CHAPTER 4

COMPETITION LAW OFFENCES

I. OVERVIEW

Criminal offences under the *Competition Act*[1] have undergone a significant evolution since Canada's first antitrust legislation came into force in 1889.[2] Initially, antitrust legislation in Canada prohibited conspiracies and agreements that unduly prevented or lessened competition. It incorporated criminal offences, including offences covering mergers and monopolies, price maintenance, exclusive dealing, and misleading advertising. Partial decriminalization began in 1976 and has evolved significantly since the establishment of a civil reviewable practices regime and the Competition Tribunal in 1986. Conduct that was previously addressed by criminal offences but is now addressed by the civil reviewable practice provisions of the Act include mergers, abuses of dominance (monopolization), price discrimination, and exclusive dealing. Furthermore, a two-track regime for misleading advertising was created in 1999. These changes created civil reviewable practices for misleading advertising, and prompted more serious conduct to be addressed by the criminal misleading advertising offences. Finally, the requirement of proof that a conspiracy prevented or lessened competition unduly—a requirement in place since 1889—was replaced in 2010 with a "per se" criminal conspiracy offence.

Currently, there are 25 criminal offences under the Act. They arise, broadly speaking, from cartel agreements, arrangements and conspiracies, false and misleading representations and deceptive marketing, multi-level marketing and pyramid selling, obstruction, failure to notify the Commissioner of a notifiable transaction, and the contravention of orders. Among the 25 criminal offences, 21 are full criminal offences (requiring proof of the *actus reus* and *mens rea* beyond a reasonable doubt) and 4 are strict liability offences.[3] Furthermore, the *Criminal*

1 RSC 1985, c C-34 [the Act].

2 *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*, SC 1889, c 41.

3 The full criminal offences under the *Competition Act* are as follows: (1) section 45 (conspiracy, agreements, or arrangements between competitors); (2) section 46 (foreign directives); (3) section 47 (bid-rigging); (4) section 48 (conspiracy related to professional sport); (5) section 49 (agreements or arrangements of federal financial institutions); (6) section 52 (false or misleading representations); (7) section 52.01(1) (false or misleading representation—sender or subject matter information); (8) section 52.01(2) (false or misleading representation—electronic message); (9) section 52.01(3) (false or misleading representation—locator); (10) section 52.1(2) (deceptive telemarketing—failing to make required disclosures); (11) section 54 (double ticketing); (12) section 55(2) (representations as to compensation); (13) section 55.1(2) (pyramid selling); (14) section 64(1) (obstruction—general); (15) section 65(1) (obstruction—failure to comply with section 11 orders and section 15 search warrants); (16) section 65(2) (failure to notify the commissioner of a proposed notifiable transaction); (17) section 65(3) (obstruction—destruction or alteration of records or things); (18) section 65.1(1) (contravention of order permitting evidence gathering for use in foreign state—failure to comply with search warrant); (19) section 65.1(2) (contravention of order permitting evidence gathering for use in foreign state—destruction or alteration of records or things); (20) section 65.2(1) (refusal after objection overruled); (21) section 65.2(2) (refusal where no ruling made on objection).

The strict liability offences under the Act are as follows: (1) section 52.1(3) (deceptive telemarketing—deceptive telemarketing practices); (2) section 53(1) (deceptive notice of winning a prize); (3) section 55(2.1) (fair, reasonable, and timely disclosure of representations as to compensation); (4) section 66 (contravention of order under part VII.1 or VIII of the Act).

Code[4] contains offences that expand criminal liability to those who participate (in some form) in the commission of an offence under the Act but do not themselves commit the offence. These offences include aiding and abetting a person to commit an offence under the Act, counselling a person to commit an offence under the Act, and conspiring with a person to commit an offence under the Act.

This chapter outlines each of the 25 criminal offences under the Act and offences under the Code that capture those who participate in (but do not commit) the commission of an offence under the Act. It sets out the elements of each of these offences, together with the relevant defences and exceptions, penalties, and analytical framework for each offence. It also discusses the application of these offences to individual offenders as well as to corporations and their directors and officers.

Note that according to section 36 of the Act, a private right of action is available to a person who has suffered a loss or damage as a result of conduct that is contrary to any provision of part VI of the Act (which includes most of the offences discussed in this chapter). This private right of action is discussed in Chapter 11.

II. CONSPIRACIES, AGREEMENTS, OR ARRANGEMENTS BETWEEN COMPETITORS

A. Overview

An offence under section 45 is one of the central pillars of the Act. A section 45 offence—classically, a horizontal agreement between competitors to fix prices, allocate markets/customers, or limit output—has been characterized as an assault on Canada's open market and being at the core of the criminal part of the Act.[5] An offence under section 45 is presumed to harm competition and have no procompetitive benefits.[6]

An agreement captured by section 45 is *per se* unlawful, meaning that it is deemed illegal without any proof of anticompetitive effects. Unlike reviewable practices, which require proof of anticompetitive effects, for section 45 offences, the anticompetitive effects in price, output, or otherwise are deemed to arise from

4 RSC 1985, c C-46 [the Code].

5 *R v Nova Scotia Pharmaceutical Society*, 1992 CanLII 72, [1992] 2 SCR 606 at 648-49; *Canada v Maxzone Auto Parts (Canada) Corp*, 2012 FC 1117 at para 52. Collusion has also been characterized as the "supreme evil of antitrust": *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP* (02-682), 540 US 398 (2004), rev'g and remand'g 305 F (3d) 89 (2d Cir 2002).

6 *Competitor Collaboration Guidelines*, *infra* note 10, s 2.1. In other words, *per se* offences are reserved for practices that are so plainly anticompetitive that they are deemed illegal without an analysis of market power and effects. See US Federal Trade Commission and US Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (April 2000), ss 1.2, 3.1, and 3.2, online: <https://www.ftc.gov/sites/default/files/attachments/dealings-competitors/ftcdojguidelines.pdf>; American Bar Association, Section of Antitrust Law, *Market Power Handbook: Competition Law and Economic Foundations*, 2nd ed (Chicago: American Bar Association, 2012) at 14. See also *Continental TV, Inc v GTE Sylvania, Inc*, 433 US 36 at 50 n16 (1977); *Nat'l Soc'y of Prof'l Eng'rs v United States*, 435 US 679 at 692 (1978).

the *per se* conduct itself.[7] Prior to March 12, 2010, categories of agreements captured by section 45 were offences only if they prevented or lessened competition "unduly."[8]

When analyzing conduct that may be captured by section 45, one must consider section 45, applicable jurisprudence, and the Competition Bureau's *Competitor Collaboration Guidelines*,[9] all of which are described more fully below.

B. The Bureau's Analytical Framework for Assessing Arrangements or Collaborations Between Competitors

Section 45 is reserved for the most egregious forms of collusion. It captures agreements between competitors to fix prices, allocate markets/customers, or restrict output if they constitute "naked restraints" on competition—namely, restraints "not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture."[10] Section 45 is not intended to capture other forms of competitor collaborations that may further a legitimate collaboration, strategic alliance, or joint venture but that may prevent or lessen competition substantially.[11] These collaborations are subject to review under the civil agreements provision of the Act, specifically section 90.1, which prohibits competitor agreements that are likely to lessen or prevent competition substantially.[12]

Duplicative proceedings under section 45 and the civil provisions of the Act are prohibited (s 45.1).[13] As a result, the Bureau generally undergoes a two-step process before deciding to evaluate an agreement or collaboration under section 45 of the Act. First, the Bureau will determine whether to assess the collaboration under the conspiracy and civil agreements provisions found in sections 45 and 90.1, respectively, or whether the collaboration should be assessed under other provisions of the Act.[14] These other provisions include mergers (s 92), agreements between federal financial institutions (s 49(1)), vertical agreements between suppliers and customers (ss 76 and 79), bid-rigging (s 47), and abuse of dominance

7 *Market Power Handbook*, *supra* note 6 at 7.

8 See Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, 2nd Sess, 40th Parl, 2009 (assented to 12 March 2009), *Budget Implementation Act, 2009*, SC 2009, c 2, s 410. The change to a *per se* regime rendered Canada's offence under section 45 to be akin to the treatment of such agreements, arrangements, and conspiracies in the United States under the *Sherman Act*.

9 Canada, Competition Bureau, *Competitor Collaboration Guidelines*, Enforcement Guidelines (23 December 2009), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html>. While the guidelines do not have the force of law, they are helpful in analyzing section 45.

10 *Competitor Collaboration Guidelines*, *supra* note 9, s 1.1.

11 *Ibid.*

12 *Ibid.*

13 Pursuant to section 45.1, "[n]o proceedings may be commenced under subsection 45(1) against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which an order against that person is sought by the Commissioner under section 76, 79, 90.1 or 92."

14 *Competitor Collaboration Guidelines*, *supra* note 9, s 1.2.

(s 79).[15] Second, if the remaining options are a criminal track under section 45 or a civil track under section 90.1, the Bureau will then determine which of these is applicable based on the available evidence.[16]

C. Elements of the Offence

The elements of an offence under section 45 of the Act are outlined in section 45(1):

> 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.

Accordingly, a person commits an offence under section 45(1) when that person, (1) with a *competitor* of that person with respect to a product or service, (2) agrees, arranges, or conspires (3) to engage in prohibited conduct captured by section 45(1)(a) (price-fixing), section 45(1)(b) (market/customer allocation), or section 45(1)(c) (output restriction).

Each of these elements is outlined below.

1. Definition of "Competitor"

Section 45(8) of the Act defines a "competitor" for the purposes of section 45 to include "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)." Accordingly, competitors for the purpose of section 45(1) capture persons that compete, or are likely to compete, with respect to the products that are the subject of the agreement.[17] Parties that compete only in respect of products not subject to an agreement are not competitors for the purposes of section 45(1).[18]

The Bureau is not required to engage in a market definition analysis when proving a breach of section 45(1). However, the Bureau will generally engage in a market definition analysis when determining whether parties to an agreement are competitors or are likely to compete.[19] In this regard, the Bureau will consider evidence regarding whether the parties to the agreement were planning to offer, were likely to offer, or had offered the same or otherwise competing products in the same or otherwise competing regions.[20]

15 *Ibid.*
16 *Ibid*, s 1.3.
17 *Ibid*, s 2.3.1. For efficiency, the term "competitor" in Section II of this chapter hereinafter includes a competitor and a likely competitor.
18 *Competitor Collaboration Guidelines*, *supra* note 9, s 2.3.1.
19 *Ibid*, ss 2.3.1 and 2.3.2.
20 *Ibid.*

There are circumstances where impugned agreements involve competing and non-competing parties. The Bureau does not view the existence of non-competing parties as insulating the competing parties from prosecution under section 45.[21] Furthermore, parties that are not competitors could nevertheless be prosecuted under section 45 through the aiding and abetting provisions (*Criminal Code*, s 21) or the counselling provisions (*Criminal Code*, s 22).[22] Pursuant to those provisions, a person who does something or omits to do something that aids in the commission of an offence or counsels a party to commit an offence may be liable as a party to the offence and be subject to the same penalties as the person who commits the offence.[23] For example, a trade or industry association that may not itself be considered a competitor could be seen to aid and abet the formation of an agreement contrary to section 45(1) through its actions, such as by convening meetings where the agreement between competitors is discussed.[24]

2. What Constitutes an Agreement, Arrangement, or Conspiracy?

An agreement[25]—the *actus reus* for a section 45(1) offence—involves the mutual arrival at an understanding to engage in prohibited conduct described in section 45(1)(a), (b), or (c).[26] An agreement exists when there is a "meeting of the minds" between the parties, either explicitly or tacitly, to engage in the prohibited conduct described in section 45(1)(a), (b), or (c).[27] The Bureau views section 45(1) as capturing all forms of agreements between competitors, regardless of the degree of formality or enforceability and regardless of whether the agreement has been implemented.[28] In this regard, the concept of an agreement under contract law does not necessarily capture an agreement under section 45 of the Act.

21 *Ibid*, s 2.3.1.

22 *Ibid.*

23 *Ibid.*

24 *Ibid*. Furthermore, in *R v JF*, 2013 SCC 12, [2013] 1 SCR 565 (a non-competition case), the Supreme Court of Canada confirmed that party liability should be restricted to those who aid or abet the agreement that forms the basis of the conspiracy as opposed to those who aid or abet the furthering of the unlawful object of the conspiracy. The Supreme Court confirmed that an offence of conspiracy under the Code is complete when two or more persons agree to pursue an unlawful object, and in order to establish guilt by "aiding and abetting," the Crown must prove that an accused aided and abetted the *actus reus* of the conspiracy (the conspirators' act of agreeing), that the accused knew the object of the conspiracy, and that the accused's assistance was intended to assist the conspirators.

25 For efficiency, the term "agreement" in Section II of this chapter hereinafter includes arrangements and conspiracies.

26 *Regina v Armco Canada Ltd and 9 other corporations*, 1976 CanLII 559, 30 CCC (2d) 183 (Ont CA) [*Regina v Armco Canada Ltd* cited to CCC], leave to appeal to SCC refused (1977), 13 OR (2d) 32n; *R v Coastal Glass & Aluminum Ltd*, 1986 CanLII 1160 at paras 16-18 (BCCA).

27 *Competitor Collaboration Guidelines*, *supra* note 9, s 2.2. *United States of America v Dynar*, [1997] 2 SCR 462 at para 87, 1997 CanLII 359; *Atlantic Sugar Refineries Co Ltd et al v Attorney General of Canada*, [1980] 2 SCR 644, 1980 CanLII 226.

28 *Competitor Collaboration Guidelines*, *supra* note 9, s 2.2.

