Kluwer Competition Law Blog

Recent Developments in Canadian Cartel Enforcement

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by Anita Banicevic and Mark Katz[1]

2015 saw a number of interesting developments in cartel enforcement in Canada, the most important of which were setbacks suffered by Canada's competition authorities in two high profile prosecutions. We discuss these and other developments below, following a brief overview of the cartel enforcement regime in Canada.

Cartel Enforcement in Canada

(i) Overview

The principal cartel offences in Canada, as set out in the Competition Act (the "Act"), are the prohibitions against certain types of agreements between competitors (price-fixing/market allocation/output restriction) and bid-rigging. Parties convicted of these offences are potentially liable to fines and/or imprisonment.[2]

The detection and investigation of cartel offences in Canada is the responsibility of Canada's competition authority, the Competition Bureau (the "Bureau"). The Bureau's efforts in this regard are significantly assisted by its immunity and leniency programs, which offer parties incentives to self-report early and cooperate with Bureau investigations.[3]

While the Bureau's mandate is to detect and investigate cartel conduct, prosecutions are handled by the Public Prosecution Service of Canada ("PPSC"). The Bureau will refer matters to the PPSC that it believes should be prosecuted, but the decision to prosecute—as well as the carriage of any ensuing prosecution—is the PPSC's responsibility alone.[4] The PPSC is also responsible for the final decision on whether to grant a party immunity or leniency, again on the Bureau's recommendation.[5]

(ii) Enforcement Activity in 2015

In 2015, the Bureau announced several enforcement steps in connection with long standing and ongoing investigations involving the retail gas, auto parts and public procurement sectors.

• On April 17, 2015, Les Pétroles Global Inc. was fined CDN$1 million for its role in a price fixing agreement affecting several retail gas markets in the Province of Québec. This was the latest in a series of proceedings stemming from the Bureau's investigation of alleged price fixing in various

retail gas markets in Québec. To date, 33 individuals and seven companies have pleaded or been found guilty.[6]

• On May 21, 2015, a former employee of an Ottawa-based IT company received an 18 month conditional sentence after pleading guilty to participating in an alleged bid-rigging conspiracy relating to the supply of professional IT services to Library and Archives Canada. The employee was also fined CDN$23,000. Bid-rigging in the public sector has been a major enforcement focus for the Bureau in recent years, especially in the Province of Québec (as can be seen in the next item and others in this section).[7]

• On June 23, 2015, the Bureau laid 44 criminal charges against three companies and four individuals accused of rigging bids in the supply of water services to municipalities in the Province of Québec between February 2005 and October 2011. The Bureau also announced that one of the companies charged had agreed to plead guilty and pay a fine of CDN$117,000 for its role in this conspiracy.[8]

• On December 9, 2015, Toyo Tire & Rubber Co., Ltd. pleaded guilty and was fined CDN$1.7 million for its participation in an international bid-rigging conspiracy involving the supply of anti-vibration components to Toyota Motor Corp., Ltd. This was the latest Canadian plea in the global auto parts cartel case, which has now resulted in eight guilty pleas in Canada and over CDN$58 million in fines imposed since April 2013.[9]

• On December 17, 2015, Groupe Esthétix pleaded guilty and was fined CDN$10,000 for its participation in a bid-rigging scheme to obtain municipal contracts for specialized sewer services in the Province of Québec between 2008 and 2009.[10] On February 8, 2016, another company, Chalifoux Sani Laurentides Inc., pleaded guilty and was fined CDN$118,000 for participating in the same conspiracy.[11] To date, five companies and one individual have pleaded guilty in this matter, resulting in a total of CDN$268,000 in fines (the individual was ordered to perform 100 hours of community service).[12]

A few points should be noted about the foregoing:

• Several of the investigations in question were triggered by informants who cooperated with the Bureau under its immunity and leniency programs referred to above (auto parts/water services/sewer services), again underlining the importance of these programs in the Bureau's anti-cartel enforcement efforts.

