GETTING RELIGION ON COMPLIANCE PROGRAMS: THE CANADIAN REGIME

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TABLE OF CONTENTS

I. INTRODUCTION

The title for this paper draws on an earlier effort in the same vein, which was entitled *How Can You Get Religion Without Going Through Hell*. That title was inspired by the observation that no matter how willing a company may be to commit to an effective compliance program, in practice it is hard to invest the very significant energy and resources required, on an ongoing basis, unless a firm has experienced the full horror of an antitrust investigation or prosecution. Without actual experience of how fundamentally disruptive and painful these proceedings are, it is difficult to appreciate just how important avoiding them is. Even then, corporate memories are short. That is not to accuse anyone of cynicism, or simply paying lip service to compliance. It is, rather, to note that due to human nature being what it is, the important is often displaced by the urgent, absent some recent, direct experience which illustrates that antitrust compliance is not merely important but urgent and critical. Until one actually experiences a cartel investigation, in all of its exquisite horror, it is difficult to comprehend how truly awful it is, and therefore how important it is to minimize the chance of such a thing occurring.

II. RECENT DEVELOPMENTS

That earlier paper is now a decade old. In the intervening time compliance has come a long way. Canada's Competition Bureau (the "Bureau") is a leader in efforts to promote and encourage the use of compliance policies and even reward implementation of meaningful compliance policies. With its 2015 Guidelines[1], discussed below, the Canadian Competition Bureau has established itself as a leader in this area. Another key milestone is the significant efforts by the International Chamber of Commerce ("ICC") in this area. The ICC launched the ICC Antitrust Compliance Toolkit in 2013 ("Toolkit").[2] The Toolkit was produced by the ICC Task Force on Antitrust Compliance and Advocacy and was intended to be a practical response to suggestions by various antitrust agencies across the globe. Earlier this year, the United States Department of Justice ("DOJ") released a guidance, also discussed below, on how the DOJ will determine the effectiveness of a company's corporate compliance program.

[1] *See* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html.
[2] *See* https://iccwbo.org/media-wall/news-speeches/icc-unveils-antitrust-compliance-toolkit/.

The goal of this paper is to provide a brief summary of the Canadian approach to compliance with the *Competition Act* (the "Act"), an overview of how the Bureau's approach compares to that of the ICC and US DOJ, some thoughts which may motivate a robust approach to compliance, and a few practical suggestions as to how firms may actually make it happen.

III. COMPLIANCE PROGRAMS: THE BUREAU'S VIEW

In 2015, the Bureau released a revised Bulletin on Corporate Compliance Programs.[3]

The Bulletin sets out the Bureau's view as to matters that should be contained in a competition law compliance program and the implications of having or not having such a program. It notes that firms can benefit by implementing internal mechanisms to assist them to comply with competition law. These mechanisms may also facilitate detection of problems and remedial action.

As the Bulletin points out, a corporate compliance program is not limited to ensuring that firms comply with the law and seek appropriate advice where questions may arise. Such a program may also assist firms in pursuing innovative and profitable business practices which are permitted by the law but which managers may previously have shied away from.

The Bureau notes that an effective compliance program will provide a number of benefits including:

- maintaining a good reputation;
- improving a business' ability to recruit and retain staff (a business with a reputation for compliance is likely to attract higher-quality employees and have a better employee retention rate);
- improving a business' ability to attract and retain customers and suppliers who value companies that operate ethically;
- reducing the risk of non-compliance;
- triggering early warnings of potentially illegal conduct;
- allowing a business to qualify for favourable treatment in sentencing or reducing costs related to litigation, fines, administrative monetary penalties, adverse publicity, and the disruption to operations resulting from a Bureau investigation and/or proceedings before the court;

[3] This Information Bulletin is available on the Competition Bureau website at: <http://www.competitionbureau.gc.ca.>.

- reducing the exposure of employees, management, and the business to criminal or civil liability;
- educating employees as to the appropriate course of conduct if called upon to provide evidence in the course of an inquiry by the Bureau or if the company is the target of such an inquiry; and
- assisting a business and its employees in their dealings with the Bureau by, for example, identifying contraventions of the Act early enough to request immunity or leniency.

The Bureau notes that whether or not a firm has an effective compliance program may not have an impact as to whether the Commissioner of Competition (the "Commissioner") may bring an application to the Competition Tribunal or recommend that charges be laid against the firm, although it may increase the chances of a firm being considered for an alternative case resolution as opposed to facing criminal charges. Having an effective compliance program may also influence considerations as to whether firms or individuals should be granted immunity from prosecution, and may have an effect in influencing proposed sentencing, particularly if the program has caused the company to take remedial action.