The *mens rea* for a section 45(1) offence arises from the agreement, and is met when the Crown proves beyond a reasonable doubt that the accused intentionally entered into the agreement found to exist.[29] The motive of the accused for entering into the agreement is irrelevant to the existence of *mens rea*.[30] The Bureau views becoming a party to an agreement at any time as sufficient to establish an offence under section 45(1) and that there is no need to establish that the object of the agreement was, in fact, carried out or that any actions were taken in furtherance of the conspiracy.[31]

The Bureau views an offence under section 45(1) as being established at the time of the agreement between competitors to engage in the prohibited conduct, and is a continuing offence for the period of the conspiracy.[32] Accordingly, the Bureau is of the view that it need only be established that the individual or firm was a party to the conspiracy at any time during the relevant period.[33]

A mere communication between parties that arouses only an expectation that each party will act in a certain way is not an agreement under section 45(1).[34] Nor is "conscious parallelism"—namely, the act of independently adopting a common course of conduct with an awareness of the likely response of competitors or in response to the conduct of competitors—sufficient to establish an agreement under section 45(1).[35] However, the Bureau does view conscious parallelism together with facilitating practices, such as sharing competitively sensitive information or activities that assist competitors in monitoring one another's prices, as potentially sufficient to establish an agreement under section 45(1).[36]

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29 *Atlantic Sugar Refineries Co Ltd et al v Attorney General of Canada*, *supra* note 27; *Container Materials Ltd et al v The King*, [1942] SCR 147 at 158; *Aetna Insurance Co et al v The Queen*, [1978] 1 SCR 731; *R v Anthes Business Forms Limited et al* (1975), 26 CCC (2d) 349 (Ont CA); *Regina v Charterways Transportation Limited et al*, 1981 CanLII 1951, 123 DLR (3d) 159, 1981 CarswellOnt 1226 at para 74 (H Ct J); *R v McLellan Supply Ltd*, 1986 CanLII 1818 at paras 22, 24-25, 12 CPR (3d) 53 (Alta QB).

30 *Container Materials Ltd et al v The King*, *supra* note 29 at 158; *Regina v Lorne Wilson Transportation Ltd; Regina v Travelways School Transit Ltd*, 1982 CanLII 2174, 138 DLR (3d) 690, 1982 CarswellOnt 1353 at para 7 (CA).

31 *Competitor Collaboration Guidelines*, *supra* note 9, s 2.2.

32 *Ibid*; *Atlantic Sugar Refineries Co Ltd et al v Attorney General of Canada*, *supra* note 27.

33 *Competitor Collaboration Guidelines*, *supra* note 9, s 2.2.

34 *Regina v Armco Canada Ltd and 9 other corporations*, *supra* note 26; *R v Canada Packers Inc* (1988), 19 CPR (3d) 133 (Alta QB).

35 *Competitor Collaboration Guidelines*, *supra* note 9, s 2.2; *Regina v Canadian General Electric Company Ltd et al*, 1976 CanLII 756 (Ont H Ct J).

36 *Competitor Collaboration Guidelines*, *supra* note 9, s 2.2. There is a natural tension between the concerns of conscious parallelism and conspiracy, as put by the then Ontario High Court of Justice in *Regina v Armco Canada Ltd and 9 other Corporations* (1974), 6 OR (2d) 521, 1974 CarswellOnt 373 at para 181 (H Ct J): "These reasons are not intended to lay down any definitive pronouncement on whether conscious parallelism is contrary to the *Combines Investigation Act*, but by way of obiter, economists to the contrary, I fail to see on a common-sense basis how conscious parallelism could be achieved without a conspiracy on the part of the accused to come to an agreement or arrangement beforehand. That occurred in this case notwithstanding that the ideal characteristics of an oligopoly were present."

3. Types of Prohibited Conduct

A. PRICE-FIXING

Section 45(1)(a) prohibits agreements between competitors to fix, maintain, increase, or control the price for the supply of a product or service. Section 45(8) defines the term "price" for the purposes of section 45 to include "any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product." These provisions, when read together, prohibit agreements between competitors to fix or control the price, or any component of the price, to be charged.[37] For example, section 45(1)(a) prohibits agreements to

- fix prices at a predetermined level;
- eliminate or reduce discounts;
- increase prices;
- reduce the rate or amount by which prices are lowered;
- eliminate or reduce promotional allowances; and
- eliminate or reduce price concessions or other price-related advantages provided to customers.[38]

The Bureau also views section 45(1)(a) as prohibiting agreements not only on the establishment of an actual price for the relevant product but also on the methods of establishing prices or other indirect forms of agreements to fix or increase the price paid by customers.[39] For example, section 45(1)(a) could prohibit certain agreements to

- use a common price list in negotiations with customers;
- apply specific price differentials between grades of products;
- apply a pricing formula or scale; and
- not sell products below cost.[40]

Section 45(1)(a) applies to the price for the supply of a product or service rather than the price for the purchase of a product or service. Accordingly, buying side agreements, such as joint purchasing agreements (even those between firms that compete in respect of the purchase of products), are not prohibited by section 45.[41] However, buying side agreements may be subject to a remedy under the civil agreements provision in section 90.1 of the Act.

B. MARKET/CUSTOMER ALLOCATION AGREEMENTS

Section 45(1)(b) prohibits agreements between competitors to allocate sales, territories, customers, or markets for the production or supply of a product or service.

37 *Competitor Collaboration Guidelines*, *supra* note 9, s 2.4.1.
38 *Ibid.*
39 *Ibid.*
40 *Ibid.*
41 *Ibid.*

According to the Bureau, section 45(1)(b) prohibits all forms of market/customer allocation agreements between competitors, including

- agreements between competitors not to compete with respect to specific customers, groups, or types of customer in certain regions or market segments, or in respect of certain types of transactions or products; and
- agreements not to compete with respect to direct sales to distributors, resellers, or customers, as well as agreements entered into by suppliers not to compete in respect of indirect sales that are made through distributors or resellers.[42]

A joint selling agreement among competitors that restricts the supply of competing products to certain territories or customers could also be prohibited under section 45(1)(b).[43]

The Bureau does not consider parties that are only suppliers of a customer to be competitors of that customer in respect of the product that is being supplied.[44] For example, the Bureau will generally not apply section 45(1)(b) to agreements that allocate markets for the resale of products supplied by a supplier to a customer who then distributes the products, including in dual-distribution agreements where the supplier also competes with the customer in respect of the sale of that product.[45] Similarly, the Bureau will generally not apply section 45(1)(b) to agreements between franchisors and franchisees that allocate markets or customers for the operations of the franchisee, including franchise agreements that provide franchisees with an authorized sales territory.[46] However, the Bureau may examine such dual-distribution and franchise agreements under the civil agreements provision in section 90.1 of the Act.[47]

C. OUTPUT RESTRICTION AGREEMENTS

Section 45(1)(c) prohibits agreements between competitors to fix, maintain, control, prevent, lessen, or eliminate the production or supply of a product or service. According to the Bureau, section 45(1)(c) prohibits all forms of output restriction agreements between competitors, including agreements to

- limit the quantity or quality of products supplied;
- reduce the quantity or quality of products supplied to specific customers or groups of customers;
- limit increases in the quantity of products supplied by a set amount; and
- discontinue supplying products to specific customers or groups of customers.[48]

42 *Ibid*, s 2.4.2.
43 *Ibid*, s 2.4.1.
44 *Ibid*, s 2.3.3.
45 *Ibid*, s 2.4.2.
46 *Ibid*, s 2.3.3.
47 *Ibid*.
48 *Ibid*, s 2.4.3.

In certain circumstances, section 45(1)(c) prohibits

- agreements that impose production quotas;
- agreements that permanently or temporarily close manufacturing facilities;
- agreements that reduce the quality of components used in a product; and
- other agreements that reduce the quantity or quality of products.[49]

A joint selling or marketing agreement among competitors that restricts the supply of competing products to certain territories or customers could also be prohibited under section 45(1)(c).[50]

D. Evidence of the Agreement, Arrangement, or Conspiracy

The elements of section 45(1), and, in particular, the existence of an agreement, must be proved beyond a reasonable doubt. In a prosecution under section 45(1), however, the Act permits the court to infer the existence of an agreement from circumstantial evidence with or without direct evidence of communication between or among the alleged parties (s 45(3)).[51] In other words, a conspiracy may be established by inference from the conduct of the parties.[52] This evidentiary caveat in the Act recognizes that there is often no direct evidence of communications among co-conspirators, and it is difficult to detect and obtain convictions for violations of section 45(1).[53] The evidentiary caveat, however, does not affect the Crown's onus to prove the existence of an agreement beyond a reasonable doubt. Furthermore, in order to convict an accused based on circumstantial evidence, the court must be satisfied that the only rational inference that can be drawn is guilt.[54]

E. Defences and Exceptions

Defences or exceptions to a violation of section 45(1) are contained in the Act and described below.

1. Ancillary Restraints Defence

Section 45(4) provides an ancillary restraints defence. No person may be convicted under section 45(1) in respect of an agreement that would otherwise contravene that section if the agreement is directly related to, and reasonably necessary for

49 *Ibid.*
50 *Ibid*, s 2.4.1.
51 The common law has also accepted that a court may infer the existence of an agreement from the surrounding circumstances. Section 45(3) effectively codified that common law. See *Regina v Armco Canada Ltd and 9 other corporations*, *supra* note 26; *Regina v Canadian General Electric Company Ltd et al*, *supra* note 35; *R v Cooper*, [1978] SCR 860; *Paradis v The King*, [1934] SCR 165, 61 CCC 184.
52 *Ibid.*
53 *Canada v Maxzone Auto Parts (Canada) Corp*, *supra* note 5 at paras 61-62.
54 *R v Griffin*, 2009 SCC 28 at para 33, [2009] 2 SCR 42.

giving effect to, a broader and lawful agreement.[55] According to section 45(4), the ancillary restraints defence is available when

- the restraint is ancillary to a broader or separate agreement that includes the same parties;
- the restraint is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement referred; and
- the broader or separate agreement, when considered in the absence of the restraint, does not contravene section 45(1).[56]

The Crown bears the onus of establishing beyond a reasonable doubt that the restraint breaches section 45(1). The parties to the agreement must establish the first and second elements of the ancillary restraints defence (ss 45(4)(a)(i) and (ii), respectively) on a balance of probabilities.[57]

According to the Bureau, the following types of ancillary restraints will generally not be reviewed under section 45(1):

a. A non-compete clause found in an employment agreement, or an agreement for the sale of assets or shares between parties;
b. An agreement among competitors to charge a common price in a blanket license agreement for artistic works;
c. An agreement to abstain from making material changes to a business pending the consummation of a merger; and
d. A non-compete obligation between the parent undertakings and a joint venture where such obligations correspond only to the products, services and territories covered by the joint venture agreement.[58]

2. *Export Agreements*

Section 45(5) provides a qualified exception for agreements between competitors that relate only to the export of products from Canada. Under this section, no person may be convicted of an offence under section 45(1) in respect of an agreement that relates only to the export of products from Canada, *unless* the agreement

- has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;[59]

55 *Competitor Collaboration Guidelines*, *supra* note 9, s 2.5.
56 *Ibid.*
57 *Ibid*, s 2.5.1.
58 *Competitor Collaboration Guidelines*, *supra* note 9, s 2.5.
59 The term "real value" replaced the term "volume" in one of a number of amendments to the Act in 1986 because it was thought that if export prices were raised sufficiently to compensate for any reduction in volume, Canada would, nevertheless, be better off. Through this amendment, it was thought that export consortia may be able to promote their products abroad such that any price increases would more than offset any reduction in the volume of shipments. See Canada, Department of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide* (Ottawa: Consumer and Corporate Affairs Canada, 1985) at 28.

- has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or
- relates only to the supply of services that facilitate the export of products from Canada.

Underpinning this exemption is the importance of global trade to the Canadian economy.[60] This exemption is designed to enhance export trade by facilitating export agreements between competing firms.[61] Conduct subject to this exemption may be subject to liability in other jurisdictions pursuant to their competition/antitrust laws.

3. Agreements Between Affiliates

Section 45(6)(a) provides an exception for agreements that are entered into between affiliated companies. According to this section, section 45(1) does not apply if the agreement "is entered into only by companies each of which is, in respect of every one of the others, an affiliate."[62] "Affiliate" is defined in the Act.[63]

4. Federal Financial Institutions

Section 45(6)(b) provides an exception for federal financial institutions. Section 45(1) does not apply if the agreement is between federal financial institutions.[64] An agreement between federal financial institutions is assessed under section 49 of the Act, described later in Section VI in this chapter.

5. Regulated Conduct

Section 45(7) provides an exception for regulated conduct, codifying what is otherwise known as the common law regulated conduct doctrine. Under this section, the regulated conduct doctrine allows a person to avoid liability under section 45(1) when the conduct in question was required or authorized by or under an Act of Parliament or the legislature of a province.[65] The Supreme Court of Canada

60 *Competition Law Amendments: A Guide*, *supra* note 59 at 27.

61 *Ibid*; *Competitor Collaboration Guidelines*, *supra* note 9, s 2.6.3. Conduct subject to the export agreements exemption may, however, violate competition/antitrust laws in jurisdictions outside Canada.

62 *Competition Act*, s 45(6)(a).

63 Section 2(2) of the Act reads as follows: "For the purposes of this Act, (a) one entity is affiliated with another entity if one of them is the subsidiary of the other or both are subsidiaries of the same entity or each of them is controlled by the same entity or individual; (b) if two entities are affiliated with the same entity at the same time, they are deemed to be affiliated with each other; and (c) an individual is affiliated with an entity if the individual controls the entity."

64 Pursuant to section 49(3) of the Act, "federal financial institution" under sections 45, 49, and 90.1 means "a bank or an authorized foreign bank within the meaning of section 2 of the *Bank Act*, a company to which the *Trust and Loan Companies Act* applies or a company or society to which the *Insurance Companies Act* applies."

