Reviewing the situation

Is Canada able to enforce its anti-cartel laws effectively?

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Although the vast majority of cartel matters in Canada are resolved through negotiated pleas, parties will occasionally choose to fight rather than settle. Two such contested cases came to a close in 2015, with the accused parties prevailing in both instances. In the process, these cases have renewed questions about the ability of Canadian authorities to effectively enforce Canada's anti-cartel laws.

An overview of cartel enforcement in Canada

The principal cartel offences in Canada, as set out in the Competition Act (the Act), are the prohibitions against certain types of agreements between competitors (price-fixing/market allocation/output restriction) and bid-rigging. Parties convicted of these offences are potentially liable to fines and/or imprisonment.

The detection and investigation of cartel offences in Canada is the responsibility of Canada's competition authority, the Competition Bureau (the Bureau). The Bureau's efforts in this regard are significantly assisted by its immunity and leniency programmes, which offer parties incentives to self-report early and co-operate with Bureau investigations.

While the Bureau's mandate is to detect and investigate cartel conduct, prosecutions are handled by the Public Prosecution Service of Canada (PPSC). The Bureau will refer matters to the PPSC that it believes should be prosecuted, but the decision to prosecute – as well as the carriage of any ensuing prosecution – is the PPSC's responsibility alone. The PPSC is also responsible for the final decision on whether to grant a party immunity or leniency, again on the Bureau's recommendation.

Competition Bureau setbacks

R v Durward. The first contested case in question involved bid-rigging allegations relating to 10 competitive bidding processes issued by the Canadian federal government for professional IT services. The core allegation against the accused was that they had engaged in unlawful bid-rigging by forming a consortium to co-ordinate the recruitment of subcontractors and then agreeing on the sharing of these subcontractors for the purpose of their bids.

The Bureau initiated its investigation into these allegations in 2005, triggered by concerns raised by one of the government agencies managing the bidding process. It seems that one or more of the unsuccessful bidders also complained to the Bureau. The Bureau referred the matter to the PPSC for prosecution in 2008 and charges were issued against seven companies and 14 individuals in 2009. Several of the companies and individuals pleaded guilty shortly after charges were laid. The remainder of the defendants refused to plead and were eventually committed to stand trial after a preliminary inquiry. Due to various procedural considerations, it was ultimately decided that there would be two trials – one by jury (a very rare occurrence in prosecutions under the Act) and a second by judge alone.

The jury trial commenced in September 2014 and involved three of the corporate defendants and seven individual defendants. The trial concluded in April 2015, with the jury acquitting the three corporate defendants and six individuals (the seventh individual had already been acquitted by "directed verdict" of the judge after the prosecution had rested its case in February 2015).

Although juries in Canada do not provide reasons for their decisions, based on the course of the trial and the judge's charge to the jury, it is conceivable that the jury found against the prosecution on one or more of the following grounds:

- there either was no "call for bids or tenders" as required by the offence, or the accused honestly believed that the process did not qualify as a "bid or tender"; and/or
- any arrangements between the accused to co-ordinate on the recruitment and use of subcontractors had been "made known to" the responsible federal government agencies, either expressly or implicitly.

The first point turns on the distinction developed in Canadian law between mere proposals or invitations to treat, which do not create contractual relations between parties, and actual bids or tenders, which result in a binding contract for services between the parties once the proposal is accepted. In this instance, the defendants argued that the request for proposal (RFP) process fell into the first category because the RFP was not designed to award the winners contracts to provide IT services to the federal government; rather, the selected parties only "won" the right to be eligible for future contracts, to be awarded "as and when required". They also argued that they lacked the requisite mens rea because they had honestly – although perhaps mistakenly – believed that the RFP process did not involve a "bid or tender", meaning that they did not have the necessary criminal intent to engage in bid-rigging.

As to the second point, there is no bid-rigging offence under section 47 of the Act if it is "made known to" the party calling for the bid or tender that the bidding parties are co-ordinating with each other. The PPSC argued that this element of the offence obliged the accused to expressly and proactively notify the responsible federal agencies of their co-ordination. The defendants countered by saying that it was well known in the industry and in government that small and medium-sized companies such as the defendants would not be able to participate in these RFPs without working together to recruit and then share subcontractors for their individual bids. The trial judge seemed to side with the defendants by instructing the jury that notification could be express or implied, and that it could be inferred from the evidence (including circumstantial evidence).

The loss in *R v Durward* was a significant setback for the Bureau/PPSC. Given the duration and cost of the investigation and criminal proceedings, difficult questions

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were raised about why the prosecution had failed so dramatically, including whether the investigation was handled properly and even whether charges should have been issued in the first place. Some of the more awkward disclosures for the Bureau/PPSC that surfaced during the process included that Bureau investigators had not adequately canvassed the extent to which government officials knew about the impugned arrangements (they did); the defendants had actually submitted the lowest cost proposals; and at least one of the federal government agencies at issue had continued to do business with the defendants even while the investigation and criminal proceedings were ongoing.