A compliance program will not have an influence on the Commissioner's views if senior personnel of the firm participated in or condoned the conduct. That would indicate that senior personnel are not in fact committed to *Competition Act* compliance. However, the Commissioner may give consideration to the company's program if the company can provide evidence that it exercised due diligence to prevent the commission of the offence or contravention and that the managers in question acted alone and hid the conduct from others in the company.

The Bureau notes that in its view there are seven elements that are fundamental to the success of a corporate compliance program. These seven elements are described below.

(a) Management Commitment and Support

One of the foundations of a credible and effective corporate compliance program is management's clear, continuous and unequivocal commitment and support of a culture of compliance. Management must always exercise care, skill and diligence and act in the best interest of the business. Management must be able to identify and assess the principal compliance risks that a business face and implement appropriate systems to manage those risks in addition to traditional risks faced by the business.

The company's board of directors should appoint a Compliance Officer. The officer should be given the necessary financial and human resources to carry on his or her compliance functions and should be provided the opportunity to participate in senior management decision making. The Bulletin takes the position that the Compliance Officer should report to the board of directors, or a committee of board of directors on compliance program matters.

(b) Risk-based Corporate Compliance Assessment

A thorough assessment of the potential risks faced by a company will allow it to properly design compliance strategies that address those risks. As a first step, the compliance officer, in conjunction with management, must work to identify the key legal risks faced by the business. Some of the key legal risks come from individuals who are likely to contravene the Act, including those who are likely to have contact with competitors, participants in trade association activities, and those involved in making representations to the public to promote products or the interests of the business. Some changes can affect risk profiles, such as the assignment of new duties to specific positions, significant changes to the business activities, and new risk arising from other sources. The compliance officer, together with management, should conduct risk assessments annually to better assess compliance issues and identify priority areas. The compliance officer should also ensure that new risks arising from changes both within and outside of the business are monitored and assessed. Existing job descriptions may be a helpful starting point for the compliance officer to identify risk factors associated with positions in the business, with a view to incorporating appropriate mitigation strategies as part of the requirements of the position.

(c) Tailored Policies and Procedures

A corporate compliance program should be tailored to the operations of a business and establish internal controls that reflect its risk profile. Compliance policies and procedures should also establish internal controls designed to prevent contraventions from occurring, scaled to the company's risk profile. The Bureau suggests that best practices include updating policies and procedures as the business' risk profile evolves and the compliance officer documenting efforts to promote and improve the program.

(d) Training and Education

A credible and effective corporate compliance program must include ongoing training and communications focused on compliance issues for employees at all levels that may be in a position to engage in, or to be exposed to, conduct in breach of the Act. The corporate compliance program should focus training on the general principles and the business' specific policies for individuals who deal with situations that could raise issues under the Act. The company should also consider the most effective methods for training and communicating to its employees based on the company's size and compliance risk assessment. Importantly, compliance training should be mandatory for all staff in positions with identified risks for non-compliance. Best practice would mandate documenting employees' participation in compliance training sessions.

(e) Monitoring, Verification, and Reporting Mechanisms

Monitoring, verification, and reporting mechanisms are vital to the success of any corporate compliance program and can help prevent and detect contraventions and high-risk conduct. These mechanisms can also educate staff, provide both employees and managers with the knowledge that they are subject to oversight, and determine the program's overall efficacy. An effective monitoring, verification, and reporting procedure would allow for the business to identify areas of risk, areas where additional specific training is required, and areas where compliance issues may require new policies to be developed.

Monitoring encompasses continuous efforts implemented to prevent potential breach of the Act. Evidence of monitoring may serve as evidence to support a due diligence defence, where applicable, should litigation arise. Compliance verification may vary depending on the business and specific risks faced by the business. Verification may be used to examine the effectiveness of the compliance program. A confidential, internal reporting process allows staff to provide timely and reliable information regarding potential breaches of the compliance program or the Act that can be the basis for further investigation by the Compliance Officer. An effective reporting system may be achieved in different ways, including by implementing a confidential reporting system, promoting an anonymous hotline or by identifying legal counsel and/or the Compliance Officer as compliance resources.

(f) Consistent Disciplinary Procedures and Incentives for Compliance

The Bureau notes that a disciplinary code or policy is important both for its deterrent effect and as a reflection of the firm's stance with respect to anti-competitive conduct.

