

Cartels in Canada: Practical Approaches to Manage Risk

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International antitrust or competition law compliance—particularly with respect to mergers and cartel enforcement—should constantly be on the front burner of every business, particularly those which are involved in or contemplating extending the business into foreign lands. While it is hard to keep track, there are now almost 100 nations with some form of prohibition on cartels, many of which impose criminal penalties. If businesses are international in their scope, it is likely that any improper agreements will apply across-borders, and often across the globe.

Although most major businesses address US or

EU compliance, Canadian anti-trust issues need to also be considered. After the United States and Europe, Canada has been in the forefront of enforcement. This article provides an update on issues related to the criminal enforcement of Canadian antitrust law, with particular emphasis on practical issues respecting international cartel investigations and enforcement. It also provides a preliminary roadmap of Canadian considerations if the worst comes to pass.

Summary of the Key Criminal Provisions

Overview

Canadian competition law is based on both criminal and civil enforcement paradigms. While not the universal rule, criminal enforcement focuses on the most 'hard core' types of conduct—horizontal agreements and pricing matters. Horizontal conduct (agreements

with competitors) is the most significant. This article focuses exclusively on the criminal law provisions of Canada's *Competition Act*, and focuses most specifically on the "cartel" or "conspiracy" offence. Nevertheless we touch on some of the other principal offences.

Conspiracy

The Law. The conspiracy offence has been a part of Canadian criminal antitrust law since 1889. While various details have changed over the intervening 118 years, the basic offence—an agreement between two or more persons to prevent or lessen, unduly, competition—has been relatively constant. The one very significant difference from US law is that in Canada in order to constitute an offence the agreement must have an "undue" effect on competition. Determining when agreements cross this line has been an ongoing issue in Canadian law. The guidance available from the

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jurisprudence indicates the following:

- While courts have explicitly indicated that the provision is not restricted to agreements between horizontal competitors, no successful prosecution or civil action has been undertaken that was not in the context of a horizontal agreement.
- While the courts have stated that the provision could apply to agreements amongst buyers, no successful prosecution or civil action has been brought against a buyer's (monopsony) cartel.
- The Supreme Court of Canada has indicated that for an offence there must be both a certain level of market power (in the simplest form, the agreement must encompass some minimum percentage of participants in the relevant market); and there must be conduct injurious to competition (price fixing being the most straightforward). The Supreme Court specifically indicated that the percentage of the market subject to the agreement necessary to make out an offence may change depending upon the harmfulness of the conduct engaged in. Therefore the question of "undueness" is decided, in effect, by multiplying the harmfulness of the conduct by the percentage of the market affected.

Prudent Counsel. The almost universal approach when counselling clients is that, for what would be regarded as classic "hardcore" agreements between competitors, (pricing agreements; output restriction agreements; and market allocation agreements) no such arrangements should be entered into, no matter how small the market share enjoyed by the competitors subject to the agreement. The exception to that rule is if the restrictive agreement is part of a larger efficiency enhancing arrangement—such as, for instance, a joint venture. On their own, however, even though there may be an "undueness" defence available these types of agreements are regarded as too risky, even as between small competitors.

Bid Rigging

A subset of agreements between competitors which is specifically prohibited is bid rigging. Pursuant to section 47 of the *Competition Act*,

it is unlawful for two or more bidders to agree on bids to be submitted, or to agree that one or more of them will not submit bids. Here there is no "undueness" defence—indeed the section was enacted specifically to avoid the undueness defence in the bid rigging context. Therefore, an agreement between two of 20 bidders, even if the other 18 were completely unaffected, would offend the provision. There is a specific defence in the bid rigging provision if the persons making the agreement advise the person calling for the bids of the agreement—typically in the context of bidders having decided to work together on a joint bid—before of submitting the bids.

The conspiracy and bid rigging provisions are vigorously enforced under the Canadian *Competition Act* by the Commissioner of Competition and her department, the Competition Bureau. As well, typically when a government enforcement action commences, private damages actions are also launched—very often structured as class actions. Details of some of the cases recently concluded are outlined in a sidebar located exclusively in the web version of this article; please see the end of this article for details.

Price Maintenance

After horizontal agreements, the area of most active criminal antitrust enforcement in Canada (leaving to one side misleading or fraudulent consumer representations) is price maintenance. This area of the law has a history of very aggressive criminal enforcement, and in the past two or three years the government has reinvigorated its activity.