R v Nestlé. The Bureau's second setback in 2015 came in the so-called "chocolate case," *R v Nestlé*.

This case had its origins in 2007, when the Bureau initiated an investigation into alleged price-fixing by Canadian chocolate manufacturers, based on information supplied by an immunity applicant (Cadbury Canada). Following a six-year investigation, charges were issued in 2013 against two chocolate manufacturers, several of their high-level executives, and a wholesale distributor of chocolate products and one of its executives. Shortly thereafter, a third manufacturer under investigation (Hershey Canada) pleaded guilty and agreed to pay a fine of CDN$4m.

Before a trial date could be set, however, the PPSC announced in September 2015 that it was voluntarily withdrawing the charges against two of the corporate accused and their executives. This was followed by the subsequent announcement in November 2015 that the charges against the remaining accused (corporate and individuals) would also be dropped.

Neither the PPSC nor the Bureau explained why this step was taken so abruptly. Presumably, the PPSC concluded that it no longer had a case worth pursuing. But the PPSC has never disclosed what led it to change its position.

Implications

The defeat in *Durward* and the surrender in *Nestlé* came on the heels of several Bureau losses in civil cases in 2015, including a major merger case at the Supreme Court of Canada. This combination of setbacks has generated serious questions about the ability of the Bureau/PPSC to build and win a case, criminal or civil. Indeed, one prominent Canadian think tank suggested that a new external oversight body be appointed to scrutinise the Bureau's performance in light of these losses.

A particular concern stemming from the Bureau's losses in *Durward* and *Nestlé* relates to their impact on the future viability of the Bureau's leniency programme. After all, holding out the promise of lenient treatment in criminal cases in return for co-operation is only an attractive proposition if parties face the real prospect of conviction at trial. The situations in *Durward* and *Nestlé* were particularly awkward for the Bureau because, while the co-operating parties pleaded guilty and were fined, the parties that held out for contested trials were ultimately vindicated.

Confidence in the Bureau's immunity/leniency programmes was also jarred by an interlocutory decision in the *Nestlé* matter released in early 2015.

Pursuant to Canadian law, the PPSC is required to disclose to defendant parties all of the relevant information in its possession, whether inculpatory or exculpatory. The PPSC ran into problems in the *Nestlé* proceedings after realising that it had mistakenly included in its disclosure package to the defendants certain documents over which Cadbury (the immunity applicant) and Hershey (which had pleaded guilty) claimed settlement privilege.

The PPSC applied to the Ontario Superior Court of Justice to compel the defendants to either return or destroy the documents in question, which they had refused to do. The court declined to issue an order, and instead ruled that the PPSC was required to disclose all relevant factual information it had received from Cadbury and Hershey to the defendants. The court stated that the right of the defendants to make full answer and defence trumped any countervailing interest against disclosure, particularly since both Cadbury and Hershey had known that any information provided to the Bureau would be subject to the criminal rules of disclosure.

On the positive side, the court was careful to limit disclosure to "factual information" provided by Cadbury and Hershey to the Bureau. Thus, for example, legal opinions that may have been offered, negotiations over the precise wording of agreements or views expressed about the relative importance of one matter or another did not have to be disclosed to the defendants. That said, the court's decision has given prospective immunity/leniency applicants yet another reason to hesitate about participating in the Bureau's immunity/leniency process.

Given this swirl of negative developments, the commissioner of competition took the unusual step of responding publicly to concerns raised about the state of Canadian cartel enforcement, most notably in a speech delivered on 8 December 2015.

The commissioner devoted part of this speech to defending the Bureau's conduct (and perhaps by implication criticising the PPSC). For example, he had this to say about the turn of events in *R v Nestlé*:

> "I am confident the Bureau conducted a thorough investigation of this matter, which justified the initial decision by prosecutors to lay charges. However, as you know, the prosecutors are independent and have prosecutorial discretion. How this case was concluded was not what the Bureau expected when price-fixing charges were laid against the non-cooperating accused."

The commissioner also rejected concerns about the Bureau's leniency programme. He said that the incentives for participating in the programme "still make it an attractive option for individuals and companies whose conduct has contravened the cartel provisions of the Competition Act".

That said, the commissioner also outlined several steps being taken to improve the Bureau's handling of cartel cases. These include a "lessons learned" evaluation process and the establishment of a specialised "criminal intelligence unit" within the Bureau to provide stronger analytical tools and to improve investigative efficiency.

While the impact of the *Durward* and the *Nestlé* decisions should not be exaggerated, it is clear that the Bureau's overall record in contested criminal cases, which is less than stellar, undercuts the effectiveness of its anti-cartel message to Canadian businesses and the public. It is therefore very important to the Bureau's future effectiveness that, uncomfortable as the process may be, it seriously reassesses its litigation performance, including its working relationship with the PPSC.