Cartel enforcement in Canada

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Introduction

Canada has a long history of prosecuting cartel behaviour. Legislation to this effect was first enacted by the Canadian parliament in 1889, a year before the Sherman Act was passed in the United States. In 1892, Canada's competition legislation was incorporated into the Criminal Code, where it remained until 1960 and the enactment of the Combines Investigation Act. In 1986, Canada's competition legislation underwent substantial reform, with the passage of the current Competition Act (the Act).[1] Key changes included the decriminalisation of merger review and the shift from criminal sanctions against "monopolies" to non-criminal abuse of dominance provisions. However, cartel-like conduct remained, and still remains, subject to criminal sanction.

The key criminal provision in the Act prohibiting cartel behaviour is section 45, which makes it an indictable criminal offence to conspire or otherwise agree with another person to, among other things, prevent or lessen competition "unduly" in the provision of a good or service in Canada. As such, section 45 does not create a per se offence; a negative (undue) impact on competition must be demonstrated. In many cases, this is the key issue that must be grappled with to decide whether an offence has in fact occurred. Examples of agreements or arrangements to which section 45 may apply include those that fix, manipulate or manage prices; modify or eliminate rivalry for customers' business; limit or fix production quantities; allocate customers or territories; restrict or discourage new rivals from entering into the market; implement group boycotts; and coordinate or otherwise manage the granting of trade credit.[2]

The Supreme Court of Canada has described the conspiracy provision as "one of the pillars" of Canadian competition legislation and has stated that this provision is "central to Canadian public policy in the economic sector".[3] Various heads of Canada's Competition Bureau also have made it clear that combatting cartels – both domestic and international – is a top enforcement priority.[4] As a reflection of this commitment, there have been over 70 corporate and individual convictions under section 45 and related provisions in the last decade, involving fines of over $230 million Cdn. Most notable in this regard were the convictions imposed in connection with the international bulk vitamins cartel, in which the aggregate fines levied against 12 corporations and three individuals exceeded $95 million Cdn, including the largest fine yet to be imposed against a single defendant ($48 million Cdn).

Asian companies have been well-represented in the ranks of those convicted of cartel offences in Canada. Approximately 25 per cent of the convictions imposed in the last decade in Canada have involved Asian-based entities, their Canadian affiliates or individual executives. Moreover, the Competition Bureau continues to cooperate with its Asian counterparts to investigate and prosecute cartel behaviour affecting their respective jurisdictions. Given both this history and the current enforcement environment, it is important for Asian corporations and their advisers to have an understanding of Canadian cartel law and its potential implications for their businesses.

Elements of the conspiracy offence

As a matter of Canadian criminal law, the prosecution (or Crown) must prove each and every element of an offence beyond a reasonable doubt for a court to render a guilty verdict. In PANS, the Supreme Court of Canada held that the following elements must be proven in order to establish the conspiracy offence: (i) the existence of a conspiracy, combination, agreement or arrangement to which the accused was a party; (ii) that the conspiracy, combination, agreement or arrangement, if implemented, would likely prevent or lessen competition unduly (although it is not necessary to prove that the accused intended to lessen competition unduly); (iii) that the accused had the intention to enter into the agreement and had knowledge of the terms of that agreement; and (iv) that the accused was aware or ought reasonably to have been aware that the effect of the agreement would be to prevent or lessen competition unduly.[5]

With respect to the first element (the existence of an agreement), Canadian courts have held that the mere intention or design on the part of one or more parties to effect an anticompetitive agreement or arrangement, or even discussions to that effect, will not contravene section 45 so long as they do not culminate in an agreement. At the same time, once an agreement has been entered into, it is not necessary for the Crown to prove that the agreement was implemented or that steps were taken in furtherance of the agreement. In essence, "the crime is in the conspiracy", not in the acts that it contemplates, although such acts may serve as evidence of the agreement.[6]

With respect to the second element (undue lessening or prevention of competition), the Supreme Court of Canada held in PANS that it is the combination of market power and injurious behaviour that makes a lessening or prevention of competition "undue"; the greater the market power, the less injurious the behaviour need be, and vice versa. The assessment of market power is similar to that under other sections of the Act, including mergers and abuse of dominance, and involves considerations such as market definition and shares, number and size of competitors, barriers to entry, geographical distribution of buyers and sellers, product differentiation, countervailing power and cross-elasticity of demand. As to whether the parties' behaviour qualifies as "injurious", agreements that involve price fixing, restrictions on output or market sharing will be viewed as constituting clearly injurious behaviour. Further, agreements in respect of product quality, service, promotional activity or innovation also may be injurious where such considerations are an important determinant of competitive rivalry.

