Kluwer Competition Law Blog

Blowing the Whistle on Cartels in Canada

Mark Katz (Davies Ward Phillips & Vineberg LLP, Canada) · Friday, August 30th, 2013

Cartel enforcement in Canada is heavily dependent on the use of informants. This is explained by two principal factors. First, cartel conduct is, by its very nature, secretive and carried out in the shadows of business life. Second, Canada's Competition Bureau, which is responsible for investigating cartels, is subject to budget constraints that limit its ability to expose and detect cartel conduct on its own.

In recognition of these realities, the Competition Bureau employs several tools to encourage informants to come forward with incriminating evidence. The best known of these tools is the Bureau's Immunity/Leniency program, where the Bureau will recommend favourable prosecution and sentencing treatment for parties who come forward with evidence of cartel conduct in which they are involved. This favourable treatment will vary depending upon the timeliness of the information and cooperation provided. For example, parties who are "first in" to report a cartel may be eligible to receive full immunity from prosecution. Subsequent parties who disclose, while subject to prosecution and penalty, can still receive substantial reductions in the fines that they would otherwise have to pay (potentially as high as 50 per cent).

Working off the axiom that "there is no honour among thieves", the Immunity/Leniency program aims to disrupt cartel conduct by encouraging participants to be first in line to claim favourable treatment. And by all accounts, the Bureau's program has been very successful – a large majority of the cartel cases prosecuted by the Bureau in recent years were first detected because of information provided under the program.

The Competition Act also contains special "whistleblower" protections for persons who come forward with information on cartel (and other criminal) offences. Under these provisions, the Competition Bureau must protect the identities of whistleblowers who request assurances of confidentiality in return for reporting on alleged offences. In addition, employers are broadly prohibited from taking any steps against employees (or independent contractors) who, while acting in good faith and on the basis of reasonable belief, (i) disclose a Competition Act offence (that has been or is going to be committed) to the Bureau; (ii) refuse to do anything that is an offence under the Competition Act; (iii) do anything that is required to be done in order that an offence not be committed under the Competition Act; or (iv) state an intention to do any of the above. (The Canadian Criminal Code also contains a general prohibition against employer reprisals, although it is limited to cases where the employee has provided information to a person whose duty it is to enforce federal laws; unlike the Competition Act protections, the Criminal Code offence does not apply to situations where the employee refuses to engage in criminal conduct or insists on taking

actions to avoid criminal conduct.)

The Competition Act's whistleblower provisions were enacted in 1999. Interestingly, they were suggested by individual Members of Parliament during the course of an examination of other proposed amendments to the Competition Act. They were not brought forward at the behest of the Competition Bureau nor were they part of the original amendment Bill proposed by the government at the time. They also were enacted over the objections of the Canadian Bar Association, which argued that employers should not be required to continue to deal with employees or contractors in whom they have lost confidence. The CBA commented that since an employee's complaint to the Bureau could be expected to sour the work environment, an employer acting in good faith should be entitled to terminate an employee either with notice or damages in lieu of notice. The CBA also noted that a report on the issue by the Honourable Mr. Justice Charles L. Dubin in 1997 had concluded that there was no need to amend the Competition Act to protect employee whistleblowers because existing processes already provide adequate protections.

There have not been any "whistleblower" decisions under the Competition Act provisions since they were enacted in 1999. Indeed, it is fair to say that the existence of these protections has been one of the better-kept secrets under the Competition Act, with few people even aware that there are formal legislative protections prohibiting employer reprisals against whistleblowers.

That is about to change. Earlier this year, Commissioner of Competition John Pecman announced the launch of the Bureau's new Whistleblowing Initiative. According to the Commissioner, the initiative is designed to encourage members of the public to come forward if they have reasonable grounds to believe that an offence under the Competition Act has been or is about to be committed.

The Whistleblowing Initiative does not add new protections to those already contained in the Competition Act. Rather, its main purpose seems to be to make the public aware that these protections exist in order to encourage more "self-reporting" of potential cartel and other criminal offences. Encouraging whistleblowing makes available a channel of information that is not dependent upon the immunity/leniency process and thus could help the Bureau obtain convictions without having to cut deals with cartel participants themselves.

The Whistleblowing Initiative is part of a broader global trend whereby competition and other regulatory authorities encourage employees and other insiders to report suspected offences. The financial crisis of 2008 proved to be an important impetus for whistleblowing legislation, with the U.S. Dodd-Frank Act serving as a prominent example. Most notably, the Dodd-Frank Act offers financial rewards for eligible persons who provide information to the United States Securities Exchange Commission regarding alleged violations of U.S. securities laws. Pursuant to this legislation, individuals can receive between 10 per cent to 30 per cent of fines collected by the authorities in connection with unlawful conduct. According to the SEC, the financial incentives offered by the Dodd-Frank Act have resulted in "high quality" tips that are saving SEC investigators substantial time and resources.

Closer to home, the Canada Revenue Agency plans to initiate a program to pay financial rewards for informing on Canadian taxpayers who evade taxes on foreign property and transactions. The CRA will reward up to 15 per cent of the federal tax collected (not including penalties, interest and provincial taxes) on tax assessments or reassessments greater than $100,000. (The reward will be taxable, of course).

Financial “bounties” are not part of the Whistleblowing Initiative, nor are they provided for in the Competition Act. However, other competition authorities have adopted this route. For example, the U.K. offers whistleblowers up to €100,000 for information relating to the existence of a cartel. Not surprisingly, given the Dodd-Frank experience, the possibility of paying bounties for information disclosing antitrust offences is also under examination in the United States.

Even without the prospect of financial incentives in Canada, the Whistleblowing Initiative raises serious issues for companies and their counsel. Unlike the immunity/leniency process, which is typically undertaken by corporate applicants and therefore subject to their supervision and control, whistleblowing encourages individual employees to bypass their employers and report to the Bureau directly. Moreover, any attempt by the employer to exert control over the situation could give rise to allegations that the Competition Act’s prohibition against employer reprisals has been breached. Note that these protections not only prohibit sanctions such as terminations, demotions and suspensions, but also any measure to “harass or otherwise disadvantage an employee, or deny an employee a benefit of employment.” In other words, companies and their counsel may not only have to deal with the substantive aspects of a cartel investigation, they also will have to worry about how to manage the whistleblower so as not to violate the Competition Act’s whistleblower protections.

Consider also the following scenario. As noted by the CBA, the continued presence of a whistleblower in a company’s workforce could poison the work environment, with fellow employees taking a dim view of someone whose actions may have placed their conduct under scrutiny. What if these fellow employees take to snubbing or shunning the whistleblower and the company turns a blind eye to that conduct? Could that constitute illegal harassment under the Competition Act’s whistleblower provisions? Is the company required to discipline its other employees to prevent this type of “second hand” harassment? We have no concrete answers to these questions yet. But the Bureau’s new-found emphasis on whistleblowing could bring issues such as these to the forefront very soon.

How to mitigate the challenges presented by whistleblowing? The obvious answer, first of all, is not to engage in cartel offences to begin with. But the second step is to ensure that your company has an effective competition compliance program with robust reporting/enforcement mechanisms. Employees should be taught that their first recourse must be to use internal channels should they have concerns about illegal conduct. However, that option will only be feasible if there are effective reporting channels in place. If, on the other hand, employees who want to do the right thing fear that they may be disciplined if they raise concerns, or see their concerns ignored, or conclude that wrongdoers will not be subject to serious sanctions, they will have every incentive to “blow the whistle” on their employers and approach the Bureau directly. The Bureau’s Whistleblowing Initiative now, as never before, offers a roadmap for that option.

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