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Punishing Cartels in Canada: Is a “Sea Change” on the Horizon?

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The Canadian Track Record in Punishing Cartel Conduct

Canada has a long history of pursuing and prosecuting cartels (more commonly referred to in Canadian competition law as “conspiracies”). The first criminal anti-cartel prohibition was enacted in Canada in 1889, one year prior to passage of the Sherman Act in the United States. Since that time, there have been numerous cartel prosecutions in Canada involving a myriad of industries. Canada also has an active and sophisticated immunity (amnesty)/leniency program, and is considered to be among the first jurisdictions that participants in global cartels should contact when approaching the authorities.

And yet, notwithstanding its established pedigree of cartel prosecution, there is one area of anti-cartel enforcement in which Canada is seen as lagging behind, especially in comparison to the United States – penalties and sanctions.

It’s not that the theoretical penalties for cartel conduct in Canada are negligible. For example, the Competition Act’s core prohibition against cartel conduct makes it a criminal offence for competitors (or potential competitors) to agree to fix prices, allocate markets or restrict output. Parties found to have committed this offence are liable to imprisonment for a term of up to 14 years and to fines of up to CDN$25 million per count. Similarly, violations of the criminal prohibition against bid-rigging expose parties to the potential of fines “in the discretion of the court” and to imprisonment for a term not exceeding 14 years.

In practice, however, the sanctions imposed in Canada for cartel offences have been relatively modest.

In 2012, for example, a total of approximately CDN$22.5 million in fines was imposed on parties convicted of violating the Competition Act’s conspiracy and bid-rigging offences. This compares to the approximately US$1.13 billion in cartel-related fines obtained by the U.S. Department of Justice in 2012. Even if one takes into account the rule of thumb that the Canadian economy is approximately 1/10 the size of the U.S. economy, the Canadian fine total in 2012 was still small in relative (and not just absolute) terms.

The distinction between Canada and the United States is even more pronounced when it comes to sanctions imposed against individuals. While 14 individuals in Canada were penalized for cartel

offences in 2012, the fines imposed on these individuals ranged from CDN$3,000 to CDN$10,000, with a median fine of CDN$5,000. Moreover, no individual was sentenced to serve any time in jail. By contrast, the U.S. Department of Justice secured convictions against 43 individuals in 2012, who were sentenced to a total of more than 33,600 days in prison – records for the U.S. on both counts.

Signs of Change?

The disparity between the Canadian and U.S. experience in punishing cartel conduct is no secret to Canada's competition authorities. Indeed, it is fair to say that it has been a consistent objective of the Competition Bureau to bridge that gap and to make the Canadian sanction regime more robust in practice. In arguing for heightened sanctions, the Bureau has pointed in particular to the amendments in 2009 that (a) changed the conspiracy offence into a per se offence, and (b) increased the penalties for committing this offence from a maximum of CDN$10 million in fines per count to CDN$25 million per count and from a maximum of 10 years in jail to 14 years imprisonment. In the Bureau's view, this change signalled a "reinvigorated mandate" from Parliament to pursue cartels aggressively in Canada.

Based on developments in 2012, it seems that the Bureau's message may finally be getting through. Indeed, the current Commissioner of Competition (Interim), John Pecman, recently expressed the view that there has been a "sea change" in the way that cartel offences and other white-collar crimes are now viewed in Canada.

(i) The Maxzone Decision

Mr. Pecman made this statement in commenting upon the recent sentencing decision of the Federal Court of Canada in R. v. Maxzone Auto Parts (Canada) Corp. Maxzone Canada had pleaded guilty in May 2012 to participating in a global conspiracy to fix the prices of aftermarket replacement automotive lighting parts. As part of its plea, Maxzone Canada agreed to pay a fine of CDN$1.5 million, which represented approximately 10% of its volume of commerce ("VOC") over the period of the offence.

Maxzone Canada's plea was heard by Chief Justice Crampton of the Federal Court of Canada. While Crampton C.J. accepted the jointly recommended fine in accordance with customary practice in Canada, he expressed reservations at the hearing about the adequacy of the process that had been used and indicated that he would explain his concerns in reasons to be issued at a later date.

Chief Justice Crampton eventually released his written decision in September 2012. The specific points he addressed are not directly pertinent to this article as they relate to criticisms of certain aspects of the Bureau's leniency/plea process. However, in the course of his decision, Chief Justice Crampton made several comments about cartel deterrence and sanctions and it is these remarks which the new Commissioner considers to be so significant.

Of particular note, Crampton C.J. spoke in very blunt terms about the economic impact of cartels, analogizing them to fraud and theft. As he said: "Price fixing agreements, like other forms of hard core cartel agreements … represent nothing less than an assault on our open market economy. Buyers in free market societies are entitled to assume that the prices of the goods and services they purchase have been determined by the forces of competition. When they purchase products that have been the subject of such an agreement, they are effectively defrauded."

For that reason, Crampton C.J. said that cartels "ought to be treated at least as severely as fraud and theft, if not even more severely than those offences". According to the Chief Justice, this requires the imposition of a fine that (i) ensures that the accused does not profit from its illegal conduct, and (ii) includes an additional significant amount to communicate society's abhorrence of the crime. Moreover, it may also require prison sentences as part of the sanctions menu. As Chief Justice Crampton stated: "[A]chieving effective … deterrence requires that individuals face a very real prospect of serving time in prison if they are convicted of having engaged in [carte] conduct."