Section 61 of Canada's *Competition Act* is drafted so as to catch both vertical and horizontal pricing restrictions. Like current US law,¹ the provision forbids minimum resale pricing agreements but permits suppliers to fix a maximum or cap price. Unlike US law, however, there is no *Colgate* doctrine,² and any refusal to supply a person because of that person's low pricing policy is likely to offend the provision. Given this difference from US law, and the possible greater difference in the future, depending upon the outcome of the *Leegin* case, care must be taken

in respect of distribution systems which are structured with US law in mind.

Other Criminal Concerns

As noted above, fraudulent or misleading consumer representation is an area of increasingly vigorous criminal enforcement in Canada, but that is beyond the scope of this article. With respect to additional criminal antitrust matters, price discrimination and predatory pricing are the other two principal criminal antitrust concerns. Neither is subject to vigorous government enforcement action, although both are from time to time the subject of private antitrust claims.

While all aspects of the *Competition Act's* criminal provisions, by their very nature, represent serious compliance concerns, the focus of this article is on horizontal arrangements, because that is where the international investigations focus and that is where the greatest dangers—by way of potential fines, incarceration and private damages—lie.

Practical Issues in International Cartel Investigations

International Cooperation

These days, all antitrust enforcement agencies cooperate with one another to some degree. The Canadian Competition Bureau has the longest and deepest experience of cooperation with the US Department of Justice (DOJ) of any international agency—a fact reinforced in September 2004, when the two countries signed a new positive comity antitrust enforcement agreement.

The formal agreements are important, but as important as the formal agreements are the informal networks and understandings. Canada is one of the central players in the international antitrust enforcement regime. Canada's former Commissioner of Competition, Konrad von Finckenstein, was the Chair of the International Competition Network (ICN), and its current Commissioner of Competition Sheridan Scott, has recently been elected to the same position. The personnel in both the Competition Bureau and the Canadian Department of Justice cooperate both formally and informally on a weekly and

Search and Seizure Under the Competition Act—Guidelines

This note has been prepared by Lang Michener's Competition and Marketing Law Group to provide immediate assistance if you are the subject of a search by Competition Bureau authorities. The following comments and suggestions may be helpful if you are confronted by investigators under the *Competition Act* who arrive, with little or no warning, with a judicial order or warrant authorizing them to search your premises. This note is not a substitute for legal advice. If confronted with an immediate search of your premises, you should contact your counsel as soon as possible for detailed advice.

Overview

1. Competition Bureau officials have the right to be on your premises, to review any of your files which are within the scope of the order or warrant, and to take away (temporarily) those that are relevant. It is an offence to refuse them access or to seek to hide or destroy files or documents relevant to the inquiry.
2. The investigators will usually review all potentially-relevant files, records and materials, selecting those that at the end of their search they will most likely wish to "seize," and will effect the formal "seizure" at the conclusion of their visit. The visit may last several days.
3. Do not discuss the company's commercial policies or activities with the investigators. Their entitlement is to review documents, not to question employees about the content of the documents or about any other aspect of the company's affairs.

Proper monitoring by the firm being searched is important. Not only is the search an invasion of your company's privacy, albeit an authorized one to the extent of the warrant, but subsequent enforcement proceedings under the Act are frequently based largely on seized documents.

Specific Suggestions

1. The investigator(s) should be invited into the office of the senior person on the premises, or into a boardroom.
2. Ask to see the written authorization of the investigator(s) to search your premises and ensure that it applies to the investigators who are present, to your premises, and that they are within the time limits of the authorization. Copy the authorizing document.
Note: (1) in rare situations where the delay involved in obtaining a warrant would result in the loss or destruction of evidence, a warrant may not be required regarding a search for such evidence; (2) the Commissioner under the *Competition Act* takes the position, which your lawyer may wish to dispute, that persons who are not identified in the warrant as being authorized to search may assist those who are named if those who are named supervise them.
3. Be courteous.
4. Call and ask your lawyer to attend at your premises immediately. Your lawyer will examine the investigator's authorization to ensure that it is not defective, and will assess whether you should take prompt steps to apply for a court order to stop the search or prevent or limit a seizure. If your lawyer cannot attend before the search starts, send him or her the particulars. Your lawyer may wish to speak to the head investigator.
5. Request a copy of the "information," which is the background document that would have been presented to a judge to obtain the warrant in the first place. Sometimes this will be refused, in which event your lawyer may wish to discuss the matter with the person responsible for the investigation and apply to the court if necessary to seek to obtain it, in order to decide whether an application should be made to quash the warrant (i.e., if reasonable grounds for belief did not exist as to the conduct in question or as to the premises as a likely place where evidence might exist, or if misrepresentations were made).
6. Give the investigators a place to work.
7. Communicate, by memo or as appropriate, to relevant staff, advising them that representatives are present from the Competition Bureau to examine

