The Cartels and Leniency Review

Second Edition

Editor
Christine A Varney

Law Business Research

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CONTENTS

EDITOR'S PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcement. Some notable cartels managed to remain intact for as long as a decade before they were uncovered. Some may never see the light of day. However, for those cartels that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from more than two dozen jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. In part due to US leadership, stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

The authors of these chapters are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations, and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with chapters on 31 jurisdictions) and analytical depth to those practitioners who may find themselves on the front lines of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the second edition of *The Cartels and Leniency Review*. We hope that you will find it a useful resource. The views expressed in this book are those of the authors and not those of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

Christine A Varney
Cravath, Swaine & Moore LLP
New York
January 2014

Chapter 4

CANADA

George Addy, Anita Banicevic and Mark Katz[1]

I ENFORCEMENT POLICIES AND GUIDANCE

i Competition Act

The Competition Act (the Act) is the key antitrust legislation in Canada.[2] Its stated purpose is to maintain and encourage competition in Canada to, *inter alia*, promote the efficiency and adaptability of the Canadian economy.

The Act is federal legislation. Unlike certain other jurisdictions, Canada's provinces do not have their own counterpart competition legislation. As such, enforcement of Canadian competition law is exclusively a federal matter.

The Act governs both civil reviewable practices, such as abuse of dominance and price maintenance, and criminal conduct, such as conspiracies between competitors and bid rigging.

ii Cartel offences

The principal cartel provisions in the Act make it a criminal offence to enter into certain types of agreements between competitors (conspiracies) and to engage in bid rigging.

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1 George Addy, Anita Banicevic and Mark Katz are partners at Davies Ward Phillips & Vineberg LLP. The authors would like to thank Michael Packer, student-at-law, for his assistance in preparing this chapter.

2 Competition Act, RSC 1985, c C-34.

Conspiracy

Section 45, which contains the Act's prohibition against conspiracy, makes it a criminal offence for competitors (or potential competitors)[3] to enter into price fixing agreements,[4] market allocation or market division agreements,[5] or output restriction agreements.[6]

Parties convicted of contravening the conspiracy offence are liable to a fine not exceeding C$25 million per count or to imprisonment for a term not exceeding 14 years, or both.[7] Since parties can be charged with multiple counts under the conspiracy offence, fines imposed may exceed the statutory maximum in a given case.[8]

Bid rigging

Section 47 contains the Act's bid rigging provision. Section 47 makes it a criminal offence for persons to enter into certain types of agreements in response to a call or request for bids or tenders, namely agreements to not submit a bid or tender, to withdraw a bid or tender already made, or to submit bids or tenders on terms that have been coordinated by the parties, where the agreement or arrangement is not disclosed to the person calling for the bid or tender at or before the time the bid or tender is submitted or withdrawn.

Parties convicted of bid rigging are liable to a fine in the discretion of the court, imprisonment for up to 14 years, or both. If recent fines are any indication, bid rigging has become a significant enforcement focus for the Competition Bureau (the Bureau). In 2013 alone, courts have ordered fines for bid rigging totalling over C$40 million, including a record C$30 million fine against Yazaki Corporation, a Japanese supplier of

3 The term competitor is defined in Subsection 45(8) to include 'a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement'.

4 Competition Act, Section 45(1)(a).

5 Competition Act, Section 45(1)(b).

6 Competition Act, Section 45(1)(c).

7 No custodial jail sentences have been imposed for cartel offences in Canada, although courts have imposed conditional sentences involving confinement at home, community service, or both. However, with the enactment of the Safe Streets and Communities Act in November 2012, Canadian judges no longer have the discretion to impose a conditional sentence on individuals convicted of a crime that carries a maximum penalty of 14 years' imprisonment or more. Consequently, individuals convicted of conspiracy or bid rigging (see below) will now either face a prison sentence or a fine.

8 There is also a civil reviewable practice (Section 90.1 of the Act) that prohibits agreements between competitors whose effect is to substantially prevent or lessen competition. According to the Competition Bureau's Competitor Collaboration Guidelines, the conspiracy offence (Section 45) is intended to apply to hard-core cartel conduct, while Section 90.1 is meant to capture other types of competitor agreements that may not be *per se* offences but that still have a negative effect on competition. See: Competitor Collaboration Guidelines, Section 1.3, www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html.

motor vehicle components, for its participation in an international bid rigging cartel.[9] Bid rigging involving public sector procurement contracts is an area of particular concern for the Bureau.[10]

Other cartel-related offences

The Act contains several other cartel-related offences. The most important of these is the foreign-directed conspiracy offence in Section 46. This provision makes it an offence for a corporation carrying on business in Canada to implement a directive or instruction from a person outside Canada to give effect to a foreign conspiracy that would be illegal in Canada. The offence can occur even if the directors or officers in Canada were unaware of the foreign conspiracy. The Bureau has relied upon Section 46 relatively frequently as the basis for prosecutions.[11]

iii Enforcement authorities

The Bureau is the federal government agency responsible for the investigation of anti-competitive conduct in Canada. The Bureau is headed by the Commissioner of Competition (the Commissioner), who is responsible for the administration and enforcement of the Act.

Although the Bureau is responsible for investigating alleged cartel and other criminal offences under the Act, it does not have carriage over criminal prosecutions. Rather, the prosecution of criminal offences is the responsibility of the Public Prosecution Service of Canada (the PPSC). The Bureau will refer a criminal matter to the PPSC and make a recommendation as to whether the PPSC should prosecute. The PPSC alone has the authority to decide whether it is in the public interest to proceed with a criminal prosecution under the Act. As a practical matter, Bureau officials remain closely involved with the prosecution process as it unfolds.

