Competition Criminal Enforcement in Canada

The Year in Review 2016

By Christopher Naudie and Shuli Rodal

OSLER

Table of Contents

1

Introduction

In 2016, the Commissioner of Competition (the Commissioner) pursued another year of aggressive criminal enforcement in Canada. The Cartels Directorate secured a total of approximately C$13.4 million in fines for cartel and bid-rigging offences, in contrast to the relatively modest C$2.9 million in fines that were secured in 2015. The Commissioner was successful in obtaining an appellate decision that upheld convictions in the retail gasoline case, and he also secured the second-largest fine ever for a bid-rigging offence in Canada as part of his ongoing auto parts investigation. In addition to these successes before the courts, the Commissioner deepened his commitment to cross-border cooperation with the U.S. Department of Justice through a coordinated investigation that resulted in a significant fine against Nishikawa Rubber in the U.S. Finally, the Commissioner demonstrated his leadership role in the global network of competition enforcers by announcing that the Competition Bureau (the Bureau) will host the International Competition Network's Cartel Workshop in Ottawa in 2017.

To some observers, the Commissioner's enforcement efforts appeared to be focused on re-establishing his enforcement credentials following a difficult and challenging year before the courts in 2015. In 2015, despite the investment of enormous investigative resources, the Commissioner was unable to obtain a conviction in two high-profile criminal cases. In *R. v. Durward,* following a 10-year investigation by the Cartels Directorate and an eight-month trial in connection with allegations of bid-rigging in the technology services sector, the jury returned a verdict of acquittal on all charges. In *R. v. Nestlé,* following an eight-year investigation in respect of an alleged price-fixing conspiracy in the chocolate business, the Crown unilaterally stayed all of the remaining charges. In both high-profile cases, the Cartels Directorate had conducted the underlying investigation and had recommended both cases for prosecution, but the Crown was unable to obtain any conviction in either case.

On the face of his enforcement record in 2016, the Commissioner appears to have achieved part of that goal. However, the Commissioner did not announce any new significant investigations involving domestic or foreign cartel activity, and the high level of fines collected in 2016 was largely attributable to one single bid-rigging plea in the auto parts case. Moreover, based on his reported enforcement data, the Commissioner experienced a gradual decline in the number of requests for immunity and leniency markers, and he did not report any whistleblower contacts in 2016. While there is no concrete data on this point, some have speculated that the incentives to self-report potential criminal conduct have diminished given the outcome of the *R. v. Durward* and *R. v. Nestlé* cases – particularly in light of the Crown's aggressive posture and compulsive production orders directed at the Bureau's own immunity applicant. And while the Commissioner announced an intention to review his immunity and leniency programs in light of the outcome of these cases, no consultation process has been initiated since the Commissioner publicly announced his intention to conduct a review in December 2015.

In our annual report on antitrust criminal enforcement in Canada, we examine these key developments as part of our survey of the leading investigations by the Commissioner and prosecutions by the Public Prosecution Service of Canada (PPSC). We also discuss the leading judicial decisions from 2016, and consider their implications for domestic and international price-fixing investigations. In addition, we review the Commissioner's latest public statements relating to criminal enforcement of the *Competition Act*, and highlight a number of areas where we can expect developments in 2017.

2

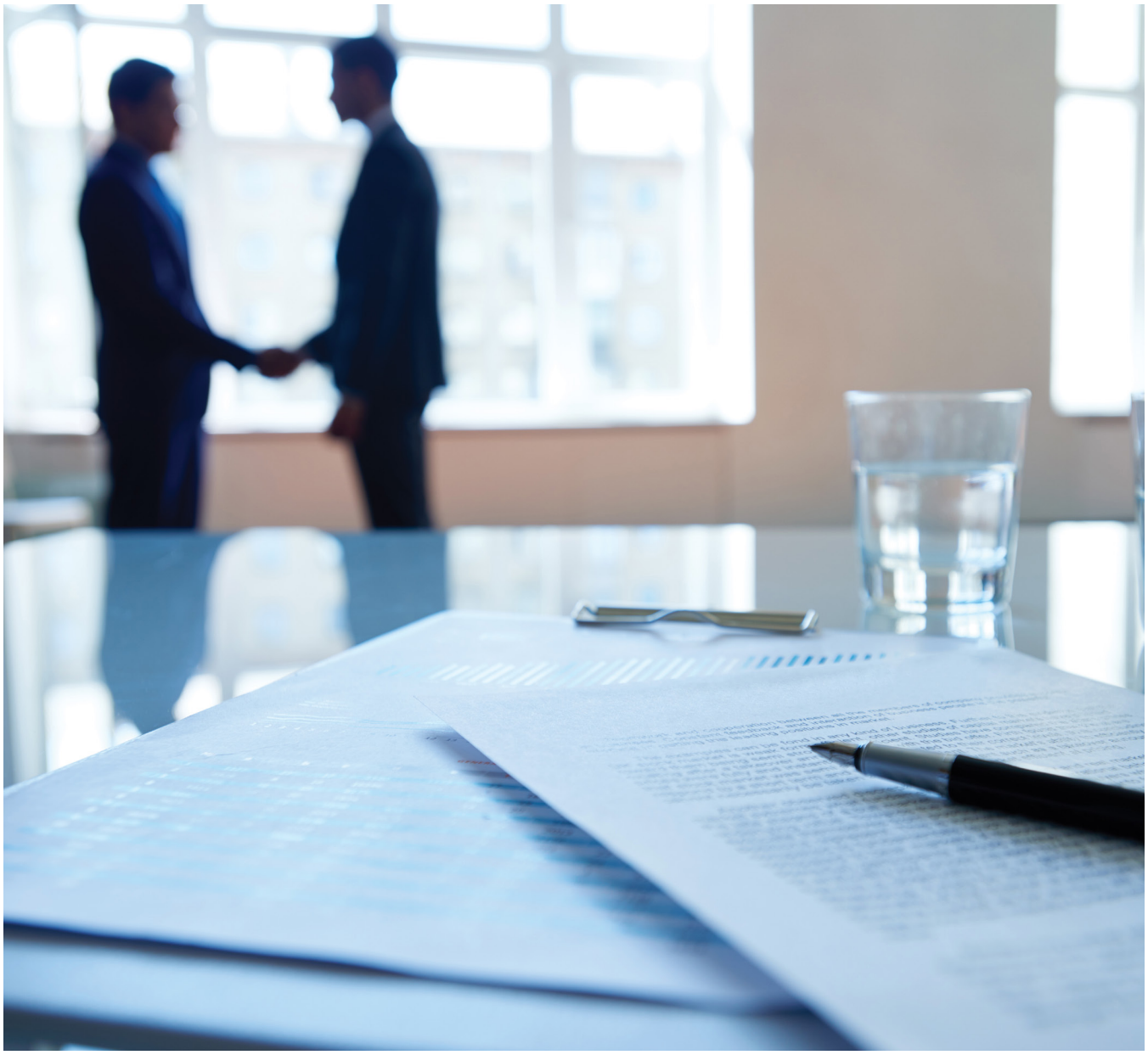
The Bureau's overall enforcement activity

