decision in *Toronto Star Newspapers Ltd. v. Ontario*.[62] That case permits a sealing order only where the Crown demonstrates serious and specific risk to the integrity of a criminal investigation. Other times, only the immunity applicant's identity and certain documents are kept confidential by court order while the information implicating competitors is laid bare. For interested parties, including journalists and plaintiffs' counsel, detailed information about alleged anticompetitive activity becomes available over the counter at the court office for about fifty cents per page to cover the court's photocopying costs.

The result is press coverage of on-going investigations – investigations which the immunity and leniency applicants would much rather keep confidential until, at least for the leniency applicants, they have to publicly plead guilty. Press coverage and public disclosure invariably produce a myriad of class action lawsuits claiming compensatory damages under section 36 of the *Competition Act*, common law torts, and equitable remedies.

But the disclosure in informations to obtain and affidavits is always one side of the story (the immunity applicant's) told by someone (the immunity applicant) who is incented to report conduct which may ultimately not support a criminal charge or conviction. It may be that an immunity applicant will provide details to the Bureau that produce search warrants and section 11 orders, but that upon investigation, never produce charges let alone a conviction. Reasonable and probable grounds to believe an offence has been committed (part of the test for obtaining a search warrant) is a far cry from proving the offence beyond a reasonable doubt.

The reward for the immunity applicant's cooperation? Negative publicity and class action lawsuits betting that the defendants will settle rather than risk protracted, costly, and uncertain litigation.

For this reason, the Immunity and Leniency programs face some criticism. Disclosure may discourage participation and undermine the effectiveness of the Immunity and Leniency programs. Participants would certainly prefer less not more public disclosure of the information provided on a confidential basis to the Competition Bureau during both programs.

IV. Interpreting and Applying Section 45 Going Forward

Whereas before 1986, Canada's competition regime relied on its criminal law foundation, today there is a civil review process for mergers, abuse of dominant position cases, and misleading advertising. As of March 2010, agreements between competitors have joined this list – at least in part. This transition is important not only because it fundamentally changed Canada's approach to competitor agreements but also because it informs how enforcers, practitioners, and courts should approach section 45's criminal prohibition going forward in three critical areas: i) the criminal prohibition's scope, ii) sentencing, and iii) the offence's intent requirement.

Is section 45 still too broad?

Proponents of the 2010 Amendments claimed that the old section 45 was too broad. It criminalized potentially beneficial agreements that were better dealt with under a civil regime. Its overbreadth chilled some pro-competitive agreements as market participants were uncertain what side of the line some agreements fell on and were unwilling to risk criminal sanction.

Critics of the 2010 Amendments argue that section 45 as amended has not solved the "chill" on market participants. Even before the 2010 Amendments, some commentators cautioned against the statutory creation of a *per se* conspiracy offence for this very reason: the relative inflexibility of a statutory *per se* offence would invariably be overbroad and criminalize pro-competitive behaviour.[63] Today's critics point to the broad definition of "competitor"[64] and section 45's *prima facie* application to "non-collusive business arrangements including pricing, territorial and output restrictions in joint ventures; dual distribution arrangements where a firm makes direct sales in competition with its independent resellers, and collaborative arrangements in network industries such as transportation or telecommunications."[65] Overbreadth, increased penalties upon conviction, and a *per se* offence designed to make convictions easier are apt to chill more pro-competitive behaviour, not less.

The Bureau's *Competitor Collaboration Guidelines*[66] address these allegations of overbreadth, at least in part. Although not binding on the Bureau, prosecutors, or the courts, the *Guidelines* outline how the Bureau intends to treat

different types of agreements between competitors or potential competitors. Throughout, the Bureau reiterates that section 45 "is reserved" for "naked restraints on competition (restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture)."[67] With reference to the very types of agreements highlighted by section 45's critics, the Bureau states that it will typically analyze dual distribution agreements,[68] anticompetitive provisions in joint venture agreements,[69] and franchise agreements[70] under section 90.1 and the other civil provisions in Part VIII of the *Competition Act* rather than treating them as criminal *per se* under section 45. Thus, even though section 45(1) *prima facie* criminalizes all of these types of agreements, the Bureau will not typically prosecute them as criminal offences.