The policy should clearly state that disciplinary consequences can and will result from willful breach of the policy and of the Act. Disciplinary measures such as suspensions, fines, or dismissals should be applied consistently in cases of violation of the policy or the Act.

(g) Compliance Program Evaluation

The company must continuously assess a program's ability to deliver its core objectives and monitor new developments regarding the Act and business activities to determine their impact on the program. The compliance officer should be tasked with the responsibility and authority to undertake the review of the program and to make changes to the program as necessary.

IV. ICC TOOLKIT

Like the Canadian Competition Bureau, the ICC has been active in respect of compliance over the last several years. The ICC's Toolkit[4] cannot and does not delve into the complexity of the laws in each jurisdiction, but many of the principles reflected in the Bureau's Information Bulletin on Compliance Policies are found in the ICC Toolkit. It sets out a pragmatic approach to antitrust compliance arranged into eleven chapters. Below is a list and brief description of the topics covered by the Toolkit.

(a) Compliance Embedded as Company Culture and Policy

The key to a successful compliance program is to reach the stage where the behaviour required under the program is an indistinguishable part of the company's culture. In order to foster a continuous ethical culture of antitrust integrity that promotes free and fair competition and compliance with the law, the company should recognize that antitrust law compliance is relevant to its operations and that there must be buy-in and ongoing and sustained commitment from senior management of a culture of compliance. A Code of Conduct (or similar document) may

[4] *See* https://iccwbo.org/media-wall/news-speeches/icc-unveils-antitrust-compliance-toolkit/.

serve as a central guide and reference for all individuals in support of day-to-day decision making.

(b) Compliance Organization and Resources

There must be a clear internal reporting structure for a company's compliance program so that effective governance of the program can be ensured and explained. Day-to-day implementation of the compliance program may be delegated to a designated person or a compliance team that should report to and have direct access to the company's board or management committee responsible for the company's compliance program. The Toolkit suggests that recruiting subject matter experts to assist in establishing policies and drafting guidelines and to counsel employees on compliance issues would further assist the company in achieving its compliance objectives. Importantly, the Toolkit notes that funding antitrust compliance should not be viewed as a "sunk cost" and the company should dedicate sufficient resources to antitrust compliance.

(c) Risk Identification and Assessment

The company should develop a methodology for mapping internal and external antitrust compliance risks, as part of or linked to the company's general risk management and controls systems. The Toolkit stresses the importance of consistent evaluation of the effectiveness of control activities developed and deployed and running regular checks or "deep dives" to test the company's assumptions about residual risk. There is a need to understand the company's overall approach to risk management and apply the same methodology to antitrust risk identification and assessment.

(d) Antitrust Compliance Know-How

Antitrust compliance know-how includes producing guidance tailored to the risk profile and needs of the company, including providing (or arranging for) interactive antitrust training and updates to relevant employee groups at regular intervals, considering the format and delivery of training, and devising formats that stimulate ongoing employee engagement.

(e) Antitrust Concerns-Handling Systems

A successful antitrust concerns-handling system includes various features such as maintaining a successful culture of reporting compliance concerns, having a clear and well publicized policy on how compliance concerns will be handled to support a culture of speaking up, managing operational issues in your company to encourage confidential and anonymous reporting of compliance concerns, and introducing a suitably managed "helpline" or "hotline" to deal with compliance concerns. Specifically, proper non-retaliation and confidentiality mechanisms should be in place as part of the whistleblower protection safeguards to protect the company's employees who raise compliance concerns. The company must also ensure that concerns are responded to in a prompt and fair manner to encourage trust in the company's compliance concerns-handling system.

(f) Handling of Internal Investigations

Internal investigations may take various forms such as in-depth legal assessments, internal compliance process audits, due diligence investigations, and special litigation to investigate and address allegations of potential wrongdoing. An internal investigation should bear in mind the specific matters that the company should consider during the course of an internal antitrust investigation including who should retain ultimate supervision and responsibility for compliance and Code of Conduct investigations. An internal investigation should also clearly set out principles underlying the investigation and specific antitrust investigation principles.

(g) Disciplinary Actions

A credible antitrust compliance program must develop an internal disciplinary code or policy addressing employees who initiate or participate in conduct that is in breach of the company's Code of Conduct. One important element is that the company should establish the aggravating and mitigating factors the company may wish to consider in assessing the appropriate disciplinary action. It would be important to determine a process for suspending disciplinary action during antitrust cases if required for the purposes of an immunity or leniency application and to assess how disciplinary action will be applied.

