

Canada

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LEGISLATION AND JURISDICTION

1 What is the relevant legislation and who enforces it?

Canada has only one statute governing all aspects of competition law, the federal Competition Act ('the Act'). Although the provisions of the Act relating to cartels and conspiracies date back to 1889, until the 1960s successful prosecutions were rare. Courts interpreted the legislation as requiring proof that the conspiracy eliminated, or attempted to eliminate, competition altogether. Prosecutions have become significantly more frequent after amendments to the Act were adopted in 1986 and the Supreme Court of Canada clarified the law in a 1992 decision.

The Act is administered and enforced by the Commissioner of Competition who serves as the head of the Competition Bureau, a unit of the Ministry of Industry. The Criminal Matters Branch of the Competition Bureau, consisting of approximately 40 officers, investigates all matters relating to cartels and conspiracies.

The Commissioner is responsible for investigating and enforcing alleged breaches of the Act. The Bureau is supported by a team of approximately 20 lawyers from the Department of Justice who are responsible for the conduct of prosecutions under the Act. Canada's Attorney General has ultimate discretion and authority to initiate criminal proceedings under the Act. However, in practical terms, cartel prosecutions are initiated only upon the Commissioner's recommendation to the Attorney General.

2 What is the substantive law on cartels in the jurisdiction?

Section 45 of the Act forms the core of Canadian cartel law. This provides that:

Every one who conspires, combines, agrees or arranges with another person:

- to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
 - to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
 - to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
 - to otherwise restrain or injure competition unduly
- is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years or to a fine not exceeding C\$10 million or to both.

Under the current law, price-fixing or market allocation conspiracies are not per se illegal in Canada. Rather, the Act prohibits only those conspiracies that have serious or – 'undue' – competitive effects, as determined under a 'partial rule of reason' analysis. There is no statute of limitations for Section 45 offences.

As with most other criminal offences, a conviction under the Act requires the Crown to prove beyond a reasonable doubt both the *actus reus* (illegal acts) and the *mens rea* (guilty mind) of the offence. The *actus reus* is established by demonstrating that (i) the accused was a party to a conspiracy, combination, agreement or arrangement, and (ii) the conspiracy, combination, agreement or arrangement, if implemented, would likely prevent or lessen competition unduly. In determining whether the agreement would or did cause an 'undue' lessening of competition, the court will consider the structure of the market and the behaviour of the parties.

Proof of the *mens rea* of the offence is also a two-part test. First, the prosecutor must demonstrate that the accused subjectively intended to enter into the agreement and had knowledge of its terms. Second, the prosecutor must establish, using an objective test, that a reasonable businessperson would or should have known that the likely effect of the agreement would be to cause an undue lessening of competition.

While Section 45 investigations traditionally have focused on price fixing and market allocation, the section is broadly worded. Potentially, it could catch other forms of cooperation amongst competitors, including behaviour such as joint ventures and strategic alliances, for which some care is required. The Act also prohibits Canadian corporations from implementing directives from a foreign corporation for the purpose of giving effect to conspiracies entered into outside of Canada (Section 46), bid-rigging (Section 47) and both horizontal and vertical

3 Are there any industry-specific offences/defences?

The Act creates two industry-specific offences, one for professional sports and the other for financial institutions. With respect to professional sports, the Act prohibits conspiracies to limit unreasonably the opportunities for any person to participate in a professional sport or to negotiate with the team or club of his/her choice in a professional league.

Unlike other sectors, conspiracies among federal financial institutions are per se offences – no lessening of competition must be proven. Any agreement among such institutions with respect to interest rates, service charges, and the amount and

conditions of loans is an offence. However, there are exceptions for the sharing of credit information and other matters.

While financial institutions are singled out for a special per se offence, other sectors and activities are excluded from the operations of the Act. These include labour relations, fishermen, shipping conferences, securities underwriting and amateur sport. Professionals such as lawyers or accountants may rely on subsection 45(7) of the Act as a complete defence to combining to provide a service that maintains standards of competence and integrity reasonably necessary to protect the public.

While the Act provides no general statutory exemption for regulated activities, the courts have created a common law 'regulated conduct' defence. Economic activity is exempt from the Act when the federal or provincial legislature has conferred on a body the power to regulate the industry and the body has exercised that power. The courts have recognised, however, that certain market activities may not be affected by the exercise of government powers and restraints on competition in respect of those activities may remain illegal.