The Commissioner continues to have an active book of ongoing investigations in Canada. In his most recent quarterly report from December 2016, the Commissioner reported that there were 133 live investigations at the Bureau, representing a modest increase from 2015–2016 and 2014–2015.[1] The Commissioner also reported that 50 of these investigations had been commenced in the first three reporting quarters for 2016, whereas 38 had been closed – suggesting a modest increase in investigative activity at the Bureau.

However, these aggregated figures include both criminal and civil investigations, and it appears that only a fraction of these cases involve criminal investigations. During these first three reporting periods, the Commissioner did not obtain search warrants, and did not have any whistleblower contacts. However, the Commissioner did report a small spike in the granting of immunity and leniency markers. Based on his year to date, the Commissioner reported that he has granted 26 immunity markers, and one leniency marker. By contrast, the Commissioner had granted 31 immunity markers in 2015–2016, and 20 markers in 2014–2015. In an interesting spike, the Commissioner reported that 16 immunity markers had been granted in the third quarter of 2016 – an unusually high number for a single quarter based on historical patterns.

However, of the existing markers that are outstanding, very few appear to have resulted in a referral to the PPSC. During these first three reporting periods, the Commissioner only made two recommendations to the PPSC for an actual grant of immunity. During the same period, the Commissioner did not refer any criminal investigations to the PPSC for action. The Commissioner did report there are six investigations in which the Bureau is still waiting for a decision (i.e., the referral occurred in 2015–2016 or prior periods, but the PPSC has not made a decision yet), but it is unclear whether any of these cases will actually result in any grant of immunity or prosecution.

1 These investigative figures are set out in the Competition Bureau, Quarterly Statistics for Period Ending December 31, 2016 (published at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04129.html). The Competition Bureau reports its investigative figures based on a March 30–April 1 reporting year.



Consistent with past years, the enforcement activity at the Cartels Directorate appears to remain heavily focused on the Commissioner's ongoing investigation into price-fixing and bid-rigging allegations in the auto parts sector. Since 2009, international regulators have been investigating allegations of bid-rigging in respect of the pricing of a number of automotive components, including safety systems such as seat belts, airbags, steering wheels and anti-lock brake systems, and critical parts such as anti-vibration rubber, instrument panel clusters, starter motors and wire harnesses. To date, the U.S. Department of Justice has laid charges against 47 corporations and 65 individuals, and has secured criminal pleas that included over US$2.9 billion in criminal fines.

Given the importance of the automotive sector in Canada, the Commissioner is continuing his own investigation in respect of the pricing of these same products that may have affected Canadian consumers. To date, since he commenced his investigation in 2009, the Commissioner has granted over 200 immunity and leniency markers to over a dozen cooperating parties. The Commissioner has also secured nine guilty pleas and over C$70 million in fines in respect of a number of different products. However, the number of pleas appears to be gradually winding down. In 2013, the Cartels Directorate secured three pleas, followed by four pleas in 2014 and one plea in 2015. In 2016, the Commissioner only secured one additional plea – but the size and significance of that plea was almost record-breaking by past standards.

More specifically, in April 2016, Showa Corporation (Showa) pled guilty to an offence in Canada for participating in an international conspiracy relating to electronic power steering assemblies, and agreed to pay a C$13-million criminal fine.[2] The plea is the second-largest fine that the Commissioner has secured as part of his ongoing auto parts investigation. The plea is also the second-largest fine that the Commissioner has ever secured in a bid-rigging case. Indeed, by international standards, Showa's plea in Canada was unusually large. In April 2014, Showa pled guilty in the United States to an offence under the *Sherman Act* and paid a fine of US$19.9 million. After adjusting for currency differences, Showa's fine in Canada was roughly 50% of its comparable fine in the United States. While Showa's volume in commerce in Canada was not publicly disclosed, Showa's fine was surprisingly high by historical standards, particularly when measured by the relative size of the U.S. and Canadian economies.

In 2016, the Commissioner only secured one additional plea – but the size and significance of that plea was almost record-breaking by past standards.