• In one case, the public authority that was allegedly victimized by bid-rigging (Library and Archives Canada) brought the matter to the Bureau's attention directly. This is evidence that the Bureau's campaign to educate public authorities about the warning signs of bid-rigging is bearing fruit.[13]

• Notwithstanding that the penalties for cartel offences in Canada are quite severe on paper (e.g., up to CDN$25 million in fines per count and up to 14 years in jail),[14] the sanctions imposed are often modest in practice, especially in comparison to the United States.

• As in most jurisdictions, the vast majority of cartel matters in Canada are resolved by way of negotiated plea. The Pétroles Global case represents one of the relatively rare Canadian instances in which a criminal cartel case was contested at trial. As discussed in more detail in the next section, the Pétroles Global case is even more unusual in that it marks one of the few instances in

recent memory in which the authorities actually won.

Competition Bureau Setbacks

Although the vast majority of cartel matters in Canada are resolved through negotiated pleas, parties will occasionally choose to fight rather than settle. Two such contested cases came to a close in 2015, with the accused parties prevailing over the Bureau/PPSC in both instances. In the process, these cases have renewed questions about the ability of the Bureau/PPSC to effectively enforce Canada's anti-cartel law.

(i) R. v. Durward

The first contested case in question involved bid-rigging allegations relating to 10 competitive bidding processes issued by the Canadian federal government for professional IT services.[15] The core allegation against the accused was that they had engaged in unlawful bid-rigging by forming a consortium to coordinate the recruitment of sub-contractors and then agreeing on the sharing of these sub-contractors for the purpose of their bids.

The Bureau initiated its investigation into these allegations in 2005, triggered by concerns raised by one of the government agencies managing the bidding process.[16] It seems that one or more of the unsuccessful bidders also complained to the Bureau. The Bureau referred the matter to the PPSC for prosecution in 2008 and charges were issued against seven companies and 14 individuals in 2009.[17] Several of the companies and individuals pleaded guilty shortly after charges were laid.[18] The remainder of the defendants refused to plead and were eventually committed to stand trial after a preliminary inquiry. Due to various procedural considerations, it was ultimately decided that there would be two trials – one by jury (a very rare occurrence in prosecutions under the Act) and a second by judge alone.

The jury trial commenced in September 2014 and involved three of the corporate defendants and seven individual defendants. The trial concluded in April 2015, with the jury acquitting the three corporate defendants and six individuals (the seventh individual had already been acquitted by "directed verdict" of the judge after the prosecution had rested its case in February 2015).[19]

Although juries in Canada do not provide reasons for their decisions, based on the course of the trial and the judge's charge to the jury, it is conceivable that the jury found against the prosecution on one or more of the following grounds:

(i) there either was no "call for bids or tenders" as required by the offense, or the accused honestly believed that the process did not qualify as a "bid or tender"; and/or

(ii) any arrangements between the accused to coordinate on the recruitment and use of sub-contractors had been "made known to" the responsible federal government agencies, either expressly or implicitly.

The first point turns on the distinction developed in Canadian law between mere proposals or invitations to treat, which do not create contractual relations between parties, and actual bids or tenders, which result in a binding contract for services between the parties once the proposal is accepted.[20] In this instance, the defendants argued that the request for proposal ("RFP") process fell into the first category because the RFP was not designed to award the winners contracts to provide IT services to the federal government; rather, the selected parties only "won" the right to

be eligible for future contracts, to be awarded "as and when required."[21] They also argued that they lacked the requisite "mens rea" because they had honestly—although perhaps mistakenly—believed that the RFP process did not involve a "bid or tender," meaning that they did not have the necessary criminal intent to engage in bid-rigging.

As to the second point, there is no bid-rigging offense under section 47 of the Act if it is "made known to" the party calling for the bid or tender that the bidding parties are coordinating with each other.[22] The PPSC argued that this element of the offence obliged the accused to expressly and pro-actively notify the responsible federal agencies of their coordination; the defendants countered by saying that it was well known in the industry and in government that small and medium-sized companies such as the defendants would not be able to participate in these RFPs without working together to recruit and then share sub-contractors for their individual bids. The trial judge seemed to side with the defendants by instructing the jury that notification could be express or implied, and that it could be inferred from the evidence (including circumstantial evidence).