4 Does the law apply to individuals or corporations or both?

The Act applies to both individuals and corporations and charges are often laid against both a corporation and its senior officers or directors. On conviction, a person is subject to a fine of up to C\$10 million and/or up to five years imprisonment per count. Individuals have been sentenced to up to one year imprisonment and have been subject to fines of up to C\$550,000. The Federal Court of Canada recently imposed a fine of C\$250,000 on a senior executive for his role in the international bulk vitamin conspiracies. The stated policy approach of the Commissioner of Competition is to recommend the prosecution of the most senior culpable individuals involved in an offence. Experience over recent years, however, does not demonstrate that individual prosecutions will be invariably pursued, even for parties who may be highly culpable.

5 Does the regime extend to conduct that takes place outside the jurisdiction?

In order to take jurisdiction over activities occurring outside of Canada, a Canadian court must find that it has both subject matter or substantive jurisdiction with respect to the alleged offence and personal jurisdiction over the accused person.

Substantive jurisdiction

The Supreme Court of Canada's 1985 decision in *R v Libman* ('*Libman*') sets out the following test for substantive jurisdiction:

'This country has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence here ... all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country...'

In the *Libman* case, a defendant who made fraudulent sales of securities by telephone from Toronto to US residents was found to be within a Canadian court's subject matter jurisdiction. The issue of substantive jurisdiction over conduct

taking place outside of Canada has not been specifically canvassed in a contested criminal proceeding under the Act and, as a result, some uncertainty remains regarding the assumption of substantive jurisdiction by the courts over such conduct in criminal prosecutions under the Act.

The Commissioner of Competition has demonstrated his willingness to adopt an expansive interpretation of *Libman*. In a 1994 case, the Commissioner obtained guilty pleas from a Japanese company and a US company which had allegedly entered into an agreement outside Canada with the threatened result of lessening competition in Canada in the sale of thermal fax paper. More recently, foreign producers of sorbates, bulk vitamins and other products have pleaded guilty to a violation of Section 45 for conduct (price fixing and market allocation) which occurred wholly outside Canada but which was specifically directed to Canadian markets, prices and customers, with clear economic effects within Canada. These examples suggest that the conscious sale of a product at an agreed fixed price to Canadian consumers may arguably trigger substantive jurisdiction.

Personal jurisdiction

The general principle governing a Canadian criminal court's assumption of personal jurisdiction is that a person who is outside Canada and not brought by any special statute within the jurisdiction of the court is prima facie not subject to the process of that court. In other words, if the statute under which the proceedings are brought does not make special provision for the service of a summons outside the jurisdiction, then the court does not have jurisdiction and cannot try the accused, unless the person is present in Canada or attorns to the jurisdiction of the court.

For individuals who are not resident in Canada, a summons compelling attendance before a Canadian court cannot be served abroad for an offence under the Act. If no service has occurred, then Canadian courts will not have jurisdiction. The case of non-resident corporations is more complex. Where the accused is a corporation, a notice of an indictment must be served on the corporation pursuant to Sections 621 and 703.2 of the Criminal Code by delivering it to 'the manager, secretary or other executive officer of the corporation or of a branch thereof'. Service upon the Canadian 'affiliate' of a foreign corporation is unlikely to be sufficient, given that an affiliate is a separate legal person.

Where a corporation does not have a branch in Canada, it may still be properly served if one of its executive officers is present in Canada. While there does not appear to be any jurisprudence under the Criminal Code dealing with the circumstances in which the executive officer is present in Canada, jurisprudence under Ontario's Rules of Civil Procedure suggests that a representative of a foreign corporation will not be properly served in Canada unless he or she is in the country to carry on the business of the corporation. If there is a Canadian affiliate of a foreign corporate conspirator, a prosecution may also be instituted against the local subsidiary under Section 46 of the Act, while leaving the foreign parent exposed to charges under Section 45.

Extradition

Persons located in the United States can be extradited to Canada pursuant to the Canada-US Extradition Treaty ('the Treaty'). The Treaty permits each state to request from the other extradition of individuals who are charged with, or have been convicted of, offences within the jurisdiction of the requesting state. Note that

extradition will only be granted for offences punishable by imprisonment for a term of more than one year. Section 45 of the Act provides for jail terms of not more than five years. Pursuant to recent amendments to the Extradition Act, Canada would be in a position to grant extradition to any country with which it has an extradition relationship, subject to the usual requirement of double criminality. It appears that extradition to Canada from the UK will become possible on the impending entry into force of legislation in that country to criminalise cartel activity.