But are the Guidelines enough? Certainly, the Bureau's statement on how it intends to enforce section 45 should provide market participants some additional certainty and reduce section 45's chilling effect. But the Guidelines remain non-binding. Market participants and their counsel must rely on prosecutorial discretion rather than the plain words of the statute. Of course, proponents of the 2010 Amendments might reply that prosecutorial discretion to charge criminally or apply to the Tribunal for a civil remedy is one of the 2010 Amendments' significant benefits. Before 2010, there was no choice between criminal and civil regimes. Agreements between competitors potentially attracted only criminal liability.

The courts, not the Bureau, will determine section 45's breadth and what it prohibits. It may be *prima facie* overbroad. But there is no reason to think that Canadian courts will prove unable to define an appropriately narrow scope for section 45. Their American counterparts have done just that with respect to section 1 of the *Sherman Act,* which is undeniably more over inclusive than section 45. It declares illegal every "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." Despite the sweeping and draconian restriction, American courts have interpreted section 1 in a flexible manner, mandated a reasonableness analysis, and fashioned *per se* and rule of reason categories to achieve a workable framework for antitrust enforcement in the United States.

Canadian courts are well positioned to conduct a similar interpretive exercise with respect to section 45. They will benefit from decades of American jurisprudence analyzing agreements in restraint of trade and applying the *per se* and rule of reason framework.

Section 45 cannot be analyzed in a vacuum. A contextual and purposive analysis indicates that its scope is narrow rather than broad. Prosecution of

some agreements between competitors may be easier, but the 2010 Amendments are part of the broader decriminalization trend in Canada's competition enforcement regime begun in 1986. As with mergers and allegations of abuse of dominance in 1986, in 2010 section 90.1 and the statutory defences in section 45 shield from criminal prosecution many types of agreements between competitors and subject them to Tribunal review on a civil standard. This legislative decision leaves fewer agreements in section 45's scope, not more. It would be a strange result if the overt non-criminalization of many types of agreements between competitors broadened rather than narrowed the criminal offence's scope.

The real question is whether Canadian courts will have the opportunity to analyze section 45 in any depth given that so many conspiracy cases resolve in guilty pleas. If conspiracy offences are now easier to prove, contested cases may all but disappear as those accused will be much more likely to plead to a reduced sentence in the face of almost certain conviction. That is not a desirable result. Members of the bar and the business community would benefit from early judicial guidance on section 45's scope. This could occur in the criminal context if the Bureau focuses on prosecuting individuals and seeking custodial sentences, as discussed below.

Civil courts may fill the gap created by a dearth of contested criminal cases. Strathy J. of the Ontario Superior Court recently considered the new section 45 in the context of a civil class action by franchisees against the iconic Tim Hortons franchise.[71] The plaintiff franchisees claimed that a joint venture agreement between the franchisor and a third-party to supply baked goods to the franchisees at certain prices violated section 45.[72] They claimed damages pursuant to section 36 of the *Competition Act*.[73]

Strathy J. summarily dismissed the plaintiffs' claims. First, His Honour held that there was no evidence that Tim Hortons and the third-party were competitors as defined in section 45.[74] Neither one had ever supplied the baked goods in issue in Canada before, nor was there any evidence that they would have in the absence of the joint venture agreement. In analyzing the issue, His Honour had regard to the *Guidelines*, demonstrating their influence with courts.[75]

Second, His Honour held that the ancillary defence provision in section 45(4) exempted the joint venture agreement from the criminal prohibition in section 45(1).[76] His reasons were categorical and should provide additional comfort to those concerned that section 45 applies to many joint venture agreements:

> Section 45(4) confirms that the agreement of two parties to form a joint venture to produce a product and to sell that product at a

> particular price is not a prohibited price-fixing agreement. If that was the case, any price fixed by the agreement, no matter what the amount, would contravene the section – a manifest absurdity.[77]

The plaintiffs have appealed Strathy J.'s decision to the Ontario Court of Appeal.[78] If the Court engages with the substantive issues, it may provide additional guidance on the appropriate scope of section 45. Regardless, with more contested competition class actions than criminal conspiracy cases, it may be civil rather than criminal courts that shape section 45's scope going forward.