The loss in R. v. Durward was a significant setback for the Bureau/PPSC. Given the duration and cost of the investigation and criminal proceedings,[23] difficult questions were raised about why the prosecution had failed so dramatically, including whether the investigation was handled properly and even whether charges should have been issued in the first place. Some of the more awkward disclosures for the Bureau/PPSC that surfaced during the process included that Bureau investigators had not adequately canvassed the extent to which government officials knew about the impugned arrangements (they did); the defendants had actually submitted the lowest cost proposals; and at least one of the federal government agencies at issue had continued to do business with the defendants even while the investigation and criminal proceedings were ongoing.

(ii) R. v. Nestlé

The Bureau's second setback in 2015 came in the so-called "chocolate case," R. v. Nestlé.

This case had its origins in 2007, when the Bureau initiated an investigation into alleged price-fixing by Canadian chocolate manufacturers based on information supplied by an immunity applicant (Cadbury Canada).[24] Following a six-year investigation, charges were issued in 2013 against two chocolate manufacturers, several of their high level executives, and a wholesale distributor of chocolate products and one of its executives.[25] Shortly thereafter, a third manufacturer under investigation (Hershey Canada) pleaded guilty and agreed to pay a fine of CDN$4 million.[26]

The matter then proceeded through the normal stages of a criminal prosecution in Canada, including mandatory disclosure by the PPSC of the non-privileged evidence in its files. (This resulted in an interesting interlocutory decision which is described in more detail in section 3 below.)

Before a trial date could be set, however, the PPSC announced in September 2015 that it was voluntarily withdrawing the charges against two of the corporate accused and their executives.[27] This was followed by the subsequent announcement in November 2015 that the charges against the remaining accused (corporate and individuals) would also be dropped.[28]

Neither the PPSC nor the Bureau explained why this step was taken so abruptly. Presumably, the PPSC concluded that it no longer had a case worth pursuing. But the PPSC has never disclosed what led it to change its position.

(iii) Implications

The defeat in Durward and the surrender in Nestlé came on the heels of several Bureau losses in civil cases in 2015, including a major merger case at the Supreme Court of Canada.[29] This combination of setbacks has generated serious questions about the ability of the Bureau/PPSC to build and win a case, criminal or civil. Indeed, one prominent Canadian think tank suggested that a new external oversight body be appointed to scrutinize the Bureau's performance in light of these losses.[30]

A particular concern stemming from the Bureau's losses in Durward and Nestlé relates to the impact of these cases on the future viability of the Bureau's leniency program. After all, holding out the promise of lenient treatment in criminal cases in return for cooperation is only an attractive proposition if the alternative for parties is to face the real prospect of conviction at trial. The situations in Durward and Nestlé were particularly awkward for the Bureau because while the cooperating parties pleaded guilty and were fined, the parties that held out for contested trials were ultimately vindicated.

In a somewhat unusual step, the Commissioner of Competition, John Pecman, responded publicly to these criticisms in several speeches, most notably one delivered on December 8, 2015.[31]

The Commissioner devoted part of his speech to defending the Bureau's conduct (and perhaps by implication criticizing the PPSC).[32] For example, he had this to say about the turn of events in R. v. Nestlé:

I am confident the Bureau conducted a thorough investigation of this matter, which justified the initial decision by prosecutors to lay charges. However, as you know, the prosecutors are independent and have prosecutorial discretion. How this case was concluded was not what the Bureau expected when price-fixing charges were laid against the non-cooperating accused.[33]

The Commissioner also rejected concerns about the Bureau's leniency program. He said that, in the Bureau's view, the incentives for participating in the program "still make it an attractive option for individuals and companies whose conduct has contravened the cartel provisions of the Competition Act."[34]

That said, the Commissioner also outlined several steps being taken to improve the Bureau's handling of cartel cases. These include a "lessons learned" evaluation process to determine if the Bureau's criminal investigations need to be conducted differently, and the establishment of a specialized "criminal intelligence unit" within the Bureau to provide stronger analytical tools and to improve investigative efficiency.[35]

While the impact of Durward and Nestlé should not be exaggerated, it is clear that the Bureau's overall record in contested criminal cases, which is less than stellar, undercuts the effectiveness of its anti-cartel message to Canadian businesses and the public. It is therefore very important to the Bureau's future effectiveness that, uncomfortable as the process may be, it seriously re-assess its litigation performance, including its working relationship with the PPSC.

Disclosure of Cartel Evidence

An important issue that has been the subject of judicial consideration in recent years is whether, and to what extent, the Bureau and PPSC are obliged to provide access to their files in cartel

matters. In 2014, the Supreme Court of Canada issued a leading decision in R. v. Jacques, ordering that wiretap evidence obtained by the Bureau during a price fixing investigation be disclosed to class action plaintiffs' counsel and their experts.[36] 2015 saw the release of two decisions considering similar issues. In one case, R. v. Nestlé, the court considered the scope of information that must be disclosed by the PPSC to accused parties in cartel prosecutions. In the second, R. v. Thouin, the issue was whether a Bureau investigator could be called to give evidence in ongoing class action proceedings. The courts decided to order disclosure in both cases, thereby continuing the trend since Jacques of opening the Bureau's investigation files to third parties (defendants/civil plaintiffs).

(i) R. v. Nestlé

Even though the chocolate case did not proceed to trial, it did generate an important interlocutory decision that clarifies the nature of the PPSC's disclosure obligations to accused parties in competition law prosecutions.[37] (Pursuant to established case law, the PPSC is required to disclose to accused parties all of the relevant information in its possession, whether inculpatory or exculpatory.)[38]

The particular issue regarding disclosure in the chocolate case arose after the PPSC realized that it had mistakenly included in its disclosure package to the defendants certain documents over which Cadbury (the immunity applicant) and Hershey (which had pleaded guilty) claimed settlement privilege.[39]

The PPSC asked the defendants to either return or destroy the documents in question, but they refused. In fact, not only did the defendants assert that they were entitled to the information in question, they also said that they should be provided with any other information withheld by the PPSC on the basis of settlement privilege.

The PPSC applied to the Ontario Superior Court of Justice for a determination of the issue, and Cadbury and Hershey were granted intervener status. The Court comprehensively disagreed with the arguments advanced by the PPSC and the interveners and ruled that the PPSC was required to disclose all relevant factual information it had received from Cadbury and Hershey as part of the Bureau's immunity and leniency processes. The Court dismissed the claim of settlement privilege because both Cadbury and Hershey knew that, under the terms of their respective agreements with the PPSC, all information provided to the Bureau could be used by the PPSC in a prosecution against other parties and would be subject to the disclosure rules in criminal proceedings. They therefore had no reasonable expectation that this information would remain confidential.[40] The Court added that, in any event, the rights of the defendants to make full answer and defence trump any countervailing interest against disclosure.[41]

Importantly, however, the Court was careful to limit disclosure to "factual information" provided by Cadbury and Hershey to the Bureau. Thus, for example, 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 did not have to be disclosed to the accused. In the Court's view, these did not constitute "facts".[42]

Given the clear terms of the Bureau's immunity and leniency programs, the Court's decision in Nestlé should not have come as a surprise to parties or their counsel. That said, by ensuring that accused parties have access to the full range of relevant information in the PPSC's possession, the

Court's decision underscores that prospective immunity/leniency applicants must take into account the potential for disclosure when weighing whether or not to cooperate with the Bureau in Canada.

(ii) R. v. Thouin

Thouin is another decision stemming from the ongoing criminal and civil proceedings relating to retail gas price-fixing in the Province of Québec.

