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Canada: Cartels

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Canada's Immunity Program, originally released by the Competition Bureau (the Bureau) in September 2000 and then overhauled in October 2007, has been a highly effective enforcement tool, encouraging early disclosure of competition offences that may otherwise be difficult to detect, such as international cartels. Under the programme, immunity from prosecution is available to the first party to disclose evidence of criminal anti-competitive activity of which the Bureau was either not aware or may not be in a position to prosecute effectively without cooperation from a participant in the illegal conduct. In practice over the past seven years, the procedures and considerations employed by the Bureau under the programme closely resemble those of the US Amnesty Program.

Canada's current cartel laws

Canada's cartel laws are similar to section 1 of the Sherman Act in the US. However, unlike in the US, the primary provisions of Canadian legislation addressing cartels, as elaborated below, do not contain a per se category of offences, although certain cartel activities can be caught in Canada under bid rigging and price maintenance provisions where there is no market element to the offence (sections 47 and 61 respectively of Canada's Competition Act (the Act)). Outside these limited exceptions, in order to prove the offence, the authorities must demonstrate that the impugned activity either did, or, where the agreement was not implemented, would have, 'unduly' prevented or lessened competition. International cartel activity that unduly lessens competition in any market in Canada is proscribed by sections 45 and 46 of the Act. Subsection 45(1) states:

Conspiracy – Every one who conspires, combines, agrees or arranges with another person

- (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,*
- (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,*
- (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or*
- (d) to otherwise restrain or injure competition unduly,*
is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

The Supreme Court of Canada has held that an agreement to lessen competition unduly requires proof of the following two elements:

- a moderate degree of market power among the parties to the agreement; and
- behaviour that tends to reduce competition or limit entry in the relevant market.¹

It is not necessary that the agreement actually results in an undue lessening of competition, nor is it necessary that the parties to the

agreement intend to lessen competition unduly. The offence will be made out where the parties to the agreement intended to enter the agreement, which, if carried out, would likely result in the requisite undue lessening of competition. A conspiracy can be inferred from circumstantial evidence. Direct evidence of communications or an agreement between the parties is not necessary for the offence to be proved.

Under section 46 of the Act, a corporation carrying on business in Canada that implements a foreign conspiracy in Canada, regardless of whether it has knowledge of the foreign conspiracy, may be guilty of an indictable offence and subject to criminal penalties. Section 46 states:

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

Foreign companies with no Canadian presence that may have taken part in an international conspiracy not to sell into the Canadian market or with respect to prices in Canada may also be pursued by the authorities for 'aiding and abetting' a section 46 offence.² In these cases, the attorney general of Canada, in the context of negotiated guilty pleas, has charged foreign companies with aiding and abetting an offence under section 46, rather than seeking to indict those companies directly under section 45. In other words, it is alleged that the foreign company aided and abetted a foreign competitor in directing the competitor's Canadian affiliate to implement a conspiracy entered into outside Canada.³ Neither the validity of section 46, nor whether it can be aided and abetted, has been determined by a Canadian court in a contested proceeding. In practice, most convictions under either section 45 or 46 are the result of negotiated plea agreements and statements of admissions.

Canada's cartel laws after 12 March 2010

Legislative amendments which will come into effect on 12 March 2010 will fundamentally alter Canada's cartel laws. A new per se criminal provision will address hard-core cartels, while a new civil reviewable regime will permit the Bureau to bring proceedings to enjoin other sorts of arrangements among competitors that prevent or lessen or are likely to prevent or lessen competition substantially in a market.

The new cartel offence removed the former longstanding requirement that there be an ‘undue’ effect on competition. It provides that it is an offence for a person, along with a competitor, to conspire, agree or arrange to:

- fix, maintain, increase or control the price or the supply of a product;
- allocate sales, territories, customers or markets for the production or supply of a product; or
- fix, maintain, control, prevent, lessen or eliminate the production or supply of a product.

