The Evolution of Amnesty and Leniency in Canadian Cartel Law Enforcement

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I. Introduction

“Favourable Treatment” in Canadian cartel enforcement comprises two essential elements: immunity (i.e., amnesty), which may be available to the first qualifying party who reports cartel conduct to the Competition Bureau (the “Bureau”); and leniency, which is available to any subsequent party that agrees to plead guilty and co-operate with the Bureau in exchange for a reduced sentence.

The Bureau has formal policies and processes in place for both immunity and leniency applicants.

As described below, these policies have been recently revised following major reforms to the Canadian cartel offence in 2009.

II. The New Cartel Offence

In March 2009, Canada enacted the most significant reform of its cartel laws since the introduction of the original Combinations in Restraint of Trade Act of 1889. The new regime employs a two-track system featuring a per se criminal offence for so-called “naked restraints” (i.e., agreements between competitors or potential competitors to fix prices, allocate customers or markets, or restrict output) and a civil “reviewable practice” for other types of competitor agreements.

Backing up the new cartel offence are significantly increased penalties, with possible prison terms of up to 14 years for convicted individuals and fines of up to C$25 million (per count charged) for individuals and companies.

1 S.C. 2009, c. 2. Notably, the cartel reforms did not come into force until March 12, 2010, thereby allowing businesses one year to adapt their business practices accordingly.

2 An Act for the Prevention and Suppression of Combinations formed in Restraint of Trade, 52 Vict. c. 41 (1889) [hereinafter the Combinations in Restraint of Trade Act].

3 Competition Act, R.S.C. 1985, c. C-34, § 45 and § 90.1, respectively [hereinafter the “Act”].

4 For example, under the former C$10 million per count maximum, F. Hoffman-LaRoche Ltd. was convicted of eight counts of conspiracy and fined a total of C$50.9 million for its role in the bulk vitamins and citric acid cartels: see Competi-
corporations. As a result, Canada arguably now has — on paper, at least — the most stringent anti-cartel regime in the world, combining a broad per se offence with severe criminal penalties.8

III. Other Relevant Offences

In addition to the per se conspiracy offence, the Competition Act maintains its separate, pre-existing per se offences for bid-rigging7 and implementing a foreign-directed conspiracy in Canada.8 The bid-rigging offence has also been expanded to cover agreements between parties responding to an invitation to tender, whereby one party agrees to withdraw a previously submitted bid.9 The foreign-directed conspiracy offence, which to our knowledge is unique to Canadian law, criminalizes any implementation by a Canadian corporation of “a directive, instruction, intimidation of policy or other communication,” given by a person outside Canada “who is in a position to direct or influence the policies” of the Canadian corporation, where the communication is “for the purpose of giving effect to a conspiracy.”10 The provision was designed to facilitate enforcement against international cartel conduct without aggressively asserting extra-territorial jurisdiction over the offender, and purports to apply even if the directors and officers of the Canadian corporation act without knowledge of the foreign conspiracy.11

These are the only cartel offences for which immunity or leniency is available. Related offences, such as obstruction or destruction of records, are not covered by the Bureau’s amnesty programs.12

IV. Obtaining Immunity in Canada

The 2009 reforms make cartel prosecutions easier by establishing a simpler per se cartel offence to prosecute, with dramatically higher penalties. As a result, obtaining immunity is more important than ever before.

Criminal matters arising under the Competition Act are investigated by the Bureau, which also handles the initial stages of immunity (and leniency) applications. However, following the initial notification, analysis and negotiation stages of an application, the Bureau turns over primary responsibility for the matter to Department of Justice lawyers from the Public Prosecutions Service of Canada (“PPSC”), along with its recommendations regarding the action to be taken.13

According the Bureau, its Immunity Program constitutes the “single most powerful means for detecting criminal activity,” and its role in cartel enforcement is “unmatched.”14 The criteria for earning a recommendation for immunity are that:

