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Anti-Cartel Enforcement In Canada - Still More Bark Than Bite

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A superior line of thought

DAVIES

ANTI-CARTEL ENFORCEMENT IN CANADA – STILL MORE BARK THAN BITE?

*By Elisa Kearney and Mark Katz**

On March 12, 2009, Canada's Parliament enacted significant amendments to the *Competition Act* (the "Act").[1] These amendments included fundamental changes to the Act's conspiracy provisions, which will come into effect in March 2010. At that time, the Act's existing conspiracy offence will be replaced with a new *per se* criminal offence for certain types of agreements between competitors and a new civil provision to deal with other types of agreements between competitors that substantially lessen or prevent competition. The changes will bring Canadian law into closer alignment with U.S. law.

The amendments represent the culmination of a lengthy effort by Canada's Competition Bureau (the "Bureau") to reform Canadian cartel law.[2] The current -- but soon to be repealed -- conspiracy offence prohibits agreements between parties that, if implemented, would prevent or lessen competition "unduly" or "unreasonably enhance" the price of a product.[3] In other words, the current offence requires the prosecution to demonstrate beyond a reasonable doubt (the criminal standard of proof) that the agreement in question has had, or is likely to have, a material negative effect on competition in a relevant market.[4] In that sense, it sharply varies from the Sherman Act, which requires only proof of agreement and does not require the government to prove "effects" in order to sustain a criminal conviction. The Bureau had long contended that the requirement to prove market impact was a serious impediment to the successful prosecution of conspiracy offences in Canada, pointing to the fact that since 1980 only three of 21 contested cases under section 45 have resulted in convictions.[5] This is a debatable proposition, but the issue is now moot.

With the coming into force of the amendments in March 2010, the Act will have a new *per se* criminal prohibition against agreements between competitors to fix prices, restrict production, or allocate sales, customers or territories. The penalties for the offence also will be increased to up to 14 years' imprisonment and a fine of up to CDN $25 million per count, up from the current maximum prison sentence of 10 years and the current maximum fine of CDN $10 million. Finally, under the new civil provision, the Bureau will be able to apply to the Competition Tribunal for relief in respect of any other category of agreement among competitors that has the effect of lessening or preventing competition substantially.

By all appearances, the amendments substantially raise the stakes for parties caught participating in cartel conduct affecting Canada. The introduction of a *per se* conspiracy offence fundamentally alters one of the cornerstones of Canadian competition law by eliminating the requirement that illegal agreements among competitors have an undue or unreasonable impact on competition (although bid-rigging has been a *per se* offence in Canada since 1985).[6] In addition, the potential penalties for engaging in cartel conduct will be significantly increased.

But will the impending amendments, in fact, lead to a marked increase in cartel prosecutions and higher penalties in Canada? Despite all the furor surrounding the amendments, the probable outcome is not yet clear.

For one, the Bureau has emphasized that it does not intend to use the new *per se* offence to target all manner of agreements between competitors. Rather, in draft guidelines released earlier this year, the Bureau affirms that the new offence will be reserved for "naked" restraints on competition and will not be enforced against agreements that may involve elements of the

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prohibited categories of conduct but that are in furtherance of a legitimate collaboration, strategic alliance or joint venture.[7] This is consistent with the statutory defence in the *per se* provision, which exempts conduct that is "ancillary" and "reasonably necessary" to a broader, legitimate agreement among competitors.[8]

Of course, the Bureau's guidelines are no more than a statement of intent, and are not binding on the courts or even the Bureau itself. Nonetheless, subject to further developments, the guidelines offer a strong signal that the Bureau will be focusing its enforcement efforts on limited types of egregious anti-competitive conduct. Moreover, these were the types of matters that the Bureau had been concentrating on in any event, even under the current offence.[9] As a result, it would not be surprising if the rate of guilty pleas and prosecutions did not increase dramatically even with the new offence in force.

It is also unclear what impact the new increase in penalties will have. Very few corporate accused were ever fined amounts approximating the current maximum of CDN $10 million per count. Indeed, only approximately 14% of cartel cases over the last 10 years (generally considered to be the heyday of cartel enforcement in Canada) resulted in corporate fines greater than CDN $5 million and more than 60% resulted in fines less than CDN $1 million.[10] In other words, having a new maximum fine of CDN $25 million in place will not in and of itself necessarily lead to higher fines.