65 Section 45(7) of the Act provides that the regulated conduct defence as it applied to section 45 before amendments came into force on March 12, 2010 will continue to apply to the amended section 45. As of March 12, 2010, section 45 no longer requires proof that an agreement or arrangement prevents or lessens competition "unduly." See Bill C-10, *supra* note 8, s 410.

has held that the application of the regulated conduct doctrine requires the wording of the criminal offence to clearly allow for the application of the regulated conduct doctrine through "leeway language," such as "against the interests of the public" or "unduly" limiting competition, the latter of which was found in section 45(1) before the section was amended and an offence thereunder became a *per se* offence.[66] The regulated conduct doctrine has been applied in a number of cases involving the *Competition Act* as well as provincial or federal legislation and regulatory regimes.[67]

The Bureau will consider a number of factors when determining whether conduct regulated by another law will be pursued under the Act—namely, the purpose of the Act, the other law said to be applicable to the conduct, the interests sought to be protected by both laws, the impugned conduct, the potentially applicable provisions of the Act and of the other law, the parties involved, and the principles of statutory interpretation applicable to the matter.[68]

6. Specialization Agreements

Section 45 does not apply in respect of specialization agreements registered with the tribunal as defined in section 85 of the Act (s 90). "Specialization agreements" are agreements under which each party agrees to discontinue producing an article or providing a service and may also include agreements under which the parties agree to buy exclusively from each other the articles or services that are the subject of the registered agreement (s 85). Specialization agreements are discussed more fully in Chapter 8.

7. Underwriters

The Act grants underwriters a partial exemption from section 45. Pursuant to section 5(1), "[s]ection 45 does not apply in respect of an agreement or arrangement between persons who are"

66 *Garland v Consumers' Gas Co*, 2004 SCC 25, [2004] 1 SCR 629. As of March 12, 2010, section 45 no longer requires proof that an agreement or arrangement prevents or lessens competition "unduly." See Bill C-10, *supra* note 8, s 410.

67 See, for example, *Reference Re Farm Products Marketing Act*, [1957] SCR 198; *Waterloo Law Association et al v Attorney-General of Canada* (1986), 58 OR (2d) 275 (H Ct J); *Industrial Milk Producers Assn v British Columbia (Milk Board)*, [1989] 1 FC 463, 1988 CanLII 5739 (TD); *R v Independent Order of Foresters* (1989), 26 CPR (3d) 229, 1989 CarswellOnt 975 at para 8 (Ont CA); *Society of Composers, Authors and Music Publishers of Canada v Landmark Cinemas of Canada Ltd* (1992), 45 CPR (3d) 346, 1992 CarswellNat 707 at para 18 (TD); *Law Society of Upper Canada v Canada (Attorney General)* (1996), 28 OR (3d) 460 (Gen Div); *Rogers Communications Inc v Shaw Communications Inc*, 2009 CanLII 48839 (Ont Sup Ct J); *Fournier Leasing Co v Mercedes-Benz Canada Inc*, 2012 ONSC 2752; *Cami International Poultry Inc v Chicken Farmers of Ontario*, 2013 ONSC 7142; *Hughes v Ontario (Liquor Control Board)*, 2018 ONSC 1723.

68 Canada, Competition Bureau, "'Regulated' Conduct," Bulletin (27 September 2010), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03273.html>. The Bureau's general approach to enforcement of the Act with respect to conduct that may be regulated by another law or legislative regime is contained in this bulletin.

- "members of a class of persons who ordinarily engage in the business of dealing in securities or"
- "between such persons and the issuer of a specific security, in the case of a primary distribution, or the vendor of a specific security, in the case of a secondary distribution,"

"*if* the agreement or arrangement has a reasonable relationship to the *underwriting* of a specific security" (emphasis added).

According to section 5(2), "underwriting" for the purposes of this partial exemption means "the primary or secondary distribution of the security, in respect of which distribution"

> (a) a prospectus is required to be filed, accepted or otherwise approved pursuant to a law enacted in Canada or in a jurisdiction outside Canada for the supervision or regulation of trade in securities; or
>
> (b) a prospectus would be required to be filed, accepted or otherwise approved but for an express exemption contained in or given pursuant to a law [enacted in Canada or in a jurisdiction outside Canada for the supervision or regulation of trade in securities].

F. Penalty

Every person who commits an offence under section 45(1) is guilty of an indictable offence and liable to a conviction for a term not exceeding 14 years or to a fine not exceeding $25 million, or to both (s 45(2)).

III. FOREIGN DIRECTIVES

A. Overview

Section 46 of the Act addresses offshore conspiracies that affect Canada. It makes it a criminal offence for a corporation carrying on business in Canada to implement a foreign directive intended to give effect to a conspiracy entered into outside Canada. Section 46 does not apply to individuals.

Section 46 contains a territorial extension, albeit indirectly, because it deems a corporation that carries on business in Canada criminally liable if that corporation implements a foreign conspiracy in Canada, even if that corporation has no knowledge of the conspiracy.

The Bureau has acknowledged that section 46 "may at first glance seem drastic."[69] However, the Bureau has noted that section 46 is the only effective way of attacking conspiracies that are formed abroad and that are deliberately

69 Canada, Bureau of Competition Policy, *Background Papers: Stage 1 Competition Policy* (Ottawa: Consumer and Corporate Affairs, 1976) at 29. Section 46 was then section 32.1 of the *Combines Investigations Act*, RSC 1970, c C-23.

projected into Canada through Canadian subsidiaries and are harmful to the Canadian economy.[70]

At the time of writing, there has not been a contested trial arising from section 46. There have, however, been several guilty pleas arising from section 46.[71] Arguably, because it can expose a Canadian corporation to criminal liability even if the directors and officers of that corporation act without knowledge of the foreign conspiracy, section 46 is arguably a potential absolute liability offence and is, accordingly, subject to a potential constitutional challenge.[72] However, section 46 has not been constitutionally challenged to date.

B. Elements of the Offence

The elements of the offence for implementing a foreign directive are outlined in section 46(1):

> 46(1) Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.

Accordingly, section 46(1) applies only to corporations that carry on business in Canada, wherever incorporated. A corporation carrying on business in Canada commits an offence under section 46 if it (1) implements a directive, an instruction, an intimation of policy, or other communication (2) from a person outside Canada who is in a position to direct or influence the policies of the corporation, and (3) where the directive, instruction, intimation of policy, or communication is for the *purpose of giving effect to* a conspiracy, combination, agreement, or arrangement entered into outside Canada that would breach section 45 (s 46(1)).[73]

70 *Background Papers: Stage 1 Competition Policy*, *supra* note 69 at 29.

71 See, for example, *Canada v Maxzone Auto Parts (Canada) Corp*, *supra* note 5; *R v Mitsubishi Corp*, 2005 CanLII 21873 (Ont Sup Ct J); *Canada v Ucar Inc*, 1999 CanLII 7636 (FC).

72 Randal T Hughes & Jeanne L Pratt, "Criminal Conspiracy" in James B Musgrove, ed, *Fundamentals of Canadian Competition Law*, 3rd ed (Toronto: Carswell, 2015) ch 4 at 70.

73 *Canada v Maxzone Auto Parts (Canada) Corp*, *supra* note 5; *R v Mitsubishi Corp*, *supra* note 71; *Canada v Ucar Inc*, *supra* note 71.

1. Implementation of Direction

The Crown has the burden of proving beyond a reasonable doubt that the corporation carrying on business in Canada implemented a directive, an instruction, an intimation of policy, or other communication. The phrase "a directive, an instruction, an intimation of policy or other communication" is broad enough to capture a wide range of directions, conveyed directly or indirectly to the corporation carrying on business in Canada.

2. Definition of Competitor/What Constitutes an Agreement, Arrangement, or Conspiracy

For a discussion of the definition of competitor and what constitutes an agreement, arrangement, or conspiracy, which applies equally to an offence under section 46(1) of the Act, see Sections II.C.1 and II.C.2, respectively, earlier in the chapter.

3. Corporation Carrying on Business in Canada Need Not Have Knowledge of the Conspiracy

Section 46 applies to the Canadian corporation even if the directors and officers of that corporation act without knowledge of the foreign conspiracy (s 46(1)).[74] For example, a Canadian subsidiary can breach section 46 for a conspiracy entered into by its foreign parent company without having any knowledge of the conspiracy, so long as the Canadian subsidiary, at the direction of the foreign parent, sold products arising from the conspiracy in Canada and they were supplied by, and at the direction of, the foreign parent.[75]

C. Exception

According to section 46(2), no proceedings may be commenced under section 46 against a company where an application has been made by the Commissioner under section 83 of the Act for an order against that company or any other person based on the same or substantially the same facts as would be alleged in proceedings under section 46. Section 83 of the Act outlines the reviewable practice of prohibiting or limiting the implementation of a foreign law and directives in Canada, including prohibiting the implementation of a foreign conspiracy (s 83(1)(b)). See Chapter 8 for a discussion of this reviewable practice.

74 See, for example, *R v Mitsubishi Corp*, *supra* note 71, where the accused itself was not a principal party to the conspiracy and had no direct involvement in the conspiracy agreement itself.

75 In its Background Paper discussing section 46, the Bureau provided the following example of conduct that would be captured by then section 32 of the *Combines Investigation Act*, *supra* note 69: a company incorporated and operating in Canada that is controlled by a foreign corporation, whereby the foreign corporation sends to the company directives limiting its exports to amounts decided on at meetings held in Europe. See *Background Papers: Stage 1 Competition Policy*, *supra* note 69 at 28.

D. Penalty

Every corporation that commits an offence under section 46 is guilty of an indictable offence and is liable on conviction to a fine in the discretion of the court (s 46(1)).

IV. BID-RIGGING

A. Overview

Section 47 of the Act is a specific offence prohibiting bid-rigging. Broadly speaking, bid-rigging ensues when two or more persons agree that, in response to a call for bids or tenders, one or more of them will not submit a bid, withdraw a bid, or submit a bid arrived at by agreement.

Section 47 of the Act is a *per se* offence (that is, bid-rigging behaviour captured by section 47(1) is deemed illegal without requiring proof of anticompetitive effects).[76] The bid-rigging provision of the Act was enacted in 1976.[77] The Act contains not only section 47 but a general conspiracy offence, section 45. The coexistence of a general conspiracy provision and a specific bid-rigging provision in the Act is unlike antitrust/competition legislation in other jurisdictions, where bid-rigging is addressed by a general conspiracy offence.[78] The historic rationale for this coexistence arises from the general conspiracy provision that was in place when the separate bid-rigging provision was enacted in 1976. The conspiracy provision in place in 1976 required the Crown to prove beyond a reasonable doubt that competition had been lessened unduly.[79] The Crown was unsuccessful prosecuting bid-rigging conduct under this provision, largely due to the difficulty in meeting this burden.[80] A separate bid-rigging offence sought to overcome this obstacle. Currently, the Act's conspiracy provision is now a *per se* offence, which has led some people to argue that sections 45 and 47 ought not to coexist and that section 47 ought to be repealed.[81]

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76 See Section II for a discussion of *per se* offences, which applies equally to a *per se* offence under section 47 of the Act.

77 In 1976, the bid-rigging provision was section 32.2 of the *Combines Investigation Act*, *supra* note 69, and was enacted by SC 1974-75-76, c 76, s 15.

78 For example, in the US, section 1 of the *Sherman Act* (15 USC §§ 1-7) prohibits any contract, combination, or conspiracy that unreasonably restrains interstate or foreign trade or commerce; this section captures price-fixing and bid-rigging violations. See also United States, Federal Trade Commission and US Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (Washington, DC: Federal Trade Commission, 2000) at 8.

79 The Act's conspiracy provision, section 45, was amended in March 12, 2010, rendering conduct captured by the offence *per se* unlawful. See Bill C-10, *supra* note 8, s 410.

80 *R v JJ Beamish Construction Company Limited et al*, [1967] 1 CCC 301 (Ont H Ct J), aff'd [1968] 1 OR 5 (CA); *Background Papers: Stage 1 Competition Policy*, *supra* note 69 at 29-31.

81 For example, see Omar Wakil & Marina Chernenko, "Bid-Rigging Enforcement Without a Bid-Rigging Provision: A Proposal for the Repeal of Section 47 of the Competition Act" (2015) 28:2 Can Comp L Rev 160, available online: <https://www.torys.com/insights/publications/2015/07/bid-rigging-enforcement-without-a-bid-rigging-provision-a-proposal-for-the-repeal-of-section-47-of-the-competition-act>.

The most common types of bid-rigging agreements or arrangements include *cover bidding* (giving the impression of competitive bidding when suppliers, in reality, agree to submit token bids that are usually too high), *bid suppression* or *withdrawal* (suppliers that agree to either abstain from bidding or withdraw bids), *bid rotation* (a preselected supplier that submits the lowest bid on a systematic or rotating basis), and *market division* (agreements among suppliers not to compete in designated geographic regions or for specific customers).[82]

When analyzing conduct that may be captured by section 47, one should have regard to section 47, applicable jurisprudence, and the Bureau's *Competitor Collaboration Guidelines*,[83] all of which are described more fully below. Section 45 should also be considered, since it may capture bid-rigging conduct that does not fit within the parameters of section 47.

B. Elements of the Offence

The elements of bid-rigging are outlined in sections 47(1) and (2):

> 47(1) In this section, "bid-rigging" means
>
> (a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request, or
>
> (b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,
>
> where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is submitted or withdrawn, as the case may be, by any person who is a party to the agreement or arrangement.
>
> (2) Every person who is a party to bid-rigging is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both.

Accordingly, prohibited conduct under section 47 is divided between agreements or arrangements between persons and those between bidders or tenderers.

Pursuant to section 47(1)(a), two or more *persons* commit an offence if (1) in response to a call or request for bids or tenders, these persons (2) intentionally and

82 Canada, Competition Bureau, "Bid-Rigging" (5 November 2015), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03152.html>; OECD, *Guidelines for Fighting Bid Rigging in Public Procurement: Helping Governments to Obtain Best Value for Money* (2009) at 2, online: <http://www.oecd.org/competition/cartels/42851044.pdf>; United States Department of Justice, "Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For" (25 June 2015), online: <https://www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes>.