Combating cartel offences remains a top enforcement priority for the Bureau.[12] Significant amendments were made to the Act in 2009 to enhance the Bureau's

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9 Competition Bureau, News Release, 'Record $30M Fine Obtained by Competition Bureau Against Japanese Auto Parts Supplier' (18 April 2013), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03560.html.

10 See, for example, Competition Bureau, News Release, 'Additional Charges Laid in Quebec Sewer Services Cartel' (20 December 2012), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03517.html; Competition Bureau, News Release, 'Competition Bureau Exposes Sewer Services Cartel in Quebec' (November 22, 2011), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03430.html; and Competition Bureau, News Release, 'Company Pleads Guilty to Bid-rigging of Federal Government Contracts', www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03484.html.

11 See, for example, Competition Bureau, News Release, 'Morgan Companies Fined $1 Million for Obstruction and Price-Fixing' (16 July 2004).

12 See, for example, remarks by John Pecman, then interim (now current) Commissioner (5 April 2013), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03556.html; Melanie L Aitken, former Commissioner, Address to the Northwinds Professional Institute 2009 Competition

capabilities in this regard. Most importantly, the conspiracy offence was converted to a *per se* offence (no longer requiring proof that the conspiracy unduly lessens competition) and the penalties for the offence were substantially increased (the maximum fines were raised from C$10 million to C$25 million per count, and the maximum prison term was increased from five to 14 years). The enactment of a *per se* conspiracy offence was intended to make it easier for the Bureau and PPSC to secure convictions. To date, however, there has only been one case resulting in a conviction under this new *per se* offence, which was secured by way of plea agreement.[13] In the absence of any contested cases, the scope of the amended offence has yet to be tested and its implications for future enforcement are not yet fully apparent.

II COOPERATION WITH OTHER JURISDICTIONS

Canada has entered into several formal state-to-state treaties, known as mutual legal assistance treaties (MLATs), and inter-agency agreements that promote and facilitate cooperation in, *inter alia*, cartel investigations. The Bureau has used these mechanisms to request the production of evidence located in other jurisdictions and to request assistance to compel the attendance of witnesses for examination.[14]

Cooperation between the Bureau and its counterpart agencies also takes place at a more informal level (e.g., coordinating simultaneous investigations in several jurisdictions). There are several recent instances where the Bureau's cooperation with its international counterparts has led to coordinated investigations and enforcement action. For example, the Bureau's ongoing investigation into LIBOR rate setting involves cooperation with agencies such as the European Commission. Similarly, the ongoing auto parts bid rigging investigation is also being coordinated with competition authorities in the US, Japan, the European Union and Australia. Indeed, the impact of international cooperation has been particularly significant in the *Auto Parts* bid rigging

Law and Policy Forum (12 February 2009), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02994.html.

13 Domfoam International Inc and Valle Foam Industries (1995) Inc were charged with, and pleaded guilty to, four counts of conspiracy under the Act: two charges under the new conspiracy provision of the Act for price-fixing from March to July 2010, for which the companies were fined a total of C$2.5 million, and two charges under the former conspiracy provision for price-fixing from January 1999 to March 2010, for which the companies were fined a total of C$10 million. See the Bureau, News Release, 'Competition Bureau Sends Signal to Price-Fixers with $12.5 Million Fine' (6 January 2012), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01353.html.

14 For instance, there is an MLAT between Canada and the United States and interagency cooperation agreements between the Bureau and the Antitrust Division of the US Department of Justice and the FTC.

case, as Canadian courts have already imposed fines totalling C$40 million against three of the Japanese companies participating in this bid rigging cartel.[15]

The Bureau will also, as a matter of course, request and expect parties to provide waivers to allow the Bureau to communicate freely with other authorities on matters relating to cartel investigations.

Finally, coordination among jurisdictions may also extend or lead to extradition requests. Canada's Extradition Act permits extradition to other jurisdictions where an offence is punishable by imprisonment of at least two years in both countries or as otherwise specified in the relevant extradition treaty.[16] To date, no one has been extradited from Canada in respect of a cartel offence, although three individuals have been extradited to the United States in respect of a deceptive telemarketing scheme.[17]

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

i Jurisdictional limitations

By their very nature, international cartels often involve conduct occurring outside Canada but which has an impact in Canada. Since the parties in international cartel cases almost always voluntarily attorn to the jurisdiction of Canada's courts as part of reaching a negotiated resolution with the Bureau or the PPSC, there is very little case law considering the jurisdiction of Canadian courts over foreign cartel participants.

While very few cases have expressly considered the scope of extraterritorial jurisdiction in respect of cartel offences under the Act, one decision has taken a broad view of the subject-matter jurisdiction of Canadian courts under the (former) conspiracy provision of the Act.[18] In *Vita-Pharm*, a motion was brought by the defendants to challenge a class action commenced in relation to the bulk vitamins conspiracy. Five foreign defendants argued that the court lacked jurisdiction because the agreements in question were made outside of Canada. The court rejected this argument, and held that the conspiracy offence is not expressly limited to agreements entered into within Canada and that a conspiracy that injures Canadians can give rise to liability in Canada even if the conspiracy was entered into abroad. This decision is consistent with the enforcement position of the Bureau and the PPSC, which take the view that the conspiracy offence

15 See, for example, Remarks by John Pecman, Commissioner (14 November 2013), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03629.html; see also Competition Bureau, News Release, 'Record $30M Fine Obtained by Competition Bureau Against Japanese Auto Parts Supplier' (18 April 2013), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03560.html.