Sentencing

Conspiracy (s. 45) and bid-rigging (s. 47) convictions now carry maximum sentences of 14 years in prison, nearly three times higher than the previous 5-year maximums.

In one sense, the 14-year maximums are deceptive. The authors are not aware of any custodial sentence for a conspiracy or bid-rigging conviction let alone anything approaching the previous 5-year maximum. Offenders have received fines and/or a conditional sentence served in the community. In light of the historical sentences for these offences, it is hard to imagine a court imposing anything close to the maximum 14-year sentence, or sentences that even threaten the previous 5-year maximums.

Yet how courts will approach sentencing given the creation of a *per se* offence and higher penalties is unknown. Two developments may provide some guidance. First, amendments to the *Criminal Code* may eliminate "house arrest" for price-fixing or bid-rigging convictions. Second, at least one Canadian court imposed higher sentences after Parliament split a previously over-inclusive criminal prohibition into separate criminal and civil components.

First, with respect to the *Criminal Code* amendments, the *Safe Streets and Communities Act*[79] received Royal Assent on March 13, 2012.[80] The *Safe Streets Act* amends several statutes, including the *Criminal Code*,[81] to fulfill the Conservative government's commitment to "move quickly to re-introduce comprehensive law-and-order legislation to combat crime and terrorism."[82] Among other things and most significantly for those convicted of conspiracy or bid-rigging, the *Safe Streets Act* restricts the use of conditional sentences – sentences less than two years which could be served in the community. As the government announced, the Act would end house arrest for property and other serious crimes.[83]

Section 742.1 of the *Criminal Code* already circumscribes judicial authority to impose conditional sentences. Conditional sentences are not available

for offences carrying a minimum sentence or if the court imposed a sentence of two years or more. The *Safe Streets Act* will remove offences carrying a maximum sentence of 14 years or life imprisonment from eligibility for conditional sentences.[84] Conspiracy and bid-rigging fall into this category with their new 14-year maximum sentences. This amendment is not yet in force.[85]

The unavailability of non-custodial, conditional sentences for conspiracy and bid-rigging convictions is a radical departure from historical sentences imposed in respect of those offences. Most recently in the Quebec gasoline price-fixing investigation, six individuals received prison terms, none of which exceeded twelve months and all of which were to be served in the community.[86] Once the provisions of the *Safe Streets Act* come into force and revise the *Criminal Code*, the non-custodial sentences imposed on some of the participants in the Quebec gasoline matter will no longer be possible.

The implications of this change remain to be seen. Although the Commissioner has stated that the Bureau will be "appropriately aggressive when dealing with individuals,"[87] jail terms will not be automatic. Courts may still impose fines and probation, and guilty pleas and cooperation with enforcement authorities will continue to mitigate longer sentences. As the Ontario Court of Appeal noted in a sentencing appeal with respect to a large-scale and secretive corporate fraud:

> [I]nvestigation and prosecution of crimes like these is difficult and expensive. It places significant stress on the limited resources available to the police and the prosecution. An early guilty plea coupled with full cooperation with the police and regulators and bona fide efforts to compensate those harmed by the frauds has considerable value to the administration of justice. The presence of those factors, depending of course on the other circumstances, may merit sentences outside of the range.[88]

But even if cooperation and guilty pleas reduce sentences, penitentiary terms may deter individuals from pleading guilty as quickly as has occurred in cases thus far. Without the potential for non-custodial sentences, individuals, their counsel and their employer's counsel may increasingly fight the criminal charges.[89] The continued complexity of proving an agreement in conspiracy cases may encourage resistance. If this occurs, it remains to be seen whether the Competition Bureau and prosecutors have the resources or determination to litigate conspiracy and bid-rigging charges.

