

Carrots and sticks: the application of Canada's leniency programme to international cartels*

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With criminal conspiracy laws that facilitate the investigation and prosecution of offshore anti-competitive conduct with local effects, Canada has been at the forefront of international cartel enforcement. Its regime combines the sticks of purportedly broad jurisdictional reach that extends offences and investigative powers beyond Canada's borders with substantial carrots in the form of an aggressive immunity/leniency programme.

Jurisdictional reach

Movement towards effects-based jurisdiction

The competition law enforcement authorities in Canada¹ take the position that Canadian courts have jurisdiction over the conduct of foreign parties engaged in global cartel activities outside Canada that may have an economic impact in Canada. This has occurred despite the fact that Canada traditionally has had a strong presumption against the extraterritorial application of criminal laws (and foreign antitrust laws). It is well-settled as a general principle of criminal law that Canadian courts have jurisdiction where conduct has a 'real and substantial connection to Canada'.² However, neither the Criminal Code³ nor the Competition Act⁴ expressly indicates whether a conspiracy undertaken outside Canada that directly (or indirectly) affects Canadian customers (eg through higher prices) falls within the jurisdiction of Canadian law. Moreover, there is no Canadian case that clearly and consciously confirms the position that effects on local customers are a sufficient foundation for subject-matter jurisdiction, as a matter of law.⁵ Nevertheless, this view has found increasing acceptance in practice and many foreign corporations and some foreign executives have chosen to come forward, submit to the jurisdiction of a

Canadian court, plead guilty to cartel offences, and pay a negotiated fine.⁶

In some cases, the practical and legal results of these pleas might be difficult to distinguish from the effects-based, extraterritorial jurisdiction of the US courts, classically expressed in *Alcoa*.⁷ Thus, although none of the judges accepting such pleas explicitly addressed the issue of subject-matter jurisdiction, it is not surprising that the Canadian authorities are espousing 'effects test' claims of jurisdiction. The dearth of judicial precedent on this important point of law is in large part attributable to some other unique features of the Canadian regimes which are designed to facilitate enforcement action against multinational enterprises.

Statutory provisions extend extraterritorial enforcement

Canadian authorities have three special tools in their enforcement arsenal that greatly aid in the investigation and prosecution of international cartel participants:

- Foreign-directed conspiracy offence – section 46 of the Competition Act makes it an offence for a Canadian corporation to implement a foreign-directed conspiracy, whether or not any director or officer of the corporation in Canada had knowledge of the conspiracy. The effect of this provision is to make the Canadian corporation responsible for the sins of its foreign parent or other affiliates, where the latter engage in an offshore cartel. It avoids the difficulties inherent in establishing personal jurisdiction over a foreign corporation that is not present in Canada. Section 46 effectively employs an enterprise-wide approach to liability that could be seen as a counterpart to the enterprise-wide benefits derived by a multinational enterprise from doing business in Canada.

- International document subpoenas – section 11(2) of the Competition Act authorises a court to order a corporation to obtain and produce responsive ‘records’ from a foreign affiliate, even though the records are held outside Canada. Such an order is not addressed to a party outside Canada and it does not purport to compel a foreign entity to do anything in Canada, or to subject itself to Canadian jurisdiction. It is expected that the entity within Canada will take whatever steps may be required to achieve compliance. If the foreign affiliate does not enable the Canadian company to produce the documents required by the order, the local company and its directors and officers will be exposed to potentially significant penalties to compel compliance with the order.⁸
- Cross-border electronic searches – section 16(1) of the Competition Act provides that any person authorised by a court warrant to search a premises may ‘use or cause to be used’ during the search any computer system on the premises ‘to search any data in or available to the computer system’. The person in possession or control of the computer system is obliged to allow the searchers ‘to search any data contained in or available to the computer system’. In a world of interconnected mainframes, servers and networks, the possibility of reaching beyond national borders for records and data held electronically by corporate affiliates outside of Canada is very real. While it seems peculiar that extraterritorial electronic searches would be allowable when the Act does not contemplate physical searches beyond Canadian borders, the Bureau believes that it is entitled to do so.

Possible *mens rea*, Charter of Rights or other defences/limitations to the scope of these extraterritorial provisions have not been tested. In practice, the possibility that they may be used effectively provides the Canadian authorities with substantial negotiating leverage to obtain both the production of relevant evidence on a voluntary basis and negotiated guilty pleas from international cartel participants.

Immunity and leniency applications

The Competition Bureau’s ‘Immunity Bulletin’⁹ sets out the circumstances and conditions under which immunity will be available to cartel participants. Published in September 2000 as a restructuring of earlier less formal programmes, and supplemented by responses to ‘frequently asked questions’ in 2003 and 2005,¹⁰ the Bureau has recently issued a Consultation Paper which invites stakeholder comment on a range of potential changes designed to further enhance the programme.

