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Canadian Court Clarifies Competition Bureau Disclosure Obligations in Cartel Prosecutions

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On February 4, 2015, the Ontario Superior Court of Justice ruled that relevant factual information proffered to the Crown in order to qualify for immunity or leniency under the Competition Bureau's cartel Immunity and Leniency Programs is not protected from disclosure to accused persons by either solicitor-client or settlement privilege. The Court's decision clarifies the robust nature of the Crown's disclosure obligations in competition law prosecutions deriving from immunity or leniency applications, and confirms the lack of any legitimate expectation of confidentiality vis-à-vis accused persons that immunity or leniency applicants can have concerning factual information they share with the Bureau and the Crown in order to obtain immunity or leniency. Davies as acts as counsel to one of the accused in this matter.

Background

The case arose from the Bureau's investigation into alleged price-fixing in the Canadian chocolate industry, which was triggered by an application under the Bureau's Immunity Program. Under the Immunity Program, participants in undetected cartel conduct contrary to the Act may receive immunity from prosecution in return for providing evidence and assistance to the Bureau and the Crown in the investigation and prosecution of the alleged cartel. In this case, in the summer of 2007, Cadbury Canada Inc. contacted the Bureau under the Immunity Program and began proffering details of information that it had gathered during the course of an internal investigation into the suspected cartel conduct. In May 2008, a formal immunity agreement was executed granting immunity to Cadbury and its senior officers and employees.

Following the execution of search warrants in November and December of 2007, one of the targets of the Bureau's investigation, Hershey Canada Inc., contacted the Bureau to seek first ranking under the Bureau's Leniency Program. The Leniency Program encourages participants in cartel conduct who do not qualify for full immunity to come forward and cooperate in the Bureau's investigation and any subsequent prosecution in return for more lenient treatment as part of an agreement to plead guilty to the conduct. Following the provision of information to the Bureau over the course of several years, Hershey entered into a formal plea agreement with the Crown in February of 2011. Under the plea agreement, Hershey received lenient treatment in sentencing (it pleaded guilty to one count of price-fixing and was fined $4 million) and its senior officers and employees obtained immunity from prosecution.

On June 6, 2013, the Bureau announced that charges had been laid against three other companies and certain individuals for alleged price-fixing of chocolate confectionary products in Canada. After commencing disclosure to the accused, the Crown realized that some of the documents disclosed were subject to continuing claims of settlement privilege by Cadbury and Hershey. The Crown then sought the return or destruction of these documents; however, the accused refused and asserted their entitlement to the information in question as well as additional information withheld by the Crown on the basis of settlement privilege arising from negotiations with Cadbury and Hershey to obtain immunity and leniency under the Bureau's programs.

The Crown brought an application to the Court for a determination of the issue, and Cadbury and Hershey were granted intervener status. It was common ground that the information over which privilege was claimed was relevant to the criminal proceedings against the accused. It was also common ground that the information provided by the interveners to the Crown subsequent to executing formal immunity and leniency agreements should be disclosed to the accused as part of the Crown's duty of disclosure. However, it was the information provided by the interveners to the Crown prior to the execution of these agreements that, in the view of the Crown and especially the interveners, should not be disclosed. Hershey argued that, in addition to being cloaked with settlement privilege, the information in question was subject to solicitor client privilege because it was gathered by Hershey's counsel during its internal investigation.

The Decision

The Court comprehensively disagreed with the arguments advanced by the Crown and the interveners. It ruled that disclosure must be made to the accused of all relevant factual materials provided to the Crown by the interveners pursuant to the Bureau's immunity and leniency processes. Such materials were not privileged; indeed, there could be no reasonable expectation of non-disclosure in subsequent criminal proceedings given the clear terms of the immunity and leniency bargains as set out in the Bureau's written policies and the formal agreements entered into with the Crown. In general, the Court could see no principled basis for according different treatment to information supplied to the Bureau and the Crown based on when that information was provided during the immunity and leniency processes.

Waiver of Solicitor-Client Privilege

The Court dismissed Hershey's claim that information provided to the Crown prior to formally obtaining immunity or leniency is protected by solicitor-client privilege. While making no finding as to whether information gathered by counsel as part of Hershey's internal investigation was in fact subject to solicitor-client privilege, the Court concluded that any such privilege would be lost upon communication of the information to the Bureau and the Crown. The court reached this conclusion because of the general principle that waiver results from disclosure of solicitor-client information to third parties, especially those that are adverse in interest, as the Bureau and Crown were in this case.

In a recurring theme of the decision, the Court found that waiver of privilege necessarily resulted from Hershey's disclosure of the information in the context of a leniency process under which Hershey was contractually obligated to provide the information to the Crown for its use in prosecuting the accused. Disclosure in this context meant that Hershey either did not view the information as privileged or was content to waive that privilege in exchange for leniency.