It is also possible that Canadian judges will be reluctant to impose custodial sentences for antitrust convictions. But in at least one case, albeit with

respect to misleading advertising, the Ontario Court of Appeal had no qualms upholding lengthy sentences for violations of the *Competition Act* and expressly departed from the historical sentences imposed for misleading advertising offences.

In *R. v. Benlolo (Serfaty),*[90] the court convicted several individuals of misleading advertising contrary to s. 52(1) of the *Competition Act*. On appeal, the accused argued that their nearly three-year sentences fell far outside the acceptable range because they far exceeded sentences imposed for misleading advertising convictions in the past.

The Court of Appeal upheld the sentences for all but one of the accused. In distinguishing the much more lenient earlier sentences, the Court of Appeal heavily relied on Parliament's then recent amendments to the misleading advertising provisions. The criminal offence had changed from a strict liability to a full *mens rea* offence. Parliament had also added civil enforcement provisions to stop misleading advertising without resort to the criminal law. The Court described these amendments as "a watershed in the treatment and approach to misleading advertising."[91] In the Court's opinion, Parliament intended to criminalize serious and egregious cases of misleading advertising while leaving less serious breaches to the civil stream. The bifurcation of the offence reduced the precedential value of the historical and much more lenient sentences. Those earlier sentences typically resulted after criminal prosecution for a much less serious breach of the misleading advertising provisions than occurred in *Benlolo*. Indeed, the Court implied that the lenient sentences reflected judicial reluctance to sanction conduct that was not morally blameworthy, and that such cases would now be dealt with under the civil provisions. Full *mens rea* offences deserved more severe sanction. Finally, the Court noted that cases involving guilty pleas and joint sentencing submissions cannot be precedential in contested cases.[92]

The wrongful conduct in *Benlolo* was serious and egregious. It was akin to fraud and met the new *mens rea* requirement. In the Court's view, it was the very type of conduct that Parliament intended to denounce and severely sanction. In these circumstances, the longer sentences were appropriate.

The Court of Appeal's analysis in *Benlolo* suggests that courts may be more willing to impose longer sentencing for conspiracy offences (and perhaps bid-rigging offences) with less regard to the sentences imposed for these offences thus far. The similarities between the amendments to the misleading advertising provisions and section 45 are striking. First, like the 1999 amendments to the misleading advertising provisions, the 2010 Amendments divided the conspiracy offence into criminal and civil streams.[93] Parliament has both increased

the maximum penalty for conspiracy offences and reserved criminal sanction only for the most egregious types of "hard core" cartel offences. Like the criminal offence of misleading advertising, section 45 may criminalize less activity but the penalty for its violation may be much more severe. Second, guilty pleas have produced the overwhelming majority of Canadian convictions for conspiracy. According to the Court of Appeal, they will be irrelevant in determining an appropriate sentencing range in contested conspiracy cases going forward.

With a dearth of recent contested conspiracy convictions in Canada, we may be entering a period of genuine uncertainty with respect to sentencing. The preliminary indications – higher penalties, elimination of non-custodial sentences, and the bifurcation of criminal and civil offences – all suggest that sentences for conspiracy convictions will rise. By how much remains to be seen. Whether individuals and companies increasingly choose to contest conspiracy charges to avoid higher and more severe sentences is also an open question.

The required intent for the new per se offence

The potential for rising sentences makes discerning the intent required under the new section 45 all the more pressing. The Constitution reserves criminal sanction only for morally blameworthy conduct, thus conviction requires some criminal intent.