Requirements for a grant of immunity

The programme offers immunity from prosecution in exchange for cooperation with a Bureau investigation, subject only to minimal qualifying requirements. A grant of immunity is available where either the Bureau is unaware of an offence and the party is the first to disclose it; or the Bureau is aware of an offence and the party is the first to come forward before there is sufficient evidence to warrant a referral of the matter to the Attorney-General. If the first party fails to meet the requirements, a subsequent party that does so may be considered for immunity.

There are four basic requirements for a grant of immunity:

- Termination of conduct – the party must take effective steps to terminate its participation in the illegal activity.
- Not instigator or sole Canadian beneficiary – the party must not have been the instigator or leader of the illegal activity, or the sole beneficiary of the activity in Canada.
- Cooperation – the party must provide complete and timely cooperation throughout the course of the investigation and prosecutions of other parties by the Canadian authorities.
- Restitution – where possible, the party must make restitution for the illegal activity.

In practice, the restitution requirement has not been strictly enforced, because the Canadian authorities have come to recognise that class action lawsuits provide an effective means of recovery to injured victims of cartels.¹¹ The preclusion of eligibility for the sole Canadian beneficiary of a cartel may seem incongruous when considered from an international perspective, but it rarely applies unless the facts involve a market allocation conspiracy in which all but one participant agrees not to sell into Canada.¹² The instigator test has also been applied in a restrained manner since the Canadian authorities have been keen to encourage rather than discourage immunity applications: no applicant has ever been disqualified on this ground, so far as is known.

Application process

The moment that corporate managers become aware that their enterprise is implicated in a cartel involving Canada, or conclude that they do not want to continue participating in such a venture, they face a pivotal decision. The Canadian immunity programme offers full immunity for all cooperating present employees in addition to a successful corporate immunity applicant.¹³ Foregoing this option is a high-risk strategy because heavy criminal penalties will be sought if any of the

other co-conspirators can provide the Canadian authorities with enough evidence or leads to pursue other parties.

The Canadian immunity application process typically involves the following steps:

- **Initial contact:** any individual or company may initiate a request for immunity in a cartel case by communicating with the Senior Deputy Commissioner of Competition, Criminal Matters. Basic information about the product area and offence will need to be provided to determine whether the party qualifies for a 'marker' as the first-in applicant.
- **Provisional guarantee of immunity:** if the party decides to proceed with the immunity application, there will need to be a detailed description of the illegal activity, usually in hypothetical terms. If the Canadian authorities are satisfied that the programme criteria are met, a written 'provisional guarantee of immunity' ('PGI') will be issued.
- **Full disclosure:** following the PGI, the party must make full disclosure of evidence including submission of relevant documents and interviews of witnesses. The disclosure will be on the basis that the Canadian authorities will not use the information against the immunised party unless there is a failure to comply with the party's cooperation obligations under the PGI or immunity agreement.
- **Immunity agreement:** assuming the required cooperation is provided under the PGI, the Attorney-General will execute a definitive immunity agreement that will include all of the party's continuing obligations.

The Bureau's 'marker' practice

The Canadian programme employs the same type of 'first-in' principle used in the United States. However, the party must be first *in Canada* – being first in another jurisdiction will *not* result in any favourable treatment in Canada. There have been two cases in which the party that obtained amnesty as the first to apply in the United States was slow to come forward in Canada; each corporation was required to plead guilty in Canada and be subject to significant fines.¹⁴ The timing of a telephone call may mean the difference between complete immunity and a corporate fine of millions of dollars and individual exposure by corporate employees.

Because of the acknowledged pressure to be the first to apply, the Competition Bureau has adopted the US Department of Justice's practice of accepting a 'marker'. If a party is aware that an offence has been committed, but is not yet able due to the state of its internal investigation to fully substantiate an

application, it may preserve its place as 'first in' by requesting a marker. This facilitates the Bureau's objective of obtaining information about potential offences as early as possible. But it creates the possibility of sequencing differences and variations in outcomes between jurisdictions if a party applies for a marker in Canada at a time when another party that has applied for amnesty in the United States or elsewhere is trying to ascertain whether it has committed an offence in Canada. Thus parties considering an immunity application in other jurisdictions should be aware of the importance of simultaneous marker applications if they have issues in Canada.

