



# Best Practices for Regulatory Investigations: Handling Cartel Investigations Under the Competition Act

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4<sup>th</sup> Conducting Regulatory  
Investigations Course

(Federated Press)

September 13, 2013

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# Outline

1. Enforcement Framework
2. Responding to Cartel Investigations
3. The Internal Investigation
4. Immunity/Leniency



# ENFORCEMENT FRAMEWORK

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# Enforcement Authorities

- Competition Bureau (“Bureau”) is responsible for administering and enforcing the Competition Act (the “Act”)
- Bureau investigates alleged criminal offences under the Act (such as cartel offences) but does not prosecute
- Prosecution of criminal offences is responsibility of Public Prosecutions Service of Canada (“PPSC”)
  - Upon referral by the Bureau

# Investigative Powers Under the Competition Act



- Bureau has extensive compulsory powers to investigate alleged violations of the Act:
  - Search and seizure (including computers, smart phones, pdas, etc.)
  - Production of records
  - Examinations under oath
  - Written responses under oath
  - Wiretaps
- Judicially authorized on basis of *ex parte* applications

# Cartel Offences

- Two principal cartel offences: conspiracies and bid-rigging
- Both are *per se* offences – no requirement to prove market impact
- Severe Penalties
  - Up to 14 years in prison
  - Up to \$25 million in fines per count: conspiracies
  - Fines in the discretion of the court: bid-rigging
- “Follow-on” civil litigation

# Cartel Offences

- Key enforcement priority for Bureau
- Emphasis on prosecution of individuals
- Recent cases:
  - Retail gas price fixing in Quebec: 39 individuals and 15 companies charged/33 individuals and 7 companies convicted
  - Chocolate: charges laid against 3 companies and 3 individuals/one guilty plea
  - Air cargo price fixing: 9 guilty pleas/over \$25 million in fines
  - Auto parts: 3 guilty pleas/record fine of \$30 million for bid-rigging offence
  - Polyurethane foam price fixing: \$12.5 million fine/first conviction under amended conspiracy provisions



# RESPONDING TO CARTEL INVESTIGATIONS

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# Cartel Investigations Under the Competition Act



- Bureau typically relies on search and seizure powers in sections 15 and 16 of Act
  - See Bureau's Information Bulletin for more details ([www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca))
- Other options include compulsory production orders/requests for voluntary production
- Bureau may also advise party of investigation and request that it preserve all relevant records

# Cartel Investigations Under the Competition Act



- Responding quickly and efficiently to Bureau-initiated investigation is a critical element in organizing company's defence
- Ideally will have prepared in advance/provided training to company personnel

# Search and Seizure

- Dealing with the Bureau at the outset:
  - Don't panic. Be calm and professional
  - Request business cards/ID from Bureau officers
  - Contact senior management/counsel immediately
  - Advise lead officer that in-house/external counsel contacted and request they wait until counsel arrive/put them in touch with counsel
  - Obtain and review copy of search warrant/request underlying affidavit or ITO (may be issues on timing)
  - Provide Bureau with private boardroom with no files or direct access to IT system
- Compliance note: Advisable to provide receptionists/office managers with brief instructions in advance on what to do in case of Bureau (or other) search and seizure, including “call list” of key persons to contact

# Search and Seizure

- Internal steps:
  - Advise CEO/key officers/directors of Bureau search
  - Consider public disclosure issues
  - Suspend document retention policy
    - Disconnect paper shredders
    - IT department should suspend electronic destruction
    - Bureau may want to search shredder/need to provide access

# Search and Seizure

- Internal steps (cont'd):
  - Send “privileged and confidential” e-mail to all employees advising that:
    - Bureau investigation is underway
    - They should be polite and cooperative in helping search run smoothly/but do not chat with Bureau officers or be proactive
    - It is a criminal offence to obstruct search
    - Document retention policy is suspended until further notice/employees must preserve all records within control
    - Investigation is confidential and there should be no discussion with competitors or other third parties (including family)
    - They should advise company immediately if Bureau requests substantive interview, including if approached outside of work
  - Compliance note: Consider having draft email and employee guidelines prepared in advance

# Search and Seizure

- Internal steps (cont'd):
  - Designate members of internal search team, including company contact person to interface with Bureau and company's legal counsel
  - Search team should include senior person from IT
  - Establish "war room" for meetings of internal search team
  - Consider doing sweep for wiretaps/establish modes for safe communications

# Search and Seizure

- Establish Search Procedures:
  - Meet with Bureau team leader to establish ground rules for search
  - Company counsel should speak to Bureau counsel to establish contact and discuss any legal issues
  - Bureau officers should not be left unaccompanied while at company premises/appoint “shadows”
  - “Shadows” should be respectful but careful to observe what officers are doing/take contemporaneous notes of conduct (e.g., which offices being searched, types of records being reviewed, locations from which documents taken)
  - Within reason, try to limit exchanges with Bureau to counsel and designated company contact person
  - Keep a record of questions asked/answers

# Search and Seizure

- Establish Search Procedures (cont'd):
  - To extent possible, note – and object – if Bureau officer is reviewing/taking documents that are outside scope of search or appear to be privileged (consult with counsel first)
  - Do not authorize inspection of any premises not covered in warrant without consulting counsel
  - Counsel should be present during any substantial conversations with Bureau officers/notes should be kept of all such conversations
  - Ask to review records to be seized for privilege/to ensure within scope of search
  - To extent possible keep copies or an inventory of records seized/especially if needed to conduct business
  - Prepare memorandum setting out what happened during search



# Specific Issues: Obstruction



- Criminal offence to:
  - Impede or prevent any Bureau inquiry or examination (s. 64 of Act)
  - Fail to permit search of premises and any computer system, and the examination, copying or seizure of records (s. 65(1) of Act)
  - Destroy/alter record subject to production or warrant (s. 65(3) of Act)
- DO NOT:
  - Destroy, hide, alter or tamper in any way with documents or electronic records
  - Attempt to leave premises with concealed documents, computers, etc.
  - Lie or provide deliberately misleading statements to Bureau officers
  - Call competitors to warn about the search or otherwise to coordinate
  - Instruct anyone else to do any of the above

# Specific Issues: Obstruction



- Interviews:

- Employees should be polite and cooperative in responding to questions about whereabouts of records or access to premises
- Notes should be taken of any such conversations/answers should be short and to the point
- However, not obliged to consent to or engage in discussions on substantive matters
- Advise employees to speak to counsel (in-house/external) before engaging in any substantive discussions with Bureau or volunteering information or documents
- Issue: how far can company go?

# Specific Issues: Obstruction



- Maintaining integrity of seals
  - Bureau typically seals its work room, documents to be seized, offices not yet searched
  - Need to avoid inadvertent breach of seals (e.g. by cleaning staff)
  - Premises should be closed after working hours
  - If client controls building, should lock down (i.e. suspend electronic key access, elevators)
  - Consider posting security guards at appropriate spots or storing records where video-monitored
- Departing employees
  - Employees may need to leave premises during working hours
  - Need to establish protocol to ensure Bureau comfortable that relevant materials are not being removed

# Specific Issues: Protecting Privilege

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- Party may assert privilege over records to be seized (s.19 of Act)
  - Records to be sealed and placed in custody of court officer pending resolution
  - Either party may apply to court for determination of privilege
  - If no application within 30 days, Bureau may apply *ex parte* for delivery of records
- In practice, parties typically able to resolve issues without need for judicial determination
- Practical steps:
  - Organize list of all relevant in-house and external counsel
  - Confirm with Bureau that they are not to read/seize privileged documents
  - Ask to review all hard documents Bureau intends to seize and assert claim over any documents that appear privileged

# Specific Issues: Electronic Records



- Warrants generally authorize Bureau to search for and seize electronic records (s.16 of Act)
- Practice is to establish protocol to deal with e-records:
  - Bureau's Electronic Evidence Unit ("EEU") “images” e-record data on to a hard drive (make sure you get a copy of the hard drive)
  - EEU will subsequently identify a sub-set of potentially relevant records from the data
  - Privilege review then conducted on that sub-set prior to relevant records being handed over to Bureau case team
  - Need to determine who will conduct this privilege review (practice may vary)
  - Need to ensure that firewall between EEU and case team is effective
  - Need to ensure that claim privilege over entire data base before seized by Bureau

# Specific Issues: Extraterritoriality



- S.16 of Competition Act authorizes searches of computer systems in Canada
  - Unclear whether Bureau can search and seize records of foreign affiliate from computer system in Canada
- S.11(2) of Act authorizes Bureau to obtain order compelling production of records from foreign affiliate
  - Validity has been challenged but not determined by courts (recent challenge was abandoned)

# Specific Issues: Search Warrants

- Consider if grounds exist for challenging search warrant/wiretap authorization
- Consider if should obtain “sealing order” after search is executed
  - High standard must be met in order to displace general rule of openness
  - Must show serious risk to proper administration of justice/salutary effects outweigh deleterious effects



# THE INTERNAL INVESTIGATION

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# The Internal Investigation

- Purpose:
  - Identify any wrongful conduct
  - Risk assessment/informs decision to seek immunity/leniency
- Issues to Consider
  - Time is of essence/need to get at facts asap
  - “Upjohn” warnings/when to retain separate counsel for individual employees
  - Discipline
  - Treatment of “Whistleblowers”



# IMMUNITY/LENIENCY

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# Immunity/Leniency

- Bureau's immunity/leniency programs are a major element in its effort to detect/prosecute cartels
- Applications are made to the Bureau but final decision is made by the PPSC taking into account the Bureau's recommendation
- Treatment depends on timing of approach: "race to the authorities"

# Immunity/Leniency

First Applicant	Eligible for recommendation of full immunity from prosecution including with respect to current officers, directors, employees who cooperate
Second Applicant	Eligible for recommendation of 50% reduction in fine and no separate charges against current officers, directors, employees who cooperate
Third Applicant	Eligible for recommendation of 30% reduction in fine but no automatic recommendation of leniency for current officers, directors, employees
Subsequent applicants	Subject to negotiation

# Immunity/Leniency

- Immunity/leniency applicants must agree to cooperate with investigation/prosecution at own expense
  - Disclosure of all information, evidence and documents within possession or control
  - Secure cooperation of current and former directors, officers and employees
- Leniency applicants must agree to plead guilty and face prosecution in Canada at end of process
- No protection from private damage actions in either case

# Considerations

- Where are you “in line”?
  - Is immunity available/what type of penalty reduction (leniency) is possible?
- Is Bureau more likely to pursue individuals if do not cooperate?
- Is there risk that individual employees may seek immunity/leniency on own?
  - Do not want to be in position where employee secures more favourable treatment than company
- Impact on private litigation
  - Will there be a plea and public admission of guilt?