The Supreme Court of Canada characterised section 45 in PANS as mandating a "partial rule of reason" inquiry. It is "rule of reason" given that there is no per se violation. The rule of reason analysis is only "partial", however, in that there is not a full-blown consideration of efficiencies. As the Court stated, "considerations such as private gains by the parties or counterbalancing efficiency gains to the public lie...outside of the inquiry under [section 45]. Competition is presumed by the Act to be in the public benefit."

Investigations and prosecutions

The Bureau has considerable powers at its disposal to investigate

alleged conspiracies, such as the authority to obtain judicially-authorised search warrants (including computer searches), document production orders, orders compelling testimony and written returns under oath, and wiretaps. The Act also includes specific provisions designed to protect "whistleblowers" and makes it an offence to obstruct a Bureau investigation.[7]

There are still many unresolved questions about the Bureau's ability to use its broad investigative powers against parties located outside of Canada. For example, it is by no means clear that a judge would have the jurisdiction to issue one of these orders against an entity or individual not present in Canada.[8] Quite apart from the jurisdictional issues, there also would be the practical difficulties of enforcing such an order even if it could be properly issued. Another unresolved issue is the extent to which a search warrant may authorise the Bureau to use a Canadian company's computer system to access records located in the database of a foreign affiliate.

While the Competition Bureau is responsible for investigating alleged conspiracies, it does not prosecute criminal violations of the Act. Prosecution is the responsibility of the Attorney General of Canada. The Bureau will refer criminal matters to the Attorney General, which then must decide whether it is in the public interest to commence proceedings. Prosecutions under the Act are brought in the regular criminal courts. Although the Attorney General has official carriage of these cases, Bureau officers will work closely with counsel for the Attorney General throughout the prosecution process.

There is no "statute of limitations" in Canada for indictable criminal offences, such as the conspiracy offence. Therefore, while a party could conceivably benefit from the passage of time to escape prosecution in other jurisdictions (such as the United States), the same party could still face prosecution in Canada under section 45.

Penalties and sentencing

Parties convicted of contravening section 45 are liable to a fine not exceeding $10 million Cdn per count or to imprisonment for a term not exceeding five years or to both. Courts also may impose "prohibition orders", which are judicial orders that forbid the repetition or continuation of the offence. Prohibition orders also may include "prescriptive terms" requiring that positive steps be taken to ensure adherence with the law and the prevention of future offences (eg, the establishment of a compliance programme).

There has been a marked escalation in recent years in the quantum of corporate fines imposed in Canada for conspiracy offences. There also have been more instances of individuals (including foreign nationals) being penalised, although it is still very rare for individuals to receive jail sentences rather than fines.[9]

There are no formal sentencing guidelines in Canada pursuant to which penalties for conspiracy and other criminal offences under the Act may be determined. Rather, the courts are guided by the general principles of sentencing as set out in the Criminal Code (which applies to all criminal offences) and by certain principles developed by the case law specifically in relation to competition law offences. 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"; and that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the accused. Additional specific factors include the duration of the offence; the accused's role in the offence; the market share of the accused; and the potential harm to consumers.[10]

As a practical matter, however, virtually all penalties imposed in Canada for conspiracy and related offences under the Act are the product of plea negotiations between the accused and the Competition Bureau/Attorney General. That is because contested prosecutions involving these offences are exceedingly rare. Although the courts retain the ultimate jurisdiction to reject any penalty which the parties propose, joint submissions on penalty are almost always accepted.

Generally speaking, the Competition Bureau and the Attorney General will take the negotiating position that any monetary fine should be calculated as a percentage of the accused's sales of the relevant product in Canada over the period of the offence (the "relevant volume of commerce"). Experience over the past few years indicates that a proposed fine of approximately 20 per cent of the relevant volume of commerce will be the general starting point in plea negotiations. This can vary upwards or downwards depending upon the presence of mitigating or aggravating factors (eg, the timing and degree of cooperation offered by the accused). In addition, there may be cases in which taking a percentage of the accused's relevant volume of commerce is considered to be insufficient, for example, where the conspiracy involved an agreement not to sell into Canada and thus there is no relevant volume of commerce to use as a benchmark. In those cases, the Bureau and Attorney General will insist on a fine that is sufficiently large in the circumstances to send the appropriate deterrence "message".[11]