However, by marked contrast, the Commissioner only secured a small number of relatively modest pleas in his domestic enforcement activities in 2016. Last year, the Commissioner obtained five pleas in domestic criminal cases – one plea in a deceptive market case relating to office supplies, four pleas for bid-rigging and/or conspiracy offences relating to various projects in the construction/infrastructure industry, and one plea for bid-rigging and conspiracy relating to the supply of information technology services to the federal government.[3] These pleas all involved small to medium-sized contracts and/or projects, and resulted in a total amount of C$378,000 in fines. The biggest domestic penalty that the Commissioner obtained in 2016 was the product of a long-running investigation relating to a residential construction project in Montréal. In 2005, following a tip from a former employee of one of the bidders, the Commissioner initiated an investigation into the bidding for constructive services relating to a residential construction project in Montréal. In 2010, after a five-year investigation, the Commissioner announced criminal charges against eight companies and five individuals. To date, two of those companies and one individual have pled guilty, and the Commissioner has collected a total amount of C$565,000 in fines.

2 Competition Bureau, Press Release, "Japanese Auto Parts Company Fined $13 Million for Participating in a Bid-Rigging Conspiracy" dated April 1, 2016 (published at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04058.html).

3 Competition Bureau, Penalties Imposed by the Courts – 2016 (published at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01863.html).

In the latest plea, a Québec-based ventilation company, Enterprises de ventilation Climasol, pled guilty to the offence of bid-rigging and received a fine of C$130,000. The president of Climasol, Roch Raby, also pled guilty to an offence and agreed to a fine of C$10,000.[4]

Overall, the Commissioner's enforcement activities resulted in fewer pleas and smaller fines and penalties relative to past years. The Commissioner secured five guilty pleas in domestic criminal cases and one plea in an international cartel case, in contrast to the 12 pleas that the Commissioner secured in his 2015–2016 reporting period. In addition, as noted above, the Commissioner secured a total amount of criminal fines of C$378,000 in domestic cases in 2016. By comparison, in domestic enforcement cases, the Commissioner had secured convictions/pleas of approximately C$1.2 million in 2015, C$164,000 in 2014 and C$4.1 million in 2013.[5]

4 Competition Bureau, Press Release, "Bid-rigging Scheme Leads to $140,000 Fines for Quebec Company and Its President" dated March 14, 2016 (published at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04042.html).

5 See, by comparison, Competition Bureau, Penalties Imposed by the Courts – 2015 and 2014 (published at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01863.html).

3

The Bureau's enforcement efforts against individuals

The Bureau's enforcement actions against individuals have been the subject of live discussion in Canada, particularly in light of parallel developments in the United States. In September 2015, the Department of Justice issued a significant enforcement direction to federal prosecutors (the Yates Memo) that underscored the importance of "holding individuals accountable" for corporate wrongdoing across all areas of law. In a separate speech in February 2016, Deputy Assistant Attorney General Brent Snyder noted that consistent with the Yates Memo, the U.S. Antitrust Division "has long touted prison time for individuals as the single most effective deterrent to the 'temptation to cheat the system and profit from collusion.'"[6] He further noted that the Antitrust Division had prosecuted an increasing number of individuals relative to corporate defendants in recent years (over 350 individuals have been prosecuted during the past five years), and had secured longer sentences relative to past years (an average sentence of 24 months between 2010 and 2015).

By contrast, the Commissioner and the PPSC have not invoked the tool of incarceration with the same vigour as their brethren in the United States. Indeed, historically, it was rare for the courts to impose a term of imprisonment for an individual who was convicted of the conspiracy and bid-rigging provisions of the *Competition Act* (the *Act*). In the rare circumstances where the courts have imposed sentences on individuals in Canada for violations of the *Act*, the courts have often used a combination of probation and "conditional sentences" (i.e., a non-custodial sentence that may be served in the community with a number of conditions).

6 See U.S. Department of Justice, Deputy Assistant Attorney General Brent Snyder Delivers Remarks at the Yale Global Antitrust Enforcement Conference, dated February 19, 2016 (published at https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust).

However, as part of amendments to the *Act* in 2009, the Parliament of Canada (Parliament) substantially increased the potential custodial penalties for criminal anti-competitive conduct. For an offence committed under the conspiracy provisions, the maximum fine under the *Act* was increased from C$10 million to $25 million, and the maximum term of imprisonment was increased from five years to 14 years. For an offence committed under the bid-rigging provisions, the term of imprisonment was also increased from five years to 14 years. In light of this near-tripling of penalties by Parliament coupled with the goal of "individual accountability" that has been enunciated by U.S. antitrust enforcers, many expected that the Commissioner and the PPSC would advocate for incarceration with increasing frequency in antitrust cases.

Since these amendments, there have been signs that the Commissioner is seeking stricter penalties against individuals. For example, following the Commissioner's investigation in the Québec retail gasoline case, the PPSC charged 39 individuals and 15 companies for allegedly fixing the price of gasoline in four local markets in Québec. Since the initial charges in 2008, 33 individuals and seven companies have pleaded guilty or were found guilty. With respect to the 33 individuals that pleaded guilty or were found guilty at trial, six individuals have been sentenced to terms of imprisonment of 54 months.[7] The Commissioner has also secured some significant sentences of imprisonment in domestic deceptive marketing cases. For instance, in a notable case in 2009, a promoter of a lottery reselling scheme pled guilty to an offence under the deceptive mass marketing provisions of the *Act* and received a one-year suspended sentence coupled with 18 months on probation.[8] In 2014, the owner of an online directories business pled guilty to an offence under the deceptive marketing provisions of the *Act* and received a sentence of 18 months in prison.[9]

...as part of amendments to the *Act* in 2009, the Parliament of Canada (Parliament) substantially increased the potential custodial penalties for criminal anti-competitive conduct.

However, notwithstanding these cases, it remains rare for an individual to serve significant prison time for a criminal conspiracy or bid-rigging offence in Canada. In the cases since 2009 where the Commissioner has reached a plea agreement with an individual, the majority of sentences have involved the imposition of a fine, often coupled with a prohibition order and/or community service. In addition, in cases involving more serious sanctions, the Commissioner and the PPSC have continued to agree to pleas involving conditional sentences. Even in cases where the PPSC has sought prison time, the courts have imposed prison sentences that are measured in months, rather than years.