The same applies to individual penalties, given Canada's reputation for being lax on white-collar criminals. While the Bureau remains committed to pursuing sanctions against individuals implicated in cartel conduct,[11] its options have tended to be constrained by the judicial reluctance in Canada to impose severe penalties in white collar cases.[12] For example, out of the 11 individuals sentenced for cartel offences between 1998 and 2008, nine were required to pay fines and only two were sentenced to prison. Moreover, the fines imposed ranged between CDN $10,000 and CDN $250,000 and the "prison sentences" consisted of conditional sentences to serve time in the "community" (a form of "house arrest") rather than in jail.[13] This is in stark contrast to the United States where, for example, cases prosecuted by the Antitrust Division of the U.S. Department of Justice (the "Antitrust Division") have resulted in "over $2 billion in criminal fines and more than 162 years in jail time" since 2006 alone.[14]

That said, there are a few nascent signs that the tide may be rising in Canada towards stricter penalties for individuals who commit white collar crimes, including offences contrary to the Act. For example, there was a noticeable increase this year in prison sentences handed out for cartel offences under the Act. These sentences all relate to the Bureau's prosecution of a domestic conspiracy to fix the price of retail gasoline in the province of Québec. Four out of the five individuals who pleaded guilty in 2009 to participating in this cartel received prison sentences, although the sentences imposed continued to be conditional sentences allowing the individuals to serve time "in the community."[15]

There also have been heavier fines and even prison sentences for individuals convicted of violating the Act's deceptive marketing and telemarketing offences.[16] For example, an individual was fined CDN $2 million in August 2009 after pleading guilty to making false or misleading representations to the public with respect to a lottery ticket reselling scheme.[17] In addition, an individual was sentenced in July 2009 to two years in the federal penitentiary after pleading guilty to deceptive telemarketing contrary to the Act and fraud contrary to section 380 of the *Criminal Code*.[18]

The latter case is particularly interesting because it involved not only charges under the Act but the fraud provisions of the *Criminal Code* as well. On October 21, 2009, the Canadian government introduced legislation to amend the *Criminal Code* fraud provisions to, among other things, impose a two-year mandatory minimum sentence for fraud over $1 million.[19] The purpose of the proposed Bill is to

help combat white collar crime in Canada. The Bill has received Second Reading in the House of Commons and was referred to the Committee stage for review on October 26, 2009.

One potential implication of the Bill, if enacted, is that the Bureau may seek to take advantage of the minimum sentences offered under the *Criminal Code* and have parties charged with fraud instead of, or in addition to, cartel offences in appropriate cases. While the Bureau has brought charges of fraud in conjunction with charges under the misleading advertising and telemarketing provisions of the Act, we are not aware of any case where the Bureau has brought a charge of fraud in conjunction with a section 45 offence.

Using fraud charges to get at cartel conduct or other anticompetitive schemes would be consistent with the approach taken in the United States, where the Antitrust Division appears to be bringing an increasing number of cases charging Title 18 offences (such as conspiracy to defraud, bribery, money laundering, and mail and wire fraud) in addition to or instead of charges under Section 1 of the Sherman Act.[20] The Antitrust Division will generally consider bringing a conspiracy or a substantive fraud count in instances of anticompetitive conduct that do not violate the Sherman Act (e.g., an unsuccessful attempt to fix prices or rig bids, bribery of a purchasing agent) or when the additional charges are necessary to reflect adequately the nature and extent of the criminal conduct.[21]

The Bureau is already closely following in the footsteps of the Antitrust Division when it comes to adopting a zero tolerance policy with regard to the process-oriented offence of obstruction of justice.[22] In 2004, for example, The Morgan Crucible Company was fined for wilfully providing false and incomplete evidence to Bureau officials investigating an international cartel involving carbon brushes and current collectors.[23] In September 2006, criminal charges for obstruction and destruction of documents were brought against an individual employee of a ventilation company who allegedly removed and destroyed papers from his agenda that were relevant to a Bureau investigation.[24]

With the advent of a *per se* offence, and an increase in penalties, parties operating in Canada will no doubt have to be even more careful not to engage in conduct that contravenes the Act's new conspiracy provision. That said, it still remains to be seen whether the amendments, together with what might be an emerging tougher stance against white collar crime in general, will result in a sea change in anti-cartel enforcement in Canada.

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1. Bill C-10, An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures received Royal Assent on March 12, 2009. *See* http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&query=5697&List=toc&Session=22.