The procedure for extradition requires the Canadian Government to make a formal request for extradition under the Treaty. If the individual has not been convicted, then the request documentation would have to include an arrest warrant. This procedure has been used for offences under the Act. In the 1995 *Thomas Liquidation* case, a misleading advertising case, the US authorities accepted a Canadian Government request for extradition and issued a warrant for the arrest of an officer of the accused corporation who was individually charged under the Act.

6 Are there any current proposals for change to the regime?

The Act currently does not overtly distinguish between hard-core cartel conspiracies (such as price fixing) and other forms of agreements or arrangements between competitors, such as strategic alliances, that may or may not unduly lessen competition depending on the particular facts of the case. As a result, some commentators have advocated replacing the current regime with a mixed criminal and civil regime that would exempt strategic alliances and other forms of open agreements between competitors from criminal sanction while still making them reviewable by the Commissioner in a manner similar to mergers.

This view found support in a May 2002 report of the Standing Committee on Industry, Science and Technology ('the Report'), which endorsed the creation of a dual track approach to conspiracies, and the elimination of 'undueness' as an element of the offence. Under the first track, agreements devised to restrict competition directly would retain their criminal character. All other types of agreements would be subject to civil review. In its response to the Report, the Government of Canada agreed that the conspiracy provisions should remain an enforcement priority, and confirmed that amendments to the Act's conspiracy provisions would form a core part of the consultation process in the next round of amendments. It would appear that Section 45 reform is very much on the Government's legislative agenda. The Competition Bureau is expected to release a white paper proposing reforms to Section 45 in the near future.

INVESTIGATION

7 What are the typical steps in an investigation?

The Competition Bureau routinely commences informal investigations in response to complaints by marketplace participants, strategic analysis of public information or the evidence of informants. If such an investigation leads the Commissioner to believe, on reasonable grounds, that a criminal offence has been committed, the Commissioner will launch a formal inquiry under Section 10 of the Act. Commencement of an inquiry empowers the Commissioner to exercise formal powers, for example, searches or orders to compel the production of evidence.

After evidence is obtained during an inquiry, the Commissioner decides whether to discontinue the inquiry or refer the case to the Attorney General for prosecution. If the inquiry is discontinued, the Commissioner must make a written report to the Minister of Industry. This report must summarise the information obtained from the inquiry and the reasons for its discontinuance.

In addition, the Commissioner is required to commence an inquiry in response to a directive from the Minister of Industry or by an application in proper form by six residents of Canada. Although a directive from the Minister or a 'six-resident application' cannot compel the Commissioner to take any particular enforcement proceedings, the requirement of a written report to the Minister upon the discontinuance of an inquiry ensures that the Commissioner will closely examine the facts in such cases. Consequently, the target of the inquiry may be required to incur substantial costs and inconvenience in connection with such an inquiry, even though no formal charges follow the inquiry.

8 What investigative powers do the authorities have?

During an inquiry, the Commissioner has extensive powers to obtain information not in the public domain by means of search warrants, orders for the production of records and even wire-taps. These statutory powers supplement information supplied voluntarily by marketplace participants or enforcement agencies in other jurisdictions. The Government of Canada announced recently that it will hold consultations on lawful access issues as part of its ongoing commitment to ensuring the effective investigation of crimes such as telemarketing fraud and price fixing.

Search warrants

These can be obtained by means of an ex parte court order under Section 15 of the Act. Under that section, the Commissioner must establish that there are reasonable grounds to believe that a criminal offence has been committed and that relevant evidence is located on the premises to be searched. Preventing access to premises or otherwise obstructing the execution of a search warrant is a criminal offence and the Commissioner may enlist the support of the police if access is denied.

The Act expressly provides for access to and the search and seizure of computer records and permits applications to the court to set the terms and conditions of the operation of a computer system. The Commissioner has developed extensive expertise and technology for the conduct of computer searches. While the use of advanced computer technologies may have rendered moot the question of whether there is a duty to provide computer passwords, there have been no judicial decisions as to the territorial scope of computer searches. Bureau investigators have downloaded data stored outside of Canada in the course of searches of computer systems located in Canada. There continues to be some controversy as to the precise limits of the authority granted by a warrant authorising a search of computer systems.