16 Extradition Act, SC 1999. c 18.

17 See: Competition Bureau, News Release, 'Canadian Scammers Extradited to the U.S. Receive Lengthy Prison Sentences' (30 July 2008), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02717.html.

18 *VitaPharm Canada Ltd v. F. Hoffman-LaRoche Ltd* (2002), 20 CPC (5th) 351 (*Vita-Pharm*).

applies regardless of whether the agreement was entered into in Canada so long as its effects are felt or were intended to be felt in Canada.[19]

While broad substantive jurisdiction may exist under Section 45, there are significant questions about whether a Canadian court could assert personal jurisdiction over a foreign entity with no presence in Canada but whose conduct may have had effects within Canada. For example, the general rule is that criminal process (e.g., an indictment) cannot be served on a party outside Canada unless expressly authorised by enabling legislation. Since the Act does not expressly authorise extraterritorial service of criminal process, there are serious doubts about whether the PPSC could indict a foreign party with no presence in Canada. This issue is generally avoided in practice, however, since most foreign entities voluntarily attorn to Canadian jurisdiction as part of a negotiated settlement.

ii Defences and exemptions

Section 45 incorporates certain defences and exemptions, with perhaps the most important defence being the ancillary restraints defence (the ARD). Under the ARD, Section 45 does not extend to agreements that would otherwise violate the provision but are 'ancillary', 'directly related to' and 'reasonably necessary for' a broader or separate agreement or arrangement that does not itself contravene Section 45. A commonly cited example of this defence is a non-competition agreement that is entered into between parties in the context of a merger transaction or joint venture arrangement. Given the relatively recent enactment of the amended Section 45, no Canadian jurisprudence is currently available as to the applicable scope of the ARD.

Another defence that is available in certain circumstances is the regulated conduct defence. Under Section 45(7), if conduct that would otherwise violate Section 45 can be shown to be authorised or permitted by provincial or federal legislation, then the existence of this legislation provides a complete defence to liability under Section 45.[20] For example, in certain regulated industries, the pricing for participants in the industry may be set by an industry regulator or board pursuant to provincial legislation. In recent speeches, the Commissioner has stated that the Bureau would like to develop jurisprudence as to the appropriate scope of the regulated conduct defence, and, accordingly, the Bureau is currently looking for an appropriate case to bring in this area.[21]

Other exemptions or defences available under Section 45 include an exemption for agreements entered into by affiliates, as well as a defence for agreements or conspiracies

19 See also *Fairhurst v. Anglo American PLC*, 2011 BCSC 705, where the court held that foreign defendants can be sued in Canadian courts where their cartel conduct harms plaintiffs in Canada.

20 For a discussion regarding the availability of the regulated conduct defence, see: Competition Bureau, 'Regulated' Conduct Bulletin (27 September 2010), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03273.html.

21 See, for example, Remarks by John Pecman, Commissioner (5 April 2013); www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03556.html.

relating solely to the export of products from Canada. The latter defence in respect of exports is only available where the conspiracy or agreement:

a would not result in a reduction or limitation of the real value of the exports of a product;

b has not restricted a person from entering into or expanding the business of exporting from Canada; or

c is in respect of only the supply of services that facilitate the export of products from Canada.

IV LENIENCY PROGRAMMES

The Bureau operates active Immunity and Leniency Programs. The prospect of full immunity from prosecution or leniency in sentencing are used as incentives to encourage the disclosure of cartel offences under the Act.

Consistent with the role of the PPSC as the sole prosecutor for criminal conduct, the Bureau can only recommend to the PPSC that immunity or leniency be granted. While the PPSC has the independent discretion to accept or reject the Bureau's recommendations, the PPSC generally gives serious consideration to the Bureau's views.[22]

i Immunity Program

The Bureau will provide a positive recommendation of immunity to the PPSC where a party, corporate or individual, is the first to come forward with evidence of an offence of which the Bureau is unaware, or is the first to bring forward evidence of an offence of which the Bureau is aware but has not yet obtained sufficient proof to warrant a criminal referral.[23] In addition, parties who have aided, abetted or counselled an offence may also seek immunity. It is important to note that being first-in to the authorities in another jurisdiction will not be sufficient in and of itself to permit a party to take advantage of the Bureau's Immunity Program.

There are additional requirements that a party seeking immunity from prosecution must fulfil. In particular:

a the party must terminate its participation in the illegal activity;

b the party must not have coerced others to engage in the cartel;

c the party must reveal any and all offences under the Act in which it may be involved (i.e., not only the specific offence at issue in the immunity application); and

22 The Federal Prosecution Service Deskbook details the PPSC's policy with respect to the granting of immunity, available at www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/ch35.html.

23 The Bureau's Information Bulletin and Frequently Asked Questions (the FAQs) provide guidance to potential immunity applicants on, *inter alia*, the requirements for immunity and the offences for which immunity is available. For the Information Bulletin, see Competition Bureau, Bulletin, 'Immunity Program under the Competition Act' (7 June 2010), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html. For the FAQs, see the Bureau, Immunity Program: Frequently Asked Questions (25 September 2013), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03594.html (Immunity FAQs).

d throughout the course of the Bureau's investigation and subsequent prosecution by the PPSC, the party must provide complete, timely and ongoing cooperation.