There is also a potential for strategic delay by the beneficiary of the marker. Having effectively blocked applications by others to qualify as 'first in', it is unacceptable for the marker holder to stall in providing the requisite proffer and evidence to the Canadian authorities. As a result, the Bureau has recently articulated general standards for processing an application: a proffer must normally be submitted within 30 days of a marker and the post-proffer production of information should be completed within a six-month period.¹⁵ It appears that one or more marker-holders in Canada have already been displaced due to their inability or unwillingness to move forward quickly to provide cooperation, although so far there has been only one public pronouncement to this effect.¹⁶

However, a countervailing consideration is that placing excessive pressure on a marker-holder could jeopardise the orderly internal investigation and interviews of the key individuals. The 'undue lessening of competition' requirement in Canada's conspiracy offence¹⁷ accentuates these timing challenges because an immunity applicant must be able to establish and disclose evidence regarding economic effects of the illegal activity which may not be necessary in other jurisdictions. Submissions in response to the Bureau's Consultation Paper by various parties, including the Canadian and American Bar Associations,¹⁸ have expressed serious concern about these deadlines. Bureau officials have indicated that the time frames are not hard and fast and that the Bureau will not misuse its process to frustrate applicants that are cooperating in good faith. Experience shows, however, that such timelines are frequently used as true deadlines to keep pressure on the immunity applicant.

Leniency

If a firm is not 'first in' to the Canadian authorities, there are still important reasons to consider becoming an early cooperating party. The second party to offer

cooperation has historically received very favourable treatment.¹⁹ Typically, it has qualified for a substantially reduced penalty, usually in the vicinity of 12 per cent of affected commerce, depending on the value of cooperation and any other aggravating or mitigating factors, especially if the Bureau does not yet have sufficient evidence to recommend that charges be brought against the applicant. By comparison, third and subsequent applicants have generally been offered plea bargains in the range of 20 per cent and then 30-40 per cent of the relevant volume of commerce, depending on their position in the queue as well as other aggravating or mitigating factors.²⁰ The Canadian authorities would be expected to seek materially higher fines if successful on a contested prosecution.

In recent investigations the Bureau appears to be placing more emphasis on the perceived 'value' (both in terms of timing and quality of evidence) of cooperation provided to it in the course of its investigation. While recognising the benefits of early cooperation and the Bureau's positive track record in this regard, commentators on the Consultation Paper have criticised the Bureau's more recent practice as reducing transparency and predictability.²¹

Cooperating employees of the second party to cooperate have historically been able to escape prosecution, whereas later parties would expect one or more individual prosecutions. More recently the Bureau has suggested that it will be looking for some form of accountability of one or more relevant senior individuals even from early cooperating parties.²² However, we expect that early cooperation will continue to carry some benefits in this area.

Concluding observations

Tremendous achievements in cartel enforcement have been recorded in recent years, due to the apparently broad potential for extraterritorial enforcement of Canada's Competition Act coupled with the Canadian authorities' highly successful immunity programme and leniency policies. Almost immediately after the publication of the programme there was a significant increase in the number of immunity requests. In the five years since the programme's publication, there have been over 35 immunity applications, almost double that of the preceding ten years.²³ The number of applications in international cases is so high the Bureau recently felt compelled to clarify that the policy also applies to domestic cartels.²⁴

These sticks and carrots have encouraged multinational companies to pay close attention to Canadian cartel laws. Over 50 foreign companies have been convicted of violating Canadian cartel laws and in the

past decade have paid nearly CAN\$200 million in fines.²⁵ Two of the four biggest competition cases in Canada last year were international cartels.²⁶ The recent FAQs and Consultation Paper indicate that even more rigour is likely to be added to the enforcement process. These developments make it clear that international immunity and leniency applicants ignore Canada at their peril.

Notes

* This article is revised and updated from papers presented at the ABA/IBA Cartels Conference, London, February 2006; the ABA Antitrust Section Spring Meeting, Washington, March 2006; and the IBA Spring Antitrust Conference, Sydney, April 2006.

1 As a formal matter, the Competition Bureau's mandate in respect of criminal offences in the Competition Act is to investigate and make recommendations regarding prosecution to the Attorney-General, who has sole authority to decide whether or not to lay charges (and hence is also the ultimate decision-maker on any grant of immunity from prosecution or plea negotiations). In practice, staff in the Bureau and the Attorney-General's offices coordinate closely in cartel investigations and we are not aware of any cases in which an immunity recommendation has been rejected. For convenience in this article we refer collectively to the two agencies as the 'Canadian authorities'.

2 *R v Libman* ('*Libman*') [1985] 2 SCR 178.

3 Criminal Code, RSC 1985, c C-46.

4 Competition Act, RSC 1985, c C-34.

5 Canadian courts have never overtly invoked the 'effects based' jurisdictional test promulgated in *United States v Aluminum Co of America*, 148 F 2d 416 (2d Cir 1945).