Documents that are subject to solicitor-client privilege cannot be immediately seized by search officers under a search warrant. The Act contains a special procedure for sealing such documents and for determining the validity of privilege claims within a limited time. The Act also contains a provision requiring the Commissioner to report to the Court in order to retain seized

documents. Because the affected company can ultimately request a retention or privilege hearing, and because evidence procured through an illegal search can be excluded at trial, the courts have ruled that search warrant orders cannot be appealed. However, such an order can be set aside in special circumstances such as a material non-disclosure or misrepresentation in the affidavit supporting the Commissioner's ex parte application, or the fact that the inquiry giving rise to the order has ended by the Attorney General laying criminal charges.

Amendments to the Criminal Code in 1999 gave the Commissioner the power to intercept private communications without consent through electronic means – in other words, to use a wiretap. This power is restricted to conspiracy, bid-rigging and serious deceptive marketing investigations, and requires prior judicial authorisation.

The first use of wiretaps as an investigative tool led recently to the laying of criminal charges under the telemarketing provisions of the Act, an area that has been the subject of vigorous enforcement activity on the part of the Competition Bureau. The October 2002 arrest of four directors of an alleged deceptive telemarketing operation provides a case in point, and underlines the aggressive enforcement efforts by Canadian competition authorities. The four individuals were held overnight and released only after a show-cause hearing, a noteworthy 'first' in a competition case. Cartel investigations represent no less a priority to the Competition Bureau.

Production orders

As an alternative or, frequently, in addition to executing a search warrant, the Commissioner may require the production of documents and other records and may also compel a corporation to prepare written returns of information under oath, within a certain period of time, by virtue of an order under Section 11 of the Act. On a Section 11 application, the Commissioner need only satisfy the court that an Inquiry has been initiated and that a person is likely to have relevant documents in their possession or control.

Section 11 of the Act can also be used to compel witnesses who have relevant information to testify under oath for the purpose of answering questions related to the inquiry. Such an examination takes place before a presiding officer who can determine the propriety of questions asked and the conduct of the examination. Although inquiries must be conducted in private, all persons who are the subject of an inquiry are entitled to attend the examination of a witness. However, the presiding officer has the power to safeguard confidential information by excluding representatives of competitors from commercially sensitive aspects of the examination.

Under the Act, no evidence obtained from a witness under a Section 11 order can be used against the witness in any subsequent criminal proceedings. This limitation is consistent with decisions of the Supreme Court of Canada establishing use and derivative use immunity for persons compelled to give evidence under statutory powers of investigation. Under these doctrines, once the accused establishes a plausible connection between the compelled evidence and the evidence sought to be adduced, the prosecutor must demonstrate that it would have discovered the impugned evidence without the compelled testimony. Otherwise, the evidence will be ruled inadmissible. On the other hand, where an individual employee of a corporation has been compelled to give evidence under Section 11, the evidence is generally considered admissible against the corporate accused.

INTERNATIONAL COOPERATION

- 9 Is there inter-agency cooperation? If so, what is the legal basis for and extent of cooperation?

In international cartel cases, the Competition Bureau will often cooperate closely with other competition agencies, either through formal processes or informally. Formal procedures involve the invocation of Mutual Legal Assistance Treaties (MLATs), with the United States and numerous other countries or, less formally, under competition Cooperation Agreements, such as the Canada-US and Canada-EU Agreements.

Furthermore, there may be very wide-ranging informal contacts among Canadian and foreign investigative agencies on common issues during an inquiry. While it has been used sparingly, the MLAT arrangements permit Canada and cooperating countries to undertake formal procedures in their own jurisdictions to obtain evidence for a foreign investigation. These arrangements also permit Canadian and other antitrust enforcement agencies to coordinate their enforcement activities, exchange confidential information and meet regularly to discuss case-specific matters.

In the summer of 1994, Canadian and US authorities conducted their first joint investigation. The case involved suppliers of thermal facsimile paper and ended with convictions in both jurisdictions. A similar joint investigation by the Competition Bureau and the US Department of Justice was conducted in the ductile iron pipe investigation which resulted in a conviction in Canada. More recently, there has been informal coordination (but otherwise independent and parallel investigations) into numerous international cartels, including the feed additives, graphite electrodes, bulk vitamins and, most recently, food preservatives cases. This form of cooperation has been very successful and appears likely to be the norm in future investigations into cartels affecting North America.