Courts should not lose sight of the fact that the 2010 Amendments did not eliminate the Crown's burden to prove the *mens rea* of the offence to demonstrate that the accused's conduct was morally blameworthy. Instead, they eliminated the requirement that the Crown prove the conduct's competitive impact "because the impact of an agreement between competitors is so obvious that the analysis is not required."[94]

Most would agree that clear agreements[95] between competitors to fix prices, allocate markets, or restrict output are morally blameworthy. Courts can also presume that the accused intended the consequences of its actions. As the U.S. Supreme Court held, "conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary."[96]

But section 45 only prohibits agreements *between competitors*. Parties to an agreement are not always obviously competitors, particularly in light of the *Competition Act's* expansive definition of that term. In these circumstances, when is an accused's conduct morally blameworthy?

Gonthier J.'s decision in *PANS* is a useful starting point for this analysis. His Honour held that the old section 45 required the Crown to prove two fault

elements. The first was subjective: that the accused intended to enter into the agreement and had knowledge of its terms. The second was objective: that on an objective view of the evidence, the accused intended to lessen competition unduly. The objective standard arose from the interaction of section 45(1.3), which expressly provided that the Crown did not have to establish the accused's intent to unduly lessen competition, and the Supreme Court's Charter jurisprudence which required fault to convict.

Section 45's *per se* offence has no equivalent to the old section 45(1.3) and no requirement to prove economic harm. Instead, the Crown must prove beyond a reasonable doubt i) a conspiracy, agreement or arrangement with a competitor ii) to fix, maintain, increase or control the price for the supply of a product.[97]

The first fault element of the *PANS* analysis appears to remain applicable. The accused intended to enter into the agreement with knowledge of the agreement's terms (which agreement fixed prices, allocated markets, or restricted output). But the PANS analysis does not capture one element: whether the parties to the agreement are competitors.

In the authors' view, section 45 now requires the Crown to prove three subjective intent elements rather than the two outlined in *PANS*. The Crown must prove:

(a) that the accused intended to enter into the agreement;

(b) that the accused had knowledge of the agreement's terms; and

(c) that the accused had knowledge that the parties to the agreement were its competitors, as section 45 defines that term.

At least four reasons support this approach. First, an accused without knowledge that it competes with its co-parties is not morally blameworthy and does not deserve sanction. Section 45 does not prohibit every agreement, only those with competitors. Without knowledge of competition or likely competition, there is no basis to sanction the accused. *PANS* confirmed that the court cannot convict unless the accused had knowledge of the agreement's terms. This makes sense. Only with knowledge of the agreement's terms can the accused agree to do something it knows or ought to know is illegal. Likewise, only with knowledge that it competes with its co-parties can the accused take action which it knows or ought to know offends section 45. It is that decision which attracts condemnation and deserves criminal sanction.

Second, requiring proof of the accused's knowledge aligns with the broader jurisprudence regarding criminal conspiracy. The accused's subjective intent to commit the agreed to offence is the critical mental fault element of criminal

conspiracy.[98] That circumstances exist to frustrate the offence's commission is irrelevant. Courts convict based on the accused's belief (albeit sometimes mistaken) that the offence is possible. Thus, it is what the accused actually knows at the time that is relevant, not what the facts establish after the events.

Third, this approach does not impose too high a burden on the Crown. Section 45 requires the Crown to prove an agreement *between competitors* beyond a reasonable doubt.[99] In most, if not all cases, the court will be able to infer from the evidence presented that the accused knew its co-parties were competitors. Indeed, entering into an agreement to fix prices, allocate markets, or restrict output would make little sense unless the parties to the agreement competed or were likely to compete with each other. It will be rare that a court finds beyond a reasonable doubt that the parties competed but that the accused did not have knowledge of that competition.

Fourth, an appropriately high degree of knowledge for criminal conviction will not frustrate regulation of agreements between competitors. Section 90.1 applies to any agreement between competitors. The Tribunal can issue orders under section 90.1 on the basis of the facts before it rather than the accused's moral culpability for its actions. Thus, if the Crown cannot prove an accused's knowledge, it could still pursue a civil remedy from the Tribunal under section 90.1.