The amendments increased the maximum penalty from a C\$10 million fine and five years’ imprisonment to C\$25 million and 14 years. There is a new ancillary restraints defence the meaning and extent of which will require jurisprudence to clarify. Competitor is defined to include a person who it is reasonable to believe would be likely to compete in the absence of the cartel.

The Competition Bureau has published draft Competitor Collaboration Enforcement Guidelines which state that the new criminal cartel provision will be ‘reserved for agreements between competitors to fix prices, allocate markets, or restrict output that constitute naked restraints on competition (restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture.’⁴

The immunity programme

In Canada, immunity from prosecution is available for conduct that is contrary to the criminal provisions of the Act, including conspiracy. The Bureau investigates criminal conduct that is enforced in the courts by the attorney general of Canada (AG) through the director of public prosecutions (DPP).

Canada’s immunity programme is detailed in two documents published by the Bureau in October 2007, which represent adjustments made to the original September 2000 programme in order to reflect the Bureau’s experience since the Immunity Program’s inception and the results of a public consultation process commenced in 2006. The two documents are to be read in conjunction with each other:

- an information bulletin entitled ‘Immunity Program under the Competition Act’ (the bulletin); and
- a supplement entitled ‘Immunity Program Responses to Frequently Asked Questions’ (the FAQs).

The Bureau’s companion document, entitled ‘Adjustments to the Immunity Program’ is also useful as an interpretive guide to the bulletin and the FAQs.⁵

The sole authority to grant immunity to a party implicated in an offence under the Act lies with the AG through the DPP. The role of the Bureau is to investigate potential violations under the Act and make recommendations to the DPP as to whether immunity should be granted.

Conditions for a grant of immunity

There are two situations where the Bureau may recommend that immunity be granted:

- where the Bureau is unaware of an offence in relation to a particular product or service and the party is the first to disclose it; and
- where the Bureau is aware of an offence, and the party is the first to come forward before there is sufficient evidence to warrant a referral of the matter to the DPP.

Before a recommendation will be made, however, the Bureau must be satisfied that the applicant has met, or is prepared to meet, the following conditions:

- the applicant must have ceased its participation in the illegal activity;
- the applicant must not have coerced others to be party to the illegal activity – the Bureau will only disqualify an applicant where there is evidence of clear coercive behaviour, express or implied;
- the applicant is not the only party involved in the offence; and
- during the Bureau’s investigation and subsequent prosecutions, the party must provide complete and timely cooperation, including:
 - disclosure of all competition-related offences in which it may have been involved that relate to any product, not only the product that is the subject of the immunity application, and the exercise of due diligence in seeking to uncover them, including the timely disclosure of any obstruction activities that may be revealed as a result of an applicant’s internal investigation;
 - full, frank and truthful disclosure of all evidence and information within its possession or control, wherever located, relating to the offences, no misrepresentation of any material facts and any such misrepresentations that have occurred in the past must be fully and promptly disclosed;
 - full and continuing cooperation; where the immunity applicant is a business, it must take all lawful measures at its own expense to ensure that all current directors, officers and employees cooperate throughout all stages of the investigation; provided directors, officers and employees admit their participation as part of the corporate admission and provide complete and timely cooperation, they will qualify for the recommendation for immunity as well; in addition, provided the applicant has the Bureau’s or the DPP’s consent to disclose its application for immunity, it must take all lawful measures to secure the cooperation of all affiliates and all former directors, officers and employees as well as current and former agents, who then may qualify for immunity as well, not automatically but as determined by the Bureau on a case-by-case basis; and
 - the applicant shall not disclose its immunity application to any third party without the consent of the Bureau or the DPP, except as required by law; where the applicant believes disclosure is legally required, it must first give notice to and consult with the Bureau or the DPP.

If all of these conditions are satisfied, the Bureau may recommend to the DPP that immunity be granted or, where full immunity may not be available, the Bureau may recommend other forms of leniency. For example, an applicant’s cooperation may still be considered as a mitigating factor in any plea arrangement negotiations or subsequent proceedings, or in conjunction with immunity for disclosing illegal conduct with respect to another product or service (as discussed below). It is important to note, however, that immunity may be lost at any point in the process where the applicant has not met the above requirements. In that case, immunity may still be recommended for a subsequent applicant who does meet all of the requirements.