These larger trends have been reflected in the Commissioner's recent enforcement activity in 2016. During the past year, the Commissioner only secured penalties against three individuals for contraventions of the criminal provisions of the *Act*, and none of these penalties involved any time in a correctional facility. First, in March 2016, the president of a ventilation company (Climasol) pled

7 Competition Bureau, Press Release, "Les Pétroles Global Inc. Fined $1 million for Gasoline Price-Fixing in Quebec" dated April 17, 2015 (published at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03908.html).

8 Competition Bureau, Press Release, "Direct Mailer Hit with Record $2M Fine" dated August 28, 2009 (published at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03117.html).

9 Competition Bureau, Press Release, "Deceptive Telemarketer Receives 18-Month Prison Sentence" dated May 27, 2014 (published at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03722.html).

guilty to the offence of bid-rigging and received a fine of C$10,000.[10] Second, in August 2016, the director of an IT company pled guilty to the offence of bid-rigging and received a fine of C$20,000, a conditional sentence of 18 months (with the first six months under house arrest), as well as 90 hours of community service.[11] Finally, in October 2016, the manager of a telemarketing company pled guilty to deceptive telemarketing and received a 16-month sentence of imprisonment (eight months under house arrest and eight months under curfew) as well as two years of probation.[12]

It is difficult to infer a trend from this small number of cases, but it is fair to say that to date, the Commissioner has not adopted the same tone or tenor of the Yates Memo in his enforcement actions or public statements in Canada. In antitrust cases in Canada, the penalty of incarceration is simply not used with the same degree and frequency as it is in the United States. Indeed, in his public statements and speeches, the Commissioner appears to have assiduously avoided commenting on the Yates Memo or drawing any parallels to Canada.

However, the Commissioner's approach to individual sentencing will likely change over time as a result of a legislative change in Canada. In March 2012, the Conservative government passed an omnibus criminal bill (Bill C-10) that implemented significant changes to Canada's criminal laws, including amendments that eliminate the discretion of judges to impose a conditional sentence on individuals convicted of a crime that carries a maximum penalty of 14 years of imprisonment or more – including the offence of conspiracy, bid-rigging and misleading advertising. While these amendments do not apply to conduct that was committed prior to 2012 (i.e., many of the cases in the current system), these amendments will limit the options of the PPSC and the Commissioner in seeking penalties against individuals in future cases.

10 Competition Bureau, Press Release, "Bid-rigging Scheme Leads to $140,000 Fines for Quebec Company and Its President" dated March 14, 2016 (published at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04042.html).

11 Competition Bureau, Press Release, "Second Individual Sentenced for Rigging Bids for Federal Government Contracts" dated August 24, 2016 (published at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04131.html).

12 Competition Bureau, Press Release, "Sentencing in Deceptive Telemarketing Case" dated October 28, 2016 (published at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04140.html).

4

The Bureau's use of a novel plea remedy

In one novel development in 2016, the Commissioner and the PPSC negotiated a unique plea with an individual in a bid-rigging case that required the individual to assist with the Commissioner's ongoing compliance efforts.

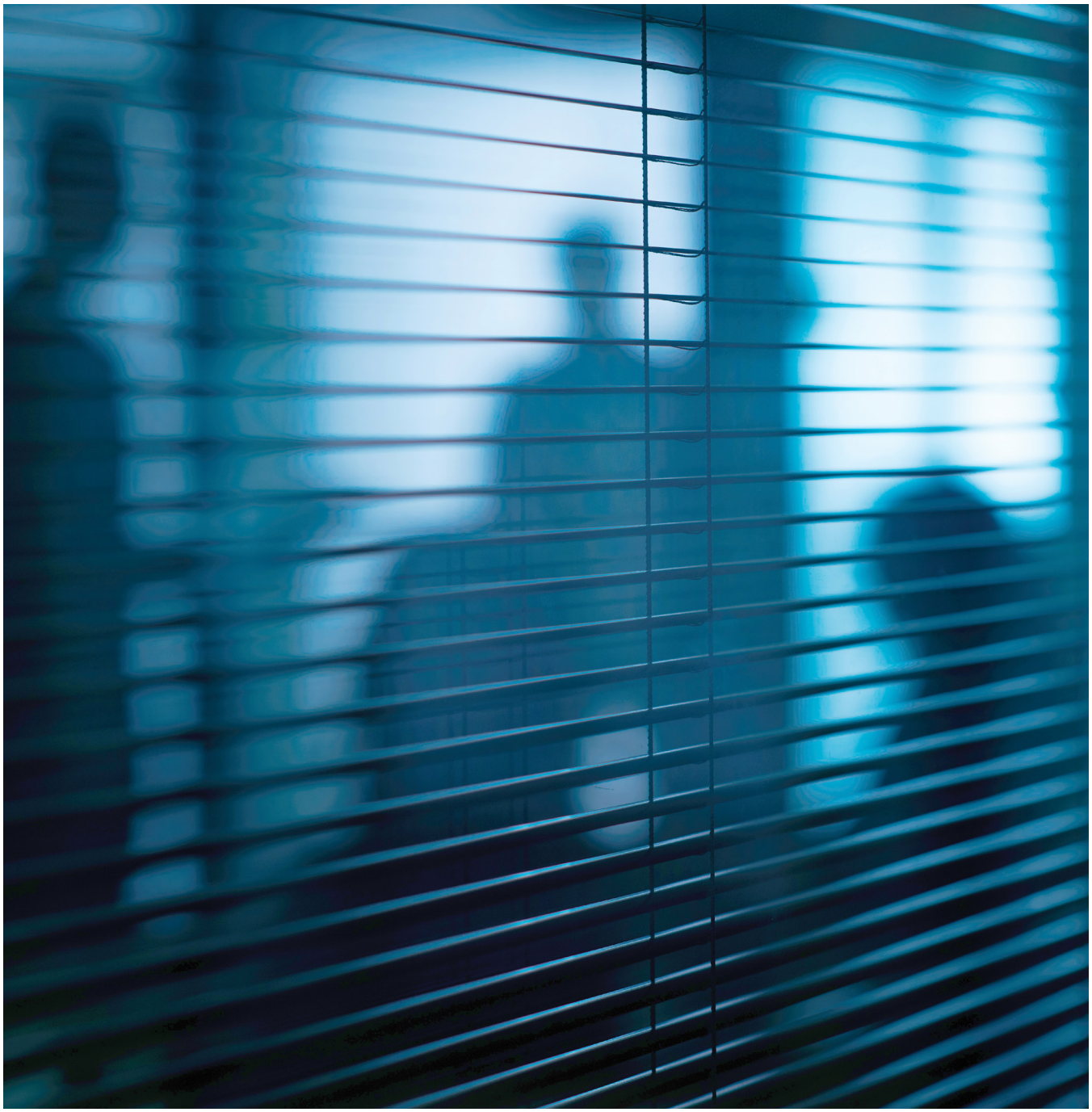
By way of background, following a five-year investigation that benefited from cooperation from an immunity applicant under the Bureau's immunity program, the PPSC laid criminal charges against one company and six individuals in 2014 for their alleged roles with respect to a bid-rigging conspiracy relating to federal government contracts for the supply of professional information technology services to Library and Archives Canada. The PPSC subsequently reached a plea with a former employee of Microtime Inc. in 2015, resulting in a fine of C$23,000, an 18-month conditional sentence and court-mandated community service.[13]