In this instance, counsel for the class action plaintiffs sought to examine the Bureau's senior investigator in the Quebec retail gas inquiry and to obtain access to evidence collected by the Bureau during the course of that inquiry. The Bureau opposed the order on the grounds that it was not a party to the class action proceedings and also that, as a federal entity, it is immune from being subjected to provincial proceedings. The Quebec Superior Court found in favour of the class action plaintiffs, relying on the Supreme Court of Canada's decision in Jacques.[43] This judgment was appealed but the appeal was dismissed by the Quebec Court of Appeal ("QCA") on December 22, 2015.[44] The QCA held that there was no immunity preventing the Bureau from being subjected to provincial proceedings and no pre-condition that it be a party to the proceedings in order to provide evidence.[45] The QCA also stated that any concerns that the plaintiffs were engaging in an evidentiary "fishing expedition" could be addressed by the case management judge.[46]

Credit for Compliance Programs

On June 3, 2015, the Bureau issued its revised Information Bulletin on Corporate Compliance Programs (the "Bulletin").[47] The purpose of the Bulletin is to provide the Bureau's perspective on the "essential components" for credible and effective corporate compliance programs designed to ensure compliance with the Act.[48]

One of the important innovations in the Bulletin is its statement that the Bureau may treat a pre-existing compliance program as a mitigating factor when making sentencing recommendations to the PPSC in criminal matters.[49] It has long been the case that the Bureau might treat the commitment to establish (or upgrade) a compliance program as a mitigating factor. But this is the first time that the Bureau has said that a pre-existing program may be of assistance to a party when it comes to sentencing, even if there was a breach of the law while that program was in operation.

The Bulletin is quick to point out, however, that the Bureau will not accord favourable treatment in all cases where the accused party had a pre-existing compliance program.[50] Rather, the Bureau will need to be persuaded that the party's compliance program was credible and effective at the time that the breach of the law occurred.[51] Indeed, the Bureau has even established a new Compliance Unit ("CU") that will be responsible for making this assessment, with parties wishing to receive credit for their programs having to grant the CU access to all appropriate corporate records and staff.[52]

There have not been any cases yet in which the Bureau has publicly discussed how this assessment process works in practice. Based on several "hypotheticals" in the Bulletin, however, it seems that the Bureau will look closely at whether the party had a legitimate "culture of compliance" in place, even if it may not have been perfect, or whether it simply paid lip service to compliance without taking the steps recommended in the Bulletin to promote effective implementation.[53]

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2 Competition Act, R.S.C. 1985, c. C-34, § 45, 47.
3 See Gov't of Can., Competition Bureau, Immunity Program under the Competition Act (June 7, 2010), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html; Gov't of Can., Competition Bureau, Leniency Program (Sept. 29, 2010), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03288.html.
4 Competition Act § 23.
5 See sources cited supra note 3.
6 See Gov't of Can., Competition Bureau, Les Pétroles Global Inc. Fined $1 Million For Gasoline Price-Fixing in Quebec (Apr. 17, 2015), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03908.html.
7 See Gov't of Can., Competition Bureau, Ontario Individual Sentenced After Pleading Guilty to Bid Rigging (May 21, 2015), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03936.html.
8 See Gov't of Can., Competition Bureau, Criminal Charges Laid in a Competition Bureau Investigation Relating to Water Services Provided by Quebec Companies (June 23, 2015), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03964.html.
9 See Gov't of Can., Competition Bureau, Toyo Tire Fined $1.7 Million for Participating in Bid Rigging Conspiracy (Dec. 9, 2015), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04013.html.
10 See Gov't of Can., Competition Bureau, Guilty Plea in the Quebec Sewer Services Cartel (Dec. 17, 2015), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04014.html.
11 See Gov't of Can., Competition Bureau, Quebec Company Fined $118,000 for Participating in Sewer Services Cartel (Feb. 8, 2016), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04028.html.