V. Conclusion

The 2010 Amendments are just over two years old. There are more questions than answers about their impact and legacy. In the authors' view, it is wrong to focus only on how the 2010 Amendments have strengthened section 45, created a *per se* offence, and arguably improved the Crown's chances to convict in "hard core" cartel cases because, at the same time, Parliament narrowed the criminal prohibition's scope with many competitor agreements now subject to a civil rule of reason analysis under section 90.1. Viewed against this backdrop, and the evolution of Canada's competition regime from a criminal to a largely civil regulatory system, the continuing criminal prohibitions remain critically important, but must be narrowly circumscribed to target only conduct deserving criminal sanction.

ENDNOTES

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[2] An Act for the Prevention and Suppression of Combinations formed in restraint of Trade, 1889 (Can.), c. 41.

[3] July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C. §§ 1–7.
[4] Bruce C. McDonald, Criminality and the Canadian Anti-Combines Laws, (1965-1966) 4 Alta. L. Rev. 67 at 69 [McDonald].
[5] It is more accurate to describe the American approach as a reasonableness analysis that considers some types of agreements presumptively unreasonable (per se criminal).
[6] R.S.C., 1985, c. C-34, as amended.
[7] Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.) s. 91.
[8] Isabel M. Pappe, The Canadian Competition Act: A Leap Forward, (1988) 22 Int'l L. 1071 at 1071.
[9] Warren Grover and Robert Kwinter, The New Competition Act, (1987) 66 Canadian Bar Review, 267 at 267 [Grover & Kwinter].
[10] Thomas W. Ross, Introduction: The Evolution of Competition Law in Canada, (1998) 13 Review of Industrial Organization 1 at 1 [Ross].
[11] Canada (Attorney General) v. Canadian National Transportation Ltd., [1983] 2 S.C.R. 206 at 250 (per Dickson J.).
[12] The legislation did grant significant criminal investigatory powers to the Commissioner of Competition (then known as the Director of Investigation and Research).
[13] Grover & Kwinter, supra note 9 at 268.
[14] An Act for the Prevention and Suppression of Combinations formed in restraint of Trade, 1889 (Can.), c. 41.
[15] Formerly s. 32 of the Combines Investigation Act, R.S.C. 1970, c. C-23.
[16] Amendments in 1900 quickly removed the "unlawfulness" requirement, but the "undueness" requirement endured: Ross supra note 10 at 3.
[17] Ross supra note 10 at 3.
[18] W.T. Stanbury, The New Competition Act and Competition Tribunal Act: "Not with a Bang, but a Whimper," 1986-1987 12 Can. Bus. L.J. 3 at 5 and 28 [Stanbury] & Suzanne Day et al, "Rightsizing Regulation: The Competition Act, 1975-2005," (2009) 24(1) Can. J.L. & Soc. 47 at 48-49.
[19] Stanbury supra note 18 at 28.
[20] Stanbury supra note 18 at 23. The Supreme Court in Aetna Ins. Co. v. The Queen (1977), 75 D.L.R. (3d) 332 (S.C.C.) and Atlantic Sugar Refineries Co. Ltd. v. A.-G. Can. (1980), 115 D.L.R. (3d) 21 (S.C.C.) had arguably added to the Crown's burden and required it to prove the accused's intent to unduly lessen competition. Parliament responded with subsections 45(1.2) and (1.3) which arguably returned the longstanding interpretation of the offences intent requirements.
[21] Michael J. Trebilcock, "Bill C-91: What are the Costs of Closure?" (1986) 7(1) Canadian Competition Policy Record 3.
[22] Stanbury supra note 18 at 28.
[23] Speaking Notes for Melanie L. Aitken, Interim Commissioner of Competition before the Senate Banking, Trade and Commerce Committee Hearings Regarding Competition Act Amendments, May 13, 2009 at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03065.html [Commissioner's Speech].
[24] Commissioner's Speech supra note 23.
[25] Ross supra note 10 at 18.