In 2016, the PPSC reached a second plea with another former employee of Microtime Inc. (Linda Graham) that resulted in a roughly comparable plea agreement – namely a fine of C$20,000, an 18-month conditional sentence and a commitment of community service. However, as part of her plea, Ms. Graham also agreed to personally contribute to the Commissioner's compliance efforts. In particular, Ms. Graham agreed to participate in two public presentations alongside the Commissioner's staff to raise awareness about compliance with the *Act*.[14]

13 Competition Bureau, Press Release, "Ontario Individual Sentenced After Pleading Guilty to Bid-Rigging" dated May 21, 2015 (published at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03936.html).

14 Competition Bureau, Press Release, "Second Individual Sentenced to Rigging Bids for Federal Government Contracts" dated August 24, 2016 (published at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04131.html).

This plea agreement appears to be the first time that the Commissioner has required an individual convicted under the *Act* to cooperate with the Bureau's ongoing compliance outreach efforts. The use of this remedy seems particularly unusual given that the PPSC's prosecution of the remaining defendants appears ongoing. In short, the Commissioner has recruited Ms. Graham to "speak out about her role in a conspiracy" even though she remains a potential witness in an ongoing criminal prosecution. It remains to be seen whether the Commissioner's novel plea arrangements in this case will achieve his goals of compliance promotion without undermining his ongoing enforcement efforts.



5

The Bureau's convictions in the retail gasoline case are upheld

While the Commissioner's enforcement activities in 2016 yielded fewer convictions and pleas relative to past years, the Commissioner and the PPSC did achieve an important appellate success before the Québec Court of Appeal in a long-running prosecution in the retail gasoline case in Québec.

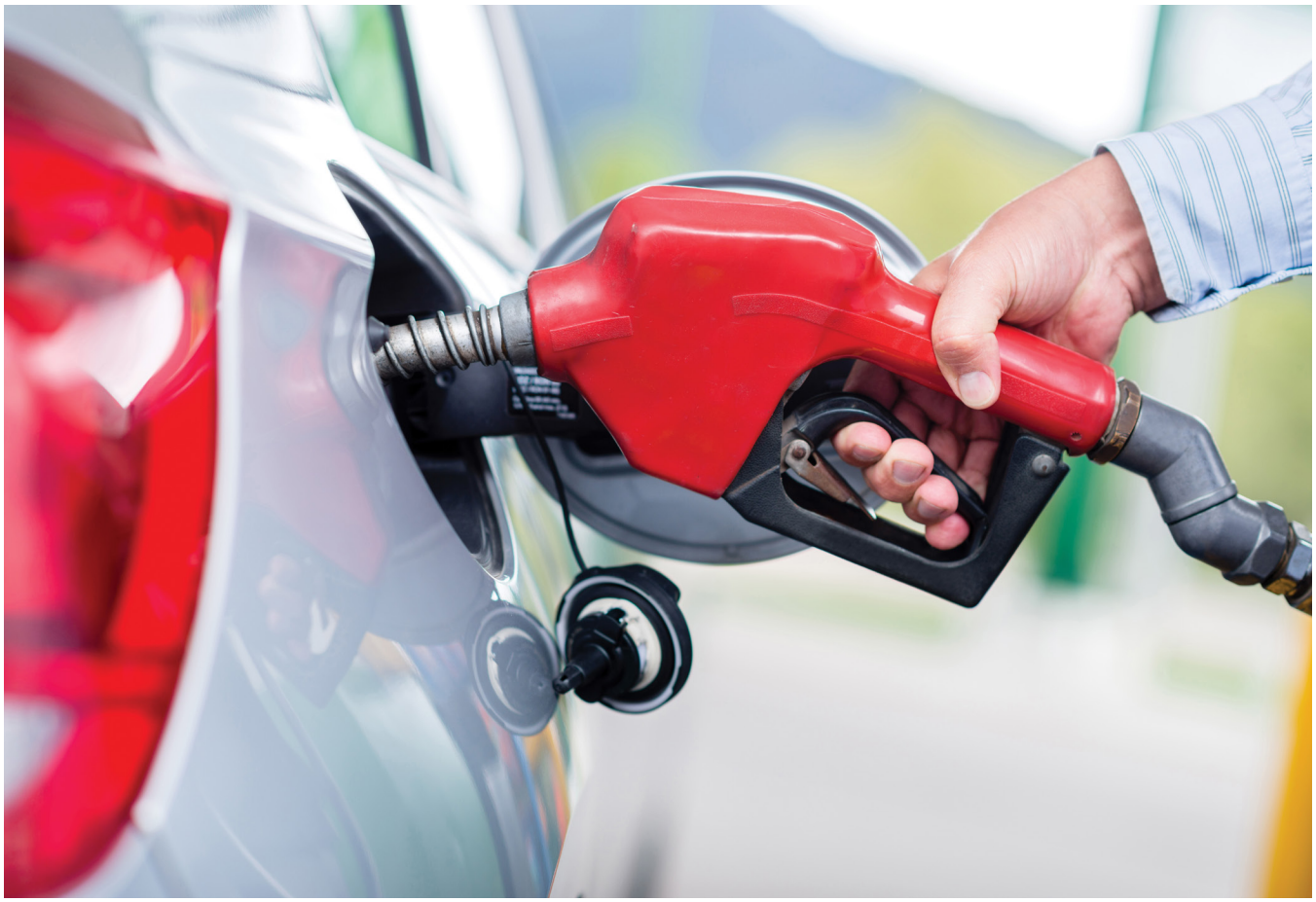
In 2004, the Commissioner commenced an extensive investigation into the pricing of retail gasoline in a number of local markets in Québec, including Victoriaville, Thetford Mines, Magog and Sherbrooke. Over the course of its investigation, the Commissioner used his full arsenal of investigative techniques under the *Act*, including wiretaps and search warrants – which in turn resulted in requests for immunity under the Commissioner's Immunity Program. The PPSC issued its first set of charges in 2008, and since that time, the PPSC has obtained pleas and convictions in respect of 33 individuals and seven companies, with fines exceeding C$4 million.[15]

As part of that larger case, the PPSC's charges against three individuals (Michel Lagrandeur, Linda Proulx and Yves Gosselin) went to trial in 2013. On the basis of evidence of wiretap transcripts as well as the evidence of certain alleged co-conspirators, the trial judge convicted the three individuals of the offence of conspiring to fix the price of retail gasoline in these markets. Following these convictions, the court sentenced each individual to pay a fine of C$15,000.[16]

The individuals appealed their convictions. Among other grounds of appeal, the appellants argued that the trial judge had failed to properly consider their defence of conscious parallelism, and had failed in her assessment of the evidence of the alleged co-conspirators. In September 2016, the Court of Appeal

15 Competition Bureau, Press Release, "Les Pétroles Global Inc. Fined $1 million for Gasoline Price-Fixing in Quebec" dated April 17, 2015 (published at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03908.html).

16 Competition Bureau, Press Release, "Three Individuals Sentenced in Quebec Gas Cartel" dated August 16, 2013 (published at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03591.html).



affirmed the convictions of Lagrandeur and Gosselin, and found no reversible error. However, the Court of Appeal vacated the conviction of Proulx and ordered a new trial.[17]

In short, in reversing Proulx's conviction, the Court found that while the trial judge had properly admitted the evidence of the alleged co-conspirators under an exception to the hearsay rule, the trial judge had erred in assessing the ultimate reliability of those statements. In addition, the Court found that the trial judge had erred in relying on certain historical statements by Proulx to establish participation in a conspiracy that occurred after those statements.

The Court of Appeal's ruling in respect of the convictions of Lagrandeur and Gosselin was an important appellate win for the Bureau, particularly in a domestic criminal case. However, the Court of Appeal's reversal of Proulx's conviction underscores the challenges of relying on the evidence of alleged co-conspirators to obtain convictions in a conspiracy case. While such evidence may be admissible in the right circumstances, the Court of Appeal's decision serves as a reminder that the Court will scrutinize the reliability of such evidence, and will be reluctant to infer future conduct from past statements.

17 *Proulx v. The Queen* (Case #500-10-0053890-133) released by the Court of Appeal on September 9, 2016.

6

The Bureau's claim of immunity to testify goes to the Supreme Court of Canada

In a separate development in the retail gasoline case, in November 2016, the Supreme Court of Canada agreed to hear a significant appeal relating to the Commissioner's ability to assert testimonial immunity in connection with the work of its criminal investigators at the Cartels Directorate.[18]

As noted above, in 2008, the Commissioner announced the first set of criminal charges in the retail gasoline case based on information that had been obtained, in part, through numerous wiretap authorizations. Following the announcement of those charges, a number of plaintiffs commenced class proceedings against defendants in the province of Québec. In one class action (the *Jacques* case), the plaintiffs named a number of oil companies, distributors and retailers who had been charged with a criminal offence. In a separate class action (the *Thouin* case), the plaintiffs named a number of oil companies, distributors and retailers who had not been charged with a criminal offence, but who the plaintiffs alleged were nonetheless implicated in the price-fixing schedule.

In the course of the proceedings in the *Jacques* case, the plaintiffs sought production of the private communications that had been intercepted by the Bureau and that had been disclosed to the accused. After a contested application and an appeal to the Supreme Court of Canada, the Commissioner was ordered to produce the requested wiretap transcripts, subject to redactions to protect certain communications involving third parties who were not subject to prosecution.[19]

18 *Attorney General of Canada v. Daniel Thouin*, 2016 CanLII 74996 (SCC).

19 *Imperial Oil v. Jacques*, [2014] 3 SCR 287.

Following the production of those transcripts, the plaintiffs in the *Thouin* case sought to examine the Bureau's lead investigator. The plaintiffs also announced an intention to seek the production of the additional wiretap transcripts that had not been produced following the Supreme Court's decision in *Jacques*. In short, in the *Jacques* case, the Bureau had only produced the transcripts that related to the accused and that were already in the hands of the accused. By contrast, in *Thouin*, the plaintiffs were seeking the production and disclosure of a much broader set of communications that had been collected by the Bureau and that had implicated other parties who had never been charged, but who were now named as defendants in the class proceeding.

In response to this request, the Crown asserted that the Bureau's lead investigator was not subject to examination, and enjoyed a testimonial immunity at common law. The Crown argued that since the investigator was not a party or a defendant in the proceeding, the investigator could not be subject to an examination for discovery under provincial rules of practice, particularly in light of the operation of federal laws governing the civil liability of Crown agents. However, the Québec courts rejected these arguments. At first instance and on appeal, the Québec courts found that the Bureau's investigator did not enjoy an immunity from testifying, and that there was an ability to examine the investigator under the *Code of Civil Procedure* in Québec. The courts also found that the proposed examination would expedite the proceeding, particularly since the investigator might be examined at trial.[20]

The parties sought leave to appeal to the Supreme Court of Canada. In November 2016, the Supreme Court granted leave, and the appeal will likely be heard in the fall of 2017. The Supreme Court's decision to hear the case is unusual, since the Court rarely grants leave to hear an appeal on a discovery issue in connection with an ongoing class proceeding. However, the Court appears to have been persuaded that there is an issue of public importance relating to the Bureau's ability to assert immunity over the work of its criminal investigators at the Cartels Directorate. In a separate decision in Ontario, the Ontario Court of Appeal had previously held that a plaintiff in a civil case may seek discovery of the RCMP's work product and files under the prevailing *Rules of Civil Procedure* in Ontario.[21] However, the Supreme Court of Canada has not yet ruled on the issue, and if the Court rejects the existence of a testimonial immunity, the Bureau's enforcement personnel in the Cartels Directorate may be subject to future requests for discovery in both domestic and international enforcement cases.

...the Court appears to have been persuaded that there is an issue of public importance relating to the Bureau's ability to assert immunity over the work of its criminal investigators at the Cartels Directorate.

20 *See Thouin v. Ultramar Ltd.*, 2015 QCCS 1432 (CanLII), affirmed by *Canada (Attorney General) v. Thouin*, 2015 QCCA 2159 (CanLII).

21 *Temelini v. Wright* (1999), 44 OR (3d) 609 (CA).

7

The Bureau's "unprecedented" cooperation with the U.S. Department of Justice

In another major development in Canada, the Commissioner announced a significant foreign plea in an international cartel case that was the product of an "unprecedented" level of cooperation between the Bureau and the U.S. Department of Justice.[22]

More specifically, in July 2016, the Commissioner announced that Nishikawa Rubber Co., Ltd. (Nishikawa), a major manufacturer of body sealing parts for automobiles (BSPs), had pled guilty in the United States and had agreed to a fine of US$130 million for its part in an international bid-rigging scheme that affected automobiles sold in the United States and Canada. The Commissioner disclosed in his announcement that Nishikawa's plea was the product of a "high degree of collaboration" between the Commissioner and the Antitrust Division of the U.S. Department of Justice. The Commissioner indicated that Nishikawa had substantial sales in Canada – namely, Nishikawa had sold approximately C$236 million of BSPs to Toyota and Honda in Canada between 2000 and 2012 that were incorporated into automobiles in Canada. However, after discussions between the two law enforcement agencies, the Commissioner reported that it was agreed the Antitrust Division would lead the investigation of the matter, since the alleged conduct "primarily targeted U.S. consumers." Nonetheless, the Bureau's staff appears to have been closely involved in the plea negotiations, and Nishikawa's fine appears to have been calculated to reflect the potential impacts in Canada as well as the United States. In its announcement, the Commissioner also highlighted that the close collaboration between regulators in negotiating Nishikawa's plea was consistent with the

22 Competition Bureau, Press Release, "Unprecedented cooperation with US antitrust enforcement authority leads to major cartel crackdown" dated July 20, 2016 (published at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04122.html).

protocols set out in the cooperation agreement between Canada and the United States relating to the mutual enforcement of their competition laws (the Cooperation Agreement).

Nishikawa's plea in this case was unusual by historical practices. In past cases where an alleged foreign conspirator had substantial sales in Canada, the Cartels Directorate would normally initiate and supervise its own investigation, and seek to negotiate its own plea based on the accused's commerce in Canada. While the Commissioner noted that Nishikawa's conduct was "primarily targeted" at U.S. consumers, that fact is often true in most cartel cases involving sales into North America. Some have speculated that Nishikawa's plea may reflect a new model for cross-border cooperation that is contemplated by the "comity" provisions of the Cooperation Agreement between Canada and the United States. But a more likely explanation for this unusual plea was the fact that many of the automobiles manufactured by Toyota and Honda that contained Nishikawa's BSPs were subsequently exported to the U.S. for sale to U.S. consumers. In light of that fact, Nishikawa's significant plea was arguably the product of a unique distribution chain in the automotive industry, and may not be transitive to future cartel investigations.

