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## Top Ten Points to Know When Resolving Global Antitrust Cases in Canada

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## I. INTRODUCTION

As one of the leading international antitrust regulators, Canada's Competition Bureau ("Bureau") undertakes many multinational investigations, most commonly in coordination with other regulators. Where parties under investigation are seeking to resolve their global antitrust liability,<sup>2</sup> Canada's Competition Bureau is often one of the jurisdictions they will approach. Processes in Canada are similar to, but have important distinctions from, case resolution practices in other jurisdictions. This brief article seeks to highlight some of the more important features of which lawyers should be aware when seeking a Canadian resolution.

## II. THE TOP TEN POINTS

### ***A. Canada Has an Adversarial Prosecutorial Model Rather Than an Adjudicative Penalty Model***

This is an important distinction from proceedings in the EU and other similar non-criminal regimes. In Canadian criminal antitrust cases, the Bureau completes its investigation and, together with the prosecution agency, levels criminal accusations in a formal indictment presented to a Canadian court, which will ultimately decide the merits of a Bureau case based upon an adversarial standard of proof beyond reasonable doubt, either after a contested trial proceeding or a plea of guilty. Full rights of defense are an essential component of this system, and a defendant is not required to co-operate with the regulator or offer affirmative proof of its defense to an indictment.

### ***B. Canada's Judiciary and Prosecution Agency Operate Independently From the Bureau***

Canada's judiciary, as noted above, are the final adjudicators of any proposed Bureau case or settlement. In order for the Bureau to bring its case before the courts, it must first successfully convince Canada's independent prosecution agency, The Public Prosecution Service of Canada<sup>3</sup> ["PPSC"] (led by the Director of Public Prosecutions ["DPP"]) that (1) its case has a "reasonable prospect of conviction"; and (2) bringing the case before the courts would not be contrary to the public interest. Although the PPSC works closely with the Bureau at various

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<sup>2</sup> This paper addresses so-called "hard-core" cartel conduct such as price-fixing, market or customer allocation, or production restriction, as well as bid-rigging, and does not address less serious variants of antitrust conduct such as price maintenance or vertical restraints.

<sup>3</sup> The PPSC, being the former prosecutorial function of Canada's Attorney General, was created in December 2006 as a component of Canada's *Federal Accountability Act* S.C. 2009, c. 9.

stages in the investigation, the ultimate decision to prosecute is made independently, on review of the Bureau's case referral under the dual criteria mentioned above. Ultimately, and even in cases where a joint resolution or "plea arrangement" is agreed to by the parties, the Courts are not bound by any recommendation and are free to impose an appropriate penalty (however, in practice, trial judges have been strongly urged by appellate courts to accept joint recommendations and have thus far never refused to do so in an antitrust case).

### **C. There is No Limitation Period for Antitrust Criminal Cases in Canada**

Unlike, for example, the United States where a five-year period of limitation applies for *Sherman Act* cases, Canada has no such limitation. In practice, however, the ability of the Bureau to bring historic cases is effectively limited by the availability of witnesses (with all the frailties of human memory) together with contemporaneous documentary or other evidence. Cases that reach back beyond seven or eight years are rare. Aspects of international comity may also figure into the extent to which the Bureau may wish to expand its range of charges beyond those made by other global regulators.

### **D. Settlement Requires a Formal Guilty Plea Proceeding Before a Superior or Federal Court.**

Given the adversarial nature of Canada's criminal justice system, a criminal settlement requires that sufficient facts be placed before the court so as to enable a judicial finding that an offence has been committed, and that the defendant corporation is admitting its guilt in relation to the specific offence or offences charged. The guilty plea is a public proceeding, fully open to the media and subject to Canada's general "open court" principle regarding public access to courts and case documents.

### **E. Formal Written Admissions Will Be Required by the Party Pleading Guilty**

As stated above, the guilty plea process is public and the PPSC will require the defendant corporation (or individual) to agree to a written set of admissions or agreed facts that will describe the nature of the antitrust conduct constituting the offence (providing such details as the type of conduct, the product, parties involved, timeframe, and effect upon markets) in order to enable a judicial finding that an offence has been committed. This document, which will be filed with the court Registrar, will be freely available to the public and media (and is often linked to a Bureau press release available online) and may be relied upon by civil plaintiffs in support of class action or other claims grounded upon the antitrust conduct.