12 Id.
13 The Bureau has dedicated a section of its website to promoting awareness and prevention of bid-rigging and has developed presentation and other materials in that regard. See Gov't of Can., Competition Bureau, Bid-Rigging — Awareness and Prevention http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02646.html. As part of this effort, the Bureau has organized over 300 education sessions with government procurement agencies since 2005.
14 See Competition Act § 45(2).
15 See Gov't of Can., Competition Bureau, Competition Bureau to Consider Not-Guilty Verdicts in Major Bid-Rigging Case (Apr. 27, 2015) http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03912.html.
16 Id.
17 See Gov't of Can., Competition Bureau, Competition Bureau to Consider Not-Guilty Verdicts in Major Bid-Rigging Case (Apr. 27, 2015) http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03912.html.
18 See Gov't of Can., Competition Bureau, Individual Pleads Guilty to Rigging Bids for a Government of Canada Contract (June 9, 2009) http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03075.html.
19 See R. v. Durward, 2014 ONSC 4194.
20 See Ontario v. Ron Engineering, [1981] 1 S.C.R. III.
21 Certain of the defendants had unsuccessfully raised the same argument in a challenge to their committal following the preliminary inquiry. See R. v. Dowdall, [2012] O.J. No. 3831 (Ont. S.C.), aff'd, [2013] O.J. No. 1456 (Ont. C.A.).

22 See Competition Act § 47.
23 Among other things, the court room in which the trial was held had to be reconfigured to permit the presentation of electronic evidence.
24 See Gov't of Can., Competition Bureau, Price-Fixing Charges Stayed in Chocolate Case (Sept. 10, 2015) http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03987.html.
25 See Gov't of Can., Competition Bureau, Charges Laid in a Price-fixing Cartel in the Chocolate Industry (June 6, 2013) http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03569.html.
26 See Gov't of Can., Competition Bureau, Hershey Pleads Guilty in Price-Fixing Cartel (June 21, 2013) http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03578.html.
27 See source cited supra note 23.
28 See Gov't of Can., Competition Bureau, Final Price-Fixing Charges Stayed in Chocolate Case (Nov. 18, 2015) http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04003.html.
29 See Tervita Corporation et al v. Commissioner of Competition, [2015] 1 S.C.R. 161, http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14603/index.do.
30 C.D. Howe Institute, Watching the Watchmen: The Need for Greater Oversight of the Competition Bureau (Nov. 2015), https://www.cdhowe.org/cpc-communique/watching-watchmen-need-greater-oversight-competition-bureau.
31 John Pecman, Commissioner of Competition, Cutting Through the Noise (Dec. 8, 2015), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04011.html.
32 Id.
33 Id.
34 Id.
35 Id.
36 Pétrolière Imperiale c. Jacques, 2014 SCC 66.
37 See R. v. Nestlé Canada Inc., 2015 ONSC 810.
38 See R. v. Stinchcombe, [1991] 3 S.C.R. 326.
39 Settlement privilege is the rule of evidence in Canada that protects from disclosure communications exchanged by parties as they try to settle a legal dispute. It is also sometimes referred to as the "without prejudice" rule. See, e.g., Union Carbide Canada Inc. v. Bombardier Inc., [2014] 1 S.C.R. 800 at para 31.
40 R. v. Nestlé Canada Inc., supra note 27, paras. 65-69.
41 Id. at para. 73.
42 Id. at para. 83.
43 Daniel Thouin v. Ultramar Ltée, 2015 QSC, No. 200-06-000135-114.
44 2015 QCA, No. 200-09-009011-153.
45 Id.
46 Id.
47 See Gov't of Can., Competition Bureau, Corporate Compliance Programs (June 3, 2015) http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html.
48 According to the Bulletin, there are seven essential components for a credible and effective compliance program: management commitment and support; risk-based assessment of compliance needs; a set of compliance policies and procedures; training and education; monitoring, verification and reporting mechanisms; consistent disciplinary procedures and incentives for compliance; and an evaluation process. Id. at § 4.
49 Id. at § 3.2.1.
50 Id.
51 Id.

52 Id.
53 See id. at Appendix D, Hypotheticals 1-3.

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