It is important to note that the Bureau and the DPP will not consider joint requests for immunity; the only exception that may be permitted is for a joint request from companies that are affiliated. Allowing a party to wait for, and coordinate with, a co-conspirator

before contacting the Bureau would presumably undermine the rationale for, and effectiveness of, the immunity programme.

Immunity is not available under the programme for obstruction or destruction of records offences.

Applicants will generally be expected to provide waivers permitting the Bureau to communicate with any other jurisdictions in which the applicant has been granted immunity.

Steps to an immunity application

Obtaining a marker

The first step is initial contact with the Canadian authorities. Anyone may discuss or request immunity for cartel activity by contacting the senior deputy commissioner of competition for criminal matters. The cornerstone of the Immunity Program is its ‘first in’ policy whereby the first qualified party to make contact with the Canadian authorities (and who subsequently meets all of its cooperation requirements) will be the sole party who receives full immunity. Consequently, a potential applicant should always consider making an application for immunity as early as possible.

Initial contact generally takes the form of an anonymous inquiry by a party’s legal counsel as to whether immunity would be available in respect of a particular product or industry. Only Bureau officials (and not the AG nor the DPP) may grant a first-in marker and ‘no names’ hypothetical information is adequate to request a marker. Once a marker has been requested, the Bureau then undertakes an internal check of its open investigations to determine whether a marker is available to guarantee the applicant’s first-in status. The FAQs emphasise the importance of providing precise product and sub-product definitions to ensure that the Bureau can do a proper search of its immunity marker database. This is consistent with the practice followed in the US.

Proffer

After the applicant has obtained a marker to reserve its first-in status, the next step is to provide the Bureau with a statement, oral or written but typically oral, known as a ‘proffer’. This is generally due within 30 days of the initial marker contact, although timing is usually discussed during the marker call and a schedule set for providing the information. Discretionary extensions beyond the typical 30 days may be granted, but the grounds for delay must be substantial since delay can affect other steps in the Bureau’s investigation, such as a search or cooperation with another jurisdiction, where timing can be critical.

In a proffer, the applicant describes in detail the illegal activity for which immunity is sought, its effect in Canada, and the supporting evidence. Proffers are typically hypothetical and are generally provided by the applicant’s legal counsel. A proffer must provide adequately detailed information about the key elements of the offence in order to permit the Bureau to recommend immunity, and for the DPP to satisfy him or herself that an offence may have been committed and that the applicant is not disqualified by reason of coercive conduct or as the sole party involved. The FAQs stress that accuracy is critical in a proffer and set out a lengthy list of the types of information the Bureau expects to receive, including:

- a description of the parties concerned in the conduct, including ownership structures and affiliations, market shares and trade association memberships;
- the product and geographic markets affected, including key Canadian customers, barriers to entry and product substitutability;
- a description of the illegal conduct, including time period, geographic scope and monitoring and enforcement measures;

- a description of the industry concerned, including pricing mechanisms, supply channels, contracts and any countervailing power;
- the effect of the conduct, including the volume of affected commerce and price impact;
- a general description of the witnesses, records and evidence available to assist the Bureau in its investigation and the DPP in its prosecution; and
- whether and from which other international authorities immunity or leniency has been requested.

In some cases, the Bureau may request an interview with witnesses or review of certain documents prior to any recommendation on immunity.

In Canada (until the recent amendments come into force), and unlike the US, horizontal agreements among competitors are not per se illegal. The authorities must demonstrate that the agreement, if implemented, is likely to lead to an undue lessening of competition in the relevant market. The FAQs indicate that the Bureau does not expect an applicant to demonstrate decisively that an undue lessening has occurred at the proffer stage as a precondition to the Bureau recommending the grant of immunity. The Bureau does expect an applicant to disclose adequate information to assess the potential anti-competitive effects, however, including information about market shares, barriers to entry, countervailing market power and cross-elasticity of demand.