(h) Antitrust Due Diligence

Antitrust due diligence may take various forms, including day-to-day monitoring of substantive antitrust compliance within the company as part of the operation of the company's antitrust compliance program, which may include due diligence in hiring new employees. It may also include an assessment of substantive antitrust compliance through selective "deep dives" into business practices and conducting due diligence on trade associations and in M&A situations.

(i) Antitrust Compliance Certifications

Once a company's antitrust compliance program has matured and has been in place for a number of years, the company should set up a process for internal certification by individual employees so that they understand and abide by compliance requirements. Certification may be required at a number of levels including by individuals in the company that have received antitrust training, third party non-governmental organizations certifying that the company's compliance program meets certain objective standards, and government or regulatory bodies certifying that the company's compliance program meets certain objective standards.

(j) Compliance Incentives

Compliance incentives may assist with changing behavior positively within the company. Incentives can work as effective tools for a business that wishes to promote compliance by employing concrete actions and can play an important role in fostering a culture of compliance. The company should consider whether to use incentives, and if so, what forms of reward the company might use for individual compliance efforts, such as positive incentives and negative incentives. The company should also consider whether the company's bonus structures might undermine substantive compliance (particularly those related to results and financial performance) or the compliance message.

(k) Monitoring and Continuous Improvement

According to the Toolkit, regular evaluations are essential features of any antitrust compliance program given the dynamic business and regulatory context in which companies operate and how this affects both internal and external risk factors. A successful antitrust compliance program must be able to demonstrate upfront how to monitor the effectiveness of the design and

operational controls of the program. Furthermore, an effective antitrust compliance program must also be able to gather, review, and benchmark data to support an objective evaluation of whether the company's program is appropriate to prevent, detect, and respond to antitrust violations. The company should also institutionalize a regular review and upgrade of the program.

V. US DOJ EVALUATION OF COMPLIANCE PROGRAMS

Recent news on the compliance front comes from the US DOJ's Criminal Division's Fraud Section, which recently released guidance on how the DOJ will determine the effectiveness of a company's corporate compliance program. The guidance, entitled *Evaluation of Corporate Compliance Programs*,[5] provides examples of topics and questions that are frequently used by the DOJ in the evaluation of a company's corporate compliance program. As noted above, the Canadian Bureau's Bulletin focuses on seven basic requirements underpinning a credible and effective corporate compliance program. The DOJ's guidance outlines eleven topics and questions to measure corporate compliance programs and further refine existing programs. The Bureau's Bulletin and DOJ guidance, like the ICC Toolkit, focus on a number of overlapping principles and themes:

- the importance of commitment and support by management as a foundation for a credible and effective corporate compliance program;
- the importance of an independent individual or department with a compliance function;
- the need to develop a methodology to assess potential risks faced by a company;
- corporate compliance policies and procedures being tailored to the operations of a business and the establishment of internal controls that reflect the business' risk profile;
- proper training and education;
- proper monitoring, verification, and confidential reporting mechanisms;
- consistent disciplinary actions and appropriate compliance-related incentive plans;
- the need to continuously improve, periodically test, and review the current compliance policies and procedures; and

[5] https://www.justice.gov/criminal-fraud/page/file/937501/download.

- awareness by the company of the risks posed to them by third parties with whom they do business.

VI. MAKING THE BUSINESS CASE FOR COMPLIANCE

An effective compliance program has the potential to bring with it a wealth of benefits. Identifying potential areas of risk in advance can save an organization not only time and money but can also go a long way to preserve goodwill. In addition, when managers within an organization are made aware of the parameters of legal and illegal conduct under the Act, they become empowered to pursue legitimate, and profitable, business practices. The following represents a summary of some of the motivations for an effective compliance policy.

(a) If You Find Out You Have A Problem, Fix It Fast

A compliance program which requires regular monitoring and reports, especially one which provides for spot checks, is likely to identify issues before the government, a fellow actor, or a potential plaintiff will know there is a problem. If you find it first and fix it, it is less likely that there will be any enforcement challenge. As well, if your firm discovers the conduct first, you are in the driver's seat to seek immunity. Canada, like many jurisdictions, offers immunity to "first in" firms. Further, the sooner the conduct is stopped, the lower the fines and damages will be.

(b) Reduce The Chances Of Private Class Actions

As noted above, it is now a virtual certainty that Canadian government enforcement action against cartels will be followed, indeed paralleled, by a private damages class action. While no such class action has yet led to final judgments, some have resulted in settlements in excess of a hundred million dollars. A compliance policy that identifies and allows repair of a problem before potential plaintiffs come across it will pay for itself many times over. Even the legal fees associated with successfully defending a class action will make the costs of putting in place and enforcing a compliance program look laughably low.