certain company records, that they are authorized to inspect such records and to treat them with courtesy. Staff should be instructed not to discuss company affairs with the investigators, and to refer all questions and inquiries to a central staff person or to counsel on the premises.

8. Appoint your lawyer or a responsible officer to monitor the search generally on an on-going basis. The responsible officer should accompany the investigators, indicate the location of documents and data accessible by computer which they are seeking, list all documents and computer information they propose to take, and facilitate copying. The responsible officer should also review the documents and files to be searched to ensure that they fall within the scope of the warrant, and in order to claim solicitor-client privilege in respect of all correspondence between your company and its lawyers (see item 9).
9. Seek to limit the extent to which the investigators review documents that do not fall within the scope of the warrant. It is partly for this reason that you should help identify the files containing documents relevant to their inquiry. The investigators are entitled to satisfy themselves, within reason, that they have found all relevant documents, but they are not allowed to go on a fishing expedition or to review documents outside the express terms of the warrant. In general terms, the search should be limited to documents or materials that:
 - a. relate or may reasonably refer or apply to the time period of the conduct referred to in the warrant;
 - b. relate or may reasonably refer or apply to the places where the alleged conduct occurred;
 - c. relate or may reasonably refer or apply to the matter or suspected conduct and products to which the warrant relates, in the sense of having some evidentiary value; and
 - d. are of a type or class of document specified in the warrant as being subject to the search.
10. A claim of solicitor-client privilege should be invoked for all correspondence, memoranda, etc., between you and your lawyer, including staff lawyers where the correspondence relates to seeking or giving legal advice. This includes documents provided to internal counsel for legal review or advice and contained in his or her file. Insist that all such correspondence and documents remain unread and uncopied by the investigators, that each such document which he or she wants to seize be numbered, that a separate list of such documents be made by date, writer and addressee, and that all such documents be deposited in an envelope which, at the conclusion of the search, will be sealed. A court will then determine any disputed issues regarding access to those documents.
11. The power to search premises includes the right to "use or cause to be used" any computer system on the premises to search any data "contained in or available to" the computer system and to seize copies of printouts or other output (*Competition Act*, section 16). Either the Director or the person in control of the computer system may, if necessary, apply to a judge to settle who should operate the system for this purpose, when and under what conditions.
12. Make a record of or identify all documents or files being reviewed by the investigators, and ensure that you have a copy or record of any documents they propose to seize before they are removed from the premises. (The documents or copies will be returned to you after the investigators have catalogued them.)
13. If there are any questions about the propriety of the scope of the proposed seizure, in the sense of the investigators wanting to take documents covered by solicitor-client privilege or otherwise arguably outside the reasonable scope of the warrant, your lawyer may seek to have the investigators seal those documents at the time of seizure in order to provide a reasonable opportunity to challenge the scope of the seizure before a court.
14. At the end of the attendance by the investigators, prepare a detailed memorandum directed to your lawyer, by the person monitoring the search, setting out any matters, including conversations with or comments by the investigators, that pertain in any way to the inquiry.

sometimes a daily basis with other counterparts at the US DOJ and Federal Trade Commission, and to a lesser extent other foreign agencies.

The reality is that, whether this issue is formal or informal, another jurisdiction the other jurisdiction will get wind of it. Even a superficial review of our web version sidebar indicates that of the principal Canadian antitrust enforcement cases taken over the last five or six years, most of them involve international arrangements. Canadian enforcement authorities have benefited significantly from the flow of information available from US and other international antitrust enforcers. There is no reason to think this will do anything but continue in the future.