6 See D M Low, 'Cartel Enforcement, Immunity and Jurisdiction: Some Recent Canadian Developments', IBA Communications and Competition Law Conference, Rome, Italy (17-18 May 2004) at 10 (online: <http://www.mcmbm.com/cartels.html>). Typically, the parties settle the case on the basis of an agreed statement of facts, which specifies that the accused submits to the jurisdiction for the purpose of the settlement only. That may solve an issue of personal jurisdiction over the accused, but it does little to clarify the question of subject-matter jurisdiction.

7 See *Alcoa*, *supra* n 5, at 444. The test articulated in that decision requires the proof of direct, substantial and reasonably foreseeable effects on US commerce as a result of anti-competitive behaviour elsewhere. The fact that the illegal agreement was made or criminal operations took place beyond American borders is irrelevant, if effects of that character are produced within the United States.

8 Under Section 65 of the Act, failure to comply with a Section 11 order is punishable by a fine not exceeding CAN\$5000, which might be multiplied on a daily basis, if that fine were insufficient to procure compliance. More significantly, any 'officer, director or agent' of the non-compliant corporation (ie the local Canadian entity, not the offshore affiliate) would be liable to a personal fine and/or up to two years' imprisonment.

9 Competition Bureau, 'Immunity Program Under the Competition Act' (21 September 2000) (online: <http://www.competitionbureau.gc.ca/PDFs/immunitye.pdf>).

10 Competition Bureau, 'Immunity Program: Responses to Frequently Asked Questions' (revised 17 October 2005) (online: http://www.competitionbureau.gc.ca/PDFs/eng_faqs_oct17-05.pdf) (the 'FAQs').

11 Restitution has been a specific factor in only one recent cartel disposition, the Graphite Electrodes settlement with UCAR and SGL. See Competition Bureau, News Release, 'Record \$30 Million Fine and Restitution by UCAR Inc for Price Fixing Affecting the Steel Industry' (18 March 1999) and Competition Bureau, News Release, 'Foreign Corporation Fined \$12.5 Million for Price Fixing' (18 July 2000).

- 12 The only occurrence of this may have been the choline chloride investigations: see Competition Bureau, News Release, 'Canadian Participant in an International Price-fixing Conspiracy For a Feed Additive Fined \$2.25 Million' (24 September 1999).
- 13 Past directors, officers and employees who offer to cooperate with the Bureau's investigation may also qualify for immunity. However, this determination will be made on a case-by-case basis. See *supra* n 9 at 4.
- 14 See Competition Bureau, News Release, 'Federal Court Imposes Fines Totalling \$88.4 Million for International Vitamin Conspiracies' (22 September 1999); and Competition Bureau, News Release, 'Competition Bureau Investigation Nets \$600,000 Fine from Bioproducts Incorporated' (19 August 2003).
- 15 FAQs, Question 1.
- 16 Colette Downie, the Assistant Deputy Commissioner of the Competition Bureau's Criminal Matters Branch, made this statement in her oral remarks at the Canadian Bar Association Competition Law Section 2004 Annual Conference, Ottawa, November 2004.
- 17 Competition Act, section 45(1).
- 18 See National Competition Law Section, Canadian Bar Association, 'Competition Bureau Immunity Program Review' (May 2006) at 27 (online: <http://www.cba.org/CBA/submissions/pdf/06-23-eng.pdf>) and 'Comments of the American Bar Association Section of Antitrust Law in Response to the Canadian Competition Bureau Request for Public Comments Regarding Immunity Program Review' (May 2006) at 30 (online: <http://www.abanet.org/antitrust/at-comments/2006/05-06/com-canadian-leniency.pdf>).
- 19 It may also qualify for immunity where the first party fails to fulfil the requirements under the Immunity Program.
- 20 See *R c Ueno Fine Chemicals Industry Ltd* [2001] JQ no 3424 (Que Sup Ct), where the court generally adopted this hierarchy of fines.
- 21 See eg 'Competition Bureau Immunity Program Review', *supra* n 18 at 34.
- 22 Sheridan Scott, 'Speaking Notes – Winter Meeting of the American Bar Association' (23 January 2006) at 3-4.
- 23 Competition Bureau, 'Immunity Program Review Consultation Paper' (February 2006) at 1-2.
- 24 Competition Bureau, 'Immunity Program: Responses to Frequently Asked Questions' (17 October 2005) at 4.
- 25 Competition Bureau, 'Penalties Imposed – International Cartels' (online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1144&lg=e>).
- 26 See 'Canada' (July 2006) 9 *Global Competition Review* Issue 7 at 32.