In 1995 and 1999, competition cooperation agreements between Canada and the United States and the European Union, respectively, came into force. Both agreements envisage coordinated enforcement activities, exchanges of information (though generally of a non-confidential character) and regular meetings to discuss matters of mutual interest. Each jurisdiction must notify the other of enforcement activities that could affect the other's 'important interests' and, when requested, each must also assist the other 'to the extent compatible with the assisting Party's laws and important interests'. The agreement also allows one party to request that the other commence enforcement action for matters affecting the requesting state – an exercise of 'positive comity' which has been invoked only very rarely in criminal matters. The Canada-US Agreement would operate under the aegis of the US IAEEA and might be of particular application to future investigations of a civil character.

Unlike the MLAT, the Canada-EU accord does not allow the respective enforcement agencies to gather and exchange confidential information for the use of the other party. The agreement is nevertheless expected to play an important role in international investigations, having regard in particular to the notification requirements that apply to the agencies' work. It will therefore make it even more necessary for companies with Canadian interests to consider the international implications of an antitrust investigation before initiating contact with investigative agencies or responding to investigative initiatives.

- 10** How does the interplay between jurisdictions affect the investigation, prosecution and sanction of cartel activity in the jurisdiction?

In light of the MLAT and the Canada-EU and Canada-US accords, a company defending a cartel investigation which has multi-jurisdictional implications, and particularly one involving the US or the EU, should be highly sensitive to the potential involvement of the Canadian Competition Bureau. A coordinated defence strategy is increasingly critical to a fully effective strategy and the timing of approaches to the regulators in each jurisdiction should be considered carefully. The exposure of key individuals to prosecution in Canada is a factor of particular concern in developing a coherent strategy.

ADJUDICATION

- 11** How is a cartel matter adjudicated?

As cartel matters are prosecuted as indictable criminal offences, they are adjudicated in any of the regular provincial courts of superior jurisdiction or in the Federal Court-Trial Division. These proceedings are then governed by the Criminal Code and the local court's Rules of Criminal Practice. Proceedings against individuals are normally taken in the provincial Superior Courts, which have well-established procedures for dealing with custodial sentences, probation and the like.

- 12** What is the appeal process, if any?

There is an automatic right of appeal from any conviction under the Act to the provincial or federal court of appeal, as the case may be. The decision of a court of appeal may be appealed to the Supreme Court of Canada, but only if the Supreme Court grants leave to do so.

- 13** With which party is the onus of proof?

In cartel cases, as in most other criminal matters, the onus is on the prosecution to prove every element of the offence beyond a reasonable doubt. Although ordinary rules of evidence apply, the Act expressly provides for the admissibility of statistical evidence that might not be admitted in some other criminal cases. Under the Act, a corporation has no right to a jury trial.

SANCTIONS

- 14** What criminal sanctions are there for cartel activity?

Given their status as the most serious – indictable – offences under the Act, cartel prosecutions attract very significant individual and corporate fines and imprisonment, together with prohibition orders made after a conviction. Courts have emphasised that, in the competition law context, fines must be large enough to deter powerful companies and must not become simply a cost of doing business. As a result, the Commissioner has recently obtained multi-million dollar fines, following guilty pleas in a number of conspiracy cases. These include the highest fine in the

history of Canadian criminal law, C\$50.9 million against Hoffmann-La Roche in the vitamins case.

- 15** What civil or administrative sanctions are there for cartel activity?

As a general rule, cartel cases are prosecuted under the criminal provisions of the Act and are subject to the criminal sanctions of fines, imprisonment and prohibition orders. It is also possible for the prosecution to seek a prohibition order to inhibit repetition of the offence in future.

For cases that do not fall into the traditional hard core cartel pattern, it would appear to be open to the Commissioner to bring an application for joint abuse of dominant position. Such applications would be heard before the Competition Tribunal, an administrative body, which considers the evidence on a civil standard of a balance of probabilities. The Competition Tribunal cannot impose fines or imprisonment, but it can make an order enjoining any activity that would constitute an abuse of dominant position. No such cases have been conducted to date.

- 16** Are private damage claims or class actions possible?

Section 36 of the Act grants private parties the right to recover in the ordinary civil courts any losses or damages suffered as a result of a breach of the criminal provisions of the Act. The Act expressly provides that a prior conviction for an offence is, in the absence of any evidence to the contrary, proof of liability. As a result, civil actions are most often commenced following a conviction or guilty plea by an accused. However, there are no conditions precedent to a civil action under the Act and the absence of a conviction, or even the refusal of the Commissioner to commence an inquiry, do not bar or provide a valid defence to such an action.