- The applicant is the first to disclose illegal conduct of which the Bureau is unaware, or is the first party to provide evidence of conduct of which the Bureau is aware that leads to a referral of the matter to the PPSC.
- The applicant has terminated its participation in the illegal activity.
- The applicant did not coerce others to participate in the illegal activity (although being the ringleader or instigator of the cartel is not a bar to obtaining immunity, as it once was).15

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5 The substantially-increased penalties are a particularly notable feature of the 2009 amendments, as this issue had not been canvassed in any of the public consultation processes that preceded the reforms. The issue, in fact, had not been raised since a 2003 Discussion Paper, and on that occasion the question related only to increasing the maximum fines, not the maximum prison sentences. See Public Policy Forum, National Consultation on the Competition Act: Final Report (8 April 2004) at 15, question 33, available online at http://www.ppforum.ca/sites/default/files/competition_act_consultation.pdf.

6 Oddly, proponents of these reforms had argued that Canada needed to replace the “undue leniency of competition” element of the former offence with per se criminality in order to keep up with its major trading partners in the US and EU; see, e.g., Competition Bureau, Submission to the Competition Policy Review Panel (11 January 2008), at 6-7, available online at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02555.html. This observation ignored the fact that US antitrust law has been moving away from a rigid “per se”/“rule of reason” dichotomy since the late 1970s, and that EC law neither condemns horizontal agreements on a per se basis nor imposes criminal sanctions.

7 Act, supra note 3, § 47.

8 Ibid., § 46.

9 This amendment was made as a direct consequence of the outcome in R. v. Rowe et al. (2004), 29 C.P.R. (4th) 525 (2004) (Ont. S.C.) [hereinafter Rowe]. One of the authors was counsel to a corporation and an individual accrued in the Rowe case.

10 Act, supra note 3, § 46(1).

11 While significant doubt exists as to whether this provision would survive a constitutional challenge in a contested case, to date it has formed the basis for guilty pleas in several international cartel cases, including graphite electrodes, carbon brushes, vitamins, fax paper and chemical insecticides. The section applies only to corporations, although the Bureau on one occasion publicly stated that “an individual could be convicted of aiding and abetting the commission of such an offence”: see Competition Bureau, Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases (25 March 2009). (The basis of this statement was that, under § 21(1) of the Criminal Code of Canada, such an individual could be found to be a party to the § 46 offence and thus liable on conviction to the same penalty as the offending corporation, i.e., a fine in the discretion of the court.) However, that statement was subsequently removed from the finalized guidelines.


13 The PPSC negotiates the key documents — the Plea Agreement and the Statement of Admissions and Agreed Facts — in the immunity process. It is also responsible for prosecuting any cases that are not resolved on consent. Further information about the PPSC and its mandate is available online at http://www.ppsc-ppsc.gc.ca/eng/.

14 Competition Bureau, Information Bulletin, Immunity Program Under the Competition Act (June 2010) at para. 2, available online at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html [hereinafter Immunity Program]. The Bureau has previously stated that it received over 35 immunity applications in the first five years of the immunity program, almost double the number of applications received throughout the 1990s; see Competition Bureau, “Immunity Program Review — Consultation Paper” (7 February 2006), available online at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02022.html.

The applicant did not act solely on its own (where there are no other parties involved in the conduct, the sole responsible party is not eligible for immunity).

The applicant provides complete, timely and ongoing cooperation, at its own expense, throughout the Bureau’s investigation and any subsequent prosecution of other parties to the cartel.

As noted above, immunity applications (like leniency applications and prosecutions) are processed in a bifurcated manner, with the initial contact and issuance of a “marker” handled by the Bureau, and the ultimate decision to grant or refuse immunity made by the PPSC, albeit with input and recommendations from the Bureau. Where a party meets the above criteria, the Bureau will recommend to the PPSC that the party be granted immunity from prosecution. This recommendation is not binding upon the PPSC.

However, immunity applicants can take comfort in the close working relationship that appears to exist between the Bureau and the PPSC, certain positive statements in the Federal Prosecution Service Deskbook,17 and the recently-issued Competition Bureau – PPSC Memorandum of Understanding.18 The valuable assistance that immunity applicants provide — as the first to notify the Bureau of the existence of a cartel, and first to cooperate by providing information that assists the ongoing investigation and, ultimately, the prosecution — suggests that their odds of receiving the coveted grant of immunity will be high where they meet the criteria set out in the Immunity Program. To the best of our knowledge, there has been no instance in which a Bureau recommendation as to immunity (or leniency) has been refused by the PPSC.