2. *See*, for example, Konrad von Finckenstein, former Commissioner of Competition, Competition Bureau, Section 45 at the Crossroads, Speech Before the 2001 Invitational Forum on Competition Law (Oct. 12, 2001), *available at* http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/01187.html. The Competition Bureau is the federal government agency that investigates allegations of anticompetitive behaviour in Canada. Prosecution is the responsibility of the Public Prosecution Service of Canada (PPSC), which is headed by the Director of Public Prosecutions (DPP). The PPSC is independent of the Federal Department of Justice and reports to Parliament through the Attorney General of Canada. The Bureau will refer criminal matters to the DPP, who then must decide whether it is in the public interest to commence proceedings. Although the Competition Bureau is responsible for investigating alleged conspiracies, it does not prosecute criminal violations of the Act.

3. RSC 1985, c. C 34., section 45.

4. *See* R. v. Nova Scotia Pharmaceutical Society, [1992] 2 SCR 606.

5. *See,* for example, Raymond Pierce, Deputy Commissioner of Competition, Criminal Matters Branch, Competition Bureau, Reform of Section 45

— The Bureau's Perspective, Speech Before the 2002 Competition Law Invitational Forum (May 8-10, 2002), *available at* http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01116.html.

6. *Supra* n.3, section 47.

7. The Bureau issued its draft Competitor Collaboration Guidelines for public comment on May 8, 2009. *See* http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/03051.html.

8. *Supra* n.3, section 45(4)(1) as amended by R.S.C. 1985, c.19 (2d Supp.).

9. *See,* for example, Sheridan Scott, former Commissioner of Competition, Competition Bureau, Cartels: Detection, Detection, Detection, Speech at the Competition Day hosted by the Físcalia National Económico Hotel Neruda, Santiago, Chile (Oct. 25, 2007), *available at* http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/02509.html.

10. *See* Competition Bureau, "Penalties imposed by the courts," *available at* http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/h_00152.html. The largest fine imposed on an individual for an offence under the Act was CDN $550,000 in the context of an agreement between competitors to share the market for the hauling and disposal of commercial waste in Québec between 1989 and 1992. *See,* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00657.html.

11. *See* News Release, Competition Bureau, Three More Guilty Pleas in Quebec Gasoline Cartel Case (May 21, 2009), *available at* http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/03055.

12. *See* Sheridan Scott, former Commissioner of Competition, Competition Bureau, Criminal Enforcement of Anti-Trust Laws -- The U.S. Model -- A Canadian Perspective, presented at Fordham Corporate Law Institute Annual Conference, New York (Sept. 14, 2006).

13. *Supra* n.10.

14. Christine A. Varney, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Vigorous Antitrust Enforcement in this Challenging Era, Remarks as Prepared for the Center for American Progress (May 11, 2009), http://www.usdoj.gov/atr/public/speeches/245711.htm.

15. News Release, Competition Bureau, Ninth Individual Sentenced in Quebec Price-Fixing Cartel (Oct. 23, 2009), *available at* http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/03145.html. Three other individuals pleaded guilty in 2008, one of whom received a conditional sentence.

16. *Supra* n.3 at sections 52 and 52.1.

17. News Release, Competition Bureau, Direct Mailer Hit with Record $2M Fine, *available at* http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/03117.html.

18. News Release, Competition Bureau, Deceptive Telemarketer Receives Jail Time, *available at* http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/03112.html.

19. Bill C-52, An Act to amend the Criminal Code (sentencing for fraud), http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4155192&Language=e&Mode=1.

20. *See* Antitrust Division Workload Statistics, http://www.justice.gov/atr/public/workstats.pdf.

21. *See* U.S. ATTORNEYS' MANUAL, § 9-27.320, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm; U.S. DEP'T OF JUSTICE ANTITRUST DIV. MANUAL at Chapter II.B.1, http://www.justice.gov/atr/public/divisionmanual/index.htm; and ABA SECTION OF ANTITRUST LAW, CRIMINAL ANTITRUST LITIGATION HANDBOOK at Chapters I and XII.

22. Sheridan Scott, former Commissioner of Competition, Competition Bureau, Speech Before the Canadian Bar Association Annual Fall Conference on Competition Law (Sept. 28, 2006), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02201.html.

23. News Release, Competition Bureau, Morgan companies fined $1 million for obstruction and price-fixing (July 16, 2004), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00252.html.

24. News Release, Competition Bureau, Obstruction and destruction of documents charges laid (Sept. 11, 2006), *available at*