Civil actions under the Act are brought before the ordinary civil courts and can be combined with other common law or statutory claims. However, there is no right to treble damages under the Act.

A relatively recent development of particular significance in the context of private antitrust litigation has been the introduction of class action legislation in the provinces of Ontario, British Columbia and Quebec and, more recently, in Saskatchewan, Newfoundland and in the Federal Court. The developing jurisprudence in Ontario has revealed a willingness of courts to certify class actions in circumstances where certification might be refused by a US court, and to create nation-wide classes.

In the only reported decision to certify a class action under the price-fixing provisions of the Act, an Ontario court certified a vast class of ultimate indirect purchasers of iron oxide pigment used in home construction materials. In reversing the decision, the Ontario Divisional Court held that damage, a necessary component of the cause of action of each plaintiff, could not be established on a class-wide basis. The Ontario Court of Appeal concurred in the view that the loss suffered by the plaintiffs could only be established on an individual basis. While the decision underlines the difficulty of proving pass-through of price increases on a class-wide basis, the applicability of class proceedings legislation to the conspiracy provisions of the Competition Act remains an important question. Indeed, the Court's reasons reflect the view that in appropriate cases, the Competition Act and class proceedings legislation may 'work together as a valuable tool against price-fixing'.

17 What recent fines or other penalties are noteworthy

In recent years, fines imposed under the Act's conspiracy provisions have increased exponentially. The ongoing inquiry into the bulk vitamins industry has generated C\$95.5 million in fines as at December, 2002. Other significant recent inquiries include graphite electrodes (C\$23,500,000 total fines) and lysine (C\$17,570,000 total fines).

Fines against individual corporate defendants in each of these recent conspiracy inquiries often have been in excess of C\$10 million. For example, on 22 September 1999, F Hoffmann-La Roche Ltd, BASF AG and Rhône-Poulenc SA paid fines of C\$48 million, C\$18 million and C\$14 million respectively, for price fixing and market allocation offences involving the bulk vitamins cartel. On 27 May 1999, the Archer Daniels Midland Company paid C\$16 million for its participation in the lysine and citric acid conspiracies. By contrast, the three main defendants in a conspiracy in the compressed gas industry paid only C\$1.7 million each in 1991. Until 1998, the largest fine under the Act against a single defendant was the C\$2.5 million fine paid by Canada Pipe Company Ltd in 1995.

SENTENCING**18** Do sentencing guidelines exist?

The Commissioner has not published formal sentencing guidelines, but the jurisprudence on sentencing for conspiracies has established the following factors for consideration:

- the size and influence of the accused, both specifically in the conspiracy and, more generally, in terms of market share, sales and volume of commerce. Fines are often between 20 and 30 per cent of sales over the duration of the conspiracy, with higher fines for conspirators which are late to resolve their exposure;
- the role of the accused in the offence, including whether it initiated or resisted participation in the offence;
- the duration of the conspiracy;
- the geographical scope of the market;
- the nature of the product;
- consciousness of illegality or wilfully criminal conduct and efforts to conceal that conduct;
- factors in mitigation such as the extent of cooperation with the Crown, restitution, the timeliness of cooperation and ability to pay.

Under Section 718.2 of the Criminal Code, the sentencing judge must have regard to sentences imposed on similar offenders in similar circumstances and it is possible to project an appropriate fine level from the significant number of recent fines imposed in Canada. However, most recent fines have been the result of plea agreements, rather than contested sentencing decisions.

19 Are they binding on the adjudicator?

Any guidelines published by the Commissioner are not binding on the courts that adjudicate cartel matters. While plea agreements are an important element of Canadian practice, the prosecution and the defence cannot fetter the sentencing discretion of the convicting court by agreement.

LENIENCY/IMMUNITY PROGRAMMES**20** Is there a leniency/immunity programme?

The Commissioner has published an information bulletin, 'Immunity Program under the Competition Act', setting out the circumstances in which the Commissioner will make a recommendation of immunity. The Bulletin (and subsequent public statements by senior Bureau officials) reflects the current practice of the Commissioner and, by extension, the Attorney General.

21 What are the basic elements of a leniency/immunity programme, if one exists?

The Bureau's programme offers immunity or leniency in exchange for a party's cooperation with the Bureau's investigation, subject to certain minimal requirements. A corporation or an individual may apply for immunity.

