

The Interaction Between Leniency Programs and Private Enforcement in Canada

Mark Katz and Erika Douglas
Davies Ward Phillips & Vineberg LLP

ICN Cartel Working Group/SGI Call
of December 12, 2012

DAVIES

Outline

- The Cartel Offence in Canada
- Immunity/Leniency in Canada
- Interaction Between Leniency and Private Cartel Litigation in Canada
- Perspectives/Conclusions

The Cartel Offence in Canada

- It is a *per se* criminal offence under the Canadian *Competition Act* to agree with competitors (or potential competitors) to engage in the following conduct:
 - Price fixing
 - Market allocation
 - Output restriction
 - Bid rigging
- Severe Penalties
 - Up to \$25 million in fines (per count, unlimited for bid rigging)
 - Up to 14 years in prison

The Cartel Offence in Canada

- The detection and prosecution of cartels is one of the Competition Bureau's key enforcement priorities
 - The head of the Bureau stated recently that "price fixing and other hard core cartel agreements ought to be treated at least as severely as fraud and theft, if not more so."
- Renewed emphasis on prosecution of individuals
- Virtually all cases resolved by negotiated pleas
- Recent cases:
 - Retail gas price fixing in Quebec: 39 individuals and 15 companies charged
 - Air cargo price fixing: 7 guilty pleas, fines totalling \$22.6 million
 - Polyurethane foam price fixing: \$12.5 million fine, first conviction under amended conspiracy provisions

Immunity/Leniency in Canada

- 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 Public Prosecution Service of Canada (PPSC) taking into account the Bureau's recommendation

Immunity/Leniency in Canada

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

Immunity/Leniency in Canada

- Immunity/leniency applicants must agree to provide timely, full and continuous cooperation with investigation/prosecution
- 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

Private Competition Litigation in Canada

- Competition Act (s. 36) permits private actions for loss or damage resulting from conduct contrary to the criminal provisions of the Act or from failure to comply with a Competition Tribunal or court order
- Record of proceedings resulting in criminal conviction is *prima facie* proof of the alleged conduct in civil action
- Single damages only
 - No US-style treble damages
 - Successful party may also recover cost of investigation

Private Competition Litigation in Canada

- "Follow on" private actions increasingly commonplace, typically in the form of class actions
 - Could be "follow on" to announcement of investigation or plea in Canada/abroad
- Notable recent examples of Canadian civil actions include: high fructose corn syrup, hydrogen peroxide, air cargo, chocolate, DRAM/SRAM, aftermarket automotive lighting products
- Trend towards competition class actions may accelerate if Supreme Court of Canada upholds favourable lower court decisions on certification

Interaction Between Leniency and Private Enforcement in Canada

- In theory, private actions are a complementary mechanism to criminal enforcement of competition law in Canada



- discourage violations of competition law
- provide restitution to the public

Interaction Between Leniency and Private Enforcement in Canada

- In practice, prospect of follow-on litigation can undermine the attractiveness of participating in immunity/leniency programs, particularly for cases that are "close to the line"
- Key concern for prospective applicants: Will application for immunity/leniency encourage or facilitate private actions in Canada (and elsewhere)
 - Admission of liability
 - Disclosure of incriminating evidence
- Also negative impact on efficiency of immunity/leniency process:
 - Reliance on oral submissions
 - Disincentive to provide waivers

Interaction Between Leniency and Private Enforcement in Canada

- Canadian courts have generally favoured maintaining the integrity of the Bureau's enforcement procedures over the needs of private litigants to obtain access to relevant information
 - *Forest Protection Ltd. v. Bayer A.G.* (1995)
 - *British Columbia Children's Hospital v. Air Products Canada Ltd.* (1997)
- Consistent with confidentiality protections in Section 29 of the *Competition Act* for information that is provided to the Bureau voluntarily or under compulsory process

Interaction Between Leniency and Private Enforcement in Canada

- Competition Bureau has taken several steps to mitigate potential of private actions to undermine confidence in immunity/leniency programs:
 - Conducts "paperless" process
 - Accepts application of "settlement privilege" to information provided and submissions made by applicant
 - Will only disclose identity of leniency applicant or information provided in response to court order
 - Will take all "reasonable steps" to protect the confidentiality of any information ordered to be disclosed by court, including seeking additional protective court orders
 - Amenable to minimizing disclosure required in public documents filed in support of negotiated pleas

Interaction Between Leniency and Private Enforcement in Canada



- These measures have not discouraged or limited the effectiveness of private actions in Canada
 - Plaintiffs have significant advantage of being able to rely on record of proceedings as proof of liability
 - Plaintiffs have other mechanisms to obtain information, e.g., discovery of parties in Canada or potential access to discovery in the United States (e.g., *Linerboard* litigation)
 - Bureau typically does not object to civil plaintiffs obtaining information directly from defendants provided does not compromise Bureau investigation (*Treat America v. Leonidas*)
 - Proof is in the pudding: competition class actions in Canada continue to grow

Perspectives/Conclusions

- Maintaining the integrity and utility of immunity/leniency programs is central to cartel detection and prosecution
- Fundamental principle should be that cooperating parties must be placed in no worse position – and indeed in a better position – than non-cooperating parties vis à vis civil plaintiffs
- Internationalization of litigation/discovery/enforcement cooperation means that liberal rules in one jurisdiction can negatively impact leniency programs in other jurisdictions
 - Case by case balancing (*Pfleiderer*) seems appealing but can lead to unpredictable and inconsistent results

Perspectives/Conclusions

- Questions for Canada/other authorities:
 - Should inviolability of authority's leniency file be codified?
 - Should limits on potential exposure to private actions be introduced as further incentive to apply for immunity/leniency?

The Interaction Between Leniency Programs and Private Enforcement in Canada

Mark Katz and Erika Douglas
Davies Ward Phillips & Vineberg LLP

ICN Cartel Working Group/SGI Call
of December 12, 2012

DAVIES