

The CPI Antitrust Journal

August 2010 (2)

International Cooperation in a New Era of Canadian Cartel Enforcement

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I. INTRODUCTION

In today's globalized economy, it is essential that competition enforcement transcend national boundaries to protect the benefits of competitive and honest markets. The borderless workplace for competition enforcers has prompted the Canadian Competition Bureau (the "Bureau") to engage in a broad array of activities to encourage increased collaboration within a global network of enforcement agencies. This is particularly the case with respect to those agencies dedicated to the detection, investigation, and prosecution of international cartel activity, the focus of this comment paper.

In addition to the case-specific benefits realized, the lessons learned from increased collaboration have contributed to a convergence of legislation, policies, and practice. The international convergence taking place in immunity program² practices is but one example of a developing coherence in the international framework for competition enforcement. There is a growing readiness among jurisdictions to consider their competition legislation and practices through the prism of international enforcement cooperation.

Amendments to the conspiracy provision of Canada's *Competition Act*³ (the "Act") came into force on March 12, 2010. The previous conspiracy provision was repealed and replaced with a new *per se* criminal provision that prohibits agreements among competitors and/or potential competitors to fix prices, allocate markets, and restrict output. As such, the previous requirement of proving an undue anticompetitive effect to the criminal burden of proof has been eliminated. Penalties for violating the conspiracy provision also increased: The maximum fine increased from \$10 million to \$25 million per count, while the maximum term of imprisonment increased from five (5) to fourteen (14) years. Other forms of competitor collaborations, such as joint ventures and strategic alliances, may be subject to review under a new civil provision (section 90.1 of the Act) that prohibits agreements only where they are likely to substantially lessen or prevent competition. These amendments were designed to create a more effective criminal enforcement regime for the most egregious forms of cartel agreements, while at the same time removing the threat of criminal sanctions for legitimate collaborations among competitors.

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² Under the Bureau's Immunity Program, the first party to disclose an offence not yet detected or to provide evidence leading to the filing of charges may receive immunity from prosecution if the party cooperates with the Bureau's investigation and complies with the terms of the Immunity Bulletin, available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html>.

³ The Act is available online at: <http://www.laws.justice.gc.ca/eng/C-34/index.html>.

The Bureau issued *Competitor Collaboration Guidelines* in December 2009, following extensive public consultations.⁴ The Guidelines set out the Bureau's interpretation of the new cartel provision and discuss the manner in which the Bureau will exercise its enforcement discretion. The Guidelines also contain a detailed consideration of how the Bureau will review a variety of agreements between competitors or potential competitors, including commercialization agreements, research and development agreements, and production joint ventures under the new civil provision of the Act.

The modernization of the law and policy in this area enhances the Bureau's ability to cooperate with foreign antitrust agencies and coordinate international cartel investigations, providing Canada with a more productive and effective cartel enforcement regime. Furthermore, increased cooperation and coordination will enhance the predictability regarding the manner in which these types of enforcement matters are assessed for businesses operating within the North American market.

International cartel enforcement presents particular challenges for the Bureau as documents and witnesses often reside outside of Canada; however, the Bureau has a range of tools and mechanisms, both formal and informal, at its disposal to facilitate and enable cooperation with its foreign counterparts. This paper examines existing tools for international cooperation, as well as recent developments in international cooperation in Canadian cartel investigations.

II. TOOLS FOR INTERNATIONAL COOPERATION

A. Informal Cooperation

The Bureau engages in extensive informal cooperation with foreign agencies. Senior management hold regular bilateral meetings with their counterparts in several jurisdictions, including the United States, the European Union, Australia, New Zealand, and Japan, to discuss case-related issues such as investigative steps, timing, and settlement approaches. Communication is not restricted to senior management, as Bureau investigators routinely coordinate enforcement actions with their counterparts in other agencies; however, legal barriers may, in certain circumstances, limit the Bureau's ability to share information.

Section 29 of the Act prohibits the Bureau from communicating information obtained during an investigation, including information produced voluntarily or obtained pursuant to the exercise of formal powers.⁵ Nonetheless, communication of such information is permitted "for the purposes of the administration or enforcement of the Act."⁶ This allows information that is considered confidential under the Act to be communicated to a foreign counterpart where the purpose is for the administration or enforcement of the Act (e.g., where the communication of this information would advance a specific investigation).

When confidential information is communicated to a foreign agency, the Bureau seeks to maintain the confidentiality of the information. This is accomplished via formal international instruments or assurances from the foreign agency. The Bureau also requires the foreign agency to limit the use of the confidential information to the specific purpose for which it was provided. Similarly, the Bureau is also willing to provide assurances to a foreign agency that the information provided will be treated confidentially, and will only be used for the administration

⁴ For more information see the *Competitor Collaboration Guidelines*, Competition Bureau, December 23, 2009, available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html>.

and enforcement of the Act. The Bureau will provide notice to, and seek the consent of, the foreign agency if it intends to use the information for any other purpose.

The Bureau will not disclose the identity or information obtained from an immunity or leniency applicant to any foreign law enforcement agency without the consent of the applicant; however, applicants routinely grant such consent.⁷ Improved communication with foreign agencies has also resulted in situations where the Bureau is alerted to cases by its international counterparts before counsel for immunity applicants approach the Bureau.

