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Recent Developments in Canadian Cartel Enforcement: Is Business Becoming Immune to the Competition Bureau's Immunity/Leniency Programs?

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Recent Developments in Canadian Cartel Enforcement: Is Business Becoming Immune to the Competition Bureau's Immunity/Leniency Programs?

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As noted in our July 26/19 post on Recent Developments in Canadian Merger Review, merger enforcement in Canada is already seeing the impact of the March 2019 appointment of Matthew Boswell as the new Commissioner of Competition. In particular, there are signs that the Competition Bureau (the "Bureau") is implementing a more aggressive enforcement agenda, with a focus on targeting non-notifiable transactions that are potentially anticompetitive.

The new Commissioner has not yet had as noticeable an impact on cartel enforcement in Canada. However, given that Commissioner Boswell is a former head of the Bureau's criminal matters branch, it is expected that he will be turning his attention to this area of competition enforcement as well.

And the state of Canadian cartel enforcement is certainly deserving of Commissioner Boswell's attention. While the Bureau continues to secure guilty pleas for cartel conduct on occasion, there are growing doubts about the sustainability of the Bureau's current enforcement paradigm. These questions are centered on whether the Bureau can continue to rely so heavily on its Immunity/Leniency programs to uncover and sanction cartel conduct affecting Canada.

In the article below, we describe the issues affecting cartel enforcement in Canada and consider its the potential implications.

1. What's the Problem?

As with other competition authorities, the Bureau has operated active Immunity/Leniency programs to encourage self-reporting by cartel participants. Pursuant to these programs, companies (or individuals) can benefit from more lenient penalties in return for disclosing their conduct and cooperating with any ensuing investigations and/or prosecutions. The benefits can include complete immunity from prosecution (for the party that is "first-in" to report) or a reduction of up to 50% in the fines that might otherwise have been imposed (for "second-in" and subsequent

parties).

Given the severity of the potential penalties involved for cartel conduct – jail for up to 14 years and fines of up to $CDN25 million per count- the benefits offered by the Bureau's Immunity/Leniency programs are significant. And the programs have been successful. Since 2014, for example, the Bureau has issued approximately 86 immunity markers to parties and approximately 31 leniency markers. (Note that not all markers ultimately turn into formal grants of immunity or leniency, but the number of markers granted roughly reflects the number of applications received and thus the level of interest in the program.)

It is no surprise, then, the that the Bureau has long considered its Immunity/Leniency programs to be its most effective tool for detecting, investigating, and prosecuting cartel conduct affecting Canada. But the impressive numbers above mask a very noticeable downward trend in recent years.

If we look at the last full fiscal year for which data is available (April 1, 2017 to March 31, 2018), for example, there were only 7 immunity markers issued in that time. By comparison, there were 31 immunity markers issued in 2015/16 and 27 in 2016/2017. Similarly, with respect to leniency (as opposed to immunity), there was only one leniency marker issued in 2017/2018 and also only one in 2015/16. This is down from 17 leniency markers issued in 2014/15 and 12 in 2015/16. In the last part-year period for which data is available (April 1, 2018 to September 30, 2018), there was only 1 immunity marker issued and 0 leniency markers. So the decline is obvious.

2. Why the Problem?

It is possible that the decline in immunity/leniency markers in the last few years is simply explained by the cyclical nature of cartel enforcement. There are bountiful years when large global cartels generate a large number of immunity/leniency applications (think auto parts, airlines and vitamins for example) and fallow years when the cartel business slows down, so to speak. While we don't deny that there is likely some element of "boom and bust" baked into the declining number of applications seen above, we think that there are also more systemic factors at work, and that these factors are increasingly causing parties to question the merits of self-reporting potential cartel conduct in Canada and cooperating with the Bureau.

(*i) The Immunity/Leniency Programs are Themselves Part of the Problem*

One of the biggest complaints about the Bureau's Immunity/Leniency programs is that they impose onerous obligations on cooperating parties. The Bureau demands "complete, timely and ongoing" cooperation from immunity/leniency applicants, which translates into obligations to make full disclosure of all relevant documents, making personnel available for (sometimes multiple) interviews, and testifying at the trials of non-cooperating parties.

The obligations on immunity/leniency applicants were made even more onerous by changes to the Bureau's programs in September 2018. Among other things, the programs now require that applicants must provide more comprehensive disclosure in an expedited time frame; and contemplates that the Bureau may record witness interviews.

Other changes have increased uncertainty for applicants. For example, there is now a new "interim" stage in the immunity process during which an applicant receives only conditional immunity (with full immunity granted only after the applicant's cooperation is no longer required).

Given the length of time that these types of investigations and prosecutions can take, this approach means that an applicant can be left waiting for a number of years until its position is confirmed.

As well, the new programs reverse the prior understanding that automatic immunity coverage would be extended to all directors, officers and employees under a corporate immunity agreement – instead, individuals seeking immunity will need to demonstrate their own personal knowledge of, or participation in, the unlawful conduct and their willingness to cooperate with the Bureau's investigation to benefit from the corporate immunity.

The new programs also create uncertainty for leniency applicants. Under the prior version of the leniency program, applicants were eligible to receive fine reductions of 50% for a first-in leniency applicant, 30% for the second-in applicant and on a case-by-case basis for subsequent applicants. Under the revised program, fine reductions will now turn entirely on the value of the applicant's cooperation with the Bureau's investigation, taking into account the timing of an application, speed of disclosure and the relevance of the evidence provided. Accordingly, a second- in or subsequent leniency applicant could receive a greater percentage discount than a first-in applicant if it provides more valuable evidence and cooperation, and the advantages of seeking a leniency marker may be more difficult to predict in advance under this new approach.

(*ii) The Impact of Class Actions*

Another important disincentive to cooperation is that immunity and leniency applicants are not protected from private actions for civil damages arising from their conduct.

The Competition Act allows private plaintiffs to sue cartel participants for damages resulting from their criminal conduct. Plaintiffs are also entitled to rely on any convictions of these cartel participants (whether by plea or after a contested proceeding) in support of their claims.

Follow-on class actions for damages resulting from cartel conduct are now a well-established feature of the Canadian landscape and have only gained further traction since the Supreme Court of Canada (the "SCC") ruled in 2013 that indirect purchaser claims may be certified as class actions.

Now the SCC is considering yet further potential expansions to permissible class action claims brought in connection with alleged cartel offences. In December 2018, the SCC heard the appeal of Godfrey v Sony Corporation in which the Court was asked to consider whether "umbrella purchasers" can assert statutory and common law claims in connection with alleged price-fixing conspiracies. Umbrella purchasers are those who purchase products directly or indirectly from non-conspirators, but who nevertheless allege they were overcharged because price-fixing by the cartel participants raised the general overall market price, thereby also causing firms that did not participate in the cartel to raise their prices.

Although Canadian law does not provide for treble damages as in the United States, the amounts at issue are still considerable, as is the cost of defending against civil claims. Therefore, potential immunity/leniency applicants must take into account the virtual inevitability that civil litigation will ensue once the cartel conduct is disclosed. This is an especially difficult issue for leniency applicants because they will be required to plead guilty in open court as part of their settlements with the Bureau.

(*iii) Threat of Debarment from Government Procurement*

For businesses that routinely transact with public entities in Canada, another – potentially catastrophic – outcome of a conviction for cartel offences under the Act is ineligibility to bid on public contracts pursuant to the Canadian government's "Integrity Regime" for public procurement.

The Integrity Regime was first adopted in November 2012 and provides that parties convicted of cartel and certