

## MAKING SENSE OF THE SHIFT IN PARADIGM ON CARTEL ENFORCEMENT: THE CASE FOR APPLYING A DESERT PERSPECTIVE

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Soon after the coming into force of changes to the criminal provisions in the *Competition Act*, the commissioner of competition signalled that cartel enforcement would start to reflect a new mindset, one that treats cartels as truly criminal. But while the impetus for this shift in paradigm is well-intentioned—to give effect to a stronger criminal law mandate following the amendments—it is poorly explained, because its defenders continue to refer to the predominant deterrence rationale used in competition law, even though applying a harm-based view of crime and punishment to cartels fails to explain why criminal enforcement is needed.

I believe that applying a desert perspective offers a compelling alternative explanation for this shift toward treating cartels as truly criminal. Drawing on the work of Arthur Ripstein, I offer an account of cartel enforcement that focuses on the inherently wrongful disregard for competition that characterizes cartels. I argue that seeing cartels as a particularly serious misuse of the competitive system, one that is so fundamentally at odds with the notion of a competitive marketplace that it cannot be tolerated, is what justifies recourse to the consistent and uniquely public response of the criminal law. Seen in this light, bringing a more criminal law-oriented mindset to bear on cartel enforcement makes sense in way that this shift in paradigm does not when justified in deterrence terms.

Peu de temps après l'entrée en vigueur des modifications apportées aux dispositions pénales de la *Loi sur la concurrence*, le commissaire de la concurrence a signalé que la lutte contre les cartels commencerait à refléter un nouvel état d'esprit considérant les cartels comme étant véritablement criminels. Mais, bien que le but de ce changement de paradigme — donner effet à un mandat plus fort suite à ces amendements — est bien intentionné, il demeure mal expliqué. En effet, il continue d'être justifié en fonction de l'argument de la dissuasion utilisé dans le droit de la concurrence, même si l'application d'une vue fondée sur le préjudice de la criminalité et la punition des cartels ne parvient pas à expliquer pourquoi l'application des peines est nécessaire.

Nous croyons que l'application d'une perspective basée sur le mérite offre une explication alternative convaincante à cette évolution vers le traitement des cartels comme étant véritablement criminel. En nous appuyant sur les travaux d'Arthur Ripstein, nous proposons un récit de la lutte contre les cartels qui se concentre sur le mépris envers la concurrence qui est inhérent aux cartels. Je soutiens que concevoir les cartels comme constituant un abus particulièrement grave du système concurrentiel, un abus fondamentalement en contradiction avec la notion d'un marché concurrentiel à un point tel qui ne peut être toléré, justifie le recours à la réponse cohérente et singulièrement publique du droit pénal. Vu sous cet angle, appréhender l'application des peines relatives aux cartels dans un état d'esprit plus orienté vers le droit criminel est plus logique que lorsque justifié en termes de dissuasion.

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## Introduction

New conspiracy provisions came into force in March of this year, and we are seizing this opportunity to begin the admittedly long process of shifting the paradigm of our criminal programme.

In a nutshell, relieved of the prior economic effects requirement, which was not suited to a standard of proof beyond a reasonable doubt, we are working to move from a jurisdiction often disproportionately focused on pleas—especially with respect to international cartels—to one that is appropriately aggressive in using our new tools to ensure that consumers and those who carry on business in Canada can be confident that the criminality of this activity is recognized, and the law will be enforced with vigour.<sup>1</sup>

These words, spoken by then Commissioner of Competition Melanie Aitken<sup>2</sup> in the autumn of 2010, mark the beginning of a concerted communications effort on the part of the commissioner to signal a change in the Competition Bureau's (Bureau's) approach to the enforcement<sup>3</sup> of criminal provisions in the *Competition Act* (the *Act*).<sup>4</sup> This shift follows the

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<sup>1</sup> Melanie L Aitken, Address (delivered at the CBA Fall Competition Law Conference, Gatineau, 30 September 2010), online: Competition Bureau <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00138.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00138.html)> [Aitken, "Speech of 30 September 2010"].

<sup>2</sup> Between the writing and final publication of this article, Commissioner Aitken announced that she would leave her post on 21 September 2012, more than eighteen months before the end of her five-year mandate. At the time of publication, though no successor had been named, there was nothing to suggest that the shift in paradigm regarding cartel enforcement initiated during Commissioner Aitken's tenure would not continue after her departure.

<sup>3</sup> Over the course of the 2009-2012 period since the enactment of the 2009 amendments, the former commissioner of competition, Melanie L. Aitken, gave fifteen speeches in several different venues, most recently at the Canadian Bar Association 2012 Competition Law Spring Forum in Toronto on 2 May 2012 (Melanie L Aitken, "Best Practices in a Time of Active Enforcement" (delivered at the Canadian Bar Association Competition Law Section 2012 Competition Law Spring Forum, Toronto, 2 May 2012), online: Competition Bureau <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00138.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00138.html)>). In each public address, Commissioner Aitken discussed the amendments and made at least a passing reference to the new approach to criminal enforcement that she believes flows naturally from them. In this article, I will refer to specific speeches by date, which is how they are listed online (under the heading *Speeches*): Competition Bureau <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00138.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00138.html)>.

I am fully cognizant of the fact that "enforcement" is not done by the Bureau per se, in that prosecutions of competition offences and the exercise of prosecutorial discretion over them are the jurisdiction of federal prosecutors from the Public Prosecution Service of Canada (PPSC). See Part I.A.3, below.

<sup>4</sup> By "criminal provisions", I mean the offences set out in part VI of the *Competition Act* that target naked restraints of trade, referred to by the Bureau as "cartel behaviour" (price-fixing, market allocation, supply restrictions, and bid rigging): see *Competition*

coming into force on 12 March 2010 of reforms to competition law that were passed in 2009.<sup>5</sup> In particular, Commissioner Aitken indicated that she believes these amendments provide the commissioner and the Bureau with a stronger mandate for criminal enforcement against cartels, one that supports the adoption of a tougher enforcement attitude toward criminal cartel behaviour.<sup>6</sup>

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*Act*, RSC 1985, c C-34, ss 45-47 [*Act*]. All references to the *Act* are to its current provisions, unless otherwise indicated.

- <sup>5</sup> See *Budget Implementation Act, 2009*, SC 2009, c 2 [*2009 Budget Act*]. A one-year delay applied to the coming into force of the transformation of the conspiracy offence in section 45, as it existed, into two new provisions: section 45 (*Act, supra* note 4), which would apply only to the limited subset of conduct that could be said to be per se anti-competitive (*2009 Budget Act, supra* note 5, s 410), and a new civil provision, section 90.1 (*Act, supra* note 4), which would apply to all other collaborations and would allow for the consideration of procompetitive effects of collaboration, specifically efficiency gains (*2009 Budget Act, supra* note 5, s 429).

The 2009 amendments generally track the recommendations made by the Competition Policy Review Panel in its June 2008 report: Canada, Competition Policy Review Panel, *Compete to Win: Final Report, June 2008* (Ottawa: Publishing and Depository Services, 2008), online: Competition Policy Review Panel <[http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h\\_00040.html](http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h_00040.html)> [*Compete to Win*]. The panel saw these changes as a fine tuning of a reasonably effective competition regime. Other than the change to the conspiracy provision, the amendments modified the merger review process, repealed the criminal pricing provisions (predatory pricing, price discrimination, geographic price discrimination, and promotional allowances), increased the potential penalties applicable to the offences in part VI of the *Act*, added administrative monetary penalties for certain noncriminal anticompetitive practices, added certain remedies and rights of action in connection with civil reviewable matters, and increased penalties for the obstruction and non-compliance provisions of the *Act*. These modifications are summarized in a Competition Bureau document: Competition Bureau Canada, *A Guide to Amendments to the Competition Act* (22 April 2009), online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03045.html>> [*Guide to Amendments*]. For a more detailed description of the amendments, see Mistrale Goudreau & Jennifer Quaid, “De quelques développements récents en droit de la concurrence” (2010) 22:2 CPI 317 (especially at 318-30).

- <sup>6</sup> See e.g. Competition Bureau Canada, *Annual Report of the Commissioner of Competition for the Year Ending March 31, 2010* (Gatineau: Competition Bureau, 2012) at 12, online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03426.html>> [*Annual Report 2009-2010*]; *Guide to Amendments, supra* note 5 at 1; Melanie L Aitken, Address (delivered at the CBA Spring Conference, Toronto, 3 May 2011), online: Competition Bureau <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00138.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00138.html)> [Aitken, “Speech of 3 May 2011”] (referring to delivering on an enhanced and reinvigorated mandate); Melanie L Aitken, Address (Keynote Speech delivered at the Canadian Bar Association 2011 Fall Conference, Hilton Lac-Leamy, Que, 6 October 2011) [Aitken, “Speech of 6 October 2011”] (describing how the Bureau is now operating under a “coherent” framework with “more powerful” criminal provisions because of the amendments); Melanie L Aitken, Address (delivered at the 2011 Competition Law and Policy Forum, Northwinds Professional Institute, Cambridge, Ont, 24 February 2011), online: Competition Bureau <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00138.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00138.html)> [Aitken, “Speech of 24

Commissioner Aitken provided little explanation either for her apparent confidence in this new mandate or for why it required a paradigm shift. All she said, without a lot of specifics, is that the combination of the two (i.e., the paradigm shift and new mandate) will make enforcement more “effective”. What justifies this shift, and how is it supposed to make enforcement more effective?

From the limited way it has been described, the shift in paradigm points to a shift in the *mindset* that the Bureau will bring to the scrutiny of cartel cases: one that sees cartels as unambiguously *criminal* and thus appropriately subject to criminal law.<sup>7</sup> However, though the post-amendment legislative division between civil and criminal collaborations among competitors is the ostensible reason for the shift, the current characterization of what makes cartels criminal is essentially unchanged, remaining focused on the potential harm they can cause.<sup>8</sup> Not surprisingly, the pre-amendment view that the purpose of criminal enforcement is to reduce that harm through deterrence is also unchanged. Given how it was framed, the suggestion that this paradigm shift will make enforcement more “effective” should be taken to mean that the Bureau intends to do something to further a deterrence objective.

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February 2011”] (importance of enforcement in order to deliver on the enhanced mandate flowing from the amendments); Aitken, “Speech of 30 September 2010”, *supra* note 1 (“[w]e have laid a strong foundation for the effective enforcement of our new provisions”); Melanie L Aitken, Speaking Notes (delivered at Canadian Bar Association, Competition Law Section, 2009 Spring Forum, Toronto, 12 May 2009), online: Competition Bureau <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00138.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00138.html)> (“[w]e believe these amendments create a more effective criminal enforcement regime”). The commissioner’s submissions to the Senate Banking Committee following the enactment of the amendments also convey this view: *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, 40th Parl, 2nd Sess, No 7 (13-14 May 2009) at 12-16 [Aitken Submissions to Senate Banking Committee].

- <sup>7</sup> See e.g. *ibid* at 12-13; Aitken, “Speech of 6 October 2011”, *supra* note 6 (“[c]artels and bid-rigging continue to be our focus, given the seriousness of this conduct, and its unambiguously harmful nature”; “pernicious cartels”); Aitken, “Speech of 24 February 2011”, *supra* note 6 (referring to cartels as the most serious forms of anticompetitive activity and to the need to be appropriately aggressive toward the criminal nature of the conduct at issue so that “Canad[ians] can be confident that the criminality of [cartels] is recognized”); Melanie L Aitken, Address (Keynote Dinner Address delivered at the 2010 Competition Law and Policy Conference, Cambridge, Ont, 3 February 2010), online: Competition Bureau <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00138.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00138.html)> [Aitken, “Speech of 3 February 2010”] (referring to “naked” restraints on trade as egregious). Earlier speeches and annual reports also use similar language.
- <sup>8</sup> The cartel does not have to be successful at achieving its goals. The crime lies in agreeing to engage in one of the per se anticompetitive acts enumerated in the section: see Competition Bureau Canada, *Competitor Collaboration Guidelines* (Gatineau: Competition Bureau, 2009) at 6, online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html>> [*Collaboration Guidelines*].

However laudable the objective of harm prevention may be, justifying the shift in the enforcement mindset against cartels in these terms is problematic. First, criminal and civil collaborations are not easily distinguished on the basis of harm. How can the shift justify labelling cartels as more firmly “criminal” without a solid basis on which to set them apart as a special kind of anticompetitive behaviour? Second, emphasizing deterrence does not convincingly explain why we should respond to cartels with criminal enforcement. Finally, a deterrence narrative sets up unrealistic expectations as to the kind of impact that the shift may actually have. There is at best only a weak indication that *because of the shift* there will be any meaningful change to those outcomes thought to matter most to deterrence (i.e., more cartels being discovered, more convictions, or higher penalties).

So is the shift ill-advised and doomed to fail? If, as I believe, the crux of the matter is not the absence of a rationale for the shift but rather the inability of the current rationale for criminal enforcement to convincingly explain why there are now stronger reasons for subjecting cartels to the criminal law, there is a powerful theoretical foundation available to support the shift. But it comes from a relatively unexplored source in criminal competition law: desert theory.

Desert offers compelling explanations for a new emphasis on cartels as truly criminal because of the way it links the special attributes that set cartels apart from other anticompetitive conduct with a general rationale for criminal enforcement. I believe that these explanations allow us to see the shift in attitude toward cartels as embodying a different perspective on criminal enforcement, one that is informed primarily by the goal of upholding competition rather than that of reducing the incidence of economic harm.

This article is divided into two parts. Part I explores the disconnect between the impetus for the shift and the current deterrence-based rationale for criminal enforcement. As an overview of the current enforcement context shows, the shift makes most sense when seen as a change in attitude built on institutional confidence that there is a stronger basis on which to treat cartels as criminal than there was before the amendments. However, the existence of this stronger basis does not follow from the reasons currently offered. This disconnect opens the door to considering whether a different general justification for criminal enforcement might offer another way of thinking about cartels that does support the view that there is a stronger criminal law mandate providing the impetus for the shift.

In Part II, I use the particularly rich theoretical framework of Arthur Ripstein, built around a central concept of “fair terms of interaction”, to develop this alternate rationale. Adapting Ripstein’s concepts, I show that what distinguishes cartels from other collaborations is not the harm that

they cause (as would be required by a deterrence-based rationale) but rather the fact that they are a deliberate attempt to avoid the burdens of a competitive system while still reaping its benefits. It is the wrongfulness of this deliberate choice that places cartels outside the bounds of acceptable behaviour for market participants.

Thinking of cartels in this way explains why *punishment*, a special form of state response, is justified. By signalling that the deliberate disregard for the competitive system will not be tolerated, punishment conveys a public commitment to consistently uphold the rules of competition for the benefit of all. This in turn maintains confidence in the robustness of the competitive system.

Against this backdrop, the shift in paradigm can influence enforcement for the better if it presents its new criminal law mindset as a principled perspective from which to undertake efforts to uphold competition against the particular threat posed by cartels.

Before going any further, I should stress that this article does not advocate the elimination of deterrence as an objective of punishment, either in general criminal law or in competition law. It merely places it in a secondary position, at least as regards the question of a general justification for punishment of cartels. Though it is beyond the scope of this article, there is little doubt that deterrence still has a role to play, notably in the selection of the type and quantum of punishment, and in how it is distributed.<sup>9</sup> In addition, though deterrence-based justifications for criminal competition enforcement have tended to draw on economic analysis for support, I do not believe that my analysis is inconsistent with the idea that competition law is directed at economic activity and economic actors. Rather, I argue that, in the context of justifying the adoption of an attitude that cartels are truly criminal, focusing on the reduction of the economic harm that might result is not as convincing a rationale for punishment as is promoting and protecting the fairness of the competitive system from those who would misuse it in a criminally wrongful way. I leave to others the consideration of whether and how the idea that punishment

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<sup>9</sup> One example of a distribution-related issue is whether it is better, from a crime-prevention point of view, to punish individual or corporate persons for crimes. Though beyond the scope of this article, this point has received considerable attention in the United States, especially among law and economics scholars such as Jennifer Arlen and Reinier Kraakman ("Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes" (1997) 72:4 NYUL Rev 687). There is still considerable debate about the usefulness of corporate liability and punishment in general, not just in competition law. My own view is that it is useful both in competition law and in other areas: see Jennifer A Quaid, "The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis" (1998) 43:1 McGill LJ 67.

can serve to uphold the competitive system might enhance existing economic models of criminal cartel behaviour.

## I. Well-Intentioned but Badly Explained: Why the Shift Needs a Different Justification

In this section, I explain why a deterrence-based narrative does not convincingly support the Bureau's claim that the shift in enforcement attitude gives effect to a stronger criminal law mandate, flowing from the amendments.

To put this shift in context and to show that it is worthy of attention, I begin with a brief description of the *Act* and how its criminal provisions are enforced. I then examine the claim that the way in which the amendments changed the scope of the criminal provisions strengthens the criminal enforcement mandate, creating the impetus for the shift. I find, however, that the post-amendment focus on cartels tells us only that a clearer line between criminal and other collaborations has been drawn. It does not tell us what it is about cartels that makes them criminal, nor does it explain why criminal enforcement is the appropriate response to them. To answer these questions, we need to consider the general justification offered to explain recourse to the criminal law as a means to combat cartels, which at present is a deterrence-based rationale. When looked at closely, this rationale neither convincingly distinguishes cartels from other anti-competitive collaborations, nor does it provide a compelling reason for using criminal punishment against them. Moreover, even if it did, it is hard to see how a *shift in mindset* might contribute to those aspects of enforcement associated with prevention of harm through deterrence. I conclude by suggesting that the failure of the deterrence rationale is not fatal to the success of the shift so long as the latter can be reimagined in terms of a different general justification for recourse to the criminal law.

### A. *Well-Intentioned: How and Why the Shift Fits into Criminal Competition Enforcement*

The shift in paradigm has been described as a change in enforcement mindset. In this section, I look more closely at what that means when considered against the backdrop of the larger context of criminal competition enforcement. Where the shift fits in this picture gives us a sense of what it can really contribute to the pursuit of criminal enforcement objectives.

#### 1. The *Competition Act* and the Overall Purpose of Enforcement

Any discussion of criminal competition enforcement must begin with the *Competition Act*. As the primary source of competition legislation, the *Act* applies to a wide range of potentially "anticompetitive" behaviour,



from price-fixing agreements and bid rigging, to marketing and pricing practices, selling arrangements, abuse of a dominant position, and mergers. It also contains provisions that give the Competition Bureau investigative powers and that direct compliance with orders made under the *Act*.<sup>10</sup>

All of these provisions are knitted together by the primary goal of maintaining and encouraging competition, as set out in the purpose clause of the *Act*:

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.<sup>11</sup>

The structure of the provision reflects the view that sanctioning anti-competitive behaviour is ultimately directed at the protection of the competitive character of the economic system, a system presumed to be the best means of achieving a variety of possible good ends.<sup>12</sup> The four policy

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<sup>10</sup> See part II, “Administration” (*Act*, *supra* note 4, ss 7-29.2), and part VII, “Other Offences” (*ibid*, ss 64-74), of the *Act*. The *Act* also sets out the process and conditions under which certain transactions must be brought to the attention of the commission of competition: see part IX, “Notifiable Transactions” (*ibid*, ss 108-24).

<sup>11</sup> *Ibid*, s 1.1 [emphasis added].

<sup>12</sup> *Compete to Win* (*supra* note 5 at 58) refers to the importance of the competitive process, especially in connection with the criminal provisions of the *Act*. The Bureau refers to the basic assumption that competition is a means to good ends in the description of its mission in enforcing the *Act*: Competition Bureau Canada, *Our Organization: What Is the Competition Bureau?*, online: Competition Bureau <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00125.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00125.html)> [*What Is the Competition Bureau?*]. G. Bruce Doern, in his insightful but sadly unpublished 1993 study of Canadian competition policy, also finds that Canada falls into the “competition as means” category, like the United States: “Canadian Competition Policy Institutions and Decision Processes in Comparative Perspective”, Study Prepared for the Bureau of Competition Policy, (September 1993) at 15 [unpublished, on file with the author]. Some academic commentators believe that economic efficiency should be given greater weight, though they acknowledge that this is not necessarily how the *Act* has been applied: see e.g. Thomas W Ross, “Introduction: The Evolution of Competition Law in Canada” (1998) 13:1-2 *Review of Industrial Organization* 1 at 9; Patrick Hughes & Margaret Sanderson, “Conspiracy Law and Jurisprudence in Canada: Towards an Economic Approach” (1998) 13:1-2 *Review of Industrial Organization* 153 at 160-63 (the pre-amendment *PANS* analysis of section 45 (for a discussion of the *PANS* judgment, see *infra* notes 15-19 and accompanying text) could accommodate some consideration of efficiencies in terms of the objective intent in forming the conspiracy, though the reasons in *PANS* do not support the application of a total welfare approach). By contrast, Tim Hazledine (“Rationalism Rebuffed? Lessons from Modern Canadian and New Zealand Competition Policy” (1998) 13:1-2 *Review of*

objectives enumerated in the latter part of the purpose clause identify the kind of public benefits that competition might be expected to produce, though it is accepted that they cannot be pursued to the same extent in all circumstances and may in some cases conflict.<sup>13</sup>

The primordial role of maintaining and upholding competition is particularly evident in the context of the criminal provisions. As the Competition Policy Review Panel observed in its 2008 review of competition policy:

These forms of illegal collaboration between competitors are particularly damaging to the *competitive process* because they reduce the normal economic incentives created by competitive markets to reduce costs and innovate, key factors that influence productivity.<sup>14</sup>

Court decisions have expressed a similar view.<sup>15</sup> They refer to the fundamental importance of protecting competition and the seriousness with

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Industrial Organization 243 at 243-45) argues that, despite what neoclassical economists might have wished, the efficiencies view of competition law has not prevailed in Canada.

<sup>13</sup> For an excellent and succinct summary of the inherent contradictions in the policy objectives set out in section 1.1 and the challenges of developing a competition policy that balances them appropriately, see Competition Bureau Canada, *Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice* by J Anthony VanDuzer & Gilles Paquet (22 October 1999), Part I, online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01256.html>> [*VanDuzer-Paquet Report*]. The majority decision in *Canada (Commissioner of Competition) v. Superior Propane Inc. (C.A.)* (2001 FCA 104 at paras 90, 98-109, [2001] 3 FC 185 [*Superior Propane*]) also highlights the contradictions in the objectives set out in section 1.1. Ross (*supra* note 12 at 9) suggests that conflict is possible, though he is less definitive.

<sup>14</sup> *Compete to Win*, *supra* note 5 at 58 [emphasis added].

<sup>15</sup> See e.g. *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at 649-50, 93 DLR (4th) 36 [PANS]; *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154, 84 DLR (4th) 161 [*Wholesale Travel*, cited to SCR] (both Chief Justice Lamer, in his dissent (at 190-91), and Justice Cory, in his majority reasons (at 222-23), refer to the primary purpose of the *Act* as the protection of competition); *Aetna Insurance v R* (1977), [1978] 1 SCR 731 at 737-39, 75 DLR (3d) 332, Laskin CJ, dissenting, but not on this point [*Aetna*]; *Howard Smith Paper Mills Limited v R*, [1957] SCR 403 at 409-11, 8 DLR (2d) 449 [*Howard Smith Mills*]; *Stinson-Reeb Builders Supply v R*, [1929] SCR 276 at 280, [1929] 3 DLR 331. A slight nuance appears in the recent decision of the Ontario Court of Appeal in *R v. Stucky* (2009 ONCA 151, 303 DLR (4th) 1 [*Stucky*]). While confirming that the overall objective of the *Act* is to promote vigorous and fair competition, the court suggests (drawing on a remark made by Chief Justice Lamer in *Wholesale Travel* (*supra* note 15 at 190-91) regarding the purpose of a reverse onus in the misleading advertising provisions) that, in the context of misleading advertising, there is a narrower, two-pronged objective of protecting consumers and preventing businesses that use misleading representations from reaping the benefits of those representations (*Stucky*, *supra* note 15 at para 56). In *Superior Propane* (*supra* note 13 at paras 113-29), the majority considered the purpose clause but was focused on whether, in the specific context of merger review, section 96 of the *Act* gives precedence to economic efficiency over the other effects of competition set out section 1.1, rather than focussing on the general purpose of the *Act*. Recent lower court decisions have made reference to the purpose

which significant attacks on it ought to be treated.<sup>16</sup> They also stress the inherently *public* benefit of competition itself. Justice Gonthier, writing for the majority in *PANS*, described the underlying policy interests that justify the cornerstone offence of conspiracy,<sup>17</sup> quoting and adding to remarks made in *Howard Smith Mills*:

The statute proceeds upon the footing that the prevention or lessening of competition *is in itself an injury to the public*. It is not concerned with public injury or public benefit from any other standpoint.<sup>18</sup>

Considerations such as private gains by the parties to the agreement or counterbalancing efficiency gains ... lie therefore outside of the inquiry under s. 32(1)(c) [now 45(1)(c)]. *Competition is presumed by the Act to be in the public benefit*. The only issue is whether the agreement impairs competition to the extent that it will attract liability.<sup>19</sup>

If the primary concern of competition legislation is to protect competition itself, and not to obtain specific effects that might flow from competition, competition can be compared to the idea of a level playing field—one where all participants strive to succeed, but within an agreed-upon sphere bounded by certain rules. Individual success or failure (or indeed the ex-

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clause when stressing the importance of protecting competition, especially against cartel activity: see *R c Lapointe-Cabana*, 2011 QCCS 2798 at para 9 (available on CanLII) [*Lapointe-Cabana*]; *R c Dubreuil*, 2009 QCCS 5816 at para 13 (available on CanLII) [*Dubreuil*]; *R c Leblond*, 2008 QCCS 6751 at para 26 (available on CanLII) [*Leblond*].

<sup>16</sup> In *PANS* (*supra* note 15 at 649), Justice Gonthier stated, “The prohibition of conspiracies in restraint of trade is the epitome of competition law. ... [It] is not just another regulatory provision. It definitely rests on a substratum of values.” In *Aetna* (*supra* note 15 at 736), Chief Justice Laskin also stressed that the public interest in prosecuting conspiracies lay in protecting *competition*, which he described as “the ultimate good in a market economy.” More recently, a similar tone was used in *Canada (Director of Investigation and Research) v. Southam Inc.* ([1997] 1 SCR 748, 144 DLR (4th) 1 [*Southam* cited to SCR]). Though it was a decision regarding mergers (a civil matter), Justice Iacobucci referred to the *evil* at which competition law is directed: “The evil to which the drafters of the *Competition Act* addressed themselves is substantial lessening of competition” (*ibid* at 789 [underlining added, italics in original]). The term “substantial” is a qualifier in section 92 of the *Act* (which deals with mergers). Prior to the 2009 amendments, section 45 had a similar limitation—it prohibited only those agreements that, if implemented, would lessen competition “unduly”. Now, the amended section 45 prohibits anticompetitive agreements outright, though the agreements falling within its ambit are much more narrowly circumscribed.

<sup>17</sup> The offence, set out in section 45 of the *Act*, was characterized as “one of the pillars of the Act” in *PANS* (*supra*, note 15 at 648). See also *ibid* at 657.

<sup>18</sup> *Howard Smith Mills*, *supra* note 15 at 411, cited in *PANS*, *supra* note 15 at 649 [emphasis added].

<sup>19</sup> *PANS*, *supra* note 15 at 649-50 [emphasis added]. See also *Aetna*, *supra* note 15 at 736-39 (where Chief Justice Laskin reviews a number of judicial precedents, including *Howard Smith Mills*, on the irrelevance of public benefit to assessing conspiracy).

tent to which the market is efficient)<sup>20</sup> does not matter so long as the basic parameters of the competitive system are respected. The provisions of the *Act* set out the legal rules that establish those basic parameters, which one might call the bounds of acceptable behaviour by participants in a competitive economy. So long as those boundaries are respected, participants have the freedom to conduct their affairs in the way that they judge is best. It is assumed that allowing participants a broad freedom to optimize their interests is the best way to make everyone better off.<sup>21</sup>

The way in which the *Act* provides for competition to be maintained differs, however, depending on whether the “anticompetitive” behaviour is an offence in relation to competition (part VI of the *Act*) or a reviewable matter (parts VII.1 and VIII). The latter are enforced through noncriminal procedures and are subject to a number of remedies.<sup>22</sup> The proceedings are usually “public”, but only in the sense that the dominant mode of enforcement is via proceedings brought by the Bureau before the Competition Tribunal.<sup>23</sup> Reviewable matters are not outright prohibitions on the commercial practices within their scope, but rather, they set out when these practices may be challenged as actually or potentially anticompetitive. The provisions fall into one of two forms: either the behaviour or practice is subject to approval, which in addition to any formal require-

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<sup>20</sup> In other words, so long as the conditions conducive to efficiency exist, it is not the role of competition law to actively manage the achievement of these efficiencies. Commissioner Aitken said as much when discussing the amendments before the Senate Banking Committee (ensuring that markets are competitive and honest so that “efficiency and innovation are fostered”): see *Aitken Submissions to Senate Banking Committee*, *supra* note 6 at 12.

<sup>21</sup> See *ibid* at 13-14.

<sup>22</sup> These remedies are not restricted to damages. They can include orders to do certain things or to abstain from certain activities: see e.g. *Act*, *supra* note 4, ss 74.1(1)(a), 74.1(1)(b), 75, 76(2), 77(2), 77(3), 79(1), 81(1), 90.1(1). Following the 2009 amendments, the Competition Tribunal may also impose an “administrative monetary penalty” in certain cases: see e.g. *ibid*, ss 74.1(1)(c), 79(3.1). The *Act* specifies that the purpose of this kind of penalty is not, however, to punish: see e.g. *ibid*, ss 74.1(4), 79(3.3). Part VII.1 of the *Act* (“Deceptive Marketing Practices”) provides for a range of “administrative remedies” (see *ibid*, ss 74.1-74.111), including permanent or temporary orders and administrative monetary penalties.

<sup>23</sup> Applications under most provisions in parts VII.1 and VIII can be brought only by the commissioner. Section 103.1 sets the conditions under which a person may apply to the tribunal for permission to make an application under section 75, 76, or 77. Section 9 provides the conditions under which six adult Canadian residents may apply to the commissioner to commence an inquiry into alleged non-compliance with an order (paragraph 9(1)(a)), civil reviewable behaviour (paragraph 9(1)(b)), or criminal behaviour (paragraph 9(1)(c)). Section 36 of the *Act* provides that a private party may bring an action to recover loss or damage caused by anticompetitive behaviour contrary to any of the rules on criminal offences in part VI or resulting from the failure of a person to comply with an order of the Competition Tribunal or a court. This kind of action is still infrequently brought in Canada.

ments, means that it cannot lessen competition unduly (e.g., mergers<sup>24</sup> and specialization agreements<sup>25</sup>), or the practice is permitted unless it has an unpermitted effect on competition<sup>26</sup> (most other matters).<sup>27</sup> Depending on the nature of the reviewable matter, otherwise “anticompetitive” conduct will not be subject to an order by the tribunal under certain circumstances.<sup>28</sup> The basic rationale behind these provisions is that, for some business practices, it may be relevant to consider whether there are positive effects (usually efficiency gains) that mitigate any negative effects on competition itself.<sup>29</sup>

The provisions that subject anticompetitive behaviour to criminal sanction are closer to outright prohibitions—they do not require proof of anticompetitive effect, nor do they permit a defence on the basis that the harm caused may be outweighed or offset by benefits such as efficiency

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<sup>24</sup> See *Act*, *supra* note 4, s 92.

<sup>25</sup> See *ibid*, s 86.

<sup>26</sup> This effect is not described in the same way for all provisions, which makes sense in light of the diversity of conduct covered. Sections 75 and 76 (refusal to deal, price maintenance) refer to “an adverse effect on competition” (*ibid*, ss 75(1)(e), 76(1)(b)); section 77 (exclusive dealing, tied selling, market restriction) refers to certain effects of the practice where “competition is or is likely to be lessened substantially” (*ibid* s 77(2)). See also *ibid*, s 77(3); sections 78 and 79 (abuse of a dominant position) require the conjunction of market power, the practice of anticompetitive acts, and a substantial lessening or prevention of competition (*ibid*, s 79(1)); sections 80 and 81 (delivered pricing) refer to the “deni[al of] an advantage [to a customer or potential customer] that would otherwise be available to him in the market” (*ibid*, s 81(1)).

<sup>27</sup> The deceptive marketing practices in part VII.1 are different. They cue off whether the practice is false or misleading in a material way: see *ibid*, ss 74.02-74.19.

<sup>28</sup> See e.g. *ibid*, s 96 (which prevents an order from being made against a merger that is otherwise anticompetitive [under the terms of section 92] where the parties can show that the merger will generate efficiency gains that outweigh and offset those anticompetitive effects). Other examples can be found in parts VII.1 and VIII: see *ibid*, ss 74.04(3), 74.05(2), 74.07(1) (due diligence and corrective measures can prevent orders being made against marketing practices that would otherwise be considered deceptive); *ibid*, ss 76(9), 77(4), 81(2), 81(3) (circumstances where the prohibited pricing behaviour can be permitted).

<sup>29</sup> This is especially true in merger review: see Competition Bureau Canada, *Merger Enforcement Guidelines* (Gatineau: Competition Bureau, 2011), online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html>> at 37-45. The particular importance of the goal of economic efficiency in the context of merger review was confirmed in the majority reasons of the Federal Court of Appeal in *Superior Propane* (*supra* note 13 at paras 113-29) and its subsequent decision in *Canada (Commissioner of Competition) v. Superior Propane Inc. (C.A.)* (2003 FCA 53 at para 16, [2003] 3 FC 529 (confirming the manner in which the Competition Tribunal applied the legal test under section 96 set out in the 2001 *Superior Propane* case)), though the court made clear that this was not the same as endorsing a total surplus approach to the assessment of efficiency gains.

gains.<sup>30</sup> Since the amendments, the offences in this part are essentially directed at different forms of cartel behaviour: conspiracy to engage in certain naked restraints of trade,<sup>31</sup> bid rigging,<sup>32</sup> and two specialized types of conspiracy.<sup>33</sup> The sharper focus on cartels can be attributed to two major substantive changes to part VI: the transformation of section 45 into a *per se* offence directed at agreements for price-fixing, market allocation, and output restriction,<sup>34</sup> and the elimination of the pricing offences.<sup>35</sup> Though intentional or recklessly deceptive marketing practices remain in part VI,<sup>36</sup> they are enforced entirely separately from other criminal matters in that part,<sup>37</sup> so much so that they are not considered part of the “criminal provisions”.<sup>38</sup> It follows that, when Commissioner Aitken referred to a

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<sup>30</sup> Though a general defence on the basis of efficiency gains is not permitted, there are some defences available that could be seen as special cases where a public policy choice has been made to allow beneficial effects, akin to efficiency gains, to be taken into account, such as the export defence (section 45(5), permitting collaborations to increase the value of exports, subject to certain conditions) and the regulated conduct defence (section 45(7), which applies where the agreement is part of a regulated scheme created presumptively in the public interest). A further defence is the ancillary agreement defence (section 45(4), where the agreement is ancillary to a broader agreement that does not violate section 45).

<sup>31</sup> See *Act*, *supra* note 4, ss 45(1)(a)-45(1)(c).

<sup>32</sup> See *ibid*, s 47.

<sup>33</sup> Conspiracy relating to professional sport (section 48 of the *Act*) and agreements or arrangements of federal financial institutions (section 49 of the *Act*).

<sup>34</sup> “Per se offence” refers to the structure of the offence—which is built on the presumption that the prohibited agreements will, if successful, have anticompetitive effects. The pre-amendment section 45 required that the prosecution prove that the agreement, if successful, would unduly lessen competition.

<sup>35</sup> Sections 50 and 51 (price discrimination), and section 61 (price maintenance) were repealed. These practices have become matters for civil review.

<sup>36</sup> These are misleading advertising (section 52 of the *Act*), deceptive telemarketing (section 52.1 of the *Act*), and other practices (section 53 [deceptive notice of winning a prize], section 54 [double ticketing], section 55 [multilevel marketing plans], section 55.1 [pyramid selling schemes]).

<sup>37</sup> Despite their inclusion in part VI of the *Act*, the deceptive marketing practices offences are considered part of the mandate of the Fair Business Practices Branch, which is to promote “truth in advertising”, even if actual prosecutions are handled by PPSC lawyers. The Fair Business Practices Branch handles the full range of advertising and marketing practices, both civil and criminal, and has an overarching mandate of consumer protection: see generally Competition Bureau Canada, *Ensuring Truth in Advertising*, online: Competition Bureau <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00529.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00529.html)>.

<sup>38</sup> References in Bureau publications to the “criminal provisions of the *Act*” (including statistics) refer to those matters that fall within the mandate of the Criminal Matters Branch and thus exclude the misleading advertising offences: see e.g. *Annual Report 2009-2010*, *supra* note 6 at 4-5, 20-22, 48. Previous annual reports have followed the same convention.

shift in paradigm in “our criminal programme”, she meant the offences that, following the amendments, are directed at prohibiting cartels.

## 2. Fostering Compliance with the *Act*

The structure of the *Act* paints only part of the enforcement picture however. How the criminal provisions fit into a broader competition enforcement policy is influenced by the general approach that the Bureau takes toward fostering compliance with the *Act*, referred to as the “conformity continuum”.<sup>39</sup> As the name connotes, the continuum refers to the spectrum of means available to the Bureau for the purpose of achieving compliance. The underlying assumption is that most people will comply with rules if they know what they are.<sup>40</sup> Thus, at one end of the scale are education and information activities designed to keep business and consumers informed about how, and to what extent, competition is regulated.<sup>41</sup> In the middle are informal and negotiated efforts to reach mutually satisfactory resolutions to potential situations of non-compliance.<sup>42</sup> At the end of the scale are informal and formal responses to actual instances of non-compliance with the *Act*.<sup>43</sup>

On the continuum, formal criminal enforcement, especially full prosecution, occupies the outer edge of the strongest responses to non-compliance.<sup>44</sup> Though the continuum is not intended to set a hierarchy in the methods of achieving conformity with the *Act*,<sup>45</sup> historically, very few cases have been fully prosecuted.<sup>46</sup> Though it is not a promise to increase

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<sup>39</sup> See Competition Bureau, *Conformity Continuum: Information Bulletin* (Hull: Competition Bureau, 2000), online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01750.html>> [*Conformity Continuum*].

<sup>40</sup> See *ibid* at 1. This is a dominant theme tied to an emphasis on predictability in the Bureau’s approach to enforcement, which aims to “allow business to arrange its affairs in such a way as to be in compliance with the law” (Competition Bureau Canada, *Operating Principles*, online: Competition Bureau <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00126.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00126.html)>). See e.g. *Annual Report 2009-2010*, *supra* note 6 at 1, 5, 8, 40-43. See also *Aitken Submissions to Senate Banking Committee*, *supra* note 6 at 14-15.

<sup>41</sup> See *Conformity Continuum*, *supra* note 39 at 5-6.

<sup>42</sup> See *ibid* at 6-9.

<sup>43</sup> See *ibid* at 9-12.

<sup>44</sup> See *ibid* at 10.

<sup>45</sup> See *ibid* at 3-4.

<sup>46</sup> Most cartels are discovered when cartel offenders to come forward to denounce their co-conspirators, something that is actively encouraged through the Bureau’s immunity and leniency programs. Contested proceedings tend, therefore, to be limited to dealing with those conspirators who do not come forward early enough to claim immunity or leniency, or whose conduct precludes them from claiming immunity or leniency. The history of criminal enforcement under the *Act* and its predecessors has been chronicled by

actual prosecutions, the shift in paradigm seems to suggest that something has changed in the small space at the end of the spectrum—that explicitly labelling cartels as *criminal* is intended to dispel any hint of an institutional reticence or unease about the general legitimacy of making use of criminal enforcement, regardless of its actual frequency.<sup>47</sup>

### 3. Criminal Enforcement of the *Act*

Each arm of government plays a role in the enforcement of competition offences. The criminal prohibitions and outer limits on punishments are set out in the *Act*, supplemented as necessary by legislation such as the *Criminal Code*.<sup>48</sup> Investigations of potential violations of these criminal prohibitions are undertaken by specialized units within the Competition Bureau.<sup>49</sup> Once charges are laid, the formal aspects of the criminal process are handled by the Public Prosecution Service of Canada (PPSC). Though the decision to bring individual prosecutions is ultimately a matter of prosecutorial discretion guided by the *Federal Prosecution Desk*

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William Stanbury, who notes the small number of contested prosecutions: see WT Stanbury, “Legislation to Control Agreements in Restraint of Trade in Canada: Review of the Historical Record and Proposals for Reform” in RS Khemani & WT Stanbury, eds, *Canadian Competition Law and Policy at the Centenary* (Halifax: Institute for Research on Public Policy, 1991) 61 at 65-66 [Stanbury, “Restraint of Trade”]; WT Stanbury, “A Review of Conspiracy Cases in Canada, 1965/66 to 1987/88” (1989) 10:1 Can Compet Pol’y Rec 33 [Stanbury, “Conspiracy Cases in Canada”]. Stanbury has also documented the penalties imposed in those cases where there is a conviction and argues that this is further evidence of under-enforcement of the *Act*: WT Stanbury, “Penalties and Remedies Under the *Combines Investigation Act*, 1889-1976” (1976) 14:3 Osgoode Hall LJ 571 at 571-72, 594-96, 627 (table 5). *Compete to Win* (*supra* note 5 at 115, n 63) notes that the prevalence of guilty pleas (and of their corresponding fines) has tended to mask the fact that only a small number of contested prosecutions have led to convictions.

<sup>47</sup> Some might consider Commissioner Aitken’s references to a more aggressive use of investigation and enforcement tools and to bringing “responsible cases” (see e.g., the *Aitken Submissions to Senate Banking Committee* (*supra* note 6 (“I will not hesitate to act when we uncover evidence of a breach of the law” at 16)) and numerous speeches such as the 4 May 2010 speech (Melanie L Aitken, Address (delivered at the Economic Club of Canada, Toronto, 4 May 2010), online: Competition Bureau <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00138.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00138.html)> [Aitken, “Speech of 4 May 2010”] (“I won’t be afraid to bring responsible cases that are prepared and conducted in a principled and measured way”)) as leading to more fully contested proceedings. Given the Bureau’s limited control over criminal enforcement, and its emphasis on immunity and leniency, I do not think this is a correct inference.

<sup>48</sup> See e.g. *Act*, *supra* note 4, ss 16(6), 33(8), 34(5), 34(8), 67, 68. The general sentencing principles of the *Criminal Code* (RSC 1985, c C-46, ss 718-718.3) also apply to criminal competition matters.

<sup>49</sup> For the “criminal offences”, it is the Criminal Matters Branch; for the deceptive marketing offences, it is the Fair Business Practices Branch.



*book*,<sup>50</sup> there is also a memorandum of understanding between the PPSC and the Bureau to ensure that they coordinate their respective roles and that they consult one another, particularly with regard to decisions on immunity and leniency.<sup>51</sup> The final part of enforcement is the jurisdiction of the courts, who formally endorse findings of liability and inflictions of punishment.

Though it is only one of the players in actual enforcement, the Bureau has greater prominence when it comes to conveying a general enforcement policy. This is not surprising, if one considers that criminal proceedings are just one of several ways that the Bureau fosters compliance with the *Act* in the discharge of its broad mandate to maintain and encourage competition in Canada.<sup>52</sup> Highlighting these activities through public communications<sup>53</sup> is an important component of its compliance work.<sup>54</sup> From the Bureau's perspective, not only does public communication highlight specific enforcement activity, it also increases transparency and accountability,<sup>55</sup> and promotes awareness of the requirements of the *Act*.<sup>56</sup> In the context of criminal enforcement, media releases are issued on the

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<sup>50</sup> Federal Prosecution Service, Department of Justice Canada, *The Federal Prosecution Service Deskbook*, online: Public Prosecution Service of Canada <<http://www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/index.html>> [*FPS Deskbook*].

<sup>51</sup> *Memorandum of Understanding with Respect to the Conduct of Criminal Investigations and Prosecutions of Offences Under the Competition Act, the Consumer Packaging and Labelling Act, the Textile Labelling Act and the Precious Metals Marketing Act*, Commissioner of Competition and Director of Public Prosecutions, 13 May 2010, ss 3.1-3.13, online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03227.html>>. The *FPS Deskbook* also contains specific provisions regarding provisional grants of immunity in competition matters: *supra* note 50, ch 35.4.5.

<sup>52</sup> See the Bureau's mission statement: *What Is the Competition Bureau*, *supra* note 12. See also *Conformity Continuum*, *supra* note 39 at 1-2. The Competition Policy Review Panel expressly endorsed the view that the core mandate of the Bureau is to enforce and promote compliance with the *Act*: *Compete to Win*, *supra* note 5 at 60.

<sup>53</sup> These include: media releases, publications aimed at the public, periodic public consultations about competition policy and legislation, speeches (the texts of which are publicly available), and submissions to legislators. For a fuller description, see part 9 of the *Annual Report 2009-2010* (*supra* note 6 at 40-43).

<sup>54</sup> See *Conformity Continuum*, *supra* note 39 at 5 (describing the importance of publications and communication in promoting conformity with the *Act*). See also *Annual Report 2009-2010*, *supra* note 6 at 8, 40-43.

<sup>55</sup> See e.g. *Annual Report 2009-2010*, *supra* note 6 at 5 (it is the first of five priorities of the Bureau); *Conformity Continuum*, *supra* note 39 at 1 (also the first of five guiding principles). It was also a recurring theme in Commissioner Aitken's speeches. Not everyone agrees, however, that the type and manner of information made public by the Bureau increases transparency and accountability: see Suzanne Day et al, "Rightsizing Regulation: The Competition Act, 1975-2005" (2009) 24:1 CJLS 47 at 51-52.

<sup>56</sup> See *Conformity Continuum*, *supra* note 39 at 5. See also *Annual Report 2009-2010*, *supra* note 6 at 8, 40-43.

progress of criminal matters,<sup>57</sup> annual reports describe enforcement priorities and activities,<sup>58</sup> and enforcement “guidelines” set out the Bureau’s approach to the criminal provisions.<sup>59</sup> Without overstating their importance—they are not legally binding—these communications are numerous and easily accessed through the Bureau’s website. In contrast, though individual prosecutors may communicate with the media, the nature of these statements is such that they provide little insight into the enforcement policy applicable to a specialized area like competition.<sup>60</sup> Moreover, the decisions of courts on criminal competition matters, though legally important, are similarly limited in their impact because they are relatively few in number<sup>61</sup> (especially with respect to liability matters) and they are jurisdictionally disparate.<sup>62</sup> More importantly, unlike the Bureau’s communications, court decisions seldom provide a clear overall message on enforcement.<sup>63</sup>

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<sup>57</sup> All media releases are available online through the Competition Bureau’s *Media Centre* tab, online: Competition Bureau <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_02766.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_02766.html)>. Those relevant to the criminal provisions can also be accessed via the *Investigating Cartels* tab, online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02780.html>>.

<sup>58</sup> See e.g. *Annual Report 2009-2010*, *supra* note 6 at 5, 12-13.

<sup>59</sup> The relevant guidelines for cartels are contained in parts 1 (an overview) and 2 (a description of how collaboration will be assessed under the *Act*’s criminal conspiracy provision, section 45), as well as part 4 (some examples) of the *Collaboration Guidelines* (*supra* note 8).

<sup>60</sup> Chapter 10 of the *FPS Deskbook* (*supra* note 50) outlines the parameters of media communications that are focused either on providing factual information on specific cases or explaining the policies and procedures of the *FPS Deskbook*. Neither of these areas speaks to enforcement policy writ large.