The obligation to provide complete, timely and ongoing cooperation includes:

a keeping confidential the application for, or granting of, immunity, as well as all information relating to the immunity application (subject to certain exceptions in which disclosure is permitted);

b providing full, complete, frank and truthful disclosure of all the non-privileged evidence and information known, available to or under the control of the party with respect to the offences for which immunity is sought; and

c where a company seeks immunity, taking all lawful measures to ensure the cooperation of current directors, officers and employees for the duration of the investigation and any ensuing prosecution (this obligation extends to former directors, officers and employees, as well as current and former agents, where the company has the consent of the Bureau or the PPSC and where doing so will not jeopardise the investigation).

Current directors, officers and employees of a company that qualifies for immunity will themselves qualify for immunity if they admit their involvement in the illegal activity and provide complete and timely cooperation to the Bureau and the PPSC. However, the treatment of agents and former directors, officers and employees will be decided on a case-by-case basis.

ii Leniency Program

Where a party does not qualify for full immunity from prosecution, it still may seek and obtain leniency, resulting in a reduction in penalty.[24]

The Bureau will recommend leniency where:

a the PPSC has not yet filed criminal charges against the party;

b the party has terminated its participation in the cartel;

c the party agrees to cooperate fully and in a timely manner (at its own expense) with the Bureau's investigation and any subsequent prosecution; and

d the party agrees to plead guilty at the end of the process.[25]

As is the case with immunity, parties who have aided, abetted or counselled an offence may also apply for leniency.

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24 The Bureau's Information Bulletin and the FAQs provide guidance to potential leniency applicants on, *inter alia*, the requirements for leniency and the offences for which leniency is available. For the Information Bulletin, see Competition Bureau, Bulletin, Leniency Program (29 September 2010), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03288.html. For the FAQs, see Competition Bureau, Leniency Program: Frequently Asked Questions (25 September 2013), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03593.html (the Leniency FAQs).

25 Leniency Program Information Bulletin, Ibid.

Leniency applicants are eligible for a reduction or discount of what otherwise would have been the applicable fine, as follows:

a The first successful leniency applicant will generally receive a reduction of 50 per cent of the fine that would otherwise have been recommended to the PPSC. In addition, the Bureau will recommend that no separate charges be filed against the applicant's current directors, officers or employees provided that these individuals cooperate fully with the Bureau's investigation and any subsequent prosecution.

b The second successful leniency applicant will generally be eligible for a reduction of 30 per cent off the fine that would have been otherwise recommended by the Bureau to the PPSC. However, leniency will not automatically be extended to current directors, officers and employees.

c Subsequent leniency applicants may also benefit from fine reductions, although as a rule the discount will be lower than that received by earlier applicants. The ultimate size of the leniency reduction will be determined on a case-by-case basis, depending on when the applicant sought leniency compared with the earlier applicants and the timeliness of its cooperation.

Leniency applicants may also qualify for an immunity plus discount. This discount is available if a leniency applicant is able to disclose evidence of conduct constituting another criminal offence for which immunity from prosecution is available. In addition to potentially qualifying for immunity for that other offence, the applicant may be eligible to receive a further fine reduction in respect of the offence for which leniency is being sought. The Bureau will typically recommend an additional discount of between five to 10 per cent in this situation.

Parties considering applying for leniency in Canada should be aware of the recent decision of the Federal Court in *R v. Maxzone Auto Parts (Canada) Corp*.[26] The Federal Court's *obiter* discussion in this case creates uncertainty in two respects for parties considering applying for leniency in relation to cartel offences under the Act. First, the case suggests that, before accepting a joint sentence proposal pursuant to a plea agreement, courts will now require significant public disclosure of the underlying facts and nature of the cartel beyond what has traditionally been included in documents filed on the public record.[27] Second, the Court's *obiter* discussion also suggests that courts will question joint sentencing proposals that do not provide for imprisonment of individuals

26 *R v. Maxzone Auto Parts (Canada) Corp*, 2012 FC 1117 (*Maxzone*). In this case, Maxzone Auto Parts (Canada) Corp, the Canadian subsidiary of a Taiwan-based international automotive parts company, pleaded guilty under Section 46 of the Act. Maxzone Canada had carried out the directives it had received from its affiliates, which were intended to give effect to a foreign conspiracy to fix the sale prices of aftermarket replacement automotive lighting parts. In accordance with the Bureau's Leniency Program, the joint sentencing submission between Maxzone and the PPSC proposed a C$1.5 million fine to reflect 10 per cent of Maxzone Canada's relevant volume of commerce during the period of the offence.

27 For instance, the court calls for future sentencing submissions to include estimates of both actual and intended effects of the illegal conduct, including not only agreed or contemplated

implicated in the cartel (no individual has yet been sentenced to jail for cartel offences in Canada).

It has been argued that the *Maxzone* decision, if widely adopted, would negatively affect the attractiveness of the Bureau's Leniency Program. However, it is still an open question whether other judges or courts will follow the approach suggested in *Maxzone*. Indeed, since the release of the *Maxzone* decision, the PPSC has not brought another cartel plea proceeding in the Federal Court. Instead, these pleas are being brought before other courts with concurrent jurisdiction.

iii Process

The first step to obtaining leniency or immunity is to seek a marker from the Bureau. Requests for immunity or leniency are made to the Senior Deputy Commissioner of Competition, Criminal Matters Branch. Typically, counsel for the applicant makes contact with the Bureau when seeking a marker. At this stage, only minimal details are required (i.e., sufficient details to permit the Bureau to ascertain the product at issue).