Finally, the Bureau builds relationships with foreign agencies by providing technical assistance and participating in employee exchanges and internships.⁸

B. Formal Cooperation

International cooperation agreements and arrangements relating to the application of competition law foster a culture of cooperation among participating agencies and provide formal mechanisms that expressly favor the exchange of information and formal notifications, except where prohibited by law or contrary to important domestic interests. Under such agreements, parties recognize the value of minimizing conflict and giving careful consideration to one another's interests through all phases of their enforcement activities. Canada currently has eleven (11) international agreements, arrangements, or memoranda of understanding covering ten (10) jurisdictions.⁹

The Bureau may also rely on Canada's Mutual Legal Assistance Treaties ("MLATs") to seek evidence of criminal activity located in other jurisdictions. The MLAT and its enabling statute, the *Mutual Legal Assistance in Criminal Matters Act* ("MLACMA"), permits law enforcers, including competition authorities, to request formal assistance in obtaining and transmitting evidence relating to criminal matters,¹⁰ for example, by providing documents or executing requests for search and seizure. To date, Canada has entered into more than thirty (30) such treaties.¹¹ MLATs are a useful tool when evidence is located abroad and/or foreign counterparts are unable to share information under less formal mechanisms.

C. Multilateral Cooperation

The International Competition Network ("ICN"), together with the Organisation for Economic Co-operation and Development ("OECD"), have helped foster international

⁵ This confidentiality provision does not apply to information that has been made public, or to information for which the provider has authorized the communication.

⁶ For more information see the *Information Bulletin on the Communication of Confidential Information under the Competition Act*, Competition Bureau, October 10, 2007, available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01277.html>.

⁷ For more information see the *Immunity Program under the Competition Act*, Competition Bureau, June 7, 2010 available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html>. See also the *Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases*, Competition Bureau, March 25, 2009 available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03027.html>.

⁸ For example, in early 2010, six employees from Chile's competition agency, the Fiscalía Nacional Económica, completed a two-week internship at the Bureau's head office in Gatineau, Quebec.

⁹ A list of Canada's international instruments relating to cooperation in the enforcement of competition law is available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00128.html.

¹⁰ The International Assistance Group (IAG) of the Department of Justice Canada, under the Minister of Justice, is responsible for the review and coordination of requests for investigative assistance in criminal matters.

¹¹ A list of Canada's Mutual Legal Assistance Treaties is available online at: <http://www.treaty-accord.gc.ca/result-resultat.asp?type=&sp=1>.

cooperation and enhanced the global effort to investigate and bring competition offenders to justice.

The Bureau played a significant role in the establishment of the ICN and currently acts as the ICN Secretariat. The Senior Deputy Commissioner of the Criminal Matters Branch is the Co-Chair of the Enforcement Techniques Subgroup of the ICN Cartel Working Group. This Subgroup organizes an annual cartel workshop, a venue for anti-cartel enforcers around the world to build relationships and share valuable experiences. The next cartel workshop will be held in Yokohama, Japan in October 2010. The Subgroup has also developed an *Anti-Cartel Enforcement Manual*; a compilation of best practices used by ICN Members in key areas (e.g., searches, raids and inspections, leniency programs, investigative strategies, and interviewing techniques).¹²

The Bureau's involvement in the ICN complements its contribution to the OECD Competition Committee, the OECD Working Party No. 2 on Competition and Regulation, and the OECD Working Party No. 3 on Enforcement and Cooperation, all of which work to strengthen competition law enforcement against cartels. The Bureau routinely provides submissions to the OECD and participates in roundtable discussions addressing cartel enforcement matters. The Bureau also contributed to the OECD's 2009 *Guidelines for Fighting Bid-Rigging in Public Procurement*.¹³

III. EMERGING TOOLS

Among the emerging tools for increasing international cooperation is proactive intelligence gathering. The Bureau recognizes that an important means of deterring cartel behavior is to increase the likelihood of detection. In addition to relying on its Immunity and Leniency programs to disclose the existence of a cartel, the Bureau proactively profiles product markets subject to cartel investigations outside of its borders, with a view to detecting, and ultimately deterring, similar conduct in Canada.

A coordinated approach to outreach further enhances public awareness of the severe penalties associated with operating a cartel and should increase the detection, deterrence, and prevention efforts of competition agencies. This approach involves conveying a consistent outreach message on an international scale and requires considerable cooperation, coordination, and communication among competition agencies, much in the same way agencies cooperate internationally on enforcement activities. There is potential for more work to be done in terms of implementing a coherent international approach on outreach and, ultimately, detection, from a domestic to an international scale. To that end, the Bureau is exploring the creation of an intelligence network with antitrust agencies in other jurisdictions.

IV. FUTURE COOPERATION

Canada is entering a new era of cartel enforcement. The amended conspiracy provision has streamlined Canada's cartel laws to provide appropriate, internationally harmonized standards to address hardcore cartels. This is reinforced by some of the toughest criminal penalties in the world for cartel conduct. This convergence in laws, particularly with the United

¹² See the ICN Cartel Working Group website for more information, at: <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel.aspx>.

¹³ For more information see the *Guidelines for Fighting Bid-Rigging in Public Procurement*, March 12, 2009, available online at http://www.oecd.org/document/29/0,3343,en_2649_40381615_42230813_1_1_1_1,00.html.

States, Canada's largest trading partner, enhances the Bureau's ability to cooperate with foreign agencies and provides the business community with predictability.

Increased legal convergence should also translate into more common immunity and leniency applicants. For example, with Canada's amendment of the conspiracy provision, applicants who may not have previously met Canada's market effect threshold have reason to apply in Canada. As such, this alone may increase opportunities for international cooperation. Further, increased penalties for cartel violations in Canada provide another incentive for immunity and leniency applicants to approach the Bureau at the same time as other jurisdictions.

The quantity and quality of the Bureau's cooperation with foreign jurisdictions will only increase and strengthen its ability to detect, investigate, and prosecute international cartel activity, as it continues to foster mutual trust and practical cooperation tools in this new era of cartel enforcement.