The FAQs also state that where an applicant with a marker does not meet the 30-day (or otherwise agreed) timeline for a proffer, the marker may be revoked. This timeline has been criticised for being in conflict with the fundamental tenet of the Immunity Program – that early disclosure is best. Most international cartel cases require a lengthy internal investigation to gather adequate information to meet the Bureau’s expectations of the information required for a proffer. In practice, the Bureau has permitted some flexibility with respect to the 30-day period in appropriate cases to ensure that reliable information is disclosed as soon as possible. Any decision to cancel a marker will be made only after serious consideration of all factors and after notifying the applicant.

Applicants should take special care in oral proffers to ensure that all information is clearly stated and that counsel for the applicant and Bureau officers are in agreement about the information provided.

Immunity agreement

If the Bureau concludes that the applicant has demonstrated its eligibility and its capacity to provide full cooperation, it will present all proffered information together with a recommendation on immunity to the DPP. The DPP will then exercise its independent discretion whether to grant the applicant immunity from prosecution. If so, the DPP and the applicant will execute an immunity agreement that will record all ongoing obligations and state who is covered by the agreement, how information provided by the immunity recipient will be treated and under what circumstances immunity can be revoked. It requires that an applicant provide complete, timely and ongoing cooperation throughout the investigation and prosecution stages. Unofficial sample corporate and individual agreement templates are available on the Bureau website.

Full disclosure

After the applicant enters into an immunity agreement with the DPP, full disclosure and cooperation with the investigation and any

ensuing prosecution is essential. Full disclosure is an onerous obligation, premised on an exhaustive internal investigation and search for information that is relevant to the activity. Cooperation usually consists of numerous interviews of present and former directors, officers and employees and an exhaustive search for, and production of, relevant documents and records. During this stage, immunity applicants have an obligation to cooperate fully and to disclose all non-privileged information related to offences under the Act. This includes an obligation to use reasonable, lawful measures to encourage compliance by all present and former officers, directors, employees and affiliates. This may include paying for independent legal counsel for individuals or taking disciplinary action against individuals who refuse to cooperate, and will include covering travel and other related witness expenses. The Bureau will want to view documents and interview witnesses, sometimes under oath or videotaped. Before communicating any information regarding the investigation to a third party, such as a current agent or a former director, officer or employee, the party must seek the consent of the Bureau or the DPP.

The FAQs refer to a six-month time period from the grant of immunity within which an applicant must complete its cooperation obligations, including document production. The six-month period can be difficult to meet in cases of complex international organisations, where numerous sources of documents must be identified and reviewed before production can begin. The FAQs state that typically a schedule for post-proffer production should be established early in the process, and that lengthy delays or the non-availability of witnesses based on other commitments will not be accepted, including any that are caused by immunity applications in other jurisdictions. Going forward, it will be interesting to see how flexible the Bureau will be with respect to these timelines in order to accommodate the challenges that programme participants may face in obtaining the required information and documents.

Revocation of immunity

If a party fails to comply with any of the requirements of the immunity agreement, immunity may be revoked. Revocation has been, and will be, a rare event, reserved for the most egregious cases. The Bureau may resume investigation of any party that does not meet its obligations pursuant to the agreement and will consider referring the matter to the DPP with the recommendation that the grant of immunity be revoked. The DPP may also initiate revocation on its own. Once immunity is revoked, action may then be taken against the party with regard to the illegal activity. The same holds true for a corporation that does not fully promote the complete and timely cooperation of its employees, as well as an applicant that does not disclose any or all competition-related offences or does not provide full, frank and truthful disclosure of all evidence and information known or available to it. In this respect, any obstruction activity must be strongly discouraged and, if detected, must be immediately reported to the authorities so as not to jeopardise the grant of immunity. In addition to revocation of immunity, obstruction could lead to criminal charges under the Competition Act or the Criminal Code of Canada.