The Bureau will then consult its internal database and determine the applicant's place in line (i.e., whether it could be eligible for full immunity from prosecution or for some lesser form of leniency). This process usually takes only a matter of days. Having verified the applicant's position, the Bureau will then advise the applicant that it is eligible for a marker to secure its position in the immunity or leniency line.

Markers are available for all of the cartel offences under the Act, including conspiracy and bid rigging. The recently revised Leniency FAQs confirm that markers are also available in circumstances where the applicant's liability arises solely from aiding and abetting or counselling any of the cartel offences. This is particularly noteworthy given the Bureau's position that only one immunity marker will be granted per offence, regardless of whether liability arises as a principal to the offence or through the application of the criminal law provisions respecting aiding and abetting or counselling.

Once a marker has been granted, the applicant is expected to provide a detailed proffer setting out the nature of the conduct at issue. Immunity and leniency applicants will typically have 30 days to provide an initial proffer. Applicants must closely monitor the 30-day period, as the marker will automatically lapse without any warning or notice on behalf of the Bureau if this period of time passes and the applicant has not either perfected its marker or received an extension of time.[28]

The proffer must describe the applicant's role in the alleged cartel and outline all other information available to the applicant relating to the cartel.[29] The proffer itself is typically provided orally by counsel. That said, applicants should also be prepared for the

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price increases, but potentially deadweight loss resulting from purchasers substituting to less desirable products.

28 Immunity FAQs, footnote 24 and Leniency FAQs, footnote 25.

29 For cartel activity pre-dating 12 March 2010, the proffer must also include evidence that will help the Bureau determine whether the cartel resulted in an undue lessening of competition. This is unnecessary if the cartel was established following this date, since the conspiracy provision is now a *per se* offence (it does not require proof of an undue lessening of competition).

proffer process to extend beyond the initial oral proffer and to require the production of documents or interviews of witnesses, or both. Once the Bureau is satisfied that it has received all relevant information pertinent to the application, it will make its recommendation of immunity or leniency to the PPSC.

iv Ethical issues

Certain ethical issues can arise for counsel when advising applicants under the Immunity or Leniency Programs. Particular sensitivities are involved when deciding if counsel can or should act for both the corporate applicant and its employees. For example, as noted above, where a company is not the first applicant for leniency, current or former directors, officers and employees may not be covered by the same lenient treatment afforded to the company. As a result, it is possible that the interests of the company and individual employees may not be aligned, making separate representation appropriate.

Counsel should carefully consider the facts of each case to determine whether the interests of the company and employees are likely to conflict and whether counsel should recommend separate legal counsel for individuals.

v Confidentiality

Both immunity and leniency requests are treated as highly confidential by the Bureau and the PPSC. The identity of the party requesting immunity or leniency, and any information obtained from that party, will not be disclosed as a general rule except where:

a there has already been public disclosure by the party;
b disclosure is necessary to obtain or maintain the validity of a judicial authorisation for the exercise of investigative powers or for securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
c the party has provided its consent to the disclosure;
d disclosure is required by law; or
e disclosure is necessary to prevent the commission of a serious criminal offence.[30]

The Bureau also takes the position that it will not disclose the identity of an applicant or the information obtained from that party to private plaintiffs, Canadian or foreign, other than in response to a court order. Nevertheless, immunity or leniency applicants must be aware that private litigants may seek access to information provided to the Bureau, and courts, foreign and domestic, may grant such access.[31] Parties can seek to minimise this

30 See: Competition Bureau Information Bulletin on the Communication of Confidential Information Under the Competition Act (30 September 2013), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03597.html.

31 Ibid. An unsettled issue in Canadian jurisprudence is whether a Canadian court can compel the Bureau to disclose information collected in the course of its criminal investigation to private litigants that have initiated civil proceedings under the Act. While the recent decisions of the Quebec Superior Court in *Imperial Oil v. Jacques* and *Couche-Tard Inc v. Jacques* (in which the Court ordered the Bureau to disclose transcripts of communications intercepted by the Bureau through a wiretap) suggest that courts can compel disclosure, these decisions have been

risk by providing statements and submissions to the Bureau orally rather than in writing. The Bureau is amenable to such a paperless immunity or leniency process.

V PENALTIES

As noted previously, parties convicted of cartel offences are potentially subject to fines or imprisonment, or both.

Canada does not have formal sentencing guidelines pursuant to which penalties for cartel offences under the Act are determined. Rather, the courts are guided by the general principles of sentencing as set out in the federal Criminal Code (which apply to all criminal offences) and by certain principles developed by the case law specifically in relation to competition law offences.[32]

It is the Bureau's role to make sentencing recommendations to the PPSC, which will then decide whether to accept the recommendations. The key factor that the Bureau will consider in recommending a corporate fine to the PPSC is the overall economic harm that was caused by the conduct.