Defences and exemptions

The Act contains a number of exemptions to the conspiracy provisions, including, for example, if the agreement or arrangement relates to the exchange of statistics or credit information, cooperation in research and development or defining product standards. In general, these exemptions apply only if the agreement has no undue effect on competition in Canada with respect to prices, quantity or quality of production, markets or customers, or channels or methods of distribution. In addition, subject to certain exceptions, a party cannot be convicted under the conspiracy provisions if an agreement relates only to the export of products from Canada. The Act also provides a system for registering "specialisation agreements" with the Competition Tribunal, which has the effect of exempting the application of section 45.[12] Unfortunately, "specialisation agreements" are narrowly defined as agreements whereby each party agrees to discontinue producing an existing product. Thus, the exemption does not cover, for example, situations in which parties contemplate a broader degree of collaboration or seek an agreement with regard to anticipated or future products. To date, no specialisation agreements have been registered with the Tribunal.

Section 45 also does not apply to agreements that are entered into by companies each of which is, in respect of every one of the others, an affiliate. This is analogous to the "intra-enterprise" doctrine in US law. Criminal proceedings under section 45 are also precluded if civil proceedings have already been commenced under either the Act's abuse of dominance or merger provisions.

Extraterritorial jurisdiction

The territorial scope of section 45 has not been definitively determined by the courts, although a recent decision has taken a broad view. In that case, a motion was brought by the defendants to challenge a class action commenced in relation to the bulk vitamins conspiracy.[13] Five foreign defendants argued (among other things) that the court lacked jurisdiction because the agreements in question were made outside of Canada. The Court rejected this argument and held that the language of section 45 is not expressly limited to conspiracies 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 enforce-

ment position of the Bureau/Attorney General, which is that section 45 applies regardless of whether an agreement was entered into in Canada so long as its effects are felt or were intended to be felt in Canada.

The Competition Bureau's Immunity Programme

The Bureau's success in obtaining cartel convictions in recent years is due in large part to the availability of its immunity programme, which encourages cartel participants to disclose their illegal conduct in exchange for potential immunity from prosecution.[14] The Bureau's immunity programme is loosely modelled on the US amnesty programme and is also broadly similar to the leniency programmes in jurisdictions such as Australia, New Zealand, Japan and South Korea.[15]

Requests for immunity are made to the Bureau, which then decides whether to recommend to the Attorney General that the request be granted. All else being equal, the Bureau will provide a positive recommendation to the Attorney General where a party 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. However, being "first-in" to the authorities in another jurisdiction will not be sufficient in and of itself to permit a party to avail itself of the Bureau's immunity programme.

There are additional specific requirements which a party seeking immunity must fulfill: the party must take effective steps to terminate its participation in the illegal activity; the party must not have been the instigator or the leader of the illegal activity (as opposed to a "co-instigator" or a "co-leader"), nor the sole beneficiary of the activity in Canada; the party must reveal any and all offences under the Act in which it may be involved (ie, not only the specific offence at issue in the immunity application); the participant must provide full, frank and truthful disclosure of all the evidence and information known or available to it or under its control with respect to these offences; the party must agree to provide timely, full and continuous cooperation to the authorities for the duration of the Bureau's investigation and any ensuing prosecutions (for corporate applicants, this means taking all lawful measures to promote the continuing cooperation of directors, officers and employees); and the party may be expected to make restitution for its illegal activity.[16] Failure to comply with any of these requirements may result in the Attorney General revoking immunity and a subsequent party being entitled to claim immunity instead.

When a company qualifies for immunity, its present directors, officers and employees who admit their involvement in the illegal activity and who provide complete and timely cooperation will also qualify for immunity. However, past directors, officers and employees will be considered on a case-by-case basis.

The immunity application process will normally consist of the following steps:

- the "initial contact" with the Bureau, otherwise known as placing the "marker", which involves the disclosure of sufficient information, usually in hypothetical terms, for the Bureau to confirm that the party is "first in";
- the "proffer", which involves providing the Bureau with a more detailed description of the activity for which immunity is sought, usually within 30 days of the "marker";
- the "provisional guarantee of immunity", which involves the Bureau presenting the proffer information to the Attorney General, who will then decide whether to provide a written provisional guarantee of immunity pending further assessment of the claim;
- the "full disclosure" stage, at which the Bureau will expect to receive full, frank and truthful disclosure of the nature of the offence (and any other offences), through the production of documents, witness interviews, etc, on the understanding that the Bureau will not use this information against the party unless the party fails to comply with the terms of the immunity agreement; and
- the "immunity agreement", which involves the negotiation of the terms pursuant to which immunity will be granted by the Attorney General.