Consistent with the fair and impartial administration of the law, the Commissioner will recommend to the Attorney General that immunity be granted to a party in the following situations:

- 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.

The requirements for a grant of immunity are:

- the party must take effective steps to terminate its participation in the illegal activity;
- the party must not have been the instigator or the leader of the illegal activity, nor the sole beneficiary of the activity in Canada;
- the party must provide complete and timely cooperation throughout the course of the Bureau's investigation;
- where possible, the party will make restitution for the illegal activity; and
- if the first party fails to meet the requirements, a subsequent party that does meet the requirements may be recommended for immunity.

While the Commissioner's policy does not legally bind the Attorney General of Canada, who has the exclusive authority to grant immunity in competition cases, there is a high degree of predictability that, on a party's compliance with the Policy, a recommendation by the Commissioner would be followed. The Attorney General's policy directives to Crown prosecutors makes specific reference to the Commissioner's Program. Moreover, the lawyers attached to the Competition Bureau normally conduct the prosecutions under the Act and advise on the conduct of an investigation and it appears that no recommendation for immunity in a competition case has ever been rejected.

22 What is the importance of being 'first in' to cooperate?

If a party is 'first in' and the Bureau is unaware of the offence, it will be granted immunity if the requirements set out above are met. However, the party must be 'first in' in Canada; being first elsewhere will not suffice. The Bureau will not afford any special consideration to a party solely because it has been granted immunity or favourable treatment in another jurisdiction.

23 What is the importance of going second? Is there an 'immunity plus' or 'amnesty plus' option?

A party will not be eligible for immunity if the Bureau has been made aware of the offence by another, earlier, applicant for immunity. However, the second party to offer to cooperate will, as a practical matter, be considered for favourable treatment and may, if the first party fails to fulfil the requirements of the immunity program, still be able to request immunity. The second party will qualify for a reduced penalty, especially if the Bureau does not yet have sufficient evidence to warrant a referral to the Attorney General. Other conspirators who seek to resolve their exposure later in the investigation will have a significantly reduced ability to negotiate favourable terms, with regard to both fine levels and the exposure of culpable individuals.

24 What is the best time to approach the authorities when seeking leniency/immunity?

In order to increase its likelihood of obtaining immunity or lenient treatment, a party should approach the authorities as soon as legal counsel have information indicating that an offence has been committed. In situations involving multiple jurisdictions, a party whose business activities have a substantial connection to Canada should consider contacting the Bureau either prior to, or immediately after, approaching foreign competition law authorities.

25 What confidentiality is afforded to (a) the leniency/immunity applicant and (b) any other cooperating party?

The Competition Bureau treats as confidential – and will not inform other competition agencies with which it may be cooperating – both the identity of a party requesting immunity and any information obtained from that party. No other party will receive a commitment of non-disclosure to foreign competition agencies. The only exceptions to this policy are:

- when there has been public disclosure by the party;
- when the party has agreed and when disclosure is for the purpose of the administration and enforcement of the Act;
- when disclosure is required by law; and
- when disclosure is necessary to prevent the commission of a serious criminal offence.

26 What is needed to be a successful leniency/immunity applicant (or other cooperating party)?

The requirements for a successful grant of immunity are set out in response to question 21 above. In particular, it should be noted that there is no specific evidentiary standard that must be met by an immunity applicant.

Is there an 'immunity plus' or 'amnesty plus' option?

The Commissioner's Immunity Program bulletin does not expressly address this situation. However, it is now clear from published statements by senior Bureau officials that disclosure of a previously unknown, second offence will qualify the party for immunity with respect to that offence and a recommenda-

tion of leniency (a reduced penalty) on the first offence. The practice does not appear significantly different from the US 'Amnesty Plus' concept.

27 What is the effect of leniency/immunity granted to a corporate defendant on employees of the defendant?

If a company qualifies for immunity, all present directors, officers and employees who admit their involvement in the illegal activity as part of the corporate admission, and who provide complete and timely cooperation, will qualify for the same recommendation for immunity. 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 and immunity is not automatic for past employees.

Even if a corporation does not qualify for immunity, for example, if it were the instigator of the offence, past or present directors, officers and employees who come forward with the corporation to cooperate may nonetheless be considered for immunity as if they had approached the Bureau individually.