According to the Bureau, economic harm is not limited to an effect on prices. Instead, it encompasses the general negative economic impact that cartels can have by reducing competition and inhibiting innovation. Since it is generally difficult to quantify the degree of economic harm caused by a cartel, the Bureau will typically use as a proxy the volume of commerce (VOC) in Canada affected by the cartel multiplied by an overcharge factor. To ensure adequate deterrence, the Bureau generally starts with an overcharge factor of 20 per cent as its multiplier (10 per cent representing the notional overcharge and 10 per cent for deterrence purposes). However, the Bureau may use a different approach (or multiplier) where, in its judgement, the 20 per cent multiplier calculation does not reflect the economic harm caused by the cartel conduct in Canada. For example, the Bureau will deviate from the proxy approach when the accused party agreed to refrain from doing business in Canada and thus had no Canadian VOC at all during the relevant period. Similarly, in the bid rigging context, the Bureau will not use the proxy approach for parties that deliberately lost out on projects, referred to as cover bidders, and thus earned no revenues.

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appealed to the Supreme Court of Canada. The Supreme Court's decisions should help to clarify the circumstances in which the Bureau can be compelled to disclose the product of its criminal investigation, including potentially information obtained through the Immunity or Leniency Programs.

32 Among the considerations that courts will take into account in this regard are the need to maintain and encourage competition; the objective of deterring both the specific accused and the general public from committing the offence; that the sentence must be severe enough so as not to be regarded as 'merely a licence fee'; that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the accused; and the duration of the offence, the accused's role in the offence, the market share of the accused and the potential harm to consumers. For a recent discussion of the key sentencing principles for cartel cases in Canada, see *Maxzone*, footnote 27.

The Bureau also takes into account aggravating and mitigating factors in recommending a fine. Examples of aggravating factors include recidivism, coercion or instigation, obstruction and involvement of senior officers in the conduct. Examples of mitigating factors include cooperation with the authorities, acceptance of responsibility, early termination of conduct, restitution to victims and inability to pay.

In recent years, the Bureau has shown greater willingness to recommend sanctions against individuals, particularly individuals involved in domestic cartel conduct. For instance, in the *Quebec retail gas* case, 39 individuals have been charged and convicted as of the date of writing.[33] Similarly, charges have been laid against the former president of Nestlé Canada Inc and Mars Canada Inc and the current president of ITWAL in connection with an alleged cartel involving chocolate confectionary products in Canada.[34] Nevertheless, custodial sanctions remain rare in Canada. To date, no foreign individual has ever been jailed in Canada for a violation of the Act's cartel offences.

VI 'DAY ONE' RESPONSE

The Commissioner has a number of powerful tools to investigate alleged violations of the Act. In the criminal sphere, where available, the Bureau's investigative tool of choice is the search and seizure, whereby the Bureau can obtain and execute judicially authorised search warrants to enter premises and seize documentary and electronic records (this is the equivalent of a dawn raid).[35] Other important investigative tools available to the Bureau include documentary production orders (including against foreign affiliates of Canadian companies),[36] orders to compel testimony under oath[37] and orders to intercept electronic communications (wiretaps).[38]

Responding quickly and efficiently to a Bureau search and seizure is a critical element in organising a company's defence. While the actions to be taken by a company will vary depending on the facts and circumstances of each particular case, an efficient response will generally require attention to five key areas:

a Dealing with Bureau officers: at the outset, it is important to obtain a copy of the search warrant from the Bureau officers and immediately send it to the company's legal counsel. While the officers are under no obligation to wait for counsel to arrive, they will often agree to wait for a limited period of time before starting their search.

b Disclosure within the company: key senior executives within a company, including the CEO and chair of the board, ought to be advised as soon as possible that the

33 Competition Bureau, News Release, 'Three Individuals Sentenced in Quebec Gas Cartel' (16 August 2013), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03591.html.

34 Competition Bureau, News Release, 'Charges Laid in a Price-Fixing Cartel in the Chocolate Industry' (6 June 2013), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03569.html.

35 Competition Act, Section 15.

36 Competition Act, Sections 11(1)(b) and 11(2).

37 Competition Act, Section 11(1)(a).

38 Criminal Code, Section 183.

Bureau is executing a search warrant. The company's General Counsel should also send a privileged and confidential e-mail to all employees that advises them of the investigation. The e-mail should also instruct employees that while they are to be cooperative, they should not have any conversations with Bureau officers without legal counsel in attendance. Instead, employees should refer all questions to legal counsel. Employees should also be firmly warned not to obstruct the Bureau's search (e.g., by destroying records or removing documents from the premises without permission).

c Document access and collection: the company should cooperate with efforts by the Bureau officers to access documents within the scope of the search warrant. In the case of electronic documents stored on computers or other devices, procedures should be put in place to ensure that the integrity of the devices is maintained.

d Assertion of solicitor–client privilege: at the outset of the search, any documents that are or may be privileged should be identified. If Bureau officers are about to examine, copy or seize any document that is or may be privileged, they should be informed that a claim for privilege is being made. The officers are then required to place the document in a sealed package.

e Documenting the process: to the extent possible and without interfering with the search, a record of the types of documents seized by Bureau officers should be kept. When the search is over, a memorandum should be prepared setting out everything that took place during the search.