<sup>61</sup> In recent years, of the judicial decisions on distinct criminal competition matters (as opposed to multiple proceedings concerning the same underlying facts), more deal with misleading advertising than cartels: see e.g. *Stucky*, *supra* note 15; *R v Mouyal*, 2007 QCCQ 6141 (available on CanLII); *R v Leefe*, 2007 CarswellOnt 9385 (WL Can), [2007] OJ no 3461 (QL) (Ont Sup Ct); *R v Benlolo* (2006), 81 OR (3d) 440, (*sub nom R v Benlolo (A) et al*) 212 OAC 227 (CA).

<sup>62</sup> Criminal competition cases are heard by superior courts of criminal jurisdiction: *Act*, *supra* note 4, s 67(3). Most cases involve guilty pleas where the decision goes to the appropriateness of a joint submission on sentence. For some recent conspiracy decisions as to sentence, see e.g. *R v Kason Industries*, 2011 FC 281 (available on CanLII) [*Kason*]; *Lapointe-Cabana*, *supra* note 15; *Dubreuil*, *supra* note 15; *Leblond*, *supra* note 15; *R v Mitsubishi Corp* (2005), 40 CPR (4th) 333 (available on CanLII) (Ont Sup Ct) [*Mitsubishi*]. The middle three cases relate to the gasoline conspiracy in eastern Quebec.

<sup>63</sup> I am not suggesting that it is the role of courts to do so. Especially in matters of punishment, decisions are very much a function of individual circumstances, guided by the sentencing principles in the *Criminal Code*. However, individually appropriate decisions, taken together, do not necessarily lend themselves to a single, unifying explanation that makes for a strong primary justification for criminal enforcement. Moreover,

This brief overview of the way the *Act* is structured and enforced highlights the prominent role that the Competition Bureau has in setting expectations for how the “criminal provisions” will be enforced, even if it is but one of many players in actual enforcement proceedings. In light of the Bureau’s particular role, I believe it makes sense to think of the shift as conveying a change in the *perspective* from which it will view cartels, a belief that is reinforced by how the Bureau itself has described the shift.<sup>64</sup>

The change in perspective, though not described in detail, suggests that the Bureau is more confident about describing the general category of cartel behaviour as inherently reprehensible—it is prepared to say that there is something that makes cartels substantively different from other collaborations among competitors. It is apparent that some of this confidence comes from a belief that a much clearer legislative line has been drawn between cartels and other collaborations.<sup>65</sup> But something more

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in many trial decisions, only very cursory reference is made to the general principles underlying enforcement. And while appellate decisions, especially those of the Supreme Court of Canada, do assist in articulating general principles to guide competition enforcement, they are infrequent and may have less relevance as the law changes, as was the case following the 2009 amendments.

<sup>64</sup> See e.g. Melanie L Aitken, Address (Keynote Address delivered at the United States Council for International Business (UNCIB) / International Chamber of Commerce (ICC), New York, 22 September 2010), online: Competition Bureau <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00138.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00138.html)> [Aitken, “Speech of 22 September 2010”] (emphasizing that “shifting the game” on cartel enforcement is ultimately about instilling public confidence that the *criminality of cartels is recognized* and that the threat of enforcement is credible); Aitken, “Speech of 30 September 2010”, *supra* note 1 (referring to the shift in connection with increased recognition by courts and prosecutors that cartels are “deserving of true criminal sanctions”); Aitken, “Speech of 24 February 2011”, *supra* note 6 (describing the importance of a shift in mindset in light of the amendments to the criminal provisions and referring to the need for responsible enforcement that instills *confidence* that prosecutions are an appropriate tool in the enforcement arsenal—that is, the decision to prosecute will be driven by the need to be seen to respond to criminal conduct, even if no conviction is obtained in a given case); Aitken, “Speech of 3 May 2011”, *supra* note 6 (referring to an increased *willingness* to investigate cartels and the need to change the *dynamic* between the Bureau and the bar in criminal cases); Aitken, “Speech of 6 October 2011”, *supra* note 6 (highlighting the need to reorient the Bureau’s processes and mindset toward a “more appropriately aggressive *stance* to respond, as we must, to our new more powerful criminal provisions” [emphasis added]).

<sup>65</sup> See e.g. *Annual Report 2009-2010*, *supra* note 6 at 8, 12; Aitken, “Speech of 4 May 2010”, *supra* note 47 (“[w]e are doing our best to put a fence around the conduct we would consider investigating as criminal, and to paint that fence in bright, bold colours”); Aitken, “Speech of 24 February 2011”, *supra* note 6 (stressing the importance of bringing responsible cases to clarify the law where necessary, as part of a general goal of promoting transparency and predictability); Aitken, “Speech of 3 May 2011”, *supra* note 6 (stressing the importance of making clear what is acceptable and unacceptable conduct as the amendments are implemented); Aitken, “Speech of 6 October 2011”, *supra* note 6 (consistency in enforcement against cartels is critical to predictability, especially in the application of leniency and immunity).

subtle is also at play. The clarity of the law is mentioned in tandem with references to principled, fair, and consistent enforcement.<sup>66</sup> In my view, the Bureau is really indicating that there is something about cartels that allows us to cast a judgment about the seriousness of the behaviour in question, not unlike the way we distinguish conventional crimes from torts. The clearer law serves to highlight the substantive difference between cartels and other anticompetitive behaviour in a way that was not possible before the amendments, but the law does not explain what that difference is. The Bureau must point elsewhere to justify its adoption of a judgmental “criminal law” mindset, a justification that explains why, given the difference between cartels and other collaborations, criminal enforcement is appropriate against cartels. As I will explain in detail in the second part of this article, I think that such a justification exists, although it is not the one the Bureau claims to rely on. In the balance of this first part, I explain why the reasons currently offered as the basis for the shift do not add up to a convincing justification.

### *B. Poorly Explained: Why the Explanations for the Shift Do Not Add Up*

There is little doubt that the Bureau considers the adoption of a shift in perspective to be warranted and to be serving a purpose. But if we untangle the loose combination of elements that the Bureau refers to when explaining and justifying the shift, a disconnect emerges. The purported impetus for the shift is the post-amendment legislative focus on cartels, which is taken as a stronger basis for treating cartels as criminal. This appears to mean that the Bureau is in a better position than before to insist that criminal enforcement rests on something more than the existence of a legal prohibition. In other words, the legislative focus on cartels supports the view that criminal enforcement is now directed at inherently reprehensible conduct that ought to be sanctioned by the criminal law.

This explanation is deficient for two reasons. The first is that the narrow legislative focus on cartels does not, on its own, tell us why cartels are criminally prohibited. The changes made to the specific offence definitions in the *Act* only tell us that the legal prohibitions *are* criminal, not *why* they are appropriately criminal. Second, though one might be tempted to say that the legislative provisions were enacted to reflect an already established view that cartels are inherently criminal—indeed, the targeting

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<sup>66</sup> See e.g. *ibid* (“consistent, principled enforcement”); Aitken, “Speech of 3 May 2011”, *supra* note 6 (being “appropriately aggressive” in enforcing the new, enhanced criminal provisions); Aitken, “Speech of 24 February 2011”, *supra* note 6 (“we will move forward in a straightforward, principled, and predictable way”); Aitken, “Speech of 30 September 2010”, *supra* note 1 (referring to encouraging criminal investigators to be appropriately aggressive toward the criminal nature of the conduct at issue, and more generally, to a “more focused and robust enforcement”).

of cartels is not new from the enforcement policy perspective of the Bureau—this seems to undermine the idea that a new enforcement mindset is needed. If cartels were treated differently from other anticompetitive behaviour falling within the pre-amendment ambit of the criminal provisions, then presumably a distinct enforcement perspective on cartels has existed for some time already.

Is there some other way to understand the Bureau's view that there is something about the amendments that produces a stronger criminal law mandate requiring a "new" perspective on cartels? Since the narrower, clearer scope of the new criminal provisions tracks the scope of the Bureau's previous enforcement policy against cartels, a policy justified by deterrence, is it possible that the amendments are seen as a kind of legislative endorsement of deterrence as the primary rationale for criminal enforcement against cartels? Though I doubt the amendments can be read in this way, I think the premise underlying such a suggestion—that deterrence makes a convincing primary justification for a criminal competition law focused on cartels—gets to the heart of why the shift is poorly justified. As I will explain, the deterrence rationale as applied to cartels—cartels are criminal because they are economically harmful and criminal enforcement serves to reduce that harm through deterrence—is unconvincing in criminal law terms because it does not speak to what it is about cartels that makes them *inherently reprehensible*, nor does it explain why criminal enforcement is needed to respond to that reprehensible nature. For these reasons, it is difficult to argue that the prevailing deterrence rationale supports the claim that criminal competition enforcement now rests on a firmer, more principled basis.

Over and above the merits of the deterrence explanation, it is also hard to see how giving effect to a stronger criminal law mandate through a change in perspective on cartels can be taken to enhance deterrence. In my view, looked at through the lens of deterrence, the shift's potential impact on enforcement effectiveness dissolves into nothing more than wishful thinking.

#### 1. What Did Change: The Effect of the 2009 Amendments on the Ambit of the Criminal Prohibitions

In keeping with the spirit of the 2008 recommendations of the Competition Policy Review Panel (which noted that long-standing calls for reform of the criminal provisions<sup>67</sup> had yet to deliver amendments<sup>68</sup>), the

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<sup>67</sup> See *Compete to Win*, *supra* note 5 at 54, 58-59. The recommendation of the panel with regard to the conspiracy provision drew on the consensus view, even among critics of the pre-amendment section 45, that a criminal prohibition that focused on the most egregious forms of anticompetitive agreement (horizontal price-fixing, market alloca-

2009 amendments made three changes to part VI. Section 45 (the conspiracy offence) was changed into a per se offence prohibiting price-fixing, market allocation, and output restrictions.<sup>69</sup> Also, the maximum penalties applicable to some of the offences were increased. Finally, the pricing offences were repealed and changed into civil reviewable matters. Leaving aside the separately administered category of deceptive marketing offences, the core focus of the criminal provisions<sup>70</sup> was narrowed to “cartel” behaviour.<sup>71</sup>

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tion, and supply restrictions), widely considered to be without redeeming economic benefits, was justified: see generally Tim Kennish & Thomas W Ross, “Toward a New Canadian Approach to Agreements Between Competitors” (1997) 28:1 Can Bus LJ 22 at 30; Presley L Warner & Michael J Trebilcock, “Rethinking Price-Fixing Law” (1993) 38:1 McGill LJ 679 at 681; Richard Janda & Daniel Martin Bellemare, “Canada’s Prohibition Against Anti-competitive Collusion: The New Rapprochement with U.S. Law” (1993) 38:3 McGill LJ 620 at 621-22; Stanbury, “Restraint of Trade”, *supra* note 46 at 61-62; Hughes & Sanderson, *supra* note 12 at 154-55.

<sup>68</sup> The last unsuccessful attempt to amend the *Act* was Bill C-19 (*An Act to amend the Competition Act and to make consequential amendments to other Acts*, 1st Sess, 38th Parl, 2004 (first reading 2 November 2004)), but the bill died on the Order Paper when a federal election was called in 2005. Bill C-19 incorporated a number of amendments flowing from the conclusions in the *VanDuzer-Paquet Report* (*supra* note 13).

<sup>69</sup> Even though section 45 is a new provision, yet to be interpreted judicially, it is fair to say that the essence of the prohibition is directed at agreements to engage in any of three kinds of per se anticompetitive behaviour: price-fixing, market allocation, and output restriction: see *Compete to Win*, *supra* note 5 at 58-59. Though not legally binding, the *Collaboration Guidelines* also reinforce this view: *supra* note 8 at 6.

<sup>70</sup> These are conspiracy (*Act*, *supra* note 4, ss 45, 48-49) and bid rigging (*ibid*, s 47). Except for bid rigging (which is always a separate offence), cartel behaviour falls within the ambit of the conspiracy offence. For an excellent historical overview of the different versions of the conspiracy provision, which shows that the scope of the basic prohibition had changed little in substance from 1889 to 1999 (and indeed until the 2009 amendments), see Paul François Famula, “Section 45 of the *Competition Act*: Partial Rule of Reason or Partially Reasonable Rule?” (1999) 62:1 Sask L Rev 121 at 125-28. See also Ross, *supra* note 12.

<sup>71</sup> Though Canadian competition law has always prohibited “cartel”-type behaviour, the term is not used in the *Act*. Rather, “cartel” has emerged over the last ten to fifteen years as a term of art in international competition circles, notably by the competition committee of the Organisation for Economic Co-operation and Development (OECD). For the OECD, the expression “hard-core cartel” means “an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce” (OECD, Committee on Competition Law and Policy, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, Doc No C(98)35/FINAL (1998), I.A.2(a), online: OECD <<http://www.oecd.org/daf/competition/recommendations.htm>> [OECD 1998 Recommendation]).

By reserving the criminal law for the subset of anticompetitive agreements that are cartels,<sup>72</sup> the 2009 amendments addressed the problematic ambit of the previous criminal provisions in part VI of the *Act*. This problem was mainly attributable to the uncertain breadth of section 45<sup>73</sup> and the continued presence of the pricing offences, which depending on the context, could be considered procompetitive.<sup>74</sup> There is little doubt that the amendments made important and much-needed changes, especially from the standpoint of addressing the problems with how section 45 was drafted and structured. However, in terms of the amendments constituting clear recognition of the need to target cartels, this change is less significant when one considers that a de facto criminal enforcement focus on cartels had been in place since the late 1990s.<sup>75</sup> The existence of this ear-

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<sup>72</sup> Other potentially anticompetitive agreements among competitors (i.e., noncartel agreements) are now treated as civil reviewable matters governed by the new section 90.1 of the *Act*.

<sup>73</sup> Prior to the amendments, section 45 had an ambiguous scope flowing from the fact that it was characterized as somewhere between a per se offence (illegal regardless of whether it lessened competition “unduly”) and a rule of reason offence (illegal only if the agreement would, if implemented, unduly lessen competition). Justice Gonthier expressed this view in *PANS* (*supra* note 15 at 650), stating that the conspiracy provision fell somewhere between per se and the rule of reason. Although the provision covered the kind of behaviour that might be considered per se illegal because of the way the provision was drafted, a problem arose in terms of enforcement, because the prosecution was always required to prove that, if implemented, an agreement would lessen competition unduly and that the participants knew or ought to know that the agreement would lessen competition unduly. Very few successful cases were ever prosecuted under the pre-amendment section 45, although this did not prevent prosecutors from negotiating plea bargains, especially once the Bureau established an immunity policy in the 1990s. The Competition Policy Review Panel noted these issues: *Compete to Win*, *supra* note 5 at 58 (in its recommendation to change section 45 into a per se provision targeting cartels).

<sup>74</sup> The Competition Bureau had, for some time, recognized the need to decriminalize these practices. In 1998, the Bureau commissioned an independent study by two academics, J. Anthony VanDuzer and Gilles Paquet. Their final report, *Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice*, was publicly released in October 1999, online: *VanDuzer-Paquet Report*, *supra* note 13. They found that it was very difficult to distinguish between pro- and anticompetitive pricing practices, and recommended that the existing criminal pricing practices become civil reviewable matters. The Competition Policy Review Panel made recommendations along the same lines (*Compete to Win*, *supra* note 5).

<sup>75</sup> This increased focus on hard-core cartels is evident in the annual reports of the commissioner of competition from about 2000 onwards, increasing under the tenure of Sheridan Scott (2004-2009) and Melanie Aitken (2009-2012), as well as in the many press releases and speeches that draw attention to cartel enforcement. All cartel-related publications and press releases are available either from the *Investigating Cartels* webpage (*supra* note 57) or the *Publications* webpage (online: Competition Bureau <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00139.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00139.html)>). The Canadian focus on cartels followed an international trend that emerged after the breakthrough criminal investigation by US anti-

lier enforcement policy dilutes the claim that the new narrow focus on cartels in the *Act* is a substantive change that provides the impetus for a shift in enforcement perspective. If anything, it undermines this claim, since as a practical matter, the Bureau adopted a different “enforcement perspective” on cartels when it decided to pursue an enforcement strategy that was narrower than the ambit of the criminal prohibitions before the amendments.