83 *Supra* note 9.

advertently[84] agree or arrange between or among them (a) not to submit a bid or tender, or (b) to withdraw a bid or tender already submitted.[85]

Under section 47(1)(b), two or more *bidders or tenderers* commit an offence if, (1) in response to a call or request for bids or tenders, these bidders or tenderers (2) intentionally and advertently[86] submit a bid that they arrived at by an agreement or arrangement.

As noted, bid-rigging is a *per se* offence.[87] Section 47 does not capture all forms of bid-rigging but only what is statutorily defined in section 47(1). Accordingly, conduct not captured by section 47(1) does not trigger an offence under section 47 even if the conduct may amount to bid-rigging in the ordinary sense.[88] However, bid-rigging conduct not captured by section 47 may nevertheless be captured by section 45 of the Act. As a practical matter, an analysis of conduct that may be considered bid-rigging should have regard to the general conspiracy provision (s 45) and specific bid-rigging provision (s 47) of the Act.

1. What Constitutes an Agreement or Arrangement?

An agreement or arrangement—the *actus reus* for a section 47 offence—involves a mutual arrival at an understanding. An agreement or arrangement under section 47 has been characterized as a "meeting of the minds" between the parties, either explicitly or tacitly, to engage in the prohibited conduct described in section 47.[89] It has also been characterized through a "consensus" approach—namely, as "a consensus of minds relative to conduct performed, or to be performed."[90] The agreement or arrangement does not have to be in relation to all aspects of the bids to be submitted in order to constitute an agreement or arrangement under section 47 of the Act.[91]

The "meeting of the minds" to engage in bid-rigging may be inferred from all of the circumstances under section 47 (as it may under section 45).[92] However, a

84 *Regina v Charterways Transportation Limited et al*, *supra* note 29; *R v McLellan Supply Ltd*, *supra* note 29.

85 Before 2009, the withdrawal of a tender pursuant to an agreement or arrangement was not an offence under section 47of the Act. See *R v Rowe* (2003), 29 CPR (4th) 525 at para 17 (Ont Sup Ct J).

86 *Regina v Charterways Transportation Limited et al*, *supra* note 29; *R v McLellan Supply Ltd*, *supra* note 29.

87 Behaviour that is considered bid-rigging under section 47 is deemed illegal without requiring proof of anticompetitive effects (see s 47(1)); *Regina v Charterways Transportation Limited et al*, *supra* note 29 at para 73.

88 *Regina v Charterways Transportation Limited et al*, *supra* note 29 at para 59; RJ Roberts, *Roberts on Competition/Antitrust: Canada and the United States*, 2nd ed (Toronto: Butterworths, 1992) at 121-22.

89 *R v Coastal Glass & Aluminum Ltd*, *supra* note 26 at paras 16-18; *R v Bugdens Taxi*, 2006 CanLII 31901, [2006] NJ No 250 (QL) at para 15 (Prov Ct); *United States of America v Dynar*, *supra* note 27 at para 87; *Regina v Armco Canada Ltd and 9 other corporations*, *supra* note 26 at 191; *Atlantic Sugar Refineries Co Ltd et al v Attorney General of Canada*, *supra* note 27; *R v Durward et al* (26 April 2015), Ottawa 09-300-68 at p 90 (Ont Sup Ct J) (jury instructions).

90 *Regina v Charterways Transportation Limited et al*, *supra* note 29 at para 34; *R v McLellan Supply Ltd*, *supra* note 29. See also Roberts, *supra* note 88 at 128-29.

91 *R v Durward et al*, *supra* note 89 at pp 136, 172, and 211.

92 *R v Bugdens Taxi*, *supra* note 89 at para 15.

mere accommodation by another bidder does not constitute an "agreement or arrangement" under section 47 of the Act.[93]

The *mens rea* for section 47 arises from the agreement or arrangement, and is met when the Crown proves beyond a reasonable doubt that the accused intentionally and advertently entered into the agreement or arrangement.[94] The motive of the accused in entering into the agreement or arrangement is irrelevant to the existence of *mens rea*.[95]

As noted, to constitute an offence under section 47(1)(b), a bid must be arrived at by an agreement or arrangement, and, as a result, the outcome of the agreement or arrangement must lead to the bid and not simply relate to steps in the preparation of the bid.[96]

2. Call or Request for Bids or Tenders

The phrase "call or request for bids or tenders" or the terms "bids" or "tenders" are not defined in the Act. The phrase "call or request for bids or tenders" is broad in nature, the interpretation of which is evolving in jurisprudence. Some have characterized the phrase as carrying "the highest degree of uncertainty."[97]

At a minimum, an agreement or arrangement to bid-rig requires a direct relationship, or nexus, between the person calling for the bids and tenders and the person submitting the tenders.[98] Determining what is captured by a "call or request for bids or tenders" focuses on the intention of the parties to create contractual relations.[99] For example, requests for a quotation to supply motor vehicle manufacturers with motor vehicle components have been found to be captured by a "call or request for bids or tenders."[100]

The courts have relied heavily upon the law of tendering and contract law in respect of requests for proposals (RFPs) in interpreting the phrase "call or request

93 *R v Coastal Glass & Aluminum Ltd*, *supra* note 26 at paras 14-15.

94 *Regina v Charterways Transportation Limited et al*, *supra* note 29 at para 74; *R v McLellan Supply Ltd*, *supra* note 29 at paras 22, 24-25.

95 *Regina v Lorne Wilson Transportation Ltd; Regina v Travelways School Transit Ltd*, *supra* note 30 at para 7.

96 *R v Durward et al*, *supra* note 89 at pp 87-88.

97 Pierre-Christian Collins Hoffman & Guy Pinsonnault, "The Characterization of a Procurement Process as a 'Call or Request for Bids or Tenders' Under Section 47 of the Competition Act" (2014) 27:2 Can Comp L Rev 323 at 329 [Hoffman & Pinsonnault, "The Characterization of a Procurement Process"].

98 *R v Coastal Glass & Aluminum Ltd*, *supra* note 26 at para 12.

99 *R v Dowdall*, 2013 ONCA 196; *R v Al Neshar et al* (1 February 2013), Montreal 500-73-0035350-104, 500-73-0035350-102 (QCCQ).

100 *R v Yazaki Corp* (18 April 2013), Ottawa (Ont Sup Ct J). See Canada, Competition Bureau, "Record $30M Fine Obtained by Competition Bureau Against Japanese Auto Parts Supplier" (18 April 2013), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03560.html>.

for bids or tenders."[101] This was illustrated in *Durward*, which was a contested proceeding involving several charges under section 47 of the Act and where the trial judge provided the following detailed written instructions to the jury regarding the phrase "call or request for bids or tenders" and the bid and tender process generally:

> ***The Bid and Tender Process***
>
> There is no difference between the words bid and tender which are often used interchangeably.
>
> A call for bids or tenders may generally be described as an invitation by the person making the call for bids or tenders, for offers from vendors or contractors, to enter into a subsequent contract on the terms specified in the invitation, to undertake the services for a price specified by the contractor. The person calling for bids or tenders will put out a call to the public or to a group of vendors or contractors asking them to submit bids that are compliant with terms set out in the call. Those who respond to the call must submit a bid that is compliant with the terms of the call, and also set out the terms on which they would be willing to undertake the services sought.
>
> While there is only one physical exchange in a call or request for tenders, at law the call for and the submission of a bid results in two separate contracts—Contract A and Contract B.
>
> In order for the procurement process to be a call for bids or tenders, there must be a Contract A and the intention to enter into a Contract B.
>
> Contract A:
>
> Under Contract A, the call is an offer and the submission of a bid is acceptance of the offer. The offer entails a promise by the caller to evaluate the proposals in compliance with the terms set out in the call. The acceptance involves an irrevocable undertaking to enter into another contract (Contract B) if the valid bid is accepted by the caller.

TABLE 1 Contract "A"

Call for Bids or Tenders	**Submission of a Bid**
Offer (*by the caller*)	Acceptance (*by the bidder*)

101 The law of tendering and contract law in respect of RFPs has evolved in jurisprudence, including in a number of decisions by the Supreme Court of Canada: *The Queen (Ont) v Ron Engineering*, [1981] 1 SCR 111; *MJB Enterprises Ltd v Defence Construction (1951) Ltd*, [1999] 1 SCR 619; *Martel Building Ltd v Canada*, 2000 SCC 60, [2000] 2 SCR 860; *Naylor Group Inc v Ellis-Don Construction Ltd*, 2001 SCC 58, [2001] 2 SCR 943; *Double N Earthmovers Ltd v Edmonton (City)*, 2007 SCC 3, [2007] 1 SCR 116; *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 SCR 69. Conceptually, the contract in an RFP is comprised of a two-phase contract: a preliminary "contract A" and a final "contract B." For a helpful discussion of the aforesaid jurisprudence arising from the Supreme Court of Canada and the law of tendering and contract law in respect of RFPs, see Collins Hoffman & Pinsonnault, "The Characterization of a Procurement Process," *supra* note 97.

Contract B:

Under Contract B, the bid is an offer, and the selection of the winning bid(s) by the caller is the acceptance. The bid is the bidder's undertaking to complete work for the caller on the terms set out in the call for bid. The acceptance results in an agreement for the bidder to undertake the services at a cost set by the bidder.

TABLE 2 Contract "B"

Call for Bids or Tenders	Submission of a Bid	Selection of the Winning Bid(s)
	Offer (*by the bidder*)	Acceptance (*by the caller*)

While there is only one physical exchange, Contract A and Contract B are separate contracts because the two contracts entail different offers and acceptance. This is the case even though the terms of Contract A (set out in the call) will often be incorporated into Contract B (the terms of which are set out in the proposal).

TABLE 3

Contract	Call for Bids or Tenders	Submission of a Bid	Selection of a Winning Bid(s)
"A"	Offer (*by the caller*)	Acceptance (*by the bidder*)	
"B"		Offer (*by the bidder*)	Acceptance (*by the caller*)

Because Contract A and Contract B are contracts, they each require the elements of contract formation to be binding: offer, acceptance and consideration.

Similarly, the title of the tendering document is not determinative of the intention of the parties. In this case, the documents in question are titled Request for Proposals. A Request for Proposal ("RFP") may or may not be a call or request for bids or tenders. It is important to look at the terms and conditions set out in the RFPs in order to determine if the parties intended to enter into the contractual relations (Contract A-Contract B) that I have described above. You may look to (1) the terms of the agreement(s); (2) the context that the parties were operating within; and (3) the exchange (or lack of exchange) of consideration.

Whether or not the procurement process is a call for bids or tenders will depend on whether the call gives rise to contractual obligations, quite apart from any resulting contract. If it does, then it is a call for bids or tenders. Conversely, where a call or request for bids of tenders lacks contractual intent, the process will not be deemed a call or request for bids and tenders.

The Contract A/Contract B framework is one that arises, if at all, from the dealings between the parties.

In reaching your decision about whether or not the RFPs that are the subject of this trial are or are not calls for bids or tenders, you may also look at the knowledge of and

> conduct of the accused and the witnesses in this case during the procurement process to help you decide the intention of the parties at the time of the submission of the proposals.[102]

The jury in *Durward* returned a finding of not guilty.[103] As with all findings in jury proceedings, no written reasons are provided. Accordingly, the basis for the jury's finding is unknown. Interestingly, the preliminary inquiry judge in *Dowdall* determined that there was sufficient evidence for a jury to consider at trial. In so doing, the preliminary inquiry judge found that an RFP may be captured by a "call or request for bids or tenders" even when it contains a term permitting the party issuing the RFP to retain the discretion not to proceed to call up work or services.[104]

In contrast, in *Al Nasher*,[105] a contested proceeding involving several charges under section 47 of the Act, the preliminary hearing judge concluded that there was insufficient evidence to commit the accused to trial. The judge relied largely on the fact that the condominium owner had no obligation to award a contract to any complaint bidder and no obligation to accept the lowest complaint bid.

Because the courts rely heavily upon the law of tendering rather than upon a statutory definition in interpreting the phrase "call or request for bids or tenders," a determination of whether bid-rigging conduct is captured by the phrase is very contextual.

C. Defences

1. The "Make Known" Defence or Notification Defence

There is no offence under section 47(1) where the agreement or arrangement is made known to the person requesting the bid or tender at or before the bid or tender is submitted or withdrawn (as the case may be) by any person who is a party to the agreement or arrangement (s 47(1)). As a practical matter, this defence legitimizes joint bidding arrangements. The accused must expressly notify the person requesting the bid or tender of the agreement or arrangement,[106] or take all reasonable care to make an agreement or arrangement known.[107] Notification cannot be inferred by the person requesting the bid or tender.[108]

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102 *R v Durward et al*, *supra* note 89 at pp 44-46.

103 *Ibid.*

104 *R v Dowdall*, 2012 ONSC 3945 at para 39; *R v Dowdall*, *supra* note 99 at para 6. The RFP contained a "task authorization" mechanism, whereby the winners who received a contract for services were required to meet a further step (i.e., task authorization) in order to be retained to conduct the work or services.

105 *Supra* note 99.

106 *Regina v Lorne Wilson Transportation Ltd; Regina v Travelways School Transit Ltd*, *supra* note 30.

107 *Regina v Charterways Transportation Limited et al*, *supra* note 29.

108 *Regina v Lorne Wilson Transportation Ltd; Regina v Travelways School Transit Ltd*, *supra* note 30. However, in her jury instructions in *R v Durward et al*, *supra* note 89 at pp 142 and 147, the trial judge noted that the "make known" defence could be made through express notification or implied notification.

The "make known" defence or notification defence is not a defence for the general conspiracy offence under section 45(1). Accordingly, an act of bid-rigging that does not trigger sections 47(1) and (2) due to the "make known" defence or notification defence may nevertheless trigger section 45(1).

2. Affiliate Companies

There is also no offence under section 47(1) where the agreement or arrangement is arrived at only by companies each of which is an affiliate company (s 47(3)). As noted, "affiliate" is defined in the Act, but the definition refers to affiliated corporations, not to affiliated companies.[109]

D. Penalty

According to section 47(2) of the Act, "Every person who is a party to bid-rigging is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both."