V. Obtaining Leniency in Canada

The decision to seek leniency in Canada is a complicated question. The ability to obtain a discount on the potential fines payable, and the possibility of avoiding prison sentences for individuals, may induce participants to seek leniency in many cases. However, pleading guilty in exchange for leniency effectively guarantees the company’s civil liability.19 The civil exposure is significant, particularly as a single cartel participant could be jointly and severally liable to pay the entire overcharge (or other harm) attributable to the cartel.

In recent years Canada has developed an active (and entrepreneurial) class actions bar, and most cartel “follow-on” civil claims (so-called even though they are routinely filed before guilty pleas are entered) are now framed as class actions. Thus, in some cases — particularly if a party is not considering contemporaneous leniency applications in other jurisdictions — it may be more advantageous to adopt a “wait and see” approach rather than immediately pursuing leniency.

The Bureau’s approach to leniency recommendations has been clarified in their recently revisions to its Leniency Program and in the corresponding FAQs document.20 They stipulate that the best possible outcome for a co-operating party (other than the immunity applicant) is a recommended 50% fine reduction, which is only available to the first leniency applicant (i.e., the second cooperating party).21 The second leniency applicant (i.e., the third-in cooperating party) can expect to receive a maximum 30% discount recommendation.22 Leniency discounts for subsequent applicants will be determined on a case-by-case basis, but will not exceed 30%. This EC-style approach to penalty levels is a significant departure from Canada’s historic approach of open-ended plea bargaining.

Importantly, there is some uncertainty regarding the calculation of the denominator, or base volume of affected commerce (“VOC”) figure, to which these percentages will be applied. In our experience, negotiating the relevant VOC is among the most important tasks of defence counsel, and significant time may be spent in developing arguments and submissions in support of a downwards revision of the VOC figure. Aggravating and mitigating factors may also affect the recommended discount percentage.23 Thus, a degree of plea bargaining continues to exist in the Canadian regime.

In various prior cases the Bureau/PPSC secured guilty pleas from some — but not all — members of a cartel and did not pursue prosecutions against the remaining parties.24 These “second and last to plead”

15. The former program also prevented a firm that had been the “sole beneficiary in Canada” of the cartel from obtaining immunity; ibid.
16 Immunity Program, supra note 14 at 5-6.
17 The Deskbook states that “Crown counsel should, where reasonably possible, solicit and weigh the views of those involved in the Crown’s case — in particular, the victim (where there is one) and the investigating agency”: see Department of Justice Canada, Federal Prosecution Service Deskbook, chapter 20, section 20.5.8.1 (emphasis added).
19 Section 36 of the Competition Act creates a private right of action whereby any person who has suffered harm as a result of a violation of the criminal provisions of the Act may recover civil damages for that harm. Section 36(2) provides that a criminal conviction — which would include conviction by way of a guilty plea — is prima facie proof that the defendant engaged in the prohibited conduct for purposes of a section 36 civil claim.
20 Competition Bureau, Information Bulletin, Leniency Program (29 September 2010), available online at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/032888.html [hereinafter the Leniency Program], and Leniency Program FAQs, supra note 12. See also “Competition Bureau Publishes Final Version of Information Bulletin on Leniency Program,” Antitrust & Trade Regulation Report, 99 ATRR 513. This is the first finalized leniency program to be issued by the Bureau. After repeated calls for such a document to be issued following the creation of a formal Immunity Program in 2000, the Bureau issued a draft Leniency Program for comment in April 2008, and revised draft versions in March 2009 and March 2010. The finalized document reflects input from numerous outside commentators, including the Canadian Bar Association, the American Bar Association and the International Bar Association. In our opinion, it is an improvement on all previous drafts issued.
21 Leniency Program, ibid., at para. 13.
22 Ibid., at para. 14.
23 See, e.g., Leniency Program, supra note 20 at para. 16ff and the Leniency Program FAQs, supra note 12 at questions 19 and 22.
24 For example, in the polyester staple fibre investigation, the Canadian authorities secured a guilty plea from Arteva S.p.A. and a fine of $1.5 million, but subsequently did not secure guilty pleas from, or pursue prosecutions against, the other parties named in the indictment and the
outcomes may have sent the message, however unintentional, that there is value in declining, or at least in delaying, to cooperate. Certain recent international cases, such as the Air Cargo investigation, have contributed to a perception that there may be value in not coming forward and instead waiting and “fighting it out” if necessary.26 Although the new Lieniency Program does not explicitly address this issue, at a recent conference the head of the Bureau’s Criminal Matters branch publicly stated that the Bureau is committed to pursuing all alleged members of a cartel once a guilty plea has been taken from a cooperating party.26 It remains to be seen whether the Bureau will consistently adhere to this position but, for the moment, its staff appear to recognize the importance of this issue in maintaining incentives for early cooperation.