In my view, in terms of a stronger criminal law mandate, the crux of the matter is that the legislative focus on cartels is only part of the answer; the provisions do not, on their own, tell us *why* cartels are criminally prohibited.<sup>76</sup> For that, we need to look at the current explanations offered by the Bureau, which draw on those developed in the pre-amendment period.

## 2. What Did Not Change: The Rationale for Cartel Enforcement

Though not all criminal law is justified by reference to only one general justification, in competition law the dominant general justification for criminal enforcement is deterrence.<sup>77</sup> This rationale was very much part

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trust authorities of the global conspiracy to fix the price of lysine: OECD, *Hard Core Cartels* (Paris: OECD, 2000) at 15-16, online: OECD <<http://www.oecd.org/competition/cartelsandanti-competitiveagreements/2752129.pdf>>. The lysine case was significant because some US defendants pleaded not guilty to the charges against them. The ensuing prosecutions by the US Department of Justice made public much of the evidence collected in the investigation, which provided a window into the workings of international cartels. This helped to foster the international co-operation needed to bring down several significant global price-fixing conspiracies from the late 1990s onward.

<sup>76</sup> Some may say that the increased penalties applicable to conspiracy could be taken as evidence of the inherent seriousness of cartels. While I agree that penalties are an indication of the relative seriousness of an offence, the pre-amendment penalties for conspiracy were already significant in criminal law terms. I am not sure that the increased maxima on their own are enough to say that the basis for treating cartels as inherently criminal has been enhanced.

<sup>77</sup> This view emerges clearly from Bureau communications, where criminal enforcement is always tied to the need to deter cartels: see e.g. *Conformity Continuum*, *supra* note 39 (“[o]ne of the objectives is to obtain penalties adequate to promote the policy goal of general and specific deterrence” at 10); *Annual Report 2009-2010*, *supra* note 6 at 4, 13; *Guide to Amendments*, *supra* note 5 at 1; *Aikten Submissions to Senate Banking Committee*, *supra* note 6 at 14, 24. See also Melanie L Aitken, Address (delivered at the ABA / US Chamber Event, Washington, DC, 1 February 2010), online: Competition Bureau <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00138.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00138.html)>; Aitken, “Speech of 3 February 2010”, *supra* note 7; Aitken, “Speech of 4 May 2010”, *supra* note 47; Melanie L Aitken, Address (delivered at the CBA Spring Competition Law Conference, Toronto, 17 May 2010), online: Competition Bureau <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00138.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00138.html)>; Aitken, “Speech of 22 September 2010”, *supra* note 64; Aitken, “Speech of 30 September 2010”, *supra* note 1; Aitken, “Speech of 6 Oct 2011”, *supra* note 6. Academic commentators also tend to assume that the proper role of criminal enforcement under the *Act* is deterrence: see



of how the Bureau justified its move to an enforcement policy focused on cartels, stressing that cartels were distinct from other anticompetitive collaborations because of their potential to cause serious economic harm without the prospect of sufficient positive, counterbalancing effects on competition. Criminal enforcement was needed to deter them and prevent that harm from occurring.<sup>78</sup>

The Bureau's view echoed the international trend of the late 1990s, which gained traction when the Organisation for Economic Co-Operation and Development (OECD) adopted its *1998 Recommendation Against Cartels*.<sup>79</sup> In the 1998 recommendation and in subsequent publications, cartels are described as the most egregious violations of competition law,<sup>80</sup> with such significant negative consequences (e.g., raising prices, restricting supply, and even distorting world trade) that there can be no possibility of mitigation by secondary effects such as efficiency gains or good intentions.<sup>81</sup>

The Bureau has used the term "cartel" in a similar way. An informal definition that combines the general scope of the post-amendment prohibitions in section 45 (as amended) and section 47 of the *Act* is posted on its website:

A cartel is a formal or informal group of otherwise independent businesses whose concerted goal is to lessen or prevent competition among its participants. Typically, cartel members enter into an agreement or arrangement to engage in one or more anti-

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e.g. Warner & Trebilcock, *supra* note 67 at 682, 717; Hughes & Sanderson, *supra* note 12 at 153-54; Kennish & Ross, *supra* note 67 at 32. To the extent that court decisions refer to general principles when approving jointly submitted sentences, they tend to emphasize deterrence, though other objectives of sentencing are mentioned in passing: see e.g. *Kason*, *supra* note 62 at para 5; *Leblond*, *supra* note 15 at paras 28, 37; *Mitsubishi*, *supra* note 62 at 338; *Lapointe-Cabana*, *supra* note 15 at paras 12-13. *Dubreuil* (*supra* note 13 at paras 16-17) appears to refer equally to denunciation and deterrence without much detail.

<sup>78</sup> Commissioner Aitken summed it up this way: "[C]ombating cartels, given how harmful their effects are to the economy, was our number one priority and remains so" (*Aitken Submissions to Senate Banking Committee*, *supra* note 6 at 12).

<sup>79</sup> *OECD 1998 Recommendation*, *supra* note 71.

<sup>80</sup> The OECD uses the term "cartel" without characterizing it as criminal behaviour. Few countries outside Canada and the United States criminalize cartel behaviour, though some have taken limited steps toward criminalizing cartels since the adoption of the *OECD 1998 Recommendation*. Criminal enforcement tends to be limited to international co-operation with respect to global cartels, with the United States taking the lead. See generally OECD, *Hard Core Cartels: Recent Progress and Challenges Ahead* (Paris: OECD, 2003), online: OECD <<http://www.oecd.org/competition/cartelsandanti-competitiveagreements/latestdocuments/>> [*OECD 2003 Report on Cartels*].

<sup>81</sup> *OECD 1998 Recommendation*, *supra* note 71, Overview, Preamble, paras 7-8. See also *OECD 2003 Report on Cartels*, *supra* note 80 at 7.

competitive activities, such as to fix prices, allocate markets or customers, limit production or supply, or rig bids.<sup>82</sup>

It is noteworthy that neither the definition above nor the prohibitions in sections 45<sup>83</sup> and 47<sup>84</sup> specifically mention economic harm. Rather, the focus is on whether there has been an agreement to engage in certain specified activities (price-fixing, market allocation, output restriction, or bid rigging) that are deemed “anticompetitive”. The definitions do not indicate whether the term “anticompetitive” refers to a disregard for competition itself or to the potential economic effects expected to flow from the implementation of an illegal agreement.

In practice, however, the Bureau has tended to emphasize the latter when explaining why cartels are criminal and why criminal sanctions are needed.<sup>85</sup> This emphasis on the harm caused by cartels draws on the rela-

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<sup>82</sup> *Investigating Cartels*, *supra* note 57. The definition refers collectively to behaviour prohibited by section 45 (conspiracy) and section 47 (bid rigging). Though the definition predates the amendments, it is much better aligned with the amended scope of section 45. Even if naked restraints on trade were generally considered to fall within the scope of the pre-amendment section 45, the scope of the pre-amendment section 45 was not, as drafted, limited to naked restraints in trade and required proof, even for naked restraints, that the restraint unduly lessened competition.

<sup>83</sup> Section 45(1) reads:

Every person commits an offence who, with a competitor of that person with respect to a product, agrees or arranges

(a) to fix, maintain, increase or control the price for the supply of a 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.

<sup>84</sup> Section 47(1) reads:

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 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.

<sup>85</sup> See e.g. *Aitken Submissions to Senate Banking Committee*, *supra* note 6 at 12-13; Aitken, “Speech of 6 October 2011”, *supra* note 6 (referring to the unambiguously harmful

tively uncontroversial economic view that cartels, as naked restraints on trade, have no redeeming features because they lead to an inefficient allocation of resources that reduces total welfare (i.e., they make the economy, in the aggregate, worse off).<sup>86</sup> Implicit in the notion of a cartel, therefore, is presumed aggregate inefficiency and negative overall economic effects. This is why economists do not necessarily object to a *per se* offence structure for cartels so long as the types of behaviour prohibited fit the presumption of inefficiency.<sup>87</sup>

This harm-based analysis is, however, problematic because it does not provide a justification for addressing cartel behaviour through criminal rather than civil sanctions. Regardless of how well the presumption of inefficiency captures the likely economic harm caused by cartels, it says nothing about why the economic harm caused by cartels is any different in nature than the harm that flows from a civil reviewable matter.<sup>88</sup> At the end of the day, conduct found to be anticompetitive on the basis of a civil reviewable standard is also economically inefficient, even though the finding is arrived at by a more circuitous route. The difference is only one of degree: civil reviewable matters tend to require proof of a significant economic effect on competition,<sup>89</sup> whereas the presumption of anticompeti-

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nature of cartels); Aitken, “Speech of 3 February 2010”, *supra* note 7 (referring to cracking down on harmful criminal cartel activity). See also *supra* note 80.

<sup>86</sup> Warner and Trebilcock (*supra* note 67 at 683-84), Kennish and Ross (*supra* note 67 at 25), and Hughes and Sanderson (*supra* note 12 at 160-63) all refer to this prevailing economic view. This is consistent with the view applied in American antitrust law: see e.g. Richard A Posner, *Economic Analysis of Law*, 8th ed (New York: Aspen, 2011) at §10.1; Phillip E Areeda, Louis Kaplow & Aaron Edlin, *Antitrust Analysis: Problems, Text, and Cases*, 6th ed (New York: Aspen, 2004) at 114.

<sup>87</sup> See *ibid.*

<sup>88</sup> I concede that it is possible to think that the *harm* from illegal cartels is the harm to competition itself. But the Canadian experience has been that harm boils down to the potential or actual *economic effects* of the cartel (e.g., through price increases or output restrictions): see e.g. *PANS*, *supra* note 15 at 650. This is why the requirement to prove the extent to which competition was lessened unduly under the pre-amendment section 45 was so difficult: see, for example, the work of Stanbury (“Restraint of Trade”, *supra* note 46 at 64; “Conspiracy Cases in Canada”, *supra* note 46 at 34-35). The harm to the competitive process *per se* (at least as I present it in Part II) and the importance of the competitive process in maintaining confidence in the integrity of the economic system as a whole, being unmeasurable, could not on their own constitute evidence of an undue lessening of competition. Under the new section 45, the removal of the need to prove effects has not changed the attitude that the harm cartels cause has concrete economic effects. The basis of the presumption is that economic effects are so likely to occur that it is not necessary to prove them, not that anticompetitive behaviour is defined by something other than economic effects.

<sup>89</sup> The actual wording varies: see *supra* note 26.

tive effects in the criminal provisions obviates the need to show the magnitude of that effect.<sup>90</sup>

In my view, if the “criminal” nature of cartels is tied to the potential for economic harm, it cannot provide a basis on which to say that the criminal enforcement mandate is stronger. If anything, it would be the opposite, since emphasizing that the distinction between criminal and civil collaboration lies only in a reduced evidentiary burden seems to use the criminal law only as a convenience, to avoid a heavier evidentiary burden—even if it is to tackle agreements that cause economic inefficiency that is otherwise hard to prove. If the issue is that cartels are hard to prove, why not create a specific civil reviewable matter with the same presumption of inefficiency that prevents evidence of efficiency or other beneficial effects from being presented to counter the finding of an anti-competitive impact?<sup>91</sup> After all, the harm itself is not more reprehensible than that of current civil reviewable matters—they both target inefficient activities that reduce aggregate economic welfare.

The inability to use economic harm to distinguish cartels from other anticompetitive collaborations also weakens a second claim—that it is legitimate to treat cartels as criminal because achieving the goal of harm reduction specifically requires criminal enforcement.<sup>92</sup> That harm reduction persists as a justification for criminal enforcement in competition law is largely attributable to the influence of economic models that examine crime and punishment in mathematical terms. If economic harm is the essence of what makes a cartel criminal, then punishment ought to be

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<sup>90</sup> Even though the amount of the harm does not factor into whether the offence has occurred, the Bureau has suggested that, where economic harm is negligible, it may be more likely to explore alternate case resolution instead of criminal enforcement: see *Collaboration Guidelines*, *supra* note 8 at 17. This tends to suggest that it is the significance of their potential economic harm that makes cartels “serious” and worthy of criminal enforcement.

<sup>91</sup> Though they present it differently, Warner and Trebilcock (*supra* note 67 at 715-18) also suggest that something more than anticompetitive harm is needed to distinguish naked restraints on trade (which could be subject to a *per se* prohibition) from other collaborations. That element is covertness (akin to a form of fraud).

<sup>92</sup> In economic terms, the effectiveness of a criminal sanction is tied to its ability to reduce the social welfare costs of crime (which are understood as the sum of the harm caused and the costs of detection and enforcement). Understood in this way, it is not typically an optimal use of social resources to bring the incidence of crime to zero. Rather, the aim should be to keep crime to the level where the net social cost is the lowest. The effectiveness of enforcement is thus the extent to which it brings the crime level (usually down) toward this optimal level. See, for example, Gary S. Becker’s seminal article, “Crime and Punishment: An Economic Approach” ((1968) 76:2 *J Pol Econ* 169 at 204-205), and Richard A. Posner’s more nuanced examination, “An Economic Theory of the Criminal Law” ((1985) 85:6 *Colum L Rev* 1193 at 1205-14 [Posner, “An Economic Theory”]).

correlated to that harm. To the extent the harm is quantifiable in monetary terms, there is a natural tendency to see optimal punishment in the same way (i.e., as a monetary penalty), which has the intuitive appeal of an apples-to-apples comparison.<sup>93</sup> Harm reduction as a justification for criminal enforcement has considerable appeal in competition law because it offers the prospect of linking the punishment imposed (usually a fine) to the economic effects of anticompetitive conduct.<sup>94</sup> Whatever the merits of using harm as a means of determining the quantum and distribution of punishment, however, focusing on harm reduction does not provide a strong primary justification for criminal enforcement against cartels. If one looks at criminal enforcement against cartels as primarily a response to the economic harm caused—a harm that is indistinguishable from that caused by other collaborations—the utility of the criminal sanction is limited to how well it reduces that harm. If a civil sanction could reduce the harm caused by cartels as well as<sup>95</sup> a criminal sanction, a civil sanction should be applied because it is cheaper to administer.<sup>96</sup> In deterrence terms, harm reduction would come at a lower cost, and thus social welfare would be better served.<sup>97</sup> Since cartel offences are still largely subject to

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<sup>93</sup> See generally Becker, *supra* note 92; George J Stigler, “The Optimum Enforcement of Laws” (1970) 78:3 J Pol Econ 526. It is important to note that this does not mean that the optimal fine equals the amount of the economic harm, only that the amount of the economic harm is one of the components used to calculate the amount of the fine.

<sup>94</sup> This assumes that potential offenders, as rational actors, will be motivated not to offend because any illicit gains will be eliminated by the fine. But determining the level of fine that will generate this presumed deterrent effect also depends on the ability to calculate the actual economic harm caused, as well as the likelihood that the offender will be apprehended and that the punishment will actually be inflicted. These assumptions are integral to the analyses of, for example, Becker (*supra* note 92), Posner (“An Economic Theory”, *supra* note 92), and Shavell (Steven Shavell, “Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent” (1985) 85:6 Colum L Rev 1232).

<sup>95</sup> Criminal sanctions may deter more—but this is not enough, in economic terms, to justify the criminal sanction. In order for social welfare to be optimized, it is the *combined* amount of harm plus enforcement cost that must be reduced: see e.g. Stigler, *supra* note 93; Becker, *supra* note 92.

<sup>96</sup> This argument is not new and is common in law and economics analyses of punishment for corporate and business crimes, which are firmly rooted in utilitarianism: see generally Arlen & Kraakman, *supra* note 9; Jennifer Arlen, “The Potentially Perverse Effects of Corporate Criminal Liability” (1994) 23:2 J Legal Stud 833; VS Khanna, “Corporate Criminal Liability: What Purpose Does It Serve?” (1996) 109:7 Harv L Rev 1477; Richard A Posner, “Optimal Sentences for White-Collar Criminals” (1980) 17:3 Am Crim L Rev 409 [Posner, “Optimal Sentences”]; Posner, “An Economic Theory”, *supra* note 92. But see Robert Cooter, “Prices and Sanctions” (1984) 84:6 Colum L Rev 1523 (who tries to bridge the gap between the jurisprudential and economic schools of thought on this point); Shavell, *supra* note 94 (despite higher social costs, the threat of “nonmonetary” sanctions is useful as a deterrent in circumstances where monetary sanctions are likely to be inadequate, though his analysis focuses on the traditional *malum in se* crimes).