V. CONSPIRACY RELATING TO PROFESSIONAL SPORT

A. Overview

Section 48 codifies a specific offence for conspiracies relating to categories of agreements and arrangements in professional sports. Section 48 represents a balance, exempting professional sports leagues from the rigid conspiracy requirements under section 45 of the Act and creating a special standard for professional sport under section 48 that permits the Bureau to consider and the courts to determine the "reasonableness" of a particular agreement or arrangement on a case-by-case basis.[110]

At the time of writing, there were no reported decisions under section 48.[111]

109 Section 2(2) of the Act reads as follows: "For the purposes of this Act, (a) one entity is affiliated with another entity if one of them is the subsidiary of the other or both are subsidiaries of the same entity or each of them is controlled by the same entity or individual; (b) if two entities are affiliated with the same corporation at the same time, they are deemed to be affiliated with each other; and (c) an individual is affiliated with an entity if the individual controls the entity."

110 Stephen F Ross, "The NHL Labour Dispute and the Common Law, the Competition Law, and Public Policy" (2004) 37 UBC L Rev 343 at 374; CJ Michael Flavell & Christopher J Kent, The Canadian Competition Law Handbook (Scarborough, Ont: Carswell, 1997) at 145.

111 Section 48 was considered, however, in *Reed v Ottawa Football Club*, 1988 CanLII 3529, *(sub nom Reed and Mandarich v Canadian Football League)* 62 Alta LR (2d) 347 (QB). The court granted an injunction against the enforcement of a Canadian Football League rule that prohibited a player who had signed a contract to play professional football with another league in the same year. In granting the interlocutory injunction, the court noted that there was a serious issue regarding whether the Canadian Football League's rule was reasonable under section 48 of the Act.

B. Elements of the Offence

The elements of an offence for conspiracy relating to professional sport are outlined in section 48(1):

> 48(1) Every one who conspires, combines, agrees or arranges with another person
>
> (a) to limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional sport or to impose unreasonable terms or conditions on those persons who so participate, or
>
> (b) to limit unreasonably the opportunity for any other person to negotiate with and, if agreement is reached, to play for the team or club of his choice in a professional league … .

Accordingly, every one commits an offence under section 48(1) when he or she conspires, combines, agrees, or arranges with another person to

- limit *unreasonably* the opportunities for any other person to participate in professional sport as a player or competitor;
- impose *unreasonable* terms or conditions on players or competitors; or
- limit *unreasonably* the opportunity for any person to negotiate with and play for a team or club of his or her choice in a professional league.

According to section 48(2), of the Act, the court, when determining whether or not an agreement or arrangement breaches section 48(1), must have regard to

- whether the sport arising from the alleged breach is organized on an international basis and, if so, whether any limitations, terms, or conditions alleged should, for that reason, be accepted in Canada; and
- the desirability of maintaining a reasonable balance among teams and clubs participating in the same league.

The inclusion of a reasonableness analysis in section 48 differentiates this conspiracy provision from the rigid general conspiracy provision in section 45, and affords the courts a significant amount of discretion in determining whether an offence has been committed.

C. Exceptions

The Act, and accordingly section 48(1), does not apply to agreements or arrangements between and among teams, clubs, and leagues pertaining to amateur sport (s 6)[112] or to agreements or arrangements reached through collective bargaining (s 4).[113]

112 Section 6(2) of the Act defines "amateur sport" as "sport in which the participants receive no remuneration for their services as participants."

113 *Yashin v National Hockey League*, 2000 CanLII 22620 (Ont Sup Ct J).

D. Application of Sections 48 and 45 of the Act

Section 48(3) clarifies the application of sections 48 and 45 to agreements and arrangements relating to professional sport. Section 48 applies (and section 45 does not apply) to agreements or arrangements between or among teams, clubs, and persons engaged in professional sport as members of the same league and between or among directors, officers, or employees of those teams and clubs where the agreements or arrangements relate to the granting and operation of franchises in the league (s 48(3)). Section 45 applies (and section 48 does not apply) to all other agreements or arrangements between or among these teams, clubs, and persons (s 48(3)).

E. Penalty

Every one who commits an offence under section 48(1) is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years, or to both.

VI. AGREEMENTS OR ARRANGEMENTS OF FEDERAL FINANCIAL INSTITUTIONS

A. Overview

Section 49 codifies a specific offence for conspiracies relating to categories of agreements and arrangements between federal financial institutions. Enacted on June 1, 1992, section 49 replaced section 309 of the former *Bank Act*,[114] which had prohibited anticompetitive agreements among banks. This change was in response to criticism of the then distribution of competition policy enforcement in respect of banks and the recognition of the importance of the banking sector to the economy and the public interest served through competition in the banking sector.[115]

Section 49 of the Act is a *per se* offence (that is, an agreement captured by section 49 is deemed illegal without requiring proof of anticompetitive effects). The agreements captured by section 49 include the rate of interest on deposits or loans and the amount or kind of any charge for a service provided to a customer. An offence under section 49(1) captures not only the federal financial institution that entered into the impugned agreement or arrangement but also every director, officer, and employee of the financial institution who knowingly made the impugned agreement or arrangement on behalf of a federal financial institution.

No proceeding may be commenced under section 49 against a federal financial institution or director, officer, and employee of the financial institution on the

114 RSC 1985, c B-1 (repealed and replaced by SC 1991, c 46).

115 *Competition Law Amendments: A Guide*, *supra* note 59 at 30.

basis of facts that are the same or substantially the same as the facts on the basis of which an order against that person is sought by the Commissioner under section 76 (price maintenance), section 79 (abuse of dominance), section 90.1 (agreements between competitors), or section 92 (mergers) of the Act (s 49(4)).

At the time of writing, there were no reported decisions under section 49.

B. Elements of the Offence

A federal financial institution is defined for the purposes of section 47 of the Act as "a bank or an authorized foreign bank within the meaning of section 2 of the *Bank Act*, a company to which the *Trust and Loan Companies Act* applies or a company or society to which the *Insurance Companies Act* applies" (s 49(3)).

Every federal financial institution (as defined) commits an offence under section 49(1) when it makes an agreement or arrangement with another federal financial institution with respect to

> (a) the rate of interest on a deposit,
> (b) the rate of interest or the charges on a loan,
> (c) the amount or kind of any charge for a service provided to a customer,
> (d) the amount or kind of a loan to a customer,
> (e) the kind of service to be provided to a customer, or
> (f) the person or classes of persons to whom a loan or other service will be made or provided or from whom a loan or other service will be withheld.

For a discussion of what constitutes an agreement or arrangement, which applies with necessary modifications to an offence under section 49 of the Act, see Section IV.B.1, earlier in the chapter.

The *mens rea* for section 49(1) arises from the agreement or arrangement, and is met when the Crown proves beyond a reasonable doubt that the federal financial institution intentionally entered into the agreement or arrangement.[116]

Section 49(1) also exposes directors, officers, and employees of a financial institution to criminal liability by providing that every director, officer, or employee of a financial institution commits an offence under section 49(1) when he or she (1) knowingly (2) makes the impugned agreement or arrangement on behalf of a federal financial institution.

The term "knowingly"—the *mens rea* for directors, officers, and employees under section 49(1)—is met when the Crown can prove beyond a reasonable doubt that the individual had knowledge of the impugned agreement or arrangement and caused or permitted the federal financial institution to enter into the agreement or arrangement. Wilful blindness has been found to be equivalent to knowledge, and, thus, the *mens rea* may also be met if the individual was

116 *Regina v Charterways Transportation Limited et al*, *supra* note 29 at para 74; *R v McLellan Supply Ltd*, *supra* note 29 at paras 22, 24-25.

deliberately ignorant about the federal financial institution entering into the agreement or arrangement.[117]

C. Exceptions

Section 49(1) does not apply to certain categories of agreements or arrangements between financial institutions as set out in section 49(2). These are agreements or arrangements

> (a) with respect to a deposit or loan made or payable outside Canada;
>
> (b) applicable only in respect of the dealings of or the services rendered between federal financial institutions or by two or more federal financial institutions as regards a customer of each of those federal financial institutions where the customer has knowledge of the agreement or by a federal financial institution as regards a customer thereof, on behalf of that customer's customers;
>
> (c) with respect to a bid for or purchase, sale or underwriting of securities by federal financial institutions or a group including federal financial institutions;
>
> (d) with respect to the exchange of statistics and credit information, the development and utilization of systems, forms, methods, procedures and standards, the utilization of common facilities and joint research and development in connection therewith, and the restriction of advertising;
>
> (e) with respect to reasonable terms and conditions of participation in guaranteed or insured loan programs authorized pursuant to an Act of Parliament or of the legislature of a province;
>
> (f) with respect to the amount of any charge for a service or with respect to the kind of service provided to a customer outside Canada, payable or performed outside Canada, or payable or performed in Canada on behalf of a person who is outside Canada;
>
> (g) with respect to the persons or classes of persons to whom a loan or other service will be made or provided outside Canada;
>
> (h) in respect of which the Minister of Finance has certified to the Commissioner that Minister's request for or approval of the agreement or arrangement for the purposes of financial policy and has certified the names of the parties to the agreement or arrangement; or
>
> (i) that is entered into only by financial institutions each of which is an affiliate of each of the others.

The Bureau has noted that agreements or arrangements that fall within the ambit of section 49(1), but also within the aforesaid exemptions, will not be assessed under section 45, the general conspiracy provision of the Act.[118] Such agreements and arrangements may, however, be subject to review under the civil provisions of the Act where such agreements are likely to substantially lessen competition.[119]

117 *Sansregret v The Queen*, [1985] 1 SCR 570 at 584-86; *R v Hinchey*, [1996] 3 SCR 1128 at paras 112-15.
118 *Competitor Collaboration Guidelines*, *supra* note 9, s 1.2.
119 *Ibid.*

Unlike the general conspiracy offence, this conspiracy offence is not subject to the ancillary restraints defence.[120]

D. Penalty

Every federal financial institution, or director, officer, or employee of a federal financial institution, that commits an offence under section 49(1) is guilty of an indictable offence and liable on conviction to a fine not exceeding $10 million or to imprisonment for a term not exceeding five years, or to both (s 49(1)).

VII. FALSE OR MISLEADING REPRESENTATION

A. Overview

Section 52(1) of the Act is the general offence for false and misleading representations. It prohibits material false or misleading representations made to the public for the purposes of promoting a product, service, or business interest. This offence captures a wide scope of deceptive marketing practices, including conduct captured by the specific deceptive marketing provisions under parts VI and VII.1 of the Act.

Section 52(1) was enacted in 1999, creating a parallel criminal offence and civil reviewable practice for general material false or misleading representations.[121] Prior to 1999, section 52(1) was a strict liability offence rather than a *mens rea* criminal offence. As a practical matter, the criminal offence under section 52(1) and the reviewable practice under section 74.01(1)(a) are duplicative but for the inclusion of the phrase "knowingly and recklessly" (i.e., the *mens rea*) in the criminal offence. Underpinning section 52(1) (and all the deceptive marketing provisions under the Act) is the prolific use of marketing and advertising in the Canadian economy to promote goods and services, and the significant impact such marketing and advertising has upon a consumer's purchasing decision. A further underpinning is the promotion of fair competition between competing advertisers within the framework of an ethical standard of advertising.[122]

When analyzing conduct that may be captured by section 52(1), one must consider section 52(1), several applicable provisions under part VI of the Act, and applicable jurisprudence, all of which are described more fully below.

120 This omission has been subject to criticism. See, for example, Marina Chernenko, "The Price of a Dormant Provision: Revisiting Section 49 of the Competition Act" (2016) 31 BFLR 601 at 604-5.

121 Bill C?20, *An Act to amend the Competition Act and to make consequential and related amendments to other Acts*, 1st Sess, 36th Parl, 1999 (assented to 11 March 1999), SC 2009, c 2. The general reviewable practice for material false or misleading representations is outlined in section 74.01(1)(a). See Chapter 9 for further information regarding the reviewable practice under section 74.01(1)(a).

122 Ronald I Cohen, "Misleading Advertising and the Combines Investigation Act" (1969) 15:4 McGill LJ 622 at 630; *R v Simpson-Sears Limited* (1969), 58 CPR 56 at 60 (Ont Prov Ct (Crim Div)); *cf R v Kellys on Seymour Limited* (1969), 60 CPR 24 (BC Mag Ct); *Regina v Colgate-Palmolive Ltd*, [1969] 1 OR 731 at 733 (Co Ct).

B. Bureau's Analytical Framework When Assessing Misleading Representations and Deceptive Marketing Practices

As noted, the making of a materially false and misleading representation can be a criminal offence or a civil reviewable practice under the Act. The two tracks are mutually exclusive (ss 52(7) and 74.16). No proceedings may be commenced under section 52(1) against a person against whom an order is sought under the civil reviewable practice sections in part VII.1 of the Act on the basis of the same or substantially the same facts (s 52(7)). Accordingly, the Commissioner chooses whether to pursue the criminal or civil track based on the analytical framework discussed more fully below. At early stages of an investigation, it is not uncommon for the Bureau to proceed with a "dual track" investigation until it decides which track to proceed on.

Section 52(1) is reserved for the most egregious forms of false and misleading representations. The Bureau will generally proceed with the civil regime over the criminal regime in most instances.[123] Generally, the Commissioner will proceed on the criminal regime only when satisfied that there exists clear and compelling evidence suggesting that the accused knowingly or recklessly made a false or misleading representation to the public, and that proceeding with the criminal regime is in the public interest.[124] An example of such evidence is the accused's continuation of a practice after consumers have made complaints directly to the accused. Public interest is assessed by balancing the seriousness of the alleged offence against mitigating factors.