Settlement Privilege Does Not Apply

The Court noted that settlement privilege is designed to encourage parties to enter settlement discussions without fear that their communications could be used against them in subsequent litigation. The Court found that a distinguishing feature of the present case was that the interveners' information provided to the Crown when negotiating immunity and leniency was not being sought for use against the interveners themselves. Rather, the information was being sought in the context of criminal proceedings against third parties. Indeed, the interveners could not identify any particular prejudice to them as a result of disclosure; neither was facing civil proceedings or criminal prosecution elsewhere arising from the subject matter of the Crown's prosecution. Thus, the facts before the Court did not directly engage the rationale for settlement privilege.

More fundamentally, however, the Court determined that the highly prescribed immunity and leniency processes within which the interveners provided information to the Bureau and the Crown could not support a finding of settlement privilege over such information. Again, the Court found that the interveners knew that obtaining immunity and leniency under the Bureau's programs would require them to deliver evidence that could be used against others in criminal proceedings. This obligation was central to the negotiations and spelled out in the Bureau's published immunity and leniency policies

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The Court found that Cadbury's immunity agreement specifically contemplated disclosure of Cadbury's information pursuant to the Crown's disclosure obligations in criminal proceedings. The Court also noted that the Bureau's leniency bulletin clearly states that "all information provided by the leniency applicant prior and pursuant to the plea agreement may be used" by the Bureau and the Crown. Under these circumstances, the Court found that Cadbury and Hershey had no reasonable expectation that their information, whether provided before or after execution of formal immunity and leniency agreements, would be protected from disclosure. The expectation was rather to the contrary given the interveners' contractual obligations to provide evidence for possible use in a criminal prosecution.

The Court went on to determine that even if settlement privilege did apply, disclosure to the accused would still be justified for two reasons. First, as with solicitor-client privilege, any settlement privilege was waived by the interveners when they provided the information to the Bureau and the Crown knowing of its intended subsequent use in criminal proceedings in which the Crown is duty-bound to disclose all relevant information to the accused. In the case of Cadbury's information, the Court found additional grounds for waiver of privilege given the Bureau's use of Cadbury's information in an affidavit to obtain search warrants against the certain of the accused. That affidavit had to be disclosed to the accused, and the use of Cadbury's information in it, and the passage of time (some eight years) since the warrants were issued, constituted waiver over any privilege.

Second, even if there were no waiver of privilege, there must be an exception to settlement privilege in this case to accommodate the rights of the accused to make full answer and defence. Such rights are protected under the Charter of Rights and Freedoms and must trump the interest in encouraging settlement. In this regard, the Court rejected the interveners' argument that failing to protect pre-immunity/leniency agreement communications would discourage cartel participants from coming forward under the Bureau's Immunity and Leniency Programs. In doing so, the Court noted that neither the Crown nor the Bureau expressed any concern about the future efficacy of the

Bureau's enforcement tools. The Court found that it was not necessary to establish a special test for an exception to settlement privilege in these circumstances. Rather, the Crown was in possession of the information at issue, therefore triggering the application of the duty in R. v. Stinchcombe to disclose all information in the Crown's possession, whether inculpatory or exculpatory, unless it is clearly irrelevant.

What Must Be Disclosed

The Court was careful to limit disclosure to "factual information" provided by the interveners to the Bureau and the Crown. Therefore, legal opinions that may have been offered, negotiations over the precise wording of agreements or views expressed about the relative importance of one matter or another need not be disclosed to the accused. In the Court's view, these would not constitute facts. Similarly, the Court found that the views of counsel for Cadbury or Hershey that there was or was not a prohibited conspiracy, at a given point in time, would not be relevant. The Court acknowledged, however, that it had developed this distinction without the benefit of reviewing the information in question, and recognized the possibility of disputes about the outer bounds of "factual information" required to be disclosed in particular situations. Accordingly, the Court considered its conclusions on the appropriate boundary between factual and non-factual information to be provisional and subject to reconsideration if the parties could not agree on whether the information at issue was factual or not**.**

Implications

The Court's decision vindicates the rights of an accused to full answer and defence in criminal competition proceedings brought under the Act. The decision has a number of implications:

• The decision ensures that accused persons in prosecutions involving the Bureau's Immunity or Leniency Programs have access to the full range of relevant information in the Crown's possession. Such information may include facts that are helpful to the defence, for example, in challenging the Crown's version of events or the credibility of Crown witnesses.

• It is a clear judicial rejection of the assertion that disclosure to the accused will harm the functioning of the Immunity or Leniency Programs. Given the clear terms of the bargain involved in qualifying for such programs, this should come as no surprise to competition counsel.

• While the Court's decision may not discourage use of the Bureau's Immunity and Leniency Programs, other recent developments may be having this effect; these include increased maximum fines and terms of imprisonment for cartel conduct, the inability to impose community-based sentences on cartel offenders, and the potential for cartel convictions (even those obtained through plea agreements under leniency) to disqualify corporations from bidding on significant government contracts in Canada and abroad.

• The increased stakes associated with cartel convictions may lead more parties to defend cartel allegations rather than cooperate with the Bureau, at least when immunity is not available. Indeed, the Court's decision in this case arose because of the accused's decision to contest the Crown's charges, which is a relatively rare occurrence in Canada, especially in cases driven by immunity applications. This decision may be the beginning of a new body of jurisprudence exploring important practical issues that may arise in contested criminal cartel proceedings in Canada.

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