[26] Commissioner's Speech supra note 23.
[27] Ross supra note 10 at 18.
[28] R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606 [PANS].
[29] PANS supra note 28 at 660.
[30] Patrick Hughes and Margaret Sanderson, Conspiracy Law and Jurisprudence in Canada: Towards an Economic Approach, (1998) 13 Review of Industrial Organization, 153 at 153-154 [Hughes & Sanderson].
[31] Brian A. Facey and Dany H. Asaf, Innovation, Growth and Prosperity: A Framework for Amending Canada's Conspiracy Laws, (2001) 20 Can. Comp. Rec. 61 at 63 [Facey & Asaf].
[32] Hughes & Sanderson supra note 30 at 154 and Facey & Asaf supra note 31 at 63.
[33] Facey & Asaf supra note 31 at 63 and 76.
[34] Hughes & Sanderson supra note 30 at 154 & Facey & Asaf supra note 31 at 63.
[35] Hughes & Sanderson supra note 30 at 153.
[36] PANS supra note 28 at 651.
[37] PANS supra note 28 at 657.
[38] Analysis of the *mens rea* requirement was necessary because the Supreme Court had recently held that a minimum mental state is an essential element of a criminal offence: R. v. Vaillancourt, [1987] 2 S.C.R. 636.39 PANS supra note 28 at 659-660.
[40] PANS supra note 28 at 660.
[41] [1996] J.Q. no 2660 (QL). Sentencing Reasons.
[42] R. v. Nova Scotia Pharmaceutical Society and Pharmacy Association of Nova Scotia (1993), 120 N.S.R. (2d) 304, 49 C.P.R. (3d) 289 (T.D.).
[43] (1995), 130 D.L.R. (4th) 500 (Ont. Ct. Gen. Div.).
[44] [1997] A.J. No. 806 (Q.B.) (QL), 5 Alta. L.R. (3d) 95.
[45] [2006] N.J. No. 250 (Pr. Ct.) (QL) aff'd R. v. Budgen's Taxi (1970) Ltd., 2007 NLTD 167, [2007] N.J. No. 322 (T.D.).
[46] Facey & Asaf supra note 31 at 62.
[47] Although other amendments came into force in 2009, the authors refer to the 2010 Amendments throughout to reflect the amendments specifically related to the treatment of competitor agreements in sections 45 and 90.1.
[48] Neil Campbell and Sorcha O'Carroll, The Americanization of Canada's Competition Act, (2009) 48 Can. Bus. L.J. 446 at 446 [Campbell & O'Carroll].
[49] McCarthy Tetrault LLP, Governmental Enacts Sweeping Changes to Canada's Competition and Foreign Investment Laws, http://www.mccarthy.ca/article_detail.aspx?id=4420.
[50] Davies Ward Phillips & Vineberg LLP, Amendments to the Competition Act: What do they mean for you?, March 13, 2009, http://www.dwpv.com/en/Resources/News/In-the-News/2009/Amendments-to-the-Competition-Act-What-Do-They-Mean-For-You.
[51] 45(1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
(a) to fix, maintain, increase or control the price for the supply of the product;
(b) to allocate sales, territories, customers or markets for the production or supply of the product; or
(c) to fix, maintain, control, prevent, lessen or eliminate the production or

supply of the product.

[52] See subsections 45(5) (export exception) and (6) (affiliate exception).

[53] Competition Bureau Canada, Competitor Collaboration Guidelines, December 23, 2009 http://www.competitionbureau.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 at 12 [Guidelines].

[54] Except agreements between affiliates (s. 90.1(7)), export agreements (s. 90.1(8)), and certain agreements certified by the Minister of Finance of Minister of Transport (s. 90.1(9)).

[55] This use of substantially rather than unduly aligns with the language of s. 77 and 79.

[56] See section 93 for the factors considered in the merger review context. Section 93 and 90.1(2) are nearly identical except that section 93 also includes the "failing firm" defense which permits the Tribunal to consider "whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail."

[57] Competition Bureau Canada, Immunity Program under the Competition Act, June 7, 2010, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html.

[58] Competition Bureau Canada, Immunity Program: Frequently asked questions, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03250.html.

[59] Competition Bureau Canada, Leniency Program Bulletin, September 29, 2010, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03288.html.