8

Conclusion

In our last annual review of the state of competition criminal enforcement in Canada, we predicted that in the coming year "the Commissioner will be emboldened to reassert his enforcement credentials" following the unsuccessful prosecutions in the *R. v. Durward* and *R. v. Nestlé* cases.[23] As measured by his enforcement activities and reported statistics in 2016, the Commissioner has lived up to that prediction, and he has secured some significant (and novel) pleas in both domestic and international cartel cases. Among other successes, the Commissioner obtained a favourable appellate decision that upheld convictions in the retail gasoline case, and he also secured the second-largest fine ever for a bid-rigging offence in Canada as part of his ongoing auto parts investigation. The Commissioner has also demonstrated his commitment to ongoing coordination with the U.S. Department of Justice in announcing the plea by Nishikawa, and the Commissioner will host one of the most significant annual gatherings of international antitrust enforcers – the 2017 ICN Cartel Workshop in Ottawa.[24]

However, in spite of these successes, the Commissioner's investigative and enforcement activity dropped by a number of public metrics. And perhaps the most significant enforcement development in 2016 was an event that did not occur – namely, the lack of any public announcement or update relating to the Commissioner's ongoing review of the Bureau's immunity and leniency programs. In December 2015, following the outcomes in *R. v. Durward* and *R. v. Nestlé,* the Commissioner delivered a high-profile speech where he announced his intention to conduct a review of the immunity and leniency programs as well as an internal "lessons learned" process as part of the "continuous improvement" of the

23 Osler, *Competition Criminal Enforcement in Canada*, The Year in Review 2015 ("Conclusion – The Year Ahead") (published at https://www.osler.com/osler/media/Osler/reports/competition/Competition-Criminal-Enforcement-in-Canada.pdf).

24 Competition Bureau, Press Release, "The Competition Bureau will host the 2017 ICN Cartel Workshop in Ottawa" dated October 5, 2016 (published at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04146.html).

Commissioner's investigative and enforcement practices.[25] During his speech, Commissioner rejected the suggestion that the incentives to self-report had changed in light of the results in those two cases, but he announced the review to determine "whether changes or clarifications are necessary," particularly in light of the court's judicial decision relating to the immunity applicant's proffer documents in *R. v. Nestlé*. The Commissioner also announced that if changes are implemented, "we will consult on the revised documents in 2016."

But 14 months later, the Commissioner has not proposed any changes, and has not disclosed the outcome of his review of his immunity and leniency programs. Based on past public statements, members of the Cartel Directorate have indicated that the Bureau is currently looking at the increased use of recorded statements and Queen for a Day letters as well as disclosure requirements. However, beyond those statements, there is no indication when (or if) the Commissioner intends to conclude his review or what his review has involved. The Commissioner's relative silence on the policy front stands in sharp contrast to the U.S. Department of Justice, which issued an important update relating the FAQs as part of the Antitrust Division's Leniency Program in January 2017.[26]

In summary, we can likely expect renewed policy discussions and consultations in 2017 relating to the disclosure and cooperation requirements under the immunity and leniency programs. We can also expect continued enforcement activity that builds on some of the successes and outcomes achieved by the Commissioner in 2016. And given parallel developments in the United States relating to the Yates program and modifications to the FAQs, the most interesting development to watch in Canada is the degree to which the Commissioner follows – or departs from – these policy initiatives, particularly in light of the new law enforcement directions that will come from the new U.S. presidential administration.

25 Speech by the Commissioner of Competition, "Cutting Through the Noise" dated December 8, 2015 (published at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04011.html).

26 U.S. Department of Justice, *Frequently Asked Questions about the Antitrust Division's Leniency Program and Model Leniency Letters*, update published on January 26, 2017 (published at https://www.justice.gov/atr/page/file/926521/download).

Cartel and Criminal Antitrust Investigations practice group

Osler has extensive experience in providing clients who are faced with a Competition Bureau investigation or potential prosecution with responsive and practical legal advice. We assess and recommend ways to mitigate risk through preventative and compliance measures, and provide strategic advice when an initial inquiry becomes a full-blown investigation, whether on a domestic matter or one involving multi-jurisdictional activities. Where an investigation points to possible criminal liability, we assist clients in making the critical decision of whether to seek a marker under the Competition Bureau's immunity or leniency policies, or to prepare to defend against an eventual prosecution. Whatever route is chosen, Osler can provide assistance from the initial inquiry through to the grant of immunity, negotiation of a leniency-based guilty plea or a full criminal trial.

To find out more about Osler's Cartel and Criminal Antitrust Investigations practice group, please visit **osler.com/criminal.**

AUTHORS

Christopher Naudie
Partner, Litigation
cnaudie@osler.com
416.862.6811

Shuli Rodal
Chair, Competition/ Antitrust & Foreign Investment
srodal@osler.com
416.862.4858

TEAM

Riyaz Dattu
Partner, Competition/ Antitrust & Foreign Investment
rdattu@osler.com
416.862.6569

Peter Franklyn
Partner, Competition/ Antitrust & Foreign Investment
pfranklyn@osler.com
416.862.6494

Peter Glossop
Partner, Competition/ Antitrust & Foreign Investment
pglossop@osler.com
416.862.6554

Mahmud Jamal
Partner, Litigation
mjamal@osler.com
416.862.6764

Michelle Lally
Partner, Competition/ Antitrust & Foreign Investment
mlally@osler.com
416.862.5925

Lawrence E. Ritchie
Partner, Litigation
lritchie@osler.com
416.862.6608

Kaeleigh Kuzma
Associate, Competition/ Antitrust & Foreign Investment
kkuzma@osler.com
416.862.6407

About Osler, Hoskin & Harcourt LLP

Osler is a leading law firm with a singular focus – your business. From Toronto, Montréal, Calgary, Ottawa, Vancouver and New York, we advise our Canadian, U.S. and international clients on an array of domestic and cross-border legal issues. Our collaborative "one firm" approach draws on the expertise of over 400 lawyers to provide responsive, proactive and practical legal solutions driven by your business needs. For over 150 years, we've built a reputation for solving problems, removing obstacles, and providing the answers you need, when you need them. It's law that works.

Osler, Hoskin & Harcourt LLP
Toronto Montréal Calgary Ottawa Vancouver New York | **osler.com**

OSLER

© 2017 Osler, Hoskin & Harcourt LLP
All rights reserved. 02/2017