It is too soon to definitively conclude, along with the Interim Commissioner, that Chief Justice Crampton's comments, which were made in obiter after all, reflect a "sea change" in the treatment of cartels in Canada. But they are consistent with a trend that seems to be unfolding, as several other recent developments indicate.

(ii) Criminal Code Amendments

For example, in March 2012, Canada's Criminal Code was amended to restrict the availability of "conditional sentences" for certain offences, including the Competition Act's conspiracy and bid-rigging offences. "Conditional sentences" are "served in the community", i.e., a form of house arrest (sometimes also involving community service) and are distinguished from "custodial sentences" that involve incarceration in prison. This can be seen as yet another indication from Parliament (along with the 2009 amendments to the Competition Act) that cartel offences ought to be treated more severely than in the past.

(iii) New Procurement Policy

In addition, the federal government took administrative steps in November 2012 to require that all parties bidding on federal government contracts certify that they have not been convicted of, among other things, the conspiracy or bid-rigging offences under the Competition Act. Interestingly, parties will find themselves banned from participating in federal government bidding processes even if they pleaded guilty and cooperated with the Competition Bureau pursuant to the Bureau's Leniency Program. This represents a significant change from previous practice, which had permitted companies that pleaded guilty to continue to act as suppliers to the federal government pursuant to a "leniency exemption".

It seems that the immediate impetus for the above-described change in government procurement policy was the plea and conviction in July 2012 of a company called Corporate Research Group Ltd. for engaging in bid-rigging in respect of real estate advisory service contracts with the federal government. However, there also were ongoing disclosures of alleged criminal conduct involving government procurement throughout 2012, particularly in the Province of Quebec where several investigations are ongoing. These revelations (and the resulting criminal proceedings) could be another important factor in influencing an attitudinal change towards cartel offences in Canada.

(iv) Enforcement in Other Areas

The Bureau has also shown a willingness recently to seek historically high penalties in other enforcement areas, which may be an indication of how it now intends to proceed in criminal enforcement.

Since 2009, for example, the Bureau has been entitled to ask for fines (technically known as "administrative monetary penalties") of up to CDN$10 million for violations of the Competition

Act's misleading advertising and abuse of dominance provisions (up to CDN$15 million for recidivists). The Bureau has consistently taken the opportunity to seek these maximum penalties in cases brought since that time.

In one case involving a major Canadian telecommunications provider, the Bureau and the provider entered into a consent agreement to remedy issues regarding that carrier's advertised pricing. The carrier also agreed to pay an "administrative monetary penalty" ("AMP") of CDN$10 million as part of this negotiated settlement. In two subsequent cases alleging misleading representations in the telecom sector, the Bureau has also requested that the maximum AMPs of CDN$10 million be awarded against various parties. The Bureau is also asking for the maximum AMPs available in a recent abuse of dominance application it brought alleging that two parties had engaged in anti-competitive conduct in relation to the rental of water heaters in Ontario.

(v) A New Sherriff in Town

In trying to gauge where cartel enforcement will go in 2013, one also cannot overlook the fact that current Interim Commissioner Pecman headed up the Bureau's Criminal Matters Branch before being selected to his new position. In that former capacity, Mr. Pecman was in charge of the Bureau's (still ongoing) investigation into price fixing at retail gas stations in Quebec and Ontario. As of the end of 2012, this investigation had resulted in charges being laid against 39 individuals and 15 companies. If there is anyone who is well suited to lead a "sea change" in cartel enforcement in Canada, it is Mr. Pecman.

A Cautionary Note

Notwithstanding the foregoing signs and signals, the Bureau's difficulties in achieving the type of change it is seeking should not be minimized. The prevailing culture in Canada is for cartel cases to be resolved by way of plea negotiations, pursuant to the Bureau's Leniency Program, with penalties essentially limited to fines based on a percentage of relevant VOC. There is no recent track record of contested cartel proceedings in Canada and there is no track record of individuals going to jail for cartel offences. At most, several individuals have agreed to plead to conditional sentences to be served in the community (as noted, that option is no longer available because of the amendments to the Criminal Code that came into effect last year). In other words, unlike in the United States, there is no assumption in Canada that a corporate plea agreement with the authorities will almost automatically entail one or more company employees serving time in prison. If anything, the assumption in Canada is precisely the opposite.

There is no doubt that any serious attempt by the Bureau to seek more robust sanctions in cartel cases, and particularly prison sentences for individuals, will generate resistance. It seems likely that parties would be more reluctant to apply for leniency and cooperate with the Bureau, plea agreements would be more difficult to negotiate, and the prospect of contested litigation would increase accordingly. In other words, the character of cartel enforcement in Canada would be completely altered.

In the end, the answer to whether a "sea change" in cartel enforcement in Canada is really approaching will depend on how determined the Bureau is to abandon the status quo and push for a more U.S.-style approach, recognizing that any shift in its enforcement stance will not be accomplished without a fight, and that any effort to move in this direction will not come with any guarantees of success.

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