The seriousness considerations include

- whether there was substantial harm to consumers or competitors that could not be adequately addressed through civil remedies;
- whether the impugned conduct targeted or took advantage of vulnerable groups, such as children or older adults;
- whether the persons involved failed to make timely and effective attempts to remedy the adverse effects of the impugned conduct;
- whether the impugned conduct continued after corporate officials became aware of it;
- whether the impugned conduct involved a failure to comply with a previous undertaking, a promised voluntary corrective action, or a prohibition order; and
- whether the persons involved had engaged in similar conduct in the past.[125]

123 Canada, Competition Bureau, "Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track Under the Competition Act," Bulletin (1999), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01223.html>.

124 *Ibid.*

125 *Ibid.*

The mitigating considerations include "whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive" and "whether the company or entity has in place an effective compliance program."[126]

C. Elements of the Offence

The elements of an offence for making a false or misleading representation in a material respect are outlined in section 52(1):

> 52(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

Accordingly, a person commits an offence under section 52(1) when, (1) for the purpose of promoting (directly or indirectly) the supply or use of a product, service, or any business interest, (2) that person (a) knowingly or recklessly (b) makes a representation (by any means whatever) (c) to the public (d) that is false or misleading in a material respect.

Each of these elements is described more fully below.

1. Persons Captured

Section 52(1) captures persons who *make* or *send* false and misleading representations—directly and indirectly—and further captures persons who *permit* a false or misleading representation to be made or sent (s 52(1.2)). Accordingly, the range of persons who may be convicted under section 52(1) is wide.

The Bureau has publicly noted that it will focus on persons who cause the representation to be made. In so doing, the Bureau will determine which person possesses decision-making authority or control over content, and assess the nature and degree of that person's authority or control.[127] With respect to online advertising, the Bureau will consider the role of the web page designers that help create the representations, the web hosts that own or operate the servers from which the representations are disseminated, the service providers that provide access to the Internet, and the businesses on whose behalf the representations are made and disseminated.[128] The Bureau has also focused on persons who permit representations to be made. For example, in a series of civil consent agreements with certain

126 *Ibid.*

127 Canada, Competition Bureau, *Application of the Competition Act to Representations on the Internet*, Enforcement Guidelines (16 October 2009), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/RepresentationsInternet2009-10-16-e.pdf/$FILE/RepresentationsInternet2009-10-16-e.pdf>. For example, in *Commissioner of Competition v Gestion Lebski inc*, 2006 CACT 32, 2006 Comp Trib 32, the tribunal concluded at para 271 that the officer of the company who was found to have engaged in reviewable conduct under section 52(1)'s civil counterpart, section 74.01(1)(a), was found to have also engaged in reviewable conduct under 74.01(1)(a) given that he was "the prime mover" behind the development and publication of the false and misleading representations at issue.

128 *Application of the Competition Act to Representations on the Internet*, *supra* note 127. The Bureau's approach regarding causation also apply to offences under sections 52(1), 52.01(1), (2), and (3).

telecommunication companies, the Commissioner concluded that these companies *permitted* a third-party content provider (an aggregator of premium text messaging and rich content services) to bill their customers for these services even though these customers did not intend to purchase or agree to pay for these services. On this basis, the Commissioner concluded that the telecommunication companies permitted false or misleading representations to be made.[129]

Through sections 52(2) and (2.1), section 52(1) captures

- persons who *import* into Canada articles, things, or displays that are accompanied by false or misleading representations; and
- persons who *cause* false or misleading representations to be expressed, made, or contained on products or through in-store, door-to-door, or telephone selling to an ultimate user.

By operation of these sections, a false or misleading representation made at the point of sale (such as when a salesperson in a store speaks to a customer), or on or in packaging materials (such as on a label attached to a product), is deemed the responsibility of the person who caused the representation to be made (s 52(2)).[130] If that person is not in Canada, responsibility shifts to the importer. In other words, where a false or misleading representation relates to a foreign product that is imported into Canada, the representation is deemed to have been made by the importer (s 52(2.1)).[131]

2. Knowingly or Recklessly

A person must *knowingly or recklessly* make a representation to the public that is false or misleading in a material respect in order to contravene section 52(1). The phrase "knowingly or recklessly" is the *mens rea* of this offence. Accordingly, to prove an offence under section 52(1), the Crown must prove beyond a reasonable doubt that the person engaged in the impugned conduct and did so knowingly or recklessly (see s 52(1)).[132]

In proving an offence under section 52(1), it is not necessary for the Crown to prove that any person was actually deceived or misled (s 52(1.1)(a)).[133] Accordingly,

129 *Commissioner of Competition v Rogers Communication Inc* (16 March 2015), CT-2015-002 (Registered Consent Agreement), online: <http://www.ct-tc.gc.ca/CMFiles/CT-2015-002_Registered%20Consent%20Agreement_2_38_3-16-2015_4749.pdf>; *Commissioner of Competition v Telus Communications Company* (30 December 2015), CT-2015-015 (Registered Consent Agreement), online: <http://www.ct-tc.gc.ca/CMFiles/CT-2015-015_Registered%20Consent%20Agreement_2_38_12-30-2015_9250.pdf>.

130 See *Canada (Commissioner of Competition) v Premier Career Management Group Corp*, 2009 FCA 295 at para 54, [2010] 4 FCR 41.

131 See *ibid* at para 55.

132 Prior to amendments to the Act in 1999, section 52 of the Act was a strict liability offence and thereby did not require proof of *mens rea*.

133 See *R v Viceroy Construction Co Ltd* (1975), 29 CCC (2d) 299 (Ont CA); *R v Birchcliff Lincoln Mercury Sales Ltd* (1987), 36 CCC (3d) 1, [1987] OJ No 655 (QL) (CA); *R v Groupmark Canada Ltd* (1991), 38 CPR (3d) 167 (Ont Gen Div); *R v Multitech Warehouse Direct (Ontario) Inc*, 1993 CarswellOnt 2931 at para 18, 19 WCB (2d) 388 (Gen Div).

the *mens rea* under section 52(1) focuses on the *nature* of the representation, not the representation's effect. It is not necessary to prove an intention to deceive or mislead or to prove whether the accused was reckless as to whether any person was deceived or misled.

The *mens rea* for section 52(1) may be proven in more than one way. The *mens rea* under section 52(1) may involve proving that the accused had knowledge of the false or misleading character of the representation.[134] It may also involve proving that the accused made the false or misleading representation in spite of knowledge that would lead any reasonable person to conclude that the representation is false or misleading. Wilful blindness has been found to be equivalent to knowledge, and, thus, *mens rea* may also involve proving that the accused was deliberately ignorant about the risk of the representation being false or misleading.[135] The Crown may prove the *mens rea* either as an inference from the nature of the act committed or by additional evidence.[136]

The *mens rea* element of an offence under section 52(1) is what differentiates this offence from its civil counterpart under section 74.01(1)(a).

3. Purpose of Promoting the Supply or Use of a Product/Service/Any Business Interest

To prove an offence under section 52(1), the Crown must prove beyond a reasonable doubt that the person who made the representation did so for the purpose of promoting the supply or use of a product, service, or any business interest, directly or indirectly.

The phrase "business interest" is not defined in the Act. The term "business," however, is defined in section 2(1) of the Act as including a wide spectrum of for-profit businesses (manufacturing, producing, transporting, acquiring, supplying, storing, and otherwise dealing in articles as well as acquiring, supplying, and otherwise dealing in services) and not-for-profit businesses (raising funds for charitable or other non-profit purposes).

The phrase "business interest" has been referred to as the business interest of the person or persons making the representation.[137] The phrase has also been given a broad meaning. It is not limited to the sales or the marketing or advertising of a product but includes *any* business interest, directly or indirectly.[138] For

134 *R v Stucky*, 2009 ONCA 151 at paras 120, 123, and 129.

135 *Sansregret v The Queen*, *supra* note 117 at 584-86; *R v Hinchey*, *supra* note 117 at paras 112-15.

136 *R v Stucky*, *supra* note 134 at para 128.

137 *Apotex Inc v Hoffmann La-Roche Ltd*, 2000 CanLII 16984 at para 14, 195 DLR (4th) 244 (Ont CA).

138 *R v Birchcliff Lincoln Mercury Sales Ltd*, *supra* note 133 at paras 15-24; *Canada (Commissioner of Competition) v Yellow Page Marketing BV*, 2012 ONSC 927 at para 40, 101 CPR (4th) 286, supp reasons 2013 ONSC 850; *Canada (Commissioner of Competition) v Premier Career Management Group Corp*, *supra* note 130 at para 17; *R v Park Realty Ltd* (1978), 43 CPR (2d) 29 (Man Prov Ct); *Apotex Inc v Hoffmann La-Roche Ltd*, *ibid* at paras 13-14.

example, a business interest is not necessarily an interest with the persons who might be misled by the representation.[139]

As a practical matter, this element is not normally difficult to satisfy.

4. Where Proof of Matters Are Not Required

In proving an offence under section 52(1), it is not necessary for the Crown to prove that

- "any person was deceived or misled" (s 52(1.1)(a));[140]
- "any member of the public to whom the representation was made was within Canada" (s 52(1.1)(b));[141] or
- "the representation was made in a place to which the public had access" (s 52(1.1)(c)).[142]

5. Makes a Representation

Section 52(1) prohibits the making of a materially false or misleading representation to the public "by any means whatever." Accordingly, the form of representation captured by section 52(1) extends beyond mere advertisement and is capable of capturing a very wide range of representations.[143]

The Bureau's position is that all representations, in any form, are captured by the Act.[144] These representations include printed, broadcast, online, and digital advertisements, written and oral representations, and audiovisual and online illustrations. There is doubt, however, regarding whether a misrepresentation by omission is captured by section 52(1).[145]

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139 For example, in *R v Birchcliff Lincoln Mercury Sales Ltd*, *supra* note 133, the accused was convicted for posting a sign concerning the manner in which it charged for repairs. The company posted the sign to promote its business interests with the vehicle manufacturer and not with the public at large.

140 See *R v Viceroy Construction Co Ltd*, *supra* note 133; *R v Birchcliff Lincoln Mercury Sales Ltd*, *supra* note 133; *R v Groupmark Canada Ltd*, *supra* note 133; *R v Multitech Warehouse Direct (Ontario) Inc*, *supra* note 133.

141 See *R v Stucky*, *supra* note 134 at para 57.

142 See *Canada (Commissioner of Competition) v Premier Career Management Group Corp*, *supra* note 130 at para 52.

143 The phrase "by any means whatever" was intended to capture representations beyond mere advertisements. As noted by the Bureau (then known as the Bureau of Competition Policy) in *Background Papers: Stage I Competition Policy*, *supra* note 69 at 39-40, "[t]he concern aroused by the varying interpretations together with the restrictions contained in the former provisions left the Director powerless to deal with certain printed representations and all oral representations not involving ordinary price claims. The provision has removed these deficiencies by referring to representations made 'by any means whatever.' It is anticipated that the amended provision will now extend to all forms of representations whether made orally by salespersons, on labels or in warranties." Furthermore, oral representations have long ago been found to be captured by the Act. See *R v Ameublement Dumouchel Furniture Ltd* (6 February 1970), Ottawa-Carleton (Ont Prov Ct); JJ Quinlan, QC, "Combines Investigation Act—Misleading Advertising and Deceptive Practices" (1972) 5 Ottawa LR 277 at 278.

144 Canada, Competition Bureau, "False or Misleading Representations and Deceptive Marketing Practices" (5 November 2015), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03133.html>.

145 *Williams v Canon Canada Inc*, 2011 ONSC 6571 at para 227; *Arora v Whirlpool Canada LP*, 2012 ONSC 4642 at paras 198-201.

The digital economy is an enforcement priority for the Bureau.[146] Accordingly, online representations in all digital formats and across interconnected platforms, such as social media sites, review platforms, news sites or aggregators, and retailer or company websites are not only considered as captured but under heightened scrutiny by the Bureau.[147] For example, in a civil consent agreement, the Commissioner concluded that a company engaged in the practice known as "astroturfing"—creating commercial representations that masquerade as the authentic experiences and opinions of impartial consumers—encouraged its employees to post positive reviews and ratings of its free mobile application online.[148]

6. To the Public

A. GENERAL

To prove an offence under section 52(1), the Crown must prove beyond a reasonable doubt that the person who made the representation did so to the public. All the circumstances of a representation should be examined when one is determining whether a representation was made "to the public." The question to ask in determining whether a representation was made to the public is "to whom were the representations made, and under what circumstances?"[149]

If a representation reaches a significant portion or subset of the public (even if initially communicated to one person), it is considered made "to the public."[150] Furthermore, it is not necessary for the Crown to prove that any member of the public to whom the representation was made was within Canada or that the representation was made in a place to which the public had access (ss 52(1.1)(b) and (c)).

B. DEEMED REPRESENTATIONS

The Act contains certain deeming provisions for representations that deal with products as well as sales involving a salesperson and a customer. In particular, representations expressed, made, or contained on products or through in-store, door-to-door, or telephone selling to an ultimate user are deemed to be made to the public, as are representations contained in or on anything that is sold, sent,

146 Canada, Competition Bureau, *The Deceptive Marketing Practices Digest*, vol 1, Bulletin (10 June 2015), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03946.html>.

147 *Ibid* at 7-10.

148 *Commissioner of Competition v Bell Canada* (14 October 2015), CT-2015-011 (Registered Consent Agreement), online: <http://www.ct-tc.gc.ca/CMFiles/CT-2015-011_Registered%20Consent%20Agreement_2_38_10-14-2015_4246.pdf>. See also Canada, Competition Bureau, "Bell Canada Reaches Agreement with Competition Bureau over Online Reviews" (14 October 2015), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03992.html>. The digital economy, including astroturfing, has also been an enforcement priority of other enforcement agencies, such as the US Federal Trade Commissioner and the United Kingdom's Competition and Marketing Authority. See, for example, *The Deceptive Marketing Practices Digest*, *supra* note 146 at 10.