The absence of a clear policy from the Bureau regarding the treatment of individual employees may also discourage later leniency applicants from coming forward, particularly where the culpable individuals are also the directing minds of the company. The Bureau’s present policy, as set out in the Lieniency Program, is to offer protection from prosecution to all current employees of the initial leniency applicant (i.e., the 2nd-in). Former employees of the 2nd-in may also be eligible for protection, depending on their particular circumstances (e.g., did the former employee subsequently join another firm that participated in the cartel?) 27 Officially, under the new Lieniency Program, employees of later applicants are not guaranteed protection, and each case will be considered on its own particular facts. We understand that Bureau staff have indicated an interest in pursuing individual employees of the 3rd-in and subsequent parties. While this may speed the race for 2nd-in status, it may also diminish the number of subsequent applications that are made.

VI. Future Trends for Canadian Amnesty Practice

Consistent with prevailing practice in the US and EC, the Bureau and PPSC have recently been giving more attention to “ability to pay” submissions in assessing the appropriate fine to be imposed on co-operating parties. The new Lieniency Program references the sentencing provisions of the Criminal Code of Canada, which state that courts must consider “the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees” when sentencing corporations.28 The Lieniency Program FAQs clarify the Bureau’s position, explaining that:

In cases where the PPSC determines that an applicant’s ability to pay should be further considered, the PPSC may ask the Bureau to verify the financial situation of the business organization or individual. A business organization will be required to provide financial information about its assets, liabilities, revenues and equity. The Bureau may request that a third-party expert accountant review the business organization’s financial information. In the case of an individual, he or she will be required to provide information about his or her financial situation, including all sources of income, property, bank and investment records, tax filings and other relevant records necessary to make a determination.29

The effect of a proposed fine on the ongoing “economic viability” of a leniency applicant played an important role at sentencing in a recent case. The Federal Court accepted a plea agreement30 in which Kason Industries Inc. (“Kason”) pled guilty to a customer allocation scheme, contrary to section 45 of the Competition Act. Owing to the company’s financial distress, the court accepted the parties’ recommended sentence of a C$250,000 fine, paid in annual instalments over five years. Based on the criteria set out in the Lieniency Program, and the affected volume of commerce (which was stipulated to have been $3.16 million), Kason should have received a fine of C$316,000 if it qualified for the maximum 50% discount available. Its fine of C$250,000 thus represented a further 21% discount from the guidelines level, which was granted (at least in part) based on Kason’s successful inability to pay argument. We are aware of at least one other case currently in negotiation where ability to pay analysis has been accepted by the Bureau and PPSC. This factor was also important in the Crompton case.31

A less positive trend is the looming threat to the use of conditional sentencing (i.e., prison sentences served in the community). Amendments proposed by the Conservative Party as part of its “tough on crime” agenda would eliminate the ability of judges to impose a conditional sentence on any person convicted of a crime.

27 Lieniency Program FAQs, supra note 12 at para. 43.
29 R. v. Crompton Corporation, Case No. T-980-04 (decision of 28 May 2004) [hereinafter Crompton]. Based on its inability to pay submissions, Crompton Corporation was sentenced to a fine of C$9 million, payable in six annual instalments without interest. Further reductions of the outstanding amount payable were negotiated in 2010 as a result of the restructuring of the company under US insolvency laws. See Chemtura Corporation, Form 10-K, Annual Report for the period December 31, 2010 at 111. See also Chemtura Corporation, Form 10-K, Annual Report for the period December 31, 2004 at 15.
which carries a maximum penalty of 14 years’ imprisonment or more (as the new cartel offence does).\textsuperscript{32} The result would be to guarantee that individuals convicted of a cartel offence will either spend time in a jail cell or receive only a fine as punishment: the halfway house of conditional sentencing would not be available. The potential chilling effects on the Bureau’s Leniency Program are significant, as individuals involved in price fixing will no doubt balk at serving jail time despite cooperating and pleading guilty. It is notable that in the ongoing investigation and prosecutions related to the Québec retail gasoline market — the Bureau’s top domestic cartel case — four individuals have received custodial sentences, and all of these sentences are to be served conditionally, in the community.\textsuperscript{33} It is doubtful whether these individuals would have agreed to plead guilty had the possibility of conditional sentencing not existed.

\textbf{VII. Conclusions}

The Bureau has publicly stated its intention to bring more cartel cases and to test the boundaries of the new law.\textsuperscript{34} It has also worked assiduously to “put its house

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\textsuperscript{32} See Bill C-16, \textit{Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act}, First Reading 22 April 2010, 3rd Seas., 40th Parl., Elizabeth II, 2010, available online at http://www2.parl.gc.ca/content/hoc/Bills/403/Government/C-16/C-16_1.C-16_1.PDF. While this Bill did not pass before the 2 May 2011 federal election, we expect it to return and proceed now that the sponsoring Conservative Party has obtained a majority in Parliament.


\textsuperscript{34} See, e.g., Speech of Commissioner of Competition Melanie L. Aitken to the Canadian Bar Association Spring Competition Law Conference (17 May 2010), available online at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03247.html. See also other recent speeches of the Commissioner, in which she proclaimed that the Bureau “needs to initiate responsible cases more often” and “must not be intimidated by the fear of losing”: Speech of Commissioner Melanie L. Aitken to the Canadian Bar Association Competition Law Section Annual Conference (25 September 2009), in order” following the legislative amendments, issuing new \textit{Competitor Collaboration Guidelines}\textsuperscript{35} and updated and revised immunity\textsuperscript{36} and leniency\textsuperscript{37} bulletins, entering into an MOU with the PPSC,\textsuperscript{38} and hiring a former Crown prosecutor and ex-securities regulator as Associate Deputy Commissioner of its Criminal Matters Branch.\textsuperscript{39} In our view, these developments portend rigorous enforcement. We expect that it will achieve greater prosecutorial success under the new regime (although, as recent American prosecutions in the DRAM and marine hose cases demonstrate,\textsuperscript{40} a \textit{per se} offence does not guarantee convictions). Given the increased potential liability exposure, we expect the use of Canada’s immunity and leniency regimes will increase under the new regime.


\textsuperscript{36} Supra note 14.

\textsuperscript{37} Supra note 20.

\textsuperscript{38} Supra note 18.


\textsuperscript{40} See \textit{U.S. v. Gary Swanson}, Case Number 06-692, U.S. District Court for the Northern District of California, 7 March 2008. Despite securing guilty pleas (and fines in excess of US$730 million) from the four companies that participated in the DRAM cartel, the U.S. Department of Justice prosecution against Gary Swanson, a former Senior Vice-President of Sales for Hynix Semiconductor America Inc., resulted in a mistrial. See also \textit{U.S. v. Northcutt}, Case Number 07-60220CR, U.S. District Court for the Southern District of Florida, 10 November 2008. In that case, the US DOJ had several co-operating witnesses from the alleged cartel marine hose who pled guilty and testified against the two accused at trial, but the jury nevertheless returned an acquittal.
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