Canadian Powers of Investigation

When investigating an alleged conspiracy offence, the Canadian Competition Bureau has powerful investigative tools. Like other antitrust agencies, of course, it depends significantly on persons knowledgeable about the conduct in issue—including former employees and participants in the arrangements who have decided to take advantage of leniency policies, as a principal of the sources of information. As well, it depends on information from various foreign antitrust authorities.

Once the Commissioner of Competition has reason to believe that a person has contravened one of the criminal provisions of the *Act* or that an offence has been or is about to be committed, she can commence an inquiry. Once she commences an inquiry, she can obtain from the Court, without notice, what is called a "Section 11 Order." Section 11 Orders are very powerful tools. They can require persons to deliver information to the Commissioner (typically these are very extensive documentary production requirements); they can require that people answer, under oath, written questions put to them; and they can require that people attend to be examined under oath. In addition to this Section 11 procedure, the Commissioner can also apply without notice for a warrant to enter and search premises. As well, search warrants permit the Competition Bureau to search computer systems on such premises for any data contained

in or available to that computer system—which may well extend to data outside of Canada. Finally, by way of principal investigative tools, section 183 of the Criminal Code permits the Commissioner to apply without notice to obtain authority to engage in wiretaps.

The investigative tools in the hands of the Commissioner are considerable, and she uses each of them, or in the appropriate cases all of them in combination, on a regular basis.

The Canadian Competition Bureau's Immunity Policy

Without a doubt, the most effective tool in the hand of Canada's Competition Bureau—as it is in the hands of the US DOJ—is its immunity policy.³ The policy is broadly stated parallel to the US DOJ's Leniency Policy. It has various criteria, the most important of which being:

- Immunity is only available to the first applicant;
- Leniency may be available to subsequent applicants;
- Immunity requires that the applicant has ceased the unlawful conduct and be willing to cooperate fully with the Government in the prosecution of others;
- The applicant must not have coerced others into the conduct, nor be the sole beneficiary of the activity in Canada; and
- Where possible, the party must make restitution for the illegal activity.

Full details of the immunity policy can be obtained from the Competition Bureau's website at <http://cb-bc.gc.ca>. Applicants for immunity are instructed to contact the deputy commissioner, criminal matters, Denyse MacKenzie, at mackenzie.denyse@cb-bc.gc.ca or 819.997.1208.

Potential Penalties

Potential penalties under the Canadian *Competition Act* are significant. The fines on a per offence basis for conspiracy are currently capped at \$10 million, although plea bargains have resulted in fines of up to \$49 million. The level of penalty typically agreed to at settlement negotiations in Canada appears to have a rough correlation, adjusting for the level of commerce in the two countries, with the level of penalties

achieved in the same cases in the United States, and has often represented 20 or 30 percent of the total commerce effected. (See web sidebar).

In addition to corporations, individuals can be jailed and, more typically, fined. The Competition Bureau indicated an intention to ramp up penalties against corporate officers engaged in conspiracies.

While the consequences, particularly for individuals, with respect to anticompetitive conduct in Canada, are not yet at the US level, they appear to be heading in that direction.

Private Antitrust Litigation

In addition to criminal sanctions, the offence provisions of the *Competition Act* give rise to a civil cause of action. The cause of action is limited to single damages, and plaintiffs must prove actual damages—no punitive damages are available. However, class proceedings are available and are now regularly used in the wake of, and often in tandem with, criminal proceedings.

Because the Canadian private antitrust scene is relatively undeveloped many questions have not yet been definitely resolved. For instance, the question of whether indirect purchasers have claims remains open.⁴ Nevertheless, the existence of a civil cause of action and class proceeding legislation now requires that any significant antitrust criminal defence also involve strategic considerations as to the likely follow-on class proceedings. While there has not yet been a judgement in a contested case, many civil settlements have been entered into, some involving the payment of tens of millions of dollars in damages.

How to Manage a Canadian Investigation

The bottom line question, given all of the foregoing, is: What should general counsel do on that fateful day when all heck breaks loose? Every fact situation will suggest a different answer to that question, but as a general rule this ten step program should help:

- Immediately create a dedicated legal team in the important jurisdictions.
- Ensure that lead counsel in the key

jurisdictions, including the US, Europe and Canada—and increasingly the UK, Japan, Korea, and Australia—meet virtually daily in the first little while, in a pre-arranged conference call, to keep everyone in each jurisdiction up to date on developments.