The FAQs do not add any more guidance on when the Bureau would consider recommending that a grant of immunity be revoked and do not provide examples of what legal steps it expects to be taken to secure the cooperation of non-cooperating individuals. For many corporate applicants, finding an appropriate and effective legal basis in the jurisdiction in which the non-cooperating witness resides can be a challenge. The FAQs do state that in the normal course the

Bureau will discuss the situation with the applicant and provide a reasonable opportunity to cure any deficiencies, and that where the DPP determines that there are grounds for revocation, it will provide 14 days' written notice to the party to likewise afford a reasonable opportunity to address any shortfalls in the party's conduct. The DPP's approach when an immunity agreement is breached is set out in the Federal Prosecution Service Deskbook.

Revocation of immunity will only affect the party that does not cooperate or otherwise fails to comply with the programme requirements. A witness that refuses to provide cooperation may be 'carved out' of the immunity agreement. No current director, officer, employee or agent will be carved out for any reason other than a failure to admit its knowledge of or participation in the conduct or an individual failure to cooperate.

The FAQs specify that the full disclosure process will be carried out on the understanding that neither the Bureau nor the DPP will use the information against the applicant unless the applicant fails to comply with the terms and conditions of its immunity agreement. The risk of cooperating and having immunity revoked could, therefore, be more severe than never having applied for immunity at all.

Proactive immunity

The Bureau does not engage in 'proactive immunity', in effect to select an optimal candidate. The Bureau does, however, inform actual and potential targets, at appropriate junctures in the course of an investigation, about the Immunity Program. The Bureau does not otherwise actively solicit potential immunity applicants.

Immunity plus and penalty plus

Under immunity plus, where a party is not first in, that party may still obtain a reduced penalty if it is the first to disclose the occurrence of a second offence related to another product or service of which the Bureau was not originally aware. In this instance, the party will be eligible for full immunity for the second offence, as well as a favourable sentencing recommendation with respect to the punishment for the original offence, provided the party pleads guilty to the original offence. In practice, immunity plus (and amnesty plus in the US) has operated as a catalyst for the disclosure of conduct that has led to the opening of a number of other investigations in related products.

In the US, there is a corollary policy called 'penalty plus' under which an applicant who applies for amnesty for one offence and fails to disclose a second offence is subject to an increased penalty for the second offence. In the October 2007 overhaul of its immunity programme, the Bureau has rejected the adoption of such a policy. The Bureau states in the adjustments to the immunity programme that if it uncovers offences that an applicant knew about but failed to disclose, it will recommend to the DPP that immunity be revoked and that the non-disclosure of the second offence be treated as an aggravating factor in sentencing with respect to that second offence.

Leniency and sentencing in cartel cases

In April 2008 the Bureau released its Draft Information Bulletin on Sentencing and Leniency in Cartel Cases,⁶ for public consultation, as forecast in the 2007 immunity programme overhaul. The draft provisions seek to foster early resolution of cartel and bid-rigging cases by offering a 50 per cent fine reduction and no individual penalties for the first leniency applicant, and lesser reductions for later applicants. Cooperation and revocation terms are similar to those in the immunity programme. The leniency programme addresses situations where entities miss the 'first in line' spot for immunity, but may still want to minimise exposure to sanctions and can offer cooperation

to that end. The draft Bulletin also sets out the Bureau's proposed approach to sentencing, predicated on economic harm as the gauge by which cartel fines should be fixed, generally using an overcharge multiplier of 20 per cent. Sentence aggravating and mitigating factors are also listed. Consultation closed in July 2008 and it remains to be seen what programme will be issued.