As noted, it is critically important that company personnel do not obstruct the Bureau's investigation. Under the Act, it is a criminal offence to:

a impede or prevent any Bureau inquiry or examination;[39]

b fail to permit the search of premises and any computer system, and the examination, copying or seizure of records;[40] and

c destroy or alter records subject to production or warrant.[41]

VII PRIVATE ENFORCEMENT

Section 36 of the Act provides a statutory right of civil action with respect to losses suffered as a result of criminal conduct under the Act, such as conduct covered by the Act's cartel offences. Specifically, a party suing under Section 36 of the Act is entitled to claim 'an amount equal to the loss or damage proved to have been suffered', as well as the full cost of any investigation initiated in connection with the matter.[42] Section 36 claims

39 Criminal Code, Section 64.

40 Criminal Code, Section 65(1).

41 Criminal Code, Section 65(3).

42 The investigation costs claimed must be supported by evidence and must distinguish between the actual investigation costs and the plaintiff's personal time and expense as a private litigant (which is not recoverable).

require that plaintiffs prove (1) all of the elements of the relevant substantive offence; and (2) that they have suffered damages as a result of the conduct proven in (1).[43]

Claims under Section 36 must be commenced within two years of the day the conduct was engaged in, or within two years of the day on which criminal proceedings were finally disposed of, whichever is later. This means that parties can be exposed to the risk of civil litigation for an extended period of time, because it often takes several years or more before criminal proceedings are disposed of in Canada.

While a private action under Section 36 can be launched by a plaintiff acting either in an individual capacity or as a representative of a class of plaintiffs in a class proceeding, most Section 36 claims are now brought as class actions.[44] This trend is likely to continue, given a trio of recent decisions issued by the Supreme Court of Canada, which held that indirect purchasers (i.e., plaintiffs that are one or more steps removed from the defendants in the chain of distribution, such as retailers and consumers) have the right to bring a class action under Section 36 of the Competition Act.[45] Prior to these cases, provincial Canadian courts had taken varying views on this issue. Some courts had favoured a relaxed standard for certification of class actions on behalf of indirect purchasers, while others had denied a cause of action outright. The Court not only confirmed the right of indirect plaintiffs to bring class actions, but also held in favour of a relaxed standard for certification.

VIII CURRENT DEVELOPMENTS

In addition to the matters discussed above, there are two other developments of note in Canadian cartel law:

a the recent changes to the Public Works and Government Services Canada (PWGSC) Integrity Framework, which prohibit parties that have been convicted under the Act from entering into contracts that are managed by PWGSC; and

43 Section 36 contains important presumptions that are designed to assist plaintiffs in proving their claims. For example, Subsection 36(2) of the Act provides that the record of proceedings in a criminal prosecution is, in the absence of any evidence to the contrary, *prima facie* proof that the defendant committed the offence or failed to comply with the order in question. Furthermore, any evidence given in criminal proceedings as to the effects of the defendant's conduct may be used as evidence of the same in a Section 36 action. That said, it is not mandatory to wait until accused parties have been convicted to commence a private action under Section 36.

44 For example, class actions have been brought in Canada against parties who participated in cartels affecting products such as lysine, citric acid, bulk vitamins, biotin, methionine, niacin, choline chloride, nucleotides, sodium erythorbate, sorbates, MSG and carbonless sheets, liquid crystal displays, air freight cargo shipping services and chocolate confectionery.

45 *Infineon Technologies AG v. Option Consommateurs*, 2013 SCC 59; *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2013 SCC 57; *Sun-Rype Products Ltd v. Archer Daniels Midland Company*, 2013 SCC 58.

b the decision of the Quebec Superior Court in *R v. Pétroles Global Inc*,[46] considering the circumstances in which criminal liability can be attributed to a corporation for the anti-competitive conduct of its employees or agents.

i PWGSC's modified Integrity Framework

The federal government's procurement department, PWGSC, announced important changes to its Integrity Framework in 2012.[47] Under the revised Integrity Framework, corporations convicted for any criminal cartel conduct under the Act, as well as their affiliates, are disqualified from bidding on most federal government contracts. This prohibition applies to all aspects of a corporation's business and not just to the line of commerce that was affected by the criminal conduct. Importantly, the policy also applies to corporations that apply to cooperate with Bureau investigations and plead guilty pursuant to the Leniency Program.

In September 2013, PWGSC and the Bureau entered into a memorandum of understanding (MOU) that is intended 'to strengthen the prevention, detection, reporting and investigation of possible cartel activity, including bid rigging' in federal government procurement.[48] Under the terms of the MOU, PWGSC and the Bureau have agreed to share resources and collaborate with respect to training and awareness programmes to help PWGSC staff detect and prevent cartel activity.

ii Corporate criminal liability under the Act

Historically, corporate criminal liability in Canada was based on the common law identification doctrine. Under that doctrine, to establish liability, prosecutors had to prove beyond a reasonable doubt that the criminal acts were committed by a directing mind of the corporation who had been delegated executive authority to design and supervise the implementation of corporate policy (rather than merely carry out such policy).[49]

In an attempt to address the perceived shortcomings of the common law identification doctrine, Parliament amended Canada's principal criminal legislation, the Criminal Code,[50] in 2004. The amendments introduced a new scheme of criminal liability for organisations (which is defined to include corporations) for fault-based offences, such as conspiracy under the Act. Under this new scheme, which is contained in Section 22.2, corporate liability attaches to the criminal conduct of 'senior officers'.[51]

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46 *R v. Pétroles Global Inc*, 2012 QCCQ 5749.

47 For an overview of the Integrity Framework, see PWGSC, 'PWGSC's Integrity Framework' (28 June 2013), www.tpsgc-pwgsc.gc.ca/apropos-about/ci-if-eng.html.

48 Competition Bureau, News Release, 'Competition Bureau and Public Works and Government Services Canada Join Forces to Help Prevent Cartel Activity' (9 September 2013), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03604.html.