[60] Competition Bureau Canada, Leniency Programs – FAQs, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03289.html.

[61] The Bureau describes the Immunity Program as, "one the Bureau's most effective tools for detecting and investigating criminal anti-competitive activities prohibited by the Competition Act."

[62] 2005 SCC 41, 2 S.C.R. 188.

[63] Facey & Asaf supra note 31 at 68-70.

[64] Section 45(8): "competitor" includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c).

[65] Campbell & O'Carrol supra note 48 at 449.

[66] Guidelines supra note 53.

[67] Guidelines supra note 53 at 1, 6, and 10.

[68] Guidelines supra note 53 at 9.

[69] Guidelines supra note 53 at 12-13.

[70] Guidelines supra note 53 at 10.

[71] Fairview Donut Inc. v. The TDL Group Corp., 2012 ONSC 1252 [Fairview].

[72] The plaintiffs also alleged violations of the old resale price maintenance provision and the old s. 45 offence. Justice Strathy summarily dismissed both claims.

[73] Section 36 permits private actions to recover damages caused by violations of Part V of the Act, including section 45.

[74] Fairview, supra note 71 at para 632.

[75] Fairview, supra note 71 at para 631.

[76] Fairview, supra note 71 at para 632-3.

[77] Fairview, supra note 71 at para 633.
[78] Notice of Appeal dated March 23, 2012, Fairview Donut Inc. and Brule Foods Ltd. v. The TDL Group Corp. and Tim Hortons Inc., Court of Appeal File No. C55239.
[79] S.C. 2012, c. 1.
[80] Parliament of Canada, House Government Bill C-10, http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Mode=1&Language=E&billId=5120829&View=0.
[81] R.S.C., 1985, c. C-46.
[82] Department of Justice, Backgrounder: Safe Streets & Communities Act http://www.justice.gc.ca/eng/news-nouv/nr-cp/2011/doc_32637.html, September 2011.
[83] Department of Justice, Backgrounder: Safe Streets & Communities Act: Ending House Arrest for Property and Other Serious Crimes, http://www.justice.gc.ca/eng/news-nouv/nr-cp/2011/doc_32635.html, September 2011.
[84] Supra note 79 section 34.
[85] Supra note 79 section 51. The provisions come into force on a day to be fixed by order of the Governor in Council.
[86] Competition Bureau, List of Charges and Sentences in the Quebec Gasoline Price-fixing Cartel, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03079.html, April 13, 2012.
[87] Remarks by Melanie L. Aitken, Commissioner of Competition, Keynote Speech at the Canadian Bar Association 2011 Fall Conference, October 6, 2011, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03424.html.
[88] R. v. Drabinksy, 2011 ONCA 582 at para 166.
[89] Although the US Department of Justice secures guilty pleas even when they come with significant penitentiary sentences. Just because non-custodial sentences are no longer available may not mean that offenders will refuse to plead guilty.
[90] (2006), 209 CCC (3d) 232 (Ont CA) [Benlolo].
[91] Benlolo supra note 90 at para 19.
[92] Benlolo supra note 90 at para 22.
[93] Although section 45 was always a full mens rea offence whereas the old misleading advertising offence was one of strict liability.
[94] Fairview supra note 71 at para 629.
[95] It is important to note that communications between competitors, even about prices, do not necessarily constitute an agreement and will not attract criminal sanction under section 45(1) if they do not.
[96] United States v. Patten (1913), 226 U.S. 525 at 543.
[97] Fairview supra note 71 at para 628.
[98] United States of America v. Dynar, [1997] 2 SCR 462 at para 105.
[99] How easy proving the fact of competition will be remains to be seen. Some commentators argue that an analysis of the relevant market remains necessary: A. Neil Campbell and Casey W. Halladay, A New Era for Canadian Cartel Enforcement, The 2011 Lexpert®/American Lawyer Guide to the Leading 500 Lawyers in Canada. The Bureau has rejected this position: Guidelines supra note 53 at 12.