149 *Canada (Commissioner of Competition) v Premier Career Management Group Corp*, *supra* note 130 at para 66.

150 *Ibid* at para 52. See also *University of British Columbia v Berg*, [1993] 2 SCR 353; *R v Shell Canada Ltd* (1972), 5 CPR (2d) 217 (Ont Co Ct); *R v Independent Order of Foresters*, *supra* note 67.

delivered, transmitted, or made available in any other manner to members to the public (s 52(2)).[151]

A product or business interest supplied to a wholesaler, retailer, or other distributor and containing a false or misleading representation is also deemed to be made to the public. As a practical matter, this deeming provision captures a vast number of representations involving the supply of products or business interests generally (s 52(3)).

7. False or Misleading in a Material Respect

To prove an offence under section 52(1), the Crown must prove beyond a reasonable doubt that the representation made by the person is "false or misleading in a material respect." This determination generally involves a two-step analysis: (1) whether the representation is false or misleading; and (2) if so, whether the false and/or misleading representation is material.[152]

A court must take into account the general impression conveyed by a representation as well as its literal meaning when determining whether or not the representation is false or misleading in a material respect (s 52(4)).[153]

A. FALSE OR MISLEADING

The Crown need only prove that a representation is false *or* misleading. The Crown need not prove both.

The terms "false" and "misleading" are distinct concepts and each must be interpreted separately. A representation is false if the representation, properly construed, is incorrect or inaccurate. Put differently, the representation is either correct or it is not.[154] A representation is "misleading" if it conveys an inaccurate or incorrect general impression after all of the circumstances surrounding the representation have been considered. In other words, even if a representation is literally true, it will be misleading if it conveys an inaccurate or incorrect general impression.[155]

151 See *Canada (Commissioner of Competition) v Premier Career Management Group Corp*, *supra* note 130 at para 54.

152 *Bell Mobility Inc v Telus Communications Company*, 2006 BCCA 578 at paras 16-18; *Go Travel Direct.Com Inc v Maritime Travel Inc*, 2009 NSCA 42 at paras 15-17.

153 *Maritime Travel Inc v Go Travel Direct.Com Inc*, 2008 NSSC 163 at para 39, 66 CPR (4th) 61; *Purolator Courier Ltd v United Parcel Service Canada Ltd*, 1995 CanLII 7313 (Ont Gen Div); *Canada (Commissioner of Competition) v PVI International Inc*, 2002 CACT 24, var'd 2004 FCA 197; *R v J Clark & Son Ltd* (1986), 71 NBR (2d) 257, 1986 CarswellNB 195 at para 15 (QB); *R v 359286 Ontario Ltd* (1981), 61 CCC (2d) 383, 1981 CarswellNfld 173 at para 15 (Prov Ct); *R v K Mart Canada Ltd* (1978), 50 CPR (2d) 271, 1978 CarswellNS 415 at para 5 (Co Ct); *R v Westfair Foods Ltd*, 1985 CanLII 2322 at para 14, 5 CPR (3d) 373 (Sask QB).

154 Bill Hearn, "Misleading Advertising and Marketing Practices" in James B Musgrove, ed, *Fundamentals of Canadian Competition Law*, 3rd ed (Toronto: Carswell, 2015) ch 12 at 323.

155 For example, in *Maritime Travel Inc v Go Travel Direct.Com Inc*, *supra* note 153, the court concluded that the general impression of certain advertisements was misleading, even though these advertisements were literally true. The defendant advertised holidays that created the general impression that they were cheaper than those of a competitor (the plaintiff) when the holiday offer was, in fact, time-limited (four days). Furthermore, the plaintiff competitor was matching the defendant's prices.

Note that general impression is discussed more fully below.

B. MATERIALITY

The phrase "in a material respect" refers to the materiality element of the offence under section 52(1). A false or misleading representation is material where an "ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered"[156] or where "it is so pertinent, germane or essential that it could affect the decision to purchase."[157] In other words, a representation is material when it leads a person to "a course of conduct that, on the basis of the representation, he or she believes to be advantageous."[158] As noted, the Commissioner need not prove that any person was deceived or misled (s 52(1.1)(a)).[159]

Materiality does not refer to the value of the product or service to the purchaser.[160] Representations that amount to "puffery"—representations that no reasonable consumer would rely upon—are not sufficient to constitute a materially false or misleading representation.[161] For example, an accused's misrepresentation that it imported lamps "directly from Italy" (the lamps were made in Italy but the accused imported them from Toronto) was not a material misrepresentation because that representation would not affect a consumer's decision to purchase.[162]

C. GENERAL IMPRESSION

The general impression of a representation involves assessing the representation's "entire mosaic" rather than "each tile separately."[163] As classically put, "the buying public does not ordinarily carefully study or weigh each word in an

156 *Commissioner of Competition v Sears Canada Inc*, 2005 CACT 2, 2005 Comp Trib 2 at para 333; *Canada (Commissioner of Competition) v Yellow Page Marketing BV*, *supra* note 138 at para 34.

157 *Apotex Inc v Hoffmann La-Roche Ltd*, *supra* note 137 at para 16; *Canada (Commissioner of Competition) v Yellow Page Marketing BV*, *supra* note 138 at para 34; *Commissioner of Competition v Sears Canada Inc*, *supra* note 156 at para 334.

158 *Application of the Competition Act to Representations on the Internet*, *supra* note 127, s 2.1; *R v Kellys on Seymour Limited*, *supra* note 122 at para 2.

159 See *R v Viceroy Construction Co Ltd*, *supra* note 133; *R v Birchcliff Lincoln Mercury Sales Ltd*, *supra* note 133; *R v Groupmark Canada Ltd*, *supra* note 133; *R v Multitech Warehouse Direct (Ontario) Inc*, *supra* note 133.

160 *Application of the Competition Act to Representations on the Internet*, *supra* note 127, s 2.1; *R v Kenitex Canada Ltd et al* (1980), 51 CPR (2d) 103 (Ont Co Ct). As noted, materiality, instead, refers to the degree to which the purchaser is affected by the representation in deciding whether to purchase the product.

161 *Maritime Travel Inc v Go Travel Direct.Com Inc*, *supra* note 153 at para 39; *Church & Dwight Ltd v Sifto Canada Inc*, 1994 CanLII 7314 (Ont Gen Div); *Telus Communications Company v Bell Mobility Inc*, 2007 BCSC 518 at paras 4 and 19; *R v Stucky*, 2006 CanLII 41523 at para 76 (Ont Sup Ct J); *Mead Johnson Canada v Ross Pediatrics*, 1996 CanLII 8235 (Ont Gen Div); *R v Cheung*, 2011 ABQB 225 at para 137.

162 *R v Sunrise Lighting Distributors (Maritime) Ltd*, 1992 CarswellNS 650 at paras 10-11, 20 WCB (2d) 92 (Prov Ct).

163 *FTC v Sterling Drug, Inc*, 317 F (2d) 669 at 674 (2nd Cir 1963), cited in *R v Imperial Tobacco Products Limited*, 1971 ALTASCAD 44, 4 CCC (2d) 423 at 441.

advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied."[164]

The Supreme Court of Canada has noted that general impression is analyzed from the perspective of the average consumer who is credulous and inexperienced and takes no more than ordinary care to observe that which is staring him or her in the face.[165] In a subsequent decision involving section 74.01(1)(b) of the Act, the civil counterpart to section 52(1), the Superior Court of Justice in Ontario found that the Supreme Court had defined the person considering the representation in three ways: credulous, inexperienced, and a consumer.[166] The Superior Court then took this as a starting point for determining the proper consumer perspective for the purposes of the proceeding before it.[167] Given the case before it, the Superior Court concluded that the consumer perspective in that case was that of a credulous and technically inexperienced consumer of wireless services.[168] It remains to be seen whether in subsequent proceedings under the Act, the trier of fact adopts the Supreme Court's somewhat generic characterization of consumer or sees fit to determine the particular consumer perspective depending on the specific facts before it.

The Bureau regards general impression as recognizing the power of the "sum of the parts" in advertising. According to the Bureau, the general impression test "ensures that the courts consider the overall impression that an advertisement as a whole makes on consumers."[169] The Bureau views the application of the general impression test as particularly important where

- the representation is partially true and partially false, or where the representation is capable of two meanings, one of which is false;[170]
- the representation is literally true but is misleading because it fails to reveal certain essential information;[171] or
- the representation is literally true insofar as the oral or written statements are concerned but the visual part of the representation may create a false impres-

164 *FTC v Sterling Drug, Inc*, *supra* note 163 at 674, quoting *Aronberg v FTC*, 132 F (2d) 165 at 167 (7th Cir 1942) and cited in *R v Imperial Tobacco Products Limited*, *supra* note 163 at 441.

165 *Richard v Time Inc*, 2012 SCC 8 at para 78. The Supreme Court's decision involved Quebec's *Consumer Protection Act* rather than the *Competition Act*.

166 *Canada (Commissioner of Competition) v Chatr Wireless Inc*, 2013 ONSC 5315 at para 128.

167 *Ibid* at para 127.

168 In *Canada (Commissioner of Competition) v Chatr Wireless Inc, ibid*, the Commissioner alleged that Rogers Communications Inc. and Chatr Wireless Inc., in their Canada-wide advertising campaign, had made material false or misleading representations in noting that their wireless services experience "fewer dropped calls than new wireless carriers" and that there should be "no worries about dropped calls."

169 *The Deceptive Marketing Practices Digest*, *supra* note 146 at 6.

170 Canada, Competition Bureau, "Additional Information About the Competition Act" (5 November 2015), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01315.html>.

171 *Ibid*; Canada, Competition Bureau, "False or Misleading Representations" (22 February 2018), s 2.4, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00513.html>.

sion, for example, where it depicts a model that is different from the advertised product.[172]

For example, general impression is tied to the Bureau's approach when it analyzes disclaimers in advertising. Fine print that expands on, or clarifies possible ambiguities in, the main body of an advertisement is unlikely to mislead consumers if the general impression of the advertisement is not otherwise misleading. However, the potential to mislead consumers increases significantly, according to the Bureau, when a disclaimer is used to restrict, contradict, or somehow negate the message to which it relates. If the main body of the advertisement creates a materially false or misleading general impression before any reference is made to a disclaimer, the fine print will unlikely alter that general impression.[173] For example, in a civil consent agreement with a series of related telecommunication companies, the Commissioner concluded that these companies created the general impression that consumers need only pay the advertised monthly price for certain services when in fact consumers were not able to purchase the services at these advertised prices. The Commissioner further concluded that the disclaimers were insufficient to alter the general impression of the representations.[174]

Note that the courts have adopted the Bureau's approach to disclaimers.[175]

D. Penalty

Every person who commits an offence under section 52(1) is guilty of an offence and is liable,

- "on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both" (s 52(5)(a)); or
- "on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both" (s 52(5)(b)).

172 "Additional Information About the Competition Act," *supra* note 170; "False or Misleading Representations," *supra* note 171, s 2.6.

173 *The Deceptive Marketing Practices Digest*, *supra* note 146 at 7. This version of the Bureau's Deceptive Marketing Digest describes the Bureau's complete approach to disclaimers in advertising.

174 *Commissioner of Competition v Bell Canada, Bell Mobility Inc and Bell ExpressVu Limited Partnership* (28 June 2011), CT-2011-005 (Consent Agreement), online: <http://www.ct-tc.gc.ca/CMFiles/CT-2011-005_Consent%20Agreement_1_45_6-28-2011_7559.pdf>.

175 For example, in *Canada (Commissioner of Competition) v Yellow Page Marketing BV*, *supra* note 138 at para 39, a civil proceeding under section 74.01(1)(a), the advertiser (Yellow Page Marketing) faxed to companies forms that gave the general impression that they had been sent by the companies' usual yellow pages supplier. The faxed forms required the companies to update their listing information. The forms contained a disclaimer in fine print noting that any business that returned the faxed forms would be obligated to a two-year contract with Yellow Page Marketing at a cost. The court found that the representations in the faxed forms were materially false or misleading (including a misleading general impression), and that the disclaimer did not reduce its false or misleading nature. See also *Purolator Courier Ltd v United Parcel Service Canada Ltd*, *supra* note 153 at para 48.

VIII. FALSE OR MISLEADING REPRESENTATION THROUGH ELECTRONIC MESSAGES

A. Overview

The *Competition Act* has specific offences that focus on electronic advertising. These provisions came into force on July 1, 2014, pursuant to Canada's Anti-Spam Legislation (CASL).[176] CASL's objective is to "encourage the growth of electronic commerce by ensuring confidence and trust in the online marketplace."[177] CASL amended the Act with a view to enabling the Commissioner to more effectively address false and misleading representations and deceptive marketing practices in the electronic marketplace.

CASL created three offences that focus on electronic messages:

1. false or misleading representations in the sender information or subject matter information of an electronic message (s 52.01(1));
2. material false or misleading representations in an electronic message (s 52.01(2)); and
3. false or misleading representations in locator information, such as URLs and metadata (s 52.01(3)).[178]

These offences represent a departure from a more traditional approach to analyzing representations that focuses on the entirety of the advertisement. These offences compel a compartmentalized analytical approach, focusing on parts of an advertisement. There are a number of other significant features to these provisions. For these offences, the Crown need not prove that the representation was made to the public as it would for the general criminal offence for a false and misleading representation. In fact, an electronic message is considered to have been sent once its transmission has been initiated. It is also immaterial whether the electronic address to which an electronic message is sent exists or whether an electronic message reaches its intended destination. Furthermore, for two of the three offences (under sections 52.01(1) and (3)), the Crown need not prove that the representation is *materially* false or misleading (only that the representation was false or misleading).

False and misleading representation offences through electronic messages are both criminal offences and civil reviewable practices under the Act. These two

176 Bill C-28, *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, 3rd Sess, 40th Parl, 2010 (assented to 15 December 2010), SC 2010, c 23.