### **F. Monetary Penalties will Generally Start at 20 Percent of Canadian VOC**

Under the Bureau's *Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases*,<sup>4</sup> the Bureau indicates that it will generally seek to impose a monetary penalty of 20 percent of a party's Canadian volume of commerce ("VOC") in the cartelized product, over the period of the alleged conspiracy in relation to Canada. This formula constitutes a "proxy" which is grounded in an assumption of an overall 10 percent overcharge associated with a cartel arrangement, coupled with an additional 10 percent penalty factor. It is open to defendants to challenge the 20 percent levy through evidence indicating that the cartel surcharge was less than the proxy amount. Disputes may also arise in respect of so-called "indirect" commerce where the cartelized product is a component of a larger device or product that is sold through various distribution

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<sup>4</sup> At this writing, the most recent draft was the March 25, 2009 version, available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03027.html>.

channels and ultimately at retail to Canadian consumers. Settlements are highly individualized, and reductions from this standard formulation may be obtained where the party offers strong and early cooperation in a Bureau investigation,<sup>5</sup> or can demonstrate other mitigating factors.

### **G. Individual Liability Exists, but Jail Sentences are Rarely Imposed**

The *Competition Act* imposes both corporate and individual criminal liability. However, the history of the Bureau's prosecution of individuals in cartel cases shows that only a single individual has served prison time (of one year's imprisonment on conviction in a driving-instructor cartel case). In other more recent cases, sentences of incarceration have been imposed, but made subject to Canada's "conditional sentencing" regime that enables an offender to effectively serve a form of "house arrest" without domicile in a correctional institution for sentences of less than two years' duration.<sup>6</sup> Recent amendments to the substantive and penalty components of Canada's *Competition Act* now have raised individual penalties to a potential 14 years' imprisonment, which will formally eliminate the availability of the conditional sentencing regime. However, it would still be open to the Bureau to agree to a suspended sentence with a period of probation for individuals,<sup>7</sup> which would avoid actual incarceration. The Bureau's *Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases* has indicated that it will seek to prosecute individuals who may be "carved out" of corporate settlements in certain circumstances; time will tell whether this policy ultimately results in jail sentences for individuals that will be approved by the Courts.

### **H. Pre-March 12, 2010 Cases Present Particular Challenges for the Bureau**

As noted above, the key conspiracy provision of Canada's *Competition Act* was amended effective March 12, 2010 so as to remove the prior requirement that the Bureau establish that any antitrust agreement or arrangement "unduly" prevented or lessened competition in a relevant antitrust market. This means that cases involving allegations of conduct occurring prior to March 12, 2010 represent strong challenges to the Bureau, whose track record in obtaining convictions on contested cases involving such proof of "undueness" has been poor. Rationally, one might expect that negotiating settlements for cases involving pre-March 12 2010 conduct might take into account the greater degree of difficulty associated with successful proof of the Bureau's allegations and, given the passage of time in company with the Bureau's finite resources, could represent an opportunity for parties to negotiate resolutions having more favorable terms. Again, time and experience will determine whether such developments will occur.

### **I. Class Action Proceedings in Canadian Antitrust Cases are Frequent and Growing**

Canada has an ever-burgeoning number of antitrust class action civil claims, which are now made not only as "follow on" actions after criminal proceedings, but are often launched even in the absence of evidence of a Canadian investigation. Parties should be aware that coordination of class action claims (by such means as the federal MDL process in the United States) does not yet exist, although arrangements among leading plaintiffs' attorney firms often allow one series of cases (by Province) to take precedence over others, thus representing an effective co-

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<sup>5</sup> For example, under the Bureau's leniency policy, the first leniency applicant providing full cooperation can receive a 50% reduction from fine levels with no carve-outs of individuals.

<sup>6</sup> See section 742.1 of the *Criminal Code*, R.S.C. 1985, c. C-46

<sup>7</sup> See section 731 of the *Criminal Code*, *supra*.

ordination. Given the implications of the above-noted formal admissions in guilty plea proceedings in Canada, close attention to the content of written admissions is essential; parties may also seek to achieve a contemporaneous resolution of their civil liability in Canada, although global considerations will often be paramount.

#### ***J. Non-Criminal Settlements are Available but are Limited in Application***

Section 34(2) of the *Competition Act* provides that a party may resolve its case by entering into a prohibition order stipulating that the party “has done...any act or thing constituting or directed toward commission of an offence.” This formulation does not require admission of any criminal conduct. However, the Bureau’s *Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases* indicates that this process will be used to reach settlements only in exceptional cases where, for example, “...the actual and potential economic harm is negligible, there are no aggravating factors and there are significant mitigating factors.” Perusal of the Bureau’s news releases indicates that this mechanism has recently been employed to settle cases involving auto body proprietors, school bus operators, and insecticide/pest control businesses.<sup>8</sup>

### **III. CONCLUSION**

Parties seeking to resolve their Canadian criminal antitrust liability should be mindful of particular features of Canada’s criminal prosecution system. While there is a large degree of regulatory conformance in the criminal cartel area, each regulator and adjudicative/prosecution regime presents particular elements that may have important implications for case resolution strategies.

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<sup>8</sup> See Bureau news releases: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02280.html>, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02990.html>, and <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02645.html>.