<sup>97</sup> This rationale has been used to argue that using the criminal sanction for corporate, white collar, and economic crime is largely unnecessary: see e.g. Arlen, *supra* note 96;

monetary penalties in the form of fines, it is at least arguable that civil fines in the same amount might achieve comparable effects in terms of harm reduction. Seen from this perspective, it is hard to argue that criminal sanctions must be used.

Imprisonment is different, of course, because there is no analogous civil sanction. In deterrence terms, one might argue that access to this special penal sanction could be particularly effective against cartel offenders because they are not typically exposed to the risk of imprisonment and thus might take extra care to avoid it. To date, however, custodial sentences for cartel offences have been exceptionally rare,<sup>98</sup> and the circumstances under which they are imposed, unusual.<sup>99</sup> Though this trend could change (recent Bureau communications suggest that imprisonment will be sought “where appropriate”), it is hard to argue that access to the special punishment of imprisonment is, at present, the primary reason for the criminal treatment of cartels.

I think there is a reason why, when examined closely, these deterrence-based explanations of the shift are weak. It is because they are being used to justify measures that do not make sense if they are directed at deterrence and harm. In my view, the answer to why cartels are inherently reprehensible and require criminal punishment does not lie in the harm they cause, however serious. Rather, it comes from the particular way the harm is caused. In my view, desert principles offer a more con-

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Khanna, *supra* note 96; Posner, “Optimal Sentences”, *supra* note 96; Posner, “An Economic Theory”, *supra* note 92 at 1204-205.

<sup>98</sup> While sections 45 and 47 provide for potentially significant imprisonment (up to fourteen years for section 45 and at the discretion of the court for section 47), in practice, infliction of imprisonment for competition offences is very rare in Canada. There is only one notable case where a term of imprisonment was imposed (and not suspended) outside of the misleading advertising context (and even there, the number of cases where imprisonment has been imposed is small). The exception came in 1996, following the first ever jury trial for a *Competition Act* offence: *R c Perreault*, [1996] RJQ 2565 (available on WL Can) (Sup Ct). The infrequent use of imprisonment as a punishment can be traced to a number of factors, notably that most cartel offenders plead guilty and have no previous criminal record (both mitigating factors as to sentence). Moreover, where offenders are corporations, there is little precedent in Canada for sanctioning corporate crime with imprisonment of corporate officers.

<sup>99</sup> In cartel cases, with the notable exception of the *Perreault* case (*ibid*), imprisonment has been imposed following a guilty plea (usually with a joint submission on sentence). Leaving aside the global cartel context (where US enforcement practice usually dictates the kind of sentence imposed), the most recent examples of sentences of imprisonment have been in the ongoing gasoline cartel in eastern Quebec. However, all the terms of imprisonment (imposed against six of about twenty individual defendants) were suspended (to be served in the community) and were of twelve months or less: see e.g. *Dubreuil*, *supra* note 15 (imposing a six-month sentence). The Bureau communications on these sentences gloss over this fact: see e.g. *Annual Report 2009-2010*, *supra* note 6 at 12-13.

vincing explanation both for the adoption of an approach that draws more heavily on criminal law, and for why this approach might make enforcement more effective.

Before concluding this part, I will make one further observation. In my view, even if deterrence were a convincing justification for the criminal treatment of cartels, it is hard to imagine how adopting a *mindset* that cartels are truly criminal and properly subject to criminal law might, on its own, have a concrete effect on how offenders weigh the risk of being caught and punished against the potential illicit benefits of engaging in cartel behaviour. Despite the tough talk of the Bureau, it is difficult to see the shift as a credible commitment to an actual increase in enforcement activity. Without such a credible threat, it is hard to see how those factors generally considered to be relevant to a rational offender's decision to commit a crime (i.e., the probability of detection and conviction, and the nature and extent of punishment) will materially change. It seems unwise, therefore, for the Bureau to tie the shift in attitude to more effective deterrence.

### *C. Why We Need to Address the Disconnect*

As I indicated in the introduction, I believe that the shift in paradigm on cartel enforcement is a change in attitude toward cartels, one that aims to treat cartels as truly criminal in the sense that they are inherently reprehensible and deserve to be dealt with under the criminal law. Though I believe that Commissioner Aitken was right to see such a mindset as consistent with a stronger criminal enforcement mandate and as capable of facilitating enforcement, I find the reasons she relied on unconvincing and even damaging. They attribute undue significance to legislative changes while at the same time relying on an unchanged deterrence rationale that does not offer a compelling general justification for subjecting cartels to the criminal law.

It would be wrong, however, to conclude that, just because deterrence does not convincingly support a stronger criminal law approach to cartels, no such basis exists. Finding this justification, however, requires looking at criminal enforcement from a different perspective. In the next section, I will explain how Arthur Ripstein's desert-based framework provides a helpful means of getting at what makes cartels criminally wrongful. Using his work on desert theory, I provide an analysis of cartel enforcement that casts the new Bureau mindset as an integral part of a justification for recourse to criminal law that can actually enhance enforcement effectiveness.

## II. Considering Another Explanation: The Case for Applying a Desert Perspective to Cartel Enforcement

### A. *Building a Desert Perspective*

#### 1. Putting Desert in Context

Punishment theories tend to fall into one of two principal, and generally opposing, schools of thought: the consequentialist school and the desert-oriented school.<sup>100</sup> While both are predicated on the idea that crime is a bad thing and demands a publicly sanctioned response, each camp thinks crime is bad for a different reason. They therefore also disagree on what the response to crime should achieve. Consequentialists see crime as harmful to victims and to society. They therefore view punishment as a means of specific deterrence, or a way to prevent the offender from causing harm again by reoffending. More importantly, consequentialists would use punishment as a means of general deterrence, which is intended to dissuade others from offending in the first place. Given that punishment inflicts unpleasant and burdensome consequences on offenders, it is justified only to the extent that it can, on balance, generate something good (in most cases, deterrence).<sup>101</sup>

The consequentialist rationale raises two related objections. First, by focusing on creating deterrent effects, the offender is simply a means to an end. Taken to its logical extreme, punishment could be inflicted every time it produces net crime-prevention benefits, without regard to other factors such as the extent of culpability and the seriousness of the crime. Second, it is unclear to what extent punishment actually causes the deterrent effects attributed to it.<sup>102</sup>

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<sup>100</sup> I have used these labels as a convenient way to refer to the “big tent” that each side in the punishment theory debate represents, in order to provide context for my discussion of specific theorists. I note that my labels do not directly capture the movement for “restorative justice”, which though intended to have broad application to all “injustice”, is often directed at questions of punishment. There is a debate about whether restorative justice ought to be associated with either side in the punishment theory debate or whether it transcends this divide: see generally Andrew von Hirsch et al, eds, *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Oxford: Hart, 2003).

<sup>101</sup> Without discounting their importance, I have excised rehabilitation and incapacitation from the discussion. Like Herbert Packer, I believe deterrence is “[t]he classic theory of prevention”: Herbert L Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968) at 39.

<sup>102</sup> Consequentialists respond to the criticisms, and most recognize the need for proportionality constraints on punishment (sometimes called “side constraints”). A notable ex-



By contrast, desert theorists see crime as wrongful and see punishment as the way to convey to the offender the censure and blame commensurate with the gravity of the wrong. Desert-based approaches presuppose the existence of individual autonomy and the ability of individuals to choose whether to engage in wrongful behaviour. Thus, someone who chooses to do wrong *deserves* the resulting punishment being wrought upon him or her. This position raises two questions. First, how does one censure an offender who rejects or refuses to acknowledge that his actions were wrongful? Second, on what basis can an account of punishment that rejects the instrumentalism of consequentialist approaches justify hard treatment<sup>103</sup>—does it simply convey further censure, or does it serve some other purpose?<sup>104</sup>

My account of desert theory takes its shape from theorists who discuss criminal law and punishment within the larger context of how law should function in a modern liberal democracy.<sup>105</sup> For them, the preference for a desert-based approach flows from the belief that a legal and political sys-

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ample is H.L.A. Hart's "mixed" account of punishment: *Punishment and Responsibility: Essays in the Philosophy of Law*, 2d ed (Oxford: Oxford University Press, 2008) (punishment should be limited to responding to a range of behaviour that has been found to violate law following a fair and just process). Desert-based critics of Hart, including John Gardner (who wrote the introduction to the second edition of Hart's book), Anthony Duff, Andrew von Hirsch and Andrew Ashworth, Michael Moore, and Arthur Ripstein, point out that these modifications do not change the fundamentally instrumental view of punishment that consequentialists espouse.

<sup>103</sup> "Hard treatment" is a common generic term used to describe the unpleasant consequences imposed on an offender as "punishment". While the concept of hard treatment is most readily associated with consequentialist theories of punishment, most modern desert theorists also see a place for hard treatment, provided that it is inflicted in a manner that reinforces the central role of desert in punishment.

<sup>104</sup> Desert theorists have offered a variety of responses to these criticisms. On the question of punishing those who reject the wrongfulness of their actions, see e.g. RA Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001) at 68-71, 75-92; Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge, UK: Cambridge University Press, 1999) at 162-63 [Ripstein, *Equality*]; Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass: Harvard University Press, 2009) at 308-14 [Ripstein, *Force*]. On hard treatment, see e.g. Duff, *supra* note 104 at 82-88; Ripstein, *Equality*, *supra* note 104 at 157-60; Ripstein, *Force*, *supra* note 104 at 314-18; Andrew von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005) at 21-27.

<sup>105</sup> See e.g. John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007); Duff, *supra* note 104; Malcolm Thorburn, "Criminal Law as Public Law" in RA Duff & Stuart P Green, eds, *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011). Arthur Ripstein also presents his theory of punishment through the lens of political theory, but in his approach, he attempts to eschew the conventional consequentialist-desert divide: *Equality*, *supra* note 104 (especially at 133-71). In his most recent work, Ripstein argues that deterrence and desert are both part of, and consistent with, his Kantian approach to punishment: *Force*, *supra* note 104 at 300-24.

tem must treat its citizens as autonomous actors capable of making decisions consistent with the demands of an individual conscience or shared values, or both. Where a citizen chooses to violate the applicable social norms enforced by the criminal law, respect for individual autonomy requires that the citizen be called to account for the wrongful conduct and face the societal condemnation that flows from it, including the infliction of any appropriate punishment. As I will discuss, of these theorists, I have found that the approach of Arthur Ripstein,<sup>106</sup> with some nuances, provides particularly helpful analytical tools to create and justify a desert-based account suitable for competition law.

## 2. A Desert-Based Understanding of the Link Between the Scope of the Criminal Law and Justifications for Punishment

Before turning to a detailed examination of how desert can justify the shift toward a more criminal law-oriented attitude to cartel enforcement by the Bureau, I will first explain how a desert-based approach connects the goals of the criminal law and punishment in a particularly compelling way. The connection reveals how the strength of a general justification for an approach to cartels that is more rooted in criminal law rests on the conjunction of two related ideas: first, that cartel behaviour is criminal and, second, that it demands the response of punishment.

The goals and purposes to be served by criminalizing conduct have an important bearing on how we justify the use of punishment. An account of what is criminal must explain what kind of undesirable conduct demands that those who engage in it be held to account for it publicly, which is obviously linked to the kind of reasons considered sufficient to justify imposing the sanction of punishment on those same persons. Though the term punishment can be used to describe the means of sanctioning a wide variety of unwanted behaviour, not all of it “criminal” in nature, discussions of how to justify punishment are usually tied to a comprehensive analysis of the role and purpose of the criminal law. Criminal law theorists tend, therefore, to use a more restrictive notion of punishment—limiting it to sanctions inflicted on those who violate “criminal laws”.<sup>107</sup>

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<sup>106</sup> Ripstein has developed his ideas about punishment as part of broader discussions of law, first in his 1999 work, *Equality* (*supra* note 104 (especially at 133-71)), and more recently in his 2009 work on Kant’s philosophy, *Force* (*supra* note 104 (especially at 300-24)).

<sup>107</sup> The quotation marks highlight that the scope of the criminal law is neither fixed nor universally agreed upon. Most theorists do not attempt to define it, choosing instead to focus on the subset of behaviour conventionally considered criminal: see e.g. von Hirsch & Ashworth, *supra* note 104 (who argue that it is not necessary for a theory of criminal law to defend all criminal prohibitions so long as the “core conduct” with which the criminal law is concerned “can legitimately be characterized as blameworthy” at 18-19).

Theorists who discuss punishment and criminal law together nevertheless tend to make two important assumptions about the criminal law: first, that its scope is determined in accordance with sound principles, usually those consistent with liberal democratic values,<sup>108</sup> and second, that once that scope is determined, the specific norms that a particular criminal prohibition is designed to uphold are basically legitimate.<sup>109</sup> I will discuss why my desert-based approach requires a detailed discussion of the first assumption but not the second.

When I refer to how the scope of the criminal law is determined, I am referring to the general basis on which we decide what kind of undesirable conduct ought to be subject to the public sanction of punishment. This determination matters in a desert-based account, which necessarily begins with some understanding of the wrongfulness that constitutes a crime. To make sense of the idea of an offender deserving punishment, there must be some general principles that set out what kind of wrongfulness rises to the level of a crime. This is not, however, the same as the second assumption, which assumes that the behaviour targeted by a specific

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See also Duff, *supra* note 104 at 59-64; Gardner, *supra* note 105 at 239-40; Ripstein, *Equality*, *supra* note 104 at 140.

<sup>108</sup> I have used this term loosely as there are variations in how it is described. Duff calls it the law of “liberal polity”, where “the central values of individual autonomy, freedom, privacy, and pluralism” should inform how the scope of the criminal law is set (*supra* note 104 at 67). For Ripstein, the criminal law protects public “standards of reasonableness” required to maintain the optimal balance between the fundamental values of freedom and security (something that he calls the “fair terms of interaction”): *Equality*, *supra* note 104 at 6-9, 156. Gardner argues that the need for what he calls “determinacy in the demarcation of wrongs” is driven by the demands of the rule of law, though he offers little content to his idea beyond fair notice and procedural protection (*supra* note 105 at 239).

<sup>109</sup> Criminal law theorists assume that the criminal law is made up of criminal prohibitions that uphold norms reflective of a shared understanding of what ought to be criminal, even if they acknowledge that, in practice, some criminal prohibitions may not fit this assumption. See e.g. Duff, *supra* note 104 at 64-66; Gardner, *supra* note 105 at 239-40; von Hirsch & Ashworth, *supra* note 104 at 18-19. Hart makes the point slightly differently, because he eschews using “morality” as a way of determining what is criminal, but he acknowledges that what is announced to be *legally* criminal in criminal legislation does not necessarily overlap with what might be understood to be *morally* wrong: *supra* note 102 at 7. It is important to note that this inevitable lack of overlap does not prevent theorists for holding another assumption: criminal prohibitions, as prohibitions set out in law, must be obeyed. Ripstein’s idea, which I will discuss in Part II.A.3, below, is that a crime is an attempt to unilaterally exempt oneself from the demands of public law (which includes criminal law) and thus demands a form of enforcement that reasserts the supremacy of law and the need to comply with it: see Ripstein, *Force*, *supra* note 104 at 306-308; Ripstein, *Equality*, *supra* note 104 at 140-41, 156.

criminal prohibition conforms to the general standard of wrongfulness and is thus properly subject to the criminal law.<sup>110</sup>

Distinguishing between the general principles that mark certain behaviour as criminal and the specific assessment of the legitimacy of a given criminal offence is important. The first assumption is part of a general justification for punishment, because it helps us understand why punishment is the required response to crime—we need to know what makes crime a special category of wrongful behaviour in order to justify why we need to use punishment, as opposed to other methods, to enforce the criminal law. The second assumption is not part of a general justification of punishment, because it is concerned only with whether a specific instance of criminalization is appropriate—it does not speak to the justifications of *punishment* at all. Debating the merits of the form that an instance of criminalization takes is not the same thing as debating whether the basic conduct targeted by that criminalization is the kind of wrong that can be considered a crime. Thus, while there may be general agreement that murder is the kind of special wrong that requires enforcement by the criminal law, there can be disagreement about the exact bounds of a given legal prohibition against murder.<sup>111</sup>

As my focus is on developing a theoretical framework to explain what it is about cartels that makes them criminal and why they are appropriately subject to punishment, my analysis must be seen as a general justification of the use of the criminal law and punishment against cartels and not a specific justification of a given form of legal prohibition against cartels. For my purposes, it is sufficient that the intention behind the 2009 amendments was to narrow the focus of the criminal provisions to cartel behaviour. This is not altered by the possibility of noncartel conduct falling within the scope of the provisions at the margins.<sup>112</sup>

I will now explain how the desert-based approach of Arthur Ripstein offers a very helpful way of tackling the key questions we need to answer in order to justify the Bureau's move toward a stance that criminal enforcement be firmly grounded on the inherently criminal nature of cartels:

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<sup>110</sup> Gardner uses the expression “theory of criminalization” to capture the same idea: “A theory of criminalization does not (and should not aspire to) tell us whether murder is wrong. It can only tell us whether, given that murder is wrong, it is also a candidate for criminalization” (*supra* note 105 at 205).

