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New Conspiracy / Cartel Law in Effect

Canada's new regime for addressing criminal cartels is now in force. The Federal Government introduced the most sweeping changes to the *Competition Act* in 25 years in March of 2009. One of the most significant amendments made was to the conspiracy law provisions. The introduction of the new conspiracy enforcement regime was delayed one year, to March 12, 2010, and is now in effect.

Under the new provisions, the government has opted for a two-tier approach to enforcement, with an absolute *per se* criminal prosecution of those competitors engaged in what is viewed to be clear offensive anti-competitive behaviour. The new provisions take away certain threshold requirements for prosecution making it easier to achieve conviction. The new provisions also introduce a civil review regime for other arrangements between competitors that may have a resulting adverse effect to competition. The Canadian Competition Bureau has issued "Competitor Collaboration Guidelines" which state that the Bureau's intention is to prosecute only 'hard-core cartel' conduct under the criminal *per se* provisions. However, the guidelines are not binding on the Bureau or the Courts and companies engaged in any form of agreement with one or more competitors would be wise to review their existing arrangements.

Under the previous conspiracy provisions, an agreement between competitors had to have a demonstrable serious impact to competition in a relevant market before it was found to be in contravention of the criminal provisions of the Act. With the new law, any agreement that fixes prices, allocates markets or restricts production or output is subject to conviction, and there is no requirement to establish that the action has had any deleterious effect on competition. The penalty upon conviction is a maximum C\$25 million fine and imprisonment of up to 14 years. In addition, plaintiffs alleging damages as a result of the offence have access to a statutory cause of action. As a result, companies are also exposed to the risk of class actions.

Certain very specific exemptions to a finding of conspiracy that were in the old legislation were removed by the amendments. Agreements between competitors which dealt only with such things as defining product standards, exchanging statistics, cooperation in research and development or engaging in measures to protect the environment are no longer express exemptions from a finding of conspiracy. Instead, the new criminal provisions provide for an 'ancillary restraints defence'. If a part of the arrangement between competitors offends the conspiracy provisions, but the offensive portion is ancillary to a broader purpose and it is directly related to, or reasonably necessary for giving effect to, that broader purpose, then the parties can avoid liability under the Act. At present, only the non-binding guidelines previously mentioned provide some framework for the viewpoint of the Bureau. Caution must be exercised in drafting any agreements to ensure that the terms of the agreement do not offend the conspiracy provisions and are in fact viewed to be ancillary to a broader purpose.



The new civil review regime, also in effect as of March 12, 2010, will address those arrangements between competitors that do not meet the standard of *per se* illegal but that are 'likely to prevent or lessen competition substantially in a market'. Where the Bureau determines there is a resulting adverse effect on competition in a market, various remedies are available including seeking an order to prohibit further action under the agreement.

Companies doing business in Canada with competitors or potential competitors, particularly through strategic alliances, joint ventures, intellectual property licensing agreements, distribution agreement and other similar structures, should review their existing arrangements to ensure that their agreements raise any issues under the new conspiracy/cartel laws in Canada.

For more information on this topic or with respect to any competition/antitrust law matter, please contact **Valerie C. Mann** at 604.631.9173 or vcmann@lawsonlundell.com.

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