177 Regulatory Impact Analysis Statement, *Electronic Commerce Protection Regulations* (4 December 2013), online: <http://fightspam.gc.ca/eic/site/030.nsf/eng/00271.html>.

178 CASL also created counterpart reviewable practices that focus on electronic messages. See Chapter 9 for a discussion of these reviewable practices.

tracks are mutually exclusive (see sections 52.01(8) and 74.16 of the Act). No proceedings may be commenced under section 52.01(1), (2), or (3) against a person against whom an order is sought under the civil reviewable practice sections of the Act on the basis of the same or substantially the same facts (s 52.01(8)). Accordingly, the Commissioner chooses whether to pursue the criminal or civil track with respect to suspected false and misleading representations through electronic messages pursuant to the analytical framework discussed in Section VII.B, earlier in the chapter.

B. Technology-Neutral Language

In aid of enforcement of these offences, the Act contains broad, technology-neutral language that seeks to capture emerging technologies. These technologies include Short Message Services (SMS or text messaging), websites, social media, uniform resource locators (URLs) and other locators, applications, blogs, and Voice over Internet Protocol (VoIP).[179] In this regard, the Act defines elements of the offences as follows:

- **Electronic message:** "a message sent by any means of telecommunication, including a text, sound, voice or image message" (s 2(1)).
- **Sender information:** "the part of an electronic message—including the data relating to source, routing, addressing or signalling—that identifies or purports to identify the sender or the origin of the message" (s 2(1)).
- **Subject matter information:** "the part of an electronic message that purports to summarize the contents of the message or to give an indication of them" (s 2(1)).
- **Locator:** "a name or information used to identify a source of data on a computer system, and includes a URL" (s 2(1)).

C. Specific Elements of the Offence

1. False or Misleading Representation (Sender or Subject Matter Information)

The elements of the offence for a false or misleading representation in the sender information or subject matter information of an electronic message is set out in section 52.01(1) of the Act:

> 52.01(1) No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, knowingly or recklessly send or cause to be sent a false or misleading representation in the sender information or subject matter information of an electronic message.

179 Canada, Competition Bureau, "Frequently Asked Questions About Canada's Anti-Spam Legislation," online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03765.html>.

Accordingly, a person commits an offence under section 52.01(1) when, (1) for the purpose of promoting (directly or indirectly) the supply or use of a product, service, or any business interest, (2) that person (a) knowingly or recklessly (b) sends, causes to be sent, or permits to be made or sent (s 52(1.2)) (c) a false or misleading representation in the sender information or the subject matter information of an electronic message.

The Crown need not prove that any person was deceived or misled (s 52.01(4)).

Under section 52.01(9)(a), an electronic message (as defined) "is considered to have been sent once its transmission has been initiated," and under section 52.01(9)(b), "it is immaterial whether the electronic address to which an electronic message is sent exists or whether an electronic message reaches its intended destination."

As noted, the phrases "sender information" and "subject matter information" are defined in the Act. As a practical matter, this offence captures persons that disguise their identity in the sender or subject matter information of an electronic message, such as an email, in order to imply a personal acquaintance with the recipient of the email in an effort to incentivize the recipient to review the email.[180] It also captures persons seeking to induce a person to open an electronic message through a false or misleading subject line of an email.[181] For example, the subject line of the email may suggest a purpose other than what is in fact sought by the sender—namely, offering to sell a product or service. The subject line of the email may also offer a price for a product or service that is not the true cost of the product or service.[182]

The breadth of the definition of "electronic message" captures virtually all forms of electronic advertising, such as email, social media, and arguably website advertising. Unlike in email, in many forms of social media, such as Twitter, LinkedIn, and Instagram, the distinction between the "subject matter information" and the "electronic message" (i.e., the body of the electronic message) is not apparent.

2. False or Misleading Representation (Electronic Message)

The elements of an offence for a material false or misleading representation in an electronic message are outlined in section 52.01(2):

180 Canada, Competition Bureau, "Introduction: The Competition Bureau and CASL," online: <http://fightspam.gc.ca/eic/site/030.nsf/vwapj/Competition_Bureau_and_CASL-eng.pdf/$FILE/Competition_Bureau_and_CASL-eng.pdf>.

181 *Ibid.*

182 For example, in *Commissioner of Competition v Aviscar Inc, Budgetcar Inc/Budgetauto Inc, Avis Budget Group, Inc and Avis Budget Car Rental, LLC*, CT-2015-001 (a civil proceeding before the Competition Tribunal), the Commissioner relied upon the civil equivalent of section 52.01(2)—section 74.011(1)—pleading that the respondents advertised prices for rental vehicles in the subject line of emails they sent or caused to be sent, but these prices were not attainable by consumers. This proceeding was resolved by way of a consent agreement. See *Commissioner of Competition v Aviscar Inc and Budgetcar Inc/Budgetauto Inc* (2 June 2016), CT-2015-001 (Registered Consent Agreement), online: <http://www.ct-tc.gc.ca/CMFiles/CT-2015-001_Registered%20Consent%20Agreement_82_66_6-2-2016_6072.pdf>.

> (2) No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, knowingly or recklessly send or cause to be sent in an electronic message a representation that is false or misleading in a material respect.

Accordingly, a person commits an offence under section 52.01(2) when, (1) for the purpose of promoting (directly or indirectly) the supply or use of a product or any business interest, (2) that person (a) knowingly or recklessly (b) sends, causes to be sent, or permits to be made or sent (s 52(1.2)) (c) a false or misleading representation in an electronic message in a material respect.

The Crown need not prove that any person was deceived or misled (s 52.01(4)).

Under section 52.01(9)(a), "an electronic message is considered to have been sent once its transmission has been initiated," and under section 52.01(9)(b), "it is immaterial whether the electronic address to which an electronic message is sent exists or whether an electronic message reaches its intended destination."

As a practical matter, this offence captures material false and misleading representations in the body of an electronic message, such as in the body of an email.

3. False or Misleading Representation (Locator)

The elements of an offence for a false or misleading representation in a locator is set out in section 52.01(3):

> (3) No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, knowingly or recklessly make or cause to be made a false or misleading representation in a locator.

Accordingly, a person commits an offence under section 52.01(3) when, (1) for the purpose of promoting (directly or indirectly) the supply or use of a product or any business interest, (2) that person (a) knowingly or recklessly (b) makes or causes to be made (c) a false or misleading representation in a locator.

The Crown need not prove that any person was deceived or misled (s 52.01(4)).

As a practical matter, this offence captures instances where persons use a web address that is false and misleading and that directs a user to a website that the user did not intend to access.[183] A false or misleading locator, such as a URL, may trigger an offence under section 52.01(3) even if the website the user is directed to is not false or misleading.

D. General Elements of the Offences

The following elements apply to offences under sections 52.01(1), (2), and (3) of the Act.

183 For example, the URL looks like that of a noteworthy company, but it is company.net instead of company.com.

1. Persons Captured

Offences under sections 52.01(1), (2), and (3) capture persons who *make* or *send* false and misleading representations, directly and indirectly (s 52(1)), and further capture persons who *permit* a false or misleading representation to be made or sent (s 52(1.2)). Accordingly, the range of persons who may be convicted of these offences is wide.

See, more generally, Section VII.C.1, "Persons Captured," earlier in the chapter.

2. Knowingly or Recklessly

A person must *knowingly or recklessly* send or cause to be sent a false or misleading representation, either in the sender information or subject matter information of an electronic message (s 52.01(1)), in an electronic message (s 52.01(2)), or in a locator (s 52.01(3)), in order to contravene these sections. Accordingly, to prove an offence under these sections, the Crown must prove beyond a reasonable doubt that the person engaged in the impugned conduct and did so knowingly or recklessly (see s 52(1)).[184]

In proving an offence under section 52.01(1), (2), or (3), it is not necessary for the Crown to prove that any person was deceived or misled (s 52(1.1)(a)).[185] Accordingly, the *mens rea* under an offence under sections 52.01(1), (2), and (3) focuses on the *nature* of the representation, not the representation's effect. It is not necessary to prove an intention to deceive or mislead or to prove whether the accused was reckless as to whether any person was deceived or misled.

The *mens rea* under an offence under sections 52.01(1), (2), and (3) may involve proving that the accused had knowledge of the false or misleading character of the representation.[186] It may also involve proving that the accused made the false or misleading representation in spite of knowledge that would lead any reasonable person to conclude that the representation is false or misleading. Wilful blindness has been found to be equivalent to knowledge, and, thus, *mens rea* may also involve proving that the accused was deliberately ignorant about the risk of the representation being false or misleading.[187] The Crown may prove the *mens rea* either as an inference from the nature of the act committed or by additional evidence.[188]

This *mens rea* element of the offences under sections 52.01(1), (2), and (3) is what differentiates these offences from their civil counterpart under sections 74.011(1), (2), and (3).

184 Prior to amendments to the Act in 1999, section 52 of the Act was a strict liability offence and thereby did not require proof of *mens rea*.

185 See *R v Viceroy Construction Co Ltd*, *supra* note 133; *R v Birchcliff Lincoln Mercury Sales Ltd*, *supra* note 133; *R v Groupmark Canada Ltd*, *supra* note 133; *R v Multitech Warehouse Direct (Ontario) Inc*, *supra* note 133.

186 *R v Stucky*, *supra* note 134 at para 120.

187 *Sansregret v The Queen*, *supra* note 117 at 584-86; *R v Hinchey*, *supra* note 117 at paras 112-15.

188 *R v Stucky*, *supra* note 134 at para 120.

3. Purpose of Promoting the Supply or Use of a Product/Service/Any Business Interest

To prove an offence under section 52.01(1), (2), or (3), the Crown must prove beyond a reasonable doubt that the person who made the representation did so for the purpose of promoting the supply or use of a product, service, or any business interest, directly or indirectly.

The phrase "business interest" is not defined in the Act. The term "business," however, is defined in section 2(1) of the Act as including a wide spectrum of for-profit businesses (manufacturing, producing, transporting, acquiring, supplying, storing, and otherwise dealing in articles as well as acquiring, supplying, and otherwise dealing in services) and not-for-profit businesses (raising funds for charitable or other non-profit purposes).

The phrase "business interest" has been referred to as the business interest of the person or persons making the representation.[189] The phrase has also been given a broad meaning. It is not limited to the sales or the marketing or advertising of a product but includes *any* business interest, directly or indirectly.[190] For example, a business interest is not necessarily an interest with the persons who might be misled by the representation.[191]

As a practical matter, this element is not normally difficult to satisfy.

4. False or Misleading

To prove an offence under section 52.01(1), (2), or (3), the Crown must prove beyond a reasonable doubt that the representation is false or misleading. See Sections VII.C.7.a and VII.C.7.c for a discussion of false or misleading representations and general impression, respectively. The discussion applies equally to offences under sections 52.01(1), (2), and (3).

5. Materiality

The Crown need not prove materiality—namely, that the representation is false or misleading *in a material respect*—for an offence under section 52.01(1) (false or misleading representations in the sender information or subject matter information of an electronic message) or under section 52.01(3) (a false or misleading representation in a locator). The Crown is required to prove materiality for an offence under section 52.01(2) (a false or misleading representation in an electronic

189 *Apotex Inc v Hoffmann La-Roche Ltd*, *supra* note 137 at para 14.

190 *R v Birchcliff Lincoln Mercury Sales Ltd*, *supra* note 133 at paras 15-24; *Canada (Commissioner of Competition) v Yellow Page Marketing BV*, *supra* note 138 at para 40; *Canada (Commissioner of Competition) v Premier Career Management Group Corp*, *supra* note 130 at para 27; *R v Park Realty Ltd*, *supra* note 138; *Apotex Inc v Hoffmann La-Roche Ltd*, *ibid* at paras 13-14.

191 For example, in *R v Birchcliff Lincoln Mercury Sales Ltd*, *supra* note 133, the accused was convicted for posting a sign concerning the manner in which it charged for repairs. The company posted the sign to promote its business interests with the vehicle manufacturer and not with the public at large.

message). See Section VII.C.7.b, earlier in the chapter, for a discussion of materiality, which applies equally to an offence under section 52.01(2).

The omission of materiality means that *any* false or misleading representation in the sender information or subject matter information of an electronic message or in a locator may be subject to enforcement action. Accordingly, and as a practical matter, companies should carefully review any marketing or advertising messages delivered through electronic messages, and, in particular, companies should review in isolation representations in the subject line of company emails and other electronic messages.

E. Penalty

Every person who commits an offence under section 52.01(1), (2), or (3) is guilty of an offence and liable

- "on conviction on indictment to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both" (s 52.01(6)(a)); or
- "on summary conviction to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both" (s 52.01(6)(b)).

IX. DECEPTIVE TELEMARKETING

A. Overview

Telemarketing generally refers to the selling of goods or services by telephone and by other means. The definition of "telemarketing" in the Act captures "interactive telephone communications" and "any means of telecommunication," including one-way broadcast telemarketing. This technology-neutral language seeks to capture current technologies, such as telephone communications, as well as emerging technologies, such as text messages, instant messages, and message conveyed through social media.

Section 52.1 of the Act creates two strict liability telemarketing offences. Broadly speaking, one offence addresses a telemarketer's failure to make upfront disclosure (s 52.1(2)), whereas the other offence prohibits a telemarketer from engaging in deceptive telemarketing practices (s 52.1(3)). Both of these offences are described more fully below. There is no civil equivalent for these two telemarketing offences.[192]

When analyzing conduct that may be captured by section 52.1, one must have regard to section 52.1, the correspondence, jurisprudence, and the Bureau's enforcement guidelines for telemarketing,[193] all of which are described more fully below.

192 However, pursuant to section 74.03(1)(d), a representation that is made by any means of telecommunication to a person as ultimate user is a representation for the purposes of section 74.01 (misrepresentations to the public) and section 74.02 (representations as to reasonable test and publication of testimonials).

193 Canada, Competition Bureau, *Telemarketing—Section 52.1 of the Competition Act*, Enforcement Guidelines (16 October 2009), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03123.html>.