<sup>111</sup> See Duff, *supra* note 104 at 64-66; Gardner, *supra* note 105 at 205, 239-40.

<sup>112</sup> Von Hirsch and Ashworth expressly make this point and do not believe that some debate about the legitimacy of offences at the margins of the criminal law affects the overall legitimacy of the criminal law: *supra* note 104 at 18-19. Ripstein makes a similar assumption, although he expresses it in terms of the demands that the criminal law makes on citizens: *Equality*, *supra* note 104 at 156.

why are cartels criminal, and why do they demand the response of punishment?

### 3. What Sets Criminal Conduct Apart: Unilateral Disregard of Public Standards

The first question to be answered is what sets criminal conduct apart from other conduct. Assuming that, in order for behaviour to be considered criminally wrongful, something more is required than the breach of a legal provision enforced through punitive sanctions, what makes certain kinds of wrongful behaviour so serious as to warrant the use of criminal law and enforcement through punishment?

Ripstein's core idea is that a society depends on the existence of law (including the criminal law) to maintain the "fair terms of interaction" between persons. He uses this phrase to describe the equilibrium that a legal system, and a political philosophy, should strive to attain between individual freedom of action and protection from the interference of others.<sup>113</sup> By upholding the fair terms of interaction, the law enables an individual person to exercise his or her freedom of action independently of the choices of others. As the expression suggests, however, the fair terms of interaction make no sense in the absence of others. The exercise of freedom by one depends on a mutual recognition of the fair limits of freedom by all. Thus, embedded in this equilibrium is the expectation that reasonable people understand the need for legally enforceable constraints on individual freedom and will abide by them, regardless of their individual opinions as to the merits of any specific constraint. In this way, the fair terms of interaction set the outer limits of acceptable behaviour and what is reasonable. It follows then that behaviour that does not respect these limits is wrong.

Since it is inevitable that some individuals will fail to act within the limits of acceptable behaviour, the law provides responses to instances of wrongdoing. It does not, however, respond to all wrongs in the same way. How, then, do we identify those wrongs that are properly dealt with by the criminal law? When is the failure to act in a manner consistent with the balance of freedom and protection *criminally* wrongful and deserving of punishment? Ripstein sums up his answer as follows:

Any account of punishment needs to explain why punishment is sometimes required in addition to compensation, as well as to say why intentional acts are the appropriate occasions for that additional response. I begin by suggesting that crimes are torts with some-

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<sup>113</sup> *Ibid* at 2; Ripstein, *Force*, *supra* note 104 at 31-50.

thing added. Once we see what is added, we see why punishment is the appropriate response to that extra thing.<sup>114</sup>

To distill this extra element, Ripstein separates the wrongfulness of crimes into two parts: wrongful injury and wrongful denial of rights. Wrongful injury refers to losses suffered as a result of wrongful behaviour. Both torts and crimes can cause wrongful injury and the law protects victims by giving them the right to seek damages from the wrongdoer for the losses suffered. Wrongful denial of rights is of a different nature and is what sets crime apart from tort. A wrongful denial of rights occurs when the wrongdoer subjects the victim's rights to his or her will. This occurs because the wrongdoer deliberately ignores the fair terms of interaction and acts in a way that denies the victim's freedom to decide independently of others how to exercise his or her rights.<sup>115</sup>

Analyzed in this way, what makes crime particularly objectionable is not the ultimate ends of the conduct (though these can be very objectionable) but rather the means by which the wrongdoer sought to reach those ends.<sup>116</sup> Focusing on the wrongfulness of the means directs our attention to the need for a certain deliberation in the behaviour of the offender. By deliberation, I am not referring here to the specific intent requirements that may be set out in a particular offence, but to the general idea that crimes are usually committed advertently. In the context of understanding what makes crimes different from torts, this advertence does not arise from the fact that the effects of crime are intentionally sought (though they often are) but rather from the offender's *choice* to pursue a particular course of action despite being aware that it disregards the rights of others (usually because the conduct will cause injury or expose others to an unreasonable risk of injury).<sup>117</sup>

Set in the larger context of Ripstein's fair terms of interaction, a crime is essentially a deliberate misuse of the freedom that the fair terms of interaction are intended to uphold. But what is it about misusing freedom in this way that requires the special response of punishment? To understand why punishment is required, we need to look again at the nature of the fair terms of interaction.

As conceived by Ripstein, the fair terms of interaction are a *legally maintained* balance of freedom of action and freedom from interference.<sup>118</sup>

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<sup>114</sup> *Equality*, *supra* note 104 at 147.

<sup>115</sup> See *ibid* at 148-49.

<sup>116</sup> See Ripstein, *Force*, *supra* note 104 at 309-12.

<sup>117</sup> See Ripstein, *Equality*, *supra* note 104 at 134.

<sup>118</sup> Ripstein's account of criminal law and punishment is firmly grounded in the broader idea that law can balance individual responsibility and social equality: *ibid* at 1-2.

Leaving aside whether it is possible for the law to uphold the *optimal* balance between these two elements (however that may be defined by a given society), the law does uphold *a* balance by identifying the extent and nature of freedom that will be legally protected.<sup>119</sup> In my view, this legally protected freedom can be understood as having two separate but reciprocal components. First, this freedom includes the ability for individuals to choose how to exercise certain fundamental rights conferred on them by law.<sup>120</sup> Second, this freedom excludes behaviour that is inconsistent with respect for the freedom of others (by disregarding either the protected individual rights of others or the rules intended to protect the public in general). The intersection of these two elements sets the legally enforced parameters of acceptable behaviour. They are the authoritative and *public* source of expectations of behaviour, overriding competing private sources of expectations such as personal belief or morality, however reasonable these latter may be. Moreover, these public expectations allow responsible citizens to guide their own behavior by reference to what the law has declared is acceptable or not.

Ripstein calls these parameters public “standards of reasonableness”.<sup>121</sup> These standards are upheld and enforced by “public” law, which encompasses the rules and institutions designed to protect the system of equal freedom around which a society is unified. Public law demands compliance because it is directed at maintaining the system on behalf of all, something Ripstein has described as an “omnilateral” standpoint.<sup>122</sup> Enforcement of public standards of reasonableness is thus critical to ensuring that the reciprocal limits on freedom are consistently and fairly upheld, reinforcing their primacy in governing conduct. In this way, all holders of freedom are treated equally—everyone must exercise his or her freedom in a manner consistent with the way in which the law upholds the fair terms of interaction.<sup>123</sup>

Legal enforceability of public standards on its own, however, tells us nothing of the precise means of enforcement. What is it about crimes that makes them a special kind of violation of public standards, one to be enforced through the specific mechanism of punishment? For Ripstein, the defining feature of a crime is that the failure to respect the requirements

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<sup>119</sup> Ripstein assumes that the demands that the criminal law makes on citizens, even where crimes are not violations of individual rights but are intended to protect the “public order”, are largely just and that, as a result, it is fair to expect that people adjust their behaviour to those demands: *ibid* at 156.

<sup>120</sup> Ripstein refers generally to “individual rights”, though he indicates that these include such fundamental rights as the right to life, physical security, and property: *ibid* at 157.

<sup>121</sup> *Ibid* at 10.

<sup>122</sup> *Force*, *supra* note 104 at 306.

<sup>123</sup> See *ibid* at 306-308.

of the fair terms of interaction is triggered by the offender's decision to act as though these terms did not apply to him or her. This is what makes crime so serious—it is a *unilateral* decision to ignore, based on private reasons, the obligation to abide by legally imposed constraints on freedom. The unilateral nature of the decision is critical because it is fundamentally inconsistent with the very reciprocity on which legally protected freedom relies. In essence, the offender has chosen to define his or her own freedom, based on his or her own interests, in a way that conflicts with, or even rejects, legally protected freedom. In a system built on the notion that the exercise of freedom depends on constraints that apply equally to all, it is inconsistent with the principles of fairness and equality to permit individuals to decide to exempt themselves from those constraints.<sup>124</sup>

Applying Ripstein's analysis, the fundamental goal of the criminal law is to uphold the primacy of legally protected freedom as against deliberate, unilateral attempts to exercise a privately determined freedom inconsistent with the fair terms of interaction. The primary concern of criminal enforcement must therefore be to ensure that the public standards that underpin legally protected freedom prevail over the offender's decision to ignore them. This cannot be accomplished through compensation, which addresses only the wrongful injury that occurs subsequent to the decision by the offender to substitute private reasons for public standards. Rather, the response to crime must clearly repudiate the offender's wrongful exercise of freedom, by vindicating the public standard that he or she has violated.<sup>125</sup> This vindication must take the form of punishment, because only punishment provides the consistent, omnilateral response (driven by public rationality and standards as opposed to the individual needs or wishes of any specific victim) that conveys the public refusal to give effect to the offender's unilateral point of view.<sup>126</sup> In other words, a wrong against the system of reciprocal freedom, once committed, cannot be ignored by the society in whose interest the system was created and is maintained. By subjecting the offender to deliberate, state-inflicted coercion, punishment reasserts the authority of public law over him or her, thereby underscoring the primacy of legally protected freedom over private attempts to subvert it.

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<sup>124</sup> This is the core thesis of *Equality* (Ripstein, *supra* note 104). Duff also discusses this idea but is not prepared to ground his account of punishment on this rationale alone: *supra* note 104 at 21-23.

<sup>125</sup> See Ripstein, *Equality*, *supra* note 104 at 156-57.

<sup>126</sup> See Ripstein, *Force*, *supra* note 104 at 306-308.



#### 4. Why Does Crime Demand Punishment? The Important Role of Public Enforcement In Upholding the Law

If crime is the wilful flouting of the essential rules around which a society is organized, then punishment must cause the offender to be resubjected to those rules, regardless of whether he or she accepts them. In the context of justifying the Bureau's shift in enforcement attitude, I will focus on the special role of public enforcement in justifying punishment in terms of upholding the law.

Public enforcement is a reflection of the state's unique interest in sanctioning violations of the criminal law.<sup>127</sup> It is a vindication of the public standards that the criminal law defends against deliberate violations motivated by private reasons. From a desert-based perspective, punishment must respond to the deliberate disregard for the public standard that the crime represents, both in terms of the impact on public order and on any individual rights that might be affected.<sup>128</sup> This is contrasted with a deterrence-based account, where punishment is intended to reduce the future incidence of the type of harm caused by the crime.

As discussed in Part I, focusing on harm makes distinguishing between the public enforcement of criminal law and the private enforcement of civil law more difficult. Some have described the difference as a contrast between behaviour that is "priced" (where, provided there is a means available to redress any harm caused, the law is indifferent to the behaviour itself) and that which is "prohibited" (where the law seeks to minimize the occurrence of the behaviour itself, not just to compensate for any actual harm caused).<sup>129</sup> In my view, this model makes a distinction of degree, not of substance. In reality, there is no basis upon which to distin-

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<sup>127</sup> Ripstein makes a distinction with regard to the state's interest in punishing an offender depending on whether or not there is an individual victim: "[t]he person who unilaterally sets the terms of interaction with others both *wrongs his or her particular victim* and commits a *wrong against the public order*" (*Equality*, *supra* note 104 at 156 [emphasis added]). I believe that he makes this distinction principally to explain how the criminal law can apply both to crimes that have a specific victim and to so-called victimless crimes. The general principle is the same for both—the role of the criminal law is to uphold an important *public* standard set out in law. This is the material point for my purposes.

<sup>128</sup> See *Ibid* at 156-57.

<sup>129</sup> Cooter provides an excellent explanation of this distinction and offers some cogent criticisms of its use in economic analyses of criminal law: see *supra* note 96 at 1523-31, 1537-38. See also Kenneth G Dau-Schmidt, "An Economic Analysis of the Criminal Law as a Preference-Shaping Policy" [1990] 1 Duke LJ 1 at 10-14 (outlining the traditional economic approach, which treats punishment as a kind of tax or price to control behaviour). As Dau-Schmidt notes, the approaches of Becker and Stigler are built on this foundation, though some of their assumptions differ. See Becker, *supra* note 92 at 170-72, 176-185; Stigler, *supra* note 93 at 527-31.

guish between the response to harm caused by priced behaviour and that caused by prohibited behaviour. The only difference is that prohibitions tend to be justified *ex ante*, on the basis of the expected likelihood and extent of harm flowing from the behaviour.<sup>130</sup> But this in and of itself offers no independent reason to use public enforcement instead of private enforcement. From the perspective of deterrence, in each case, the behaviour has a price. The price of prohibited behaviour is set at a level expected to discourage people from engaging in it all together (and consequently causing the potential harm), while the price of priced behaviour is simply aimed at encouraging people to take care to avoid causing harm while engaging a behaviour.

Linking punishment to the effects of crime has tended to have strong appeal when dealing with economic crimes, because this link fits neatly with the economic assumption of rationality—that profit-maximizing offenders engage in a kind of cost-benefit calculation before committing a crime. The weakness of this analysis is that it sees punishment solely in terms of its expected effects *at the individual level*—first, on the offender subject to punishment and, second, on any potential offenders considering whether to commit the crime. If the purpose of punishment is defined only by its potential to influence this cost-benefit analysis, how is this different from civil enforcement? How do we explain why punishment is exclusively inflicted by the state? In my view, reducing harm is not a distinct reason that explains what it is about crime that requires punishment. This makes the deterrence-based view vulnerable to the argument that criminal enforcement is simply *a* means of enforcing a legal prohibition directed at achieving the goal of harm reduction. This undermines the idea that criminal prohibitions ought to be reserved for a special class of behaviour that has characteristics that specifically call for the special response of publicly-inflicted punishment.

By contrast, where the goal of the criminal law is framed in terms of upholding the supremacy of legally protected freedom against deliberate disregard by the offender, there is something distinct about the prohibited behaviour that supports the use of the criminal law. In this context, punishment is directed at responding to that distinct “criminal” element (the choice to ignore public constraints on freedom in pursuit of private benefit), which nonpunitive remedies cannot address. The private benefit,<sup>131</sup>

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<sup>130</sup> This is certainly the assumption for the *per se* cartel offences: see e.g. *Collaboration Guidelines*, *supra* note 8 (“[cartels] are so likely to harm competition and to have no pro-competitive benefits that they are deserving of prosecution without a detailed inquiry into their actual competitive effects” at 6). See also *supra* notes 12, 67, 88, and accompanying text.