49 *Rhône v. Peter AB Widener* [1993] 1 SCR 497.

50 Criminal Code, RSC 1985, c C-46.

51 The term senior officer is defined quite broadly in Section 2 of the Criminal Code to mean 'a representative who plays an important role in the establishment of an organization's policies

The decision of the Quebec Superior Court in *R v. Pétroles Global Inc* is the first to consider the scope of Section 22.2 in the context of a criminal trial on the merits.[52] In holding the corporation, Pétroles Global, criminally responsible for the actions of its general manager, the Court commented generally on the wide breadth of Section 22.2, as compared with the common law identification doctrine. In particular, the Court confirmed that under Section 22.2, the distinction between decision-making authority and operational authority is not decisive: an individual can be found to be a senior officer, and therefore criminal liability can attach to the corporation, where the individual has authority to carry out, but not to design or supervise the implementation of, corporate policy.

While the full implications of the Quebec Superior Court's decision remain to be seen, it is possible that this decision may provide an additional basis for the Bureau to pursue its objective of targeting individuals as part of its anti-cartel enforcement efforts.

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or is responsible for managing an important aspect of the organization's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer'. For a corporation to attract criminal liability, Section 22.2 requires that, with the intent at least in part to benefit the corporation, one of the corporation's senior officers acting within the scope of his or her authority is a party to the offence; having the mental state required to be a party to the offence and acting in the scope of his or her authority directs the work of other representatives of the organisation so that they commit the act or make the omission specified in the offence; or knowing that a representative of the organisation is or is about to be a party to the offence; does not take all reasonable measures to stop them from being a party to the offence.

52 The case involved a conspiracy to fix the prices of retail gasoline in two regional markets in Quebec.

Appendix 1

ABOUT THE AUTHORS

GEORGE ADDY

Davies Ward Phillips & Vineberg LLP

George Addy is the senior partner heading the competition and foreign investment review group at Davies Ward Phillips & Vineberg LLP, and is also part of the technology and communications & media practices. He was head of the Canadian Competition Bureau (1993–1996) and its merger review branch (1989–1993). He left public service to become Executive Vice President and Chief General Counsel at TELUS, Canada's second-largest telecommunications firm.

His practice covers regulatory and competition law, including strategic advice and representation before sector regulators and competition authorities in Canada and abroad in relation to cartels, mergers, acquisitions, joint ventures, abuse of dominance and other reviewable trade practices. He is consistently listed as one of the most frequently recommended competition law practitioners in legal directories.

Mr Addy is frequently consulted by Canadian and foreign-based clients and law firms on the foreign investment, regulatory and competition law aspects of major mergers in virtually every sector of the economy, including the financial services, energy, communications, transportation, services, retail, food and agricultural sectors. His practice also includes advice and representation in relation to the full range of criminal matters under the Competition Act, Investment Canada Act matters as well as general regulatory and administrative law.

ANITA BANICEVIC

Davies Ward Phillips & Vineberg LLP

Anita Banicevic is a partner in the competition and foreign investment review practice at Davies Ward Phillips & Vineberg LLP. She advises domestic and international clients on many aspects of Canadian competition and foreign investment review law, including criminal and civil investigations, mergers, misleading advertising, and other pricing, distribution and general compliance matters.

She has also represented clients in a number of criminal cartel, misleading advertising and abuse of dominance investigations and proceedings initiated by the Competition Bureau. She has experience with contested proceedings, negotiated resolutions and, where available, immunity or leniency agreements.

Ms Banicevic is actively involved in both the American Bar Association (the ABA) and the Canadian Bar Association (the CBA), and holds leadership positions in both organisations. She is currently a member of the Executive Committee of the National Competition Law Section of the CBA, as well as co-chair of the Compliance and Ethics Antitrust Law Section of the ABA. She has also regularly served as an invited non-governmental adviser to the International Competition Network. She is also frequently recommended as a leading competition law practitioner in Canada, including by *The Best Lawyers in Canada* and *Who's Who Legal: The International Who's Who of Competition Lawyers*.

MARK KATZ

Davies Ward Phillips & Vineberg LLP

Mark Katz is a partner in the competition and foreign investment review practice at Davies Ward Phillips & Vineberg LLP. He has advised domestic and international clients on a wide variety of competition law matters, such as mergers and acquisitions, criminal cartel investigations, joint ventures, abuse of dominance, distribution and pricing practices, misleading advertising and compliance as well as foreign investment in Canada.

He has appeared at every level of court in relation to competition matters, including the Supreme Court of Canada, and has acted as counsel on several leading cases before the Competition Tribunal, including the first abuse of dominance and merger cases heard by that body. He also provides advice with respect to the application of the Investment Canada Act.

Mr Katz is actively involved in both the American Bar Association and the Canadian Bar Association, and holds leadership positions in both organisations. He has also authored a wide variety of articles and conference papers on competition law matters and contributed to a number of texts and treatises in the area, as well as authoring and presenting policy briefs for clients on a variety of domestic and international competition-related matters. Most recently, he was a co-author of *The Competition Law Guide for Trade Associations in Canada*. He is also a member of the editorial board for Competition Law Insight and a regular contributor to the Kluwer Competition Blog.

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto
Ontario M5V 3J7
Canada
Tel: +1 416 863 0900
Fax: +1 416 863 0871
gaddy@dwpv.com
abanicevic@dwpv.com
mkatz@dwpv.com
www.dwpv.com