Transnational criminal anti-competitive activity

In situations where the criminal anti-competitive activity is international, the relevant authorities may decide to pursue independent, joint or parallel investigations. For this reason, a party may decide to approach each authority separately. However, the Bureau recommends that any applicant whose business activity has a substantial connection to Canada should consider contacting the Bureau either before, or immediately after, contacting foreign competition law authorities. The Draft Information Bulletin on Sentencing and Leniency further highlights that a party who has been granted immunity or favourable treatment in another jurisdiction may not receive special consideration from the Bureau on that premise alone (and, in fact, it has occurred that a party who received immunity in another jurisdiction was not first in and did not receive immunity in Canada). If possible, companies should consider seeking immunity in all jurisdictions affected by the relevant activity in a coordinated manner. A company may be placed in a difficult position if it is cooperating in one jurisdiction and defending against an investigation in another, especially where those jurisdictions have information-sharing agreements. These agreements may have confidentiality exceptions for immunity applicants, but those matters must be carefully explored before proceeding.

Confidentiality

The Bureau guarantees absolute confidentiality with regard to information provided during a request for immunity, except where:

- disclosure is required by law (eg, as required for those who are charged with a criminal offence);

- disclosure is necessary to obtain or maintain judicial authorisation for the exercise of investigative powers;
- disclosure is to secure the assistance of a Canadian law enforcement agency;
- the party has agreed to disclosure;
- there has been public disclosure by the party;
- disclosure is necessary to prevent the commission of a serious criminal offence; or
- disclosure is otherwise for the purpose of the administration or enforcement of the Act.

The immunity programme bulletin states that if a private action for damages should arise pursuant to section 36 of the Act by reason of the offence conduct, the Bureau's policy is to provide confidential documents and evidence only in response to a court order. If that occurs, the Bureau will take all reasonable steps to protect the confidentiality of the information, including by seeking protective court orders. The bulletin further states that the Bureau will not disclose the identity of a party or the information obtained from that party to a foreign law enforcement agency without the party's consent. However, as part of an applicant's ongoing cooperation, the Bureau will expect a waiver allowing communication of information with jurisdictions to which the applicant has made similar immunity or leniency applications.

If an applicant does not have immunity, however, the Bureau will not agree to stipulations in plea agreements that limit information disclosure to other antitrust agencies. The rationale behind this is that Canada is party to international agreements that provide for mutual legal assistance among international antitrust enforcement agencies and failure to disclose information to such agencies would undermine Canada's international obligations and limit the effectiveness of these agreements.

Confidentiality of the identity of an immunity applicant and the information they provide to the Bureau during an investigation is increasingly becoming an issue in civil litigation claims and

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International and domestic clients involved in complex mergers, or who are accused of participating in price-fixing cartels, or who become embroiled in class actions or other competition litigation, all have one thing in common: they need the best competition lawyers.

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particularly parallel class actions in the US and Canada. Increasingly, plaintiffs in the US engaged in litigation concerning allegations of international cartels, for which there may be active investigations on both sides of the border, are seeking access to the Bureau's investigative files through document requests. Although Canadian plaintiffs are generally not entitled to discovery until a class action is certified, some are also seeking to gain access to US discovery by seeking standing in US class actions. The difference in privilege laws on either side of the border may lead to substantively different disclosure, such that documents or information that may be subject to privilege in Canada may be subject to disclosure in US litigation. Confidentiality of an applicant's immunity status is also an ongoing issue for corporate immunity applicants as they grapple with increasingly stringent securities disclosure laws in a number of different jurisdictions. An immunity applicant's obligations under securities disclosure laws may be at odds with the Bureau's determination to maintain confidentiality in order to protect the integrity of its own ongoing investigation.

Notes

- 1 *Canada v Pharmaceutical Society (Nova Scotia)*, [1992] 2 SCR 606 (SCC).
- 2 There is no specific 'aiding and abetting' offence set out in the Competition Act. But section 21 of the Criminal Code of Canada, RSC 1985, c C-46 provides that it is a criminal offence to aid or abet any other person who commits a criminal offence.
- 3 See for example the indictment against Tokai Carbon Co, Ltd, 1 February 2001, Federal Court File number T-24-01, available online at www.strategis.ca.
- 4 Available online at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/O2987.html
- 5 All three documents are available online at www.competitionbureau.gc.ca.
- 6 Available online at www.competitionbureau.gc.ca.



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