

## **Competitor Collaboration Guidelines Released for Comment**

### **Competition law alert**

As you might recall from previous McMillan client Bulletins, in March 2009 Canada's Competition Act was significantly over-hauled. The amendments included replacing the current criminal conspiracy offence with a more narrow offence directed at so-called "hard core" cartel activity among competitors and creating a new civil reviewable matter against which to assess other "competitor agreements".

On Friday May 8, the Commissioner of Competition released draft Competitor Collaboration Guidelines for public comment. The Guidelines are an important and largely positive attempt by the Commissioner to explain how prosecutorial discretion will be used to reduce some of the overreaching aspects of the poorly drafted new criminal offence. For example, the Guidelines state that "the amended criminal prohibition is reserved for agreements between competitors to fix price, allocate markets or restrict output that constitute naked restraints on competition (restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture)".

One disappointing area of the draft Guidelines is that the Commissioner has adopted a fairly strict rather than generous interpretation of the ancillary restraints defence, which is a critical safety valve for removing non-cartel conduct from the criminal offence. And, while the illustrative examples included in the Guidelines are an important component of meaningful guidance, some of the examples presented focus on easy rather than difficult fact situations and others provide only limited depth in the explanation as to why enforcement action will or will not be taken.

The Guidelines do not bind plaintiffs or judges, so we expect there will be numerous private actions to test application of the new laws to conduct that the Commissioner might not pursue under either the criminal or non-criminal track.

A copy of the draft Guidelines is available at:

[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf/\\$FILE/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf/$FILE/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf). Interested parties can comment on the draft; the Commissioner has requested that comments be provided by August 14, 2009.

For more information, contact any member of McMillan's Competition Law Group.