Because of the nature of the offence under section 45, parties will be expected to provide information at the proffer stage regarding the relevant market. This will enable the Bureau to assess whether there has been an "undue" lessening of competition. Appicants, however, are not required at this stage to demonstrate decisively that an undue lessening of competition has occurred in order to qualify for a provisional grant of immunity.

Importantly, the Bureau will not insist that immunity applicants make their proffer in written form. This is to avoid potential disclosure issues for immunity applicants in any follow-on civil litigation.[17] The Bureau also offers the possibility of "Immunity Plus", ie, even if an applicant is not qualified to obtain immunity with respect to offence A, it may be "first in" and qualify for immunity in respect of offence B.

Immunity requests are treated as highly confidential by the Bureau and the Attorney General. As a general rule, the identity of a party requesting immunity, and any information obtained from that party, will not be disclosed except where:

- there already has been public disclosure by the party;
- disclosure is for the purpose of the administration and enforcement of the Act and the party has provided its consent;
- disclosure is required by law; or
- disclosure is necessary to prevent the commission of a serious criminal offence.

The Bureau's position regarding confidentiality in immunity situations differs from its approach to confidentiality in other circumstances. Outside of the immunity context, the Bureau will not seek the consent of a party to disclose information if it believes that disclosure is necessary for the "administration and enforcement" of the Act. This difference in approach demonstrates the importance accorded by the Bureau to immunity applications. However, this special protection only applies to immunity applicants who are "first in" and does not assist cartel participants who may come forward subsequently to cooperate.

Parties that do not qualify for immunity may still qualify for lenient treatment if they cooperate with the Bureau's investigation. This would generally involve the party receiving a reduction in the penalty that might otherwise be imposed. The Bureau is presently considering whether to articluate its policies regarding lenient treatment in a public policy document similar to the information bulletin describing its immunity programme.

International cooperation

Canada has entered into several state-to-state treaties and inter-agency agreements to promote and facilitate cooperation in, among other things, cartel investigations. For example, Canada has agreements of this kind with Australia, New Zealand and (since October 2005) Japan. 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 under oath.

Cooperation between the Bureau and its counterpart agencies also takes place at a more informal level, eg, coordinating simul-

taneous investigations in several jurisdictions. A very recent and well-publicised example of this type of effort took place in February 2006 when the Bureau, Korea's Fair Trade Commission, the European Commission and the Antitrust Division of the US Department of Justice coordinated their investigations into the cargo operations of certain airlines.

Private actions

Section 36 of the Act provides a statutory right of civil action to claim damages and costs caused by losses suffered as a result of criminal conduct under the Act, such as conduct covered by the conspiracy provision. Although treble damages are not available, the potential exposure for cartel participants remains considerable, particularly in view of the growing number of class action proceedings that are being commenced in respect of cartel offences. For example, class actions have been brought in Canada against parties having participated in cartels affecting products such as lysine, citric acid, bulk vitamins, biotin, methionine, niacin, choline chloride, nucleotides, sodium erythorbate, sorbates and MSG, among other products.

Possible reforms

The Competition Bureau is considering possible amendments to the Act's conspiracy provisions. In the fall of 2005, an external working group of expert lawyers and economists was struck to help the Bureau evaluate various models that could be used when applying the conspiracy provision, including whether the adoption of a per se offence is appropriate. Committee members have agreed on criteria for evaluating the potential models and have commenced their analysis of several scenarios, with a view to determining, among other things, what types of behaviour the conspiracy provision should cover and whether the provision should ultimately be criminal in nature (as is currently the case) or provide for civil proceedings. Public technical roundtables are expected in the late summer or fall of 2006.[18]

Notes

1 RSC 1985, c C-34.

2 The Act contains several additional criminal offences that can extend to cartel behaviour. These include (i) bid-rigging; (ii) price maintenance (which includes horizontal conduct); and (iii) "foreign directives". Bid-rigging and price maintenance are both per se offences. The foreign directive provision makes it an offence for a corporation carrying on business in Canada to implement a directive or instruction from a person outside Canada in order to give effect to a foreign conspiracy that would be illegal in Canada. The offence can occur even if directors or officers in Canada were unaware of the foreign conspiracy. This happened recently to executives of Morganite Canada, who were convicted of this offence even though they were simply implementing directives of an affiliate in Wales and were unaware of any illegal agreement. Cartel participants also may find themselves charged under various "inchoate offences" in the Criminal Code. For example, Mitsubishi Corporation was recently fined for "aiding and abetting" the implementation of a foreign-directed conspiracy in Canada contrary to section 21 of the Criminal Code, *R v Mitsubishi Corporation (2005), 40 CPR (4th) 333 (Ont SCJ).*

3 *R v Nova Scotia Pharmaceutical Society, [1992] 2 SCR 606 at 648* [hereinafter PANS].

4 See, eg, Sheridan Scott, "Competition Bureau Progress and Priorities", Canadian Bar Association Annual Conference on Competition Law (November 3, 2005), available at www.competitionbureau.gc.ca. The Competition Bureau is the federal government agency that investigates allegations of anticompetitive behaviour in Canada. The Bureau is headed by the Commissioner of Competition, who is responsible for the administration and enforcement of the Act.

5 It should be noted that paragraph 45(1)(b) also makes it an offence to "enhance unreasonably" the price of a product. The Bureau has expressed the view that this creates a separate offence under section 45 which does not require the demonstration of an undue lessening or prevention of competition. To date, however, no prosecution has been brought on this basis.

6 Subsection 45(2.1) of the Act expressly permits a court to infer the existence of a conspiracy from circumstantial evidence, although the existence of the conspiracy must still be proven beyond a reasonable doubt.

7 Obstruction is also an offence under the Criminal Code. In 2004, for example, The Morgan Crucible Company was fined for wilfully providing false and incomplete evidence to Bureau officials investigating a cartel involving carbon brushes and current collectors.

8 Note, however, that an order for the production of documents against a corporation in Canada may extend to non-Canadian affiliates of that corporation. See subsection 11(2) of the Act.

9 The penalty in a recent domestic cartel prosecution is also worth noting in this regard. In that case, key personnel involved in the impugned conduct were ordered removed from their positions. The Commissioner has stated that this case should place corporate executives and employees on notice that they will be held personally accountable for their actions in cartel offences. Sheridan Scott, Commissioner of Competition, "Speaking Notes", Winter Meeting of the American Bar Association, Chateau Montebello, Quebec, Canada (January 23, 2006), available at http://www.competitionbureau.gc.ca.

10 See, eg, *R v Mitsubishi Corporation*, supra, note 2.

11 In the graphite electrode conspiracy, for example, both Tokai Carbon Co Ltd and Nippon Carbon Co Ltd supported the parties' price-fixing scheme in Canada by agreeing not to sell their products into the Canadian market. Tokai pleaded guilty and was fined $250,000 Cdn, while Nippon paid $100,000 Cdn following its own guilty plea, even though neither had any "relevant volume of commerce" in Canada.

12 The Competition Tribunal is a specialised administrative body established

to adjudicate applications with respect to the Act's civil provisions (eg, mergers and abuse of dominance). The Tribunal is comprised of judges of the Federal Court of Canada and non-judicial ("lay") experts.

13 *VitaPharm Canada Ltd v F Hoffman-La Roche Ltd, (2002) 20 CPC (5th) 351.*

14 See, eg, Sheridan Scott, Commissioner of Competition, "Cartel Enforcement: International and Canadian Developments", Fordham Corporate Law Institute Conference on International Antitrust Law and Policy (7 October 2004), available at http://www.competitionbureau.gc.ca.

15 The Bureau's immunity program is described in an Information Bulletin released in September 2000, as supplemented by a set of responses to "frequently asked questions" issued in October 2005. In February 2006, the Bureau released a "consultation paper" as part of a process whereby it ultimately proposes to revise its immunity program to address issues that have arisen since the program was adopted in 2000. All of these materials are available at http://www.competitionbureau.gc.ca. See also the Canadian Department of Justice's Federal Prosecution Service Deskbook, Part VII, Chapter 35, available at http://www.canada.justice.gc.ca.

16 Immunity applicants should also expect to be asked if they are or were involved in any non-competition offences which could impact negatively on their credibility as witnesses.

17 Other competition authorities have adopted similar policies with respect to paperless immunity applications. For example, the Australian Competition and Consumer Commission also no longer requires that immunity applications be made in writing. By way of contrast, Japan's recently adopted leniency program takes a more restrictive approach. The initial immunity application must be made to the Japan Fair Trade Commission in writing by facsimile. However, subsequent disclosure may be made orally if the JFTC is satisfied that there is indeed a risk of civil discovery in other jurisdictions.

18 See Sheridan Scott, Commissioner of Competition, supra, note 4.