28 What guarantee of leniency/immunity exists if a party cooperates?

An immunity agreement will be binding on the Attorney General as long as the party to whom immunity has been granted meets all of its obligations under the agreement. However, as indicated, a recommendation for a reduced penalty in exchange for a guilty plea and cooperation is not binding on the court. Canadian law does not provide for a conditional guilty plea that can be withdrawn if the Attorney General's recommendation is not accepted by the court.

29 What are the practical steps in dealing with the enforcement agency?

The immunity process typically involves the following steps:

Initial contact

Anyone may initiate a request for immunity in a cartel case by communicating with the Deputy Commissioner of Competition, Criminal Matters. Certain information will need to be provided, usually in terms of a hypothetical disclosure, to determine whether the party qualifies for immunity.

Provisional guarantee of immunity

If the party decides to proceed with the immunity application, there will need to be a description of the illegal activity, usually still in hypothetical terms. The Bureau will then present all the relevant information to the Attorney General, who has independent discretion in these matters and who will, if satisfied, issue a written provisional guarantee of immunity.

Full disclosure

Following the provisional guarantee of immunity, the party must make full disclosure to the Bureau. The disclosure will be on the basis that the Bureau will not use the information against the party, unless there is a failure to comply with the party's continuing obligations under the immunity agreement.

Immunity agreement

If the Attorney General accepts the Bureau's recommendation after full disclosure, the Attorney General will execute an immunity agreement that will include all of the party's continuing obligations.

DEFENDING A CASE

- 30** Can counsel represent employees under investigation as well as the corporation?

As individual employees can be charged with an offence under the Act as well as the company, there is a potential conflict of interest if counsel acts for both the company and any employees targeted by the Commissioner. For example, an employee may wish to obtain immunity in exchange for testimony against the corporation or the corporation may wish to claim that the employee's actions were not authorised by management.

Counsel for a corporation must caution employees that he or she acts for the company alone and, if they believe that their interests may conflict with the company's, they should obtain independent legal advice. Counsel for the company will be free to act for both the corporation and the employee, if they both consent to a waiver of the conflict of interest and agree that no information provided by one party can be confidential against the other. However, the prosecutor or investigators may resist joint representation if there is a risk of divergent interests.

- 31** Can counsel represent multiple corporate defendants?

Again, there is a potential conflict of interest amongst multiple corporate defendants and very complex issues arise. However, on occasion, large firms have acted for multiple defendants where the defendants have consented and appropriate confidentiality and conflicts management arrangements have been established between lawyers at the firm engaged in the matters.

These arrangements have usually occurred where the parties concerned have been involved in related conspiracies, but the defendants were not in a situation of actual conflict. As a matter of current practice, prosecutors will be highly unlikely to participate in joint resolution discussions involving multiple parties.

- 32** Can a corporation pay the legal costs of and/or penalties imposed on its employees?

It is possible for a corporation to indemnify an employee for legal costs and fines incurred as a result of a criminal investigation or conviction. While most indemnity agreements or insurance policies contain exclusions for deliberate wrongdoing, there is no law prohibiting such indemnification if the corporation chooses to do so. However, a convicting court, on one occasion, ordered a corporation not to pay the fine imposed on an individual employee.

GETTING THE FINE DOWN

- 33** What is the optimal way in which to get the fine down?

In Canada plea negotiations in criminal matters are a well recognised and accepted aspect of practice. The single most effective consideration in negotiating a plea agreement and sentencing recommendation is the stage in the investigation at which the party decides to come forward. Even where there are serious aggravating elements – instigation, multiple charges, obstruction or previous convictions – if the party comes forward before the investigation is complete and at an early enough stage to provide valuable assistance to the investigators for the prosecution of other parties, a reduced fine or leniency for exposed individuals may be negotiated. The rule of thumb in competition offences is that, as a proportion of the affected volume of commerce, the later the settlement, the higher the fine. Noteworthy in this context is the very recent fine imposed on Japan-based Nippon Gohsei Industries for its part in a price-fixing and market allocation conspiracy involving sorbates. Following its guilty plea, Nippon Gohsei was sentenced to pay a mere C\$100,000 fine, a surprisingly light penalty that is attributable to the company's cooperation with authorities at an early stage of the investigation, despite the late date of the conviction.

Other substantive factors are also important – capacity to pay a fine, the existence of an effective corporate compliance programme, together with a lack of management awareness of the actions of the individual participants, passive or reluctant participation, as opposed to instigation of the offence – are among the important elements in a consensual settlement of the company's exposure to prosecution.

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