<sup>131</sup> By benefit, I am referring as much to a positive gain as to the infliction of loss or injury, or both, on others that is caused by the pursuit of the offender’s private interests.

which could be addressed by remedies other than punishment, is not the main concern. As Ripstein has argued, this approach asserts the primacy of *public* rationality over *private* rationality,<sup>132</sup> which means that the offender's private reasons for choosing to offend are irrelevant to his punishment. In other words, punishment that seeks to influence a private weighing of costs and benefits misses the point, because what is wrong about crime is the very fact that the offender has chosen to use a private cost-benefit analysis while ignoring public standards. While committing a crime can be *privately* rational in terms of its expected effects on the offender (the benefits outweigh the costs),<sup>133</sup> this does not alter the fact that it is *publicly* irrational.<sup>134</sup> This public irrationality will arise because the offender's private rationality will ignore (or at least undervalue) the public cost of not respecting the system of reciprocal freedom that the criminal law helps to maintain. So long as others exercise restraint and abide by public standards, the offender can extract the benefits from the system while exempting him- or herself from the cost of complying with its obligations, a notion I will refer to as "asymmetrical participation".

Thinking about a violation of criminal law in terms of asymmetrical participation in a system predicated on reciprocity illustrates the need for an omnilateral, systemic viewpoint when responding to crime. If crime is a deliberate and reprehensible misuse of the fair terms of interaction upheld by the minimum standards enshrined in law, then punishment must respond to crime from the public perspective of protecting those fair terms. Emphasizing the public rationality of an omnilateral perspective thus sets the goal of punishment in terms very different from the individually-focused instrumentalism of deterrence.

##### 5. Getting to the Essence of the New Perspective: Upholding the Law

I have outlined a desert-based approach that I believe offers helpful tools for justifying a shift to a more criminal law-oriented mindset in competition enforcement. By framing the overarching purpose of the criminal law as upholding public standards essential to maintaining a system of legally protected reciprocal freedom, the purpose of enforcement through punishment is to publicly vindicate these standards (and by extension the freedom they protect) when they are violated. To ensure that the public standards enforced by the criminal law prevail over private attempts to subvert them, punishment must be applied consistently and fairly and

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<sup>132</sup> *Equality*, *supra* note 104 at 152-53, 155-60.

<sup>133</sup> See Becker (*supra* note 92) made this point. Though Posner ("An Economic Theory", *supra* note 92 at 1196-97) added some nuance in terms of conventional crimes, he endorsed this basic point with regard to economic crimes.

<sup>134</sup> See Ripstein, *Equality*, *supra* note 104 at 159-60.

from an omnilateral perspective. It must speak to society in general and must convey the message that the criminal law is supreme and that violations of it will not be tolerated, thereby reinforcing the collective commitment to compliance with the law and to the reciprocal freedom it upholds. This establishes why, at the level of a general justification for punishment, fairness demands that offenders be punished. This rationale establishes the general legitimacy of recourse to punishment as *the* response to crime.<sup>135</sup> It is not altered by the fact that other considerations may be relevant to justifying the infliction of punishment in a specific case.<sup>136</sup>

### *B. Applying the Approach to Competition*

In this section, I will show how Ripstein's concepts are readily adapted to competition, and provide a desert-based justification for the two matters critical to the success of the shift in enforcement attitude: what makes cartels criminal and why punishment is the required response to them.

#### 1. Competition as the Fair Terms of Interaction

The cornerstone of Ripstein's approach is the role of law in setting the bounds of legally protected freedom. This legally protected freedom is predicated on the existence of rules and institutions dedicated to maintaining a system that balances freedom of action and restraints on freedom for the benefit of all. The perspective from which these rules and institutions must enforce this balance is omnilateral. While competition law and especially criminal competition law has a more limited scope than public law and criminal law in general, it lends itself very well to an analysis grounded in the concept of reciprocal freedom.

As described in Part I, competition law in general (including criminal enforcement) is guided by the general goal of upholding and maintaining competition. Though it sounds simple, what is being protected is not expressly defined. The *Act* mandates no particular form of competition, nor does it demand that specific beneficial consequences be generated.

So what is competition and why is it important? Distilled to its essence, "competition" closely resembles Ripstein's concept of fair terms of

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<sup>135</sup> Because I am focused on how a desert approach supports the Bureau's shift in enforcement stance, I have concentrated on the importance of public enforcement and an omnilateral perspective to a general justification for punishment. As a result, I have not discussed the elements of Ripstein's desert-based approach that inform the actual infliction of punishment on offenders, particularly the use of hard treatment.

<sup>136</sup> As I have said earlier, I believe that deterrence has a role to play in the distribution and quantum of punishment.

interaction. It is the state of affairs that is expected to emerge when market participants are free to choose how to conduct their affairs without unacceptable interference. This freedom is not absolute,<sup>137</sup> however. For the system to work, the individual self-interest of each market participant is bounded by legally enforced parameters that establish the acceptable ways of exercising economic freedom. Moreover, what constitutes publicly accepted standards of reasonable behaviour in a competitive economy is not immutable and can change over time.<sup>138</sup>

At a general level, then, the role of competition law is to establish and enforce rules to strike the balance between freedom and restraint that current public standards require. These rules set the parameters of acceptable behaviour; what falls outside those parameters, however defined and enforced, is anticompetitive. As I outlined in Part I, however, the *Act* uses different methods of enforcement against different types of anticompetitive behaviour. Thus, we need to consider Ripstein's tort-crime distinction to determine what it is about cartels that makes them so reprehensible as to justify criminal status and enforcement.

## 2. What Makes Cartels Criminally Wrongful?

In Part I, I suggested that the shift in enforcement stance toward treating cartels as truly criminal reflects the Bureau's confidence that the amendments create a stronger criminal law mandate. This confidence flows from the sense that the criminal provisions, as amended, are clearly directed at a special class of anticompetitive behaviour that can be distinguished from other agreements among competitors. Despite this assertion, however, the current explanation of the criminal nature of cartels focuses on the harm they cause, which I have argued does not allow for a convincing distinction to be made between criminal and other collaborations.

Framing this matter in Ripstein's terms, if cartels are criminal, then they must be characterized by the extra element of deliberate disregard for the fair terms of interaction. This disregard is special because it is a deliberate attempt at asymmetrical participation in the system and a rejection of the reciprocity inherent in the fair terms of interaction.

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<sup>137</sup> Though it may exist in theory, in practice, a competitive market is not the same thing as an uncontrolled market. Even in so-called free market economies, governments exert some control over the functioning of competitive markets.

<sup>138</sup> Competition theory and policy evolve over time, as do ideas about what constitutes a "competitive" market and what is acceptable and unacceptable conduct. The history of the *Act* illustrates this clearly: see e.g. Khemani & Stanbury, *supra* note 46; Ross, *supra* note 12; Doern, *supra* note 12 at 26-38; Famula, *supra* note 70.

Focusing on the asymmetric effect of this disregard is important because it gets to the essence of a cartel. What sets cartels apart from other collaborations is the attempt by their members to alter the normal workings of the system of legally protected competition in an unacceptable way. This is because cartels use the wrongful means of deception—they deliberately mislead by pretending to abide by the rules of free competition—in an effort to appropriate a benefit that would not accrue to them if they were open about their intentions.<sup>139</sup> Following this analysis, what makes cartels criminal is the pursuit of gain through *means* that are antithetical to the openness expected in order for competitive markets to function well.<sup>140</sup> By acting as though they have the power to ignore the public rules designed to uphold competition for the benefit of all, cartel members reject not only the rules themselves but also the public and omnilateral perspective from which those rules are created and enforced.

This is a special kind of wrong because it violates an assumption that honest participants in an economy rely on when they exercise their freedom of action, namely that the ground rules of competition apply to everyone. Cartels deserve to be treated as criminal because they abuse the very economic freedom made possible by the existence of the anticartel rules. Thus the primary rationale for sanctioning cartel behaviour is not to prevent the negative effects caused, however significant, but rather to protect the economic system itself. This purpose demands consistent<sup>141</sup> and fair enforcement that is independent of the private reasons that cartel members might have had in entering their agreement (which, argua-

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<sup>139</sup> As mentioned in note 91, Warner and Trebilcock have argued that the covert nature of cartels is one of their defining characteristics, akin to a kind of fraud: *supra* note 67 at 715-18. They view the purpose of a criminal prohibition against cartels, however, as primarily one of deterrence and prevention of harm.

<sup>140</sup> I have chosen my language with care. Not all markets are purely competitive in the sense that economists use the term. Nevertheless, cartels offend the basic principles of free competition regardless of the competitiveness of an individual market. Indeed, it may be socially beneficial in some markets where there is less than pure competition to allow some collaboration among competitors. However, as the new division between sections 45 and 90.1 of the *Act* highlights, to be legally permitted, these collaborations must be open (at least enough for regulators to scrutinize them) and justified on efficiency, or other legitimate, grounds (e.g., industry-wide safety, standardization). By contrast, cartels are collaborations that use deception to gain an advantage that the normal openness of the market would prevent. Though this is not the typical explanation offered for calling cartels *per se* illegal, I believe that emphasizing the use of deception helps to explain why this kind of collaboration is presumed not to be justified by a legitimate reason.

<sup>141</sup> Consistent enforcement does not necessarily mean frequent enforcement. Consistency is reflected in the response to crime when it is discovered, regardless of the frequency of that detection.

bly, ought to be rational).<sup>142</sup> In other words, unless the public standard against engaging in cartel behaviour is upheld, the exercise of economic freedom within the confines of a free and fair system would become impossible.

### 3. Why Do Cartels Require Punishment?

Having argued that cartels are properly a criminal wrong under a desert-based conception of criminal law, we now need to examine the second issue: Why is punishment a necessary and legitimate response to the reprehensible nature of cartels?

Framing the question in this way underscores the important link between the essence of what makes cartels reprehensible—the deliberate attempt to subvert the ground rules of competition—and the need for a public response through criminal enforcement. In particular, it highlights the significance of the omnilateral perspective from which a justification for punishment is examined.

If punishment is to uphold the supremacy of law, it must do more than convey that disregard of the law will not be tolerated. It must also reassure those who have abided by the restraints on their individual freedom of action that they have indeed made the right choice. This matters because the fair terms of interaction depend on the collective acceptance of constraints protected by law. Private opinion as to the merits of the constraints is irrelevant. Without public confidence that responses to violations of standards will be guided by the need to protect the public interest in maintaining the system of freedom itself (independent of whether the response can generate effects on the incidence of harm), the collective impetus to abide by the standards could eventually collapse.

In criminal competition law, little attention is focused on this unique public perspective on punishment. General deterrence, though it is concerned with influencing more than just one specific offender, responds only to the private perspective of the offender—the threat of punishment is only as effective as the strength of the individual desire to avoid punishment. In the absence of evidence that punishment will cause others to change the way that they behave, the justification for punishment disappears. There is no space in such an account for the need to convey a com-

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<sup>142</sup> The economic consensus that cartels are without redeeming features also treats as irrelevant the private benefits that cartel members expect to obtain from their arrangements. However, this treatment is based on presumed inefficiency (i.e., in aggregate terms, one expects that the private benefit to cartel members will not make up for anti-competitive effects on others), rather than on a judgment that it is wrong for cartel members to behave as though their private interest in gain can subvert the public interest in competitive markets: see *supra* notes 12, 67, 88, and accompanying text.

mitment on the part of the authorities to the public good (i.e., the competitive system) that criminal competition law protects and that cartels threaten.

Adopting an omnilateral view of punishment, where punishment is the response to the need to uphold competition against asymmetrical participation by cartel members, casts competition enforcement in a different light. Those who choose private advantage over respect for the terms of engagement in a competitive economy deserve to be censured publicly. Independently of any harm caused, their actions represent not only an unwillingness to play by the rules that must apply to everyone for the system to work, but also a wrongful belief that they can unilaterally define their own, more advantageous economic freedom, from which everyone else is excluded. This contempt for, and failure to attribute value to, the free market system is what demands the special censure of punishment. This response is needed regardless of whether punishment might also cause the offender to modify his or her private cost-benefit analysis.

#### 4. The Role of the Shift as the Public Expression of an Omnilateral Perspective

I have stressed the importance of the omnilateral perspective in understanding both what makes cartels wrongful and also what about them necessitates punishment. I believe that the Bureau's shift to a more criminal law-oriented mindset regarding cartels fits into this framework. If we think of the shift not as a promise of actual enforcement primarily intended to influence the private decision to form a cartel, but rather as the expression of the uniquely public perspective that will determine how enforcement policy and decisions are made, it is possible to say that the shift will lead to more effective enforcement.

The key is for the shift to make clear that cartels are criminally reprehensible because, through the use of deceit, they seek to create asymmetrical participation in the competitive system, which is fundamentally at odds with the notion of a free and fair market. Punishment is the unique appropriate response because it is informed by the collective interest in upholding, consistently and fairly, the reciprocal balance between freedom of action and restraint that is essential to competition. This understanding of the shift reinforces public confidence that, once discovered, cartels will be taken seriously, as the deliberate attacks on competition they embody, independently of whether the prospect of punishment is capable (in theory or practice) of altering individual cost-benefit assessments.

In my view, this change in the perspective from which the goals of the shift in paradigm are understood means that the shift can be successful without being more than the change in attitude that it is. By adopting the view that treating cartels as truly criminal is appropriate and just, it establishes the clear omnilateral basis for its commitment to upholding competition and vindicating the standards of acceptable behaviour de-



signed to protect competition. Though others might enhance the message (i.e., prosecutors and courts), the Bureau's prominent role in setting the tone of enforcement is sufficient to make the commitment credible. This is different from holding out the prospect that the shift will lead to harm reduction by influencing offenders, which to be credible, depends on persons and factors outside the control of the Bureau.

## Conclusions

In my view, if the efforts initiated by Commissioner Aitken to stake out a tougher stance on cartels—a stance that I think is really the adoption of a more conventionally criminal law-oriented mindset—are to succeed, the Bureau must shift its primary justification for enforcement from deterrence toward desert. This is because referring to harm and deterrence does not speak to the two critical elements on which the Bureau's shift in enforcement attitude rests: that there is a strong basis on which to consider cartels as criminal and that punishment is the required response to this criminal nature. Moreover, it is difficult to see how this shift will make deterrence more effective than before.

Fortunately, there is a way to explain why criminal enforcement is not simply one of many responses to cartels but rather *the* necessary response to the truly criminal nature of cartel behaviour. Drawing on the idea that the essence of a crime is the choice to act without regard to those public standards that set the outer bounds of acceptable behaviour, cartels attempt to offer an advantage to their members by acting outside the permitted bounds of competition law. Cartels are different from other potentially welfare-reducing collaborations (also entered into for the purpose of gaining an advantage) because cartels are premised on using deceit to generate an asymmetrical application of rules that are intended to apply equally to all.

The focus on cartels as a misuse of the competitive system casts the role of criminal enforcement in a new light. In the context of a general goal of upholding competition, the criminal prohibition against cartels identifies the limited range of behaviour that, by its nature—exempting cartel members from the rules of competition while expecting, and even relying on, others to continue to abide by them—must fall outside the bounds of what can be tolerated. Thus, the primary purpose of criminal punishment becomes the consistent and fair enforcement of minimum standards of behaviour that reflect a public commitment to competition.

What does this mean for enforcement effectiveness? I would argue that the Bureau's shift in attitude can make a difference, but not in the way suggested by the former commissioner. Though it is but one player in the process of bringing concrete enforcement measures to bear on actual offenders (and thus it is unclear how the Bureau's shift might directly af-

fect these measures), the Bureau is uniquely positioned to use the shift as a means to reinforce the general justification for the use of criminal enforcement. It can do so by communicating a desert-based justification that explains the particular wrongfulness of cartels and the basis for punishing them from the omnilateral perspective of upholding the integrity of the competitive system for the benefit of all. By signalling that cartels are an abuse of this system, criminal enforcement is justified by the need for competition to be consistently and fairly upheld, regardless of the frequency with which violations might be detected. This does not mean that actual enforcement efforts do not matter; it only means that the primary justification for enforcement comes from elsewhere. Indeed, one can hope that actual enforcement efforts give concrete expression to the importance of consistent and fair application of the rules of competition. I would further add that, although it is unlikely to do so directly, there is nothing in the shift in attitude that is inconsistent with trying to reduce the incidence of cartels.

A shift in paradigm cannot happen overnight. Nevertheless, by setting out a clear and convincing rationale for making the shift toward treating cartels as truly criminal—one that explains why the shift is justified and why it matters—the Bureau places itself in a strong position to deliver on its ultimate goal of more effective cartel enforcement.

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