(c) Reduce Securities Law Risks

One of the key difficulties associated with potential antitrust liability, for public companies, has become the question of the necessary securities law disclosures. Fail to disclose a material fact and be sued by your shareholders. Disclose it, and be sued by your customers. It is a Hobson's Choice that a compliance system may help avoid.

(d) Reduce Customer/Consumer Ill-Will

Dealing with continuing customers after a cartel investigation becomes public is no picnic. For a consumer products firm, the damage to the brand may be the largest cost of such an event. The fact that at least some other competitors face the same challenges is cold comfort. A compliance system may avoid the problem. Even if it does not do so fully, it may put the firm in a position to take advantage of immunity policies, and thereby improve the firm's public relations position.

(e) Reduce Key Employee Issues

An important problem associated with cartel investigations and prosecutions is the loss of key management personnel. Often a low-level employee will implicate key managers through the firm's reporting structure, and those managers may therefore be lost. An effective compliance policy may help those managers recognize the issue, protect themselves, and minimize the damage to the firm once they become aware of the problem.

(f) Provide a Competitive Advantage

As well as keeping the firm clear of risk, an effective compliance policy may well give the firm's managers better tools to compete aggressively. The subtitles of the antitrust laws are such that few managers know when they can refuse to deal with others or engage in various vertical restraints. A better sense of the rules surrounding such situations will equip the firm to act more aggressively in the marketplace.

(g) Obtain Beneficial Treatment in an Investigation

A firm with a functioning compliance program that nevertheless violates the antitrust laws may still be in a better position to obtain some form of leniency from the Bureau compared to a firm

that has ignored antitrust compliance completely. That is not so if the policy has been used by the former firm as a blind for illegal conduct, but a genuine intention to comply with the antitrust laws as evidenced by a compliance policy may be a mitigating factor.

VII. A TOP 10 LIST TO MAKE COMPLIANCE POLICIES HAPPEN

As noted at the outset, while everyone knows that compliance programs are a good idea, it can be difficult to invest the energy and money into taking them beyond the page, or the annual compliance seminar, unless or until disaster strikes. This paper has outlined some of the reasons one should pursue compliance, and the collected international wisdom on what a good Compliance Program should include. The question, then, is how to achieve the necessary motivation to make it happen. The logic of doing so is outlined above, but logic isn't everything. Making it happen is really a management task; it has to be valued the way other important matters are valued, it has to be monitored and measured, and it has to be a significant aspect of someone's job. Some suggestions to achieve the desired result include:

1. Ensure compliance policies are an important feature of a single senior manager's responsibilities.

2. The responsibility <u>should not</u> be that of the General Counsel. More urgent issues will always win out for the attention of the General Counsel. Ideally, the responsible compliance officer should be a senior lawyer in the legal department who knows how the firm operates, who the main personalities are, and where the issues lie.

3. The compliance officer should have authority to report directly to both the General Counsel and the CEO. The Bureau also takes the view that there be a right to report directly to the Board.

4. The compliance role needs to be a significant aspect of the job of the compliance officer.

5. The compliance officer needs to develop, annually, a plan for training and for monitoring, which plan is approved in advance, and in accordance with which he or she is evaluated. The plan needs to consider the specific risks faced by the business and needs to be re-thought each year as operations and risks change.

6. The compliance officer needs to make regular, pre-scheduled reports to the CEO/General Counsel on progress against the plan throughout the year.

7. There needs to be a budget to hire outside firms and consultants as necessary. The compliance officer needs to explain, at year end, why he or she did not spend the budget.

8. The compliance officer needs the ability to access documents and e-mails without advance permission.

9. There should generally be a review of a possible issue (i.e. a mock investigation of a possible violation or some similar effort) at least once per year.

10. Particularly in a public company, plans need to be put in place, in advance, as to the course of action to be followed when conduct is discovered which is in violation of the antitrust laws. This will not eliminate the panic such a discovery inevitably gives rise to, but it helps.

VIII. CONCLUSION

The legal and financial consequences of non-compliance with the antitrust laws are becoming more severe every day. Individuals as well as organizations are at serious risk. Public companies face dual risks, under securities laws for failing to disclose problems, and under antitrust laws when they do. Compliance systems form an integral part of an individual or organization's ability to avoid such issues. This is no longer a matter that can be left to once-a year seminars or outside counsel; it is a critical in-house function for any sizeable corporation. The trick is to find ways to make these systems work, and this paper offers some suggestions as to both motivation and mechanisms in that regard.