- Instruct everyone that no documents may be destroyed, and secure the electronic back up of emails so that they are not deleted on a regular cycle.
- Carefully monitor the ongoing searches, if any, so as to maintain solicitor-client privilege and avoid unnecessary admissions.
- Identify key witnesses as soon as humanly possible and interview them—in their home jurisdictions—immediately and, if necessary repeatedly, until the facts are known. Do not dismiss people from employment precipitously, but consider relieving them of duty. Figure out where key ex-employees are.
- Review all available documents. Review of electronic communications will be a very time consuming, labour intensive, but ultimately likely informative exercise.
- If the facts suggest immunity applications are appropriate, immediately contact the relevant officials in the key jurisdictions—including Canada. Contacting other jurisdictions and making an arrangement for immunity will not provide Canadian immunity.
- Take great care with all public statements which may be required by securities legislation. The temptation will be to deny all liability and indicate that concerns are “baseless,” but you do not wish to have to make corrective statements soon thereafter.
- Ensure that dealings with the antitrust enforcement agency, including the Canadian Competition Bureau, are “paperless,” to minimize production in the US and/or possibly Canada in subsequent private litigation.
- If the facts suggest the availability of a good defence, consider appropriate joint defence agreements, so as to share resources and also keep some tabs on others in the industry.

These first few days will be bad, no matter what you do, but actions taken at first may set the stage for an ultimately acceptable outcome. It is critically important to be at least as well, if


not better prepared and more knowledgeable than the government authorities and the other subjects of the investigation. Since teams with the appropriate expertise in each jurisdiction are limited, and since conflicts may abound, getting off the mark early is a very good first step.

US Heavily Influences Outcome

There is no doubt that the most important jurisdiction with respect to anti-cartel enforcement has been, and remains, the United States. The triple threat of significant criminal financial penalties to corporate defendants, treble damage class action suits, and the increasing incarceration of individuals found guilty of antitrust violations—including foreign nationals—should and does inspire fear of US anti-trust laws. Consequently, any strategy for managing an international cartel investigation must take into account, first and foremost, the implications in the United States. Implications for corporate accused in the European Union and Canada are also very significant. In the EU, there is the threat of an extreme financial consequence, so high it can bankrupt firms. In Canada, there is the risk of criminal liability against both corporations and individuals, the growing reality of civil damages claims, including class action litigation, and significant fines. Managing the risk in Canada is a primary issue in any international investigation.

There are few worse events in the life of a general counsel than discovering that your employer is the subject of a full blown international cartel investigation. The first announcement of such an investigation is often the arrival of enforcement authorities at your offices; perhaps at your offices on a number of different continents; perhaps all on the same business day. Information is partial and confused, but decisions, which may have very significant implications, have to be made quickly. Employees, customers, the board, securities markets—all need to be given information, even though much of that information is not available, and that which is available may be highly problematic. Issues have to be dealt with involving many

jurisdictions at once. It is likely to be a long and confusing day.

There is no easy answer to any of these issues. However, we hope that with this article you have flags for some of the considerations which apply in Canada and some guidance as to how to manage the Canadian component of an antitrust investigation. 

Please see the web version of this article at www.acc.com/docket for an additional sidebar, “Penalties for Price Fixing Under the Canadian Competition Act (1997-2007).”

NOTES

1. Note: The article was prepared before the issuance of a decision by the Supreme Court of the United States in *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*
2. Generally, under the *Colgate* doctrine, a company is free to deal with whomever it wishes unilaterally as long as it does not act with the purpose of forming a monopoly. *United States v. Colgate & Co.*, 250 U.S. 300, 307-08 (1919).
3. The US Department of Justice’s Corporate and Individual Leniency Policies are available online via the Antitrust Division Website: <www.usdoj.gov/atr/public/guidelines/guidelin.htm> (date accessed 14 June 2007). The Canadian Competition Bureau’s Immunity Policy is available online via the Competition Bureau’s website: www.strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct1990e.html (dated accessed: 14 February 2005).
4. See *Chadha v. Bayer Inc.* (2003) 63 O.R. (3d) 22 (C.A.), aff’g (2001), 54 O.R. (3d) 520 (Div. Ct.). Application for leave to appeal to the Supreme Court of Canada dismissed with costs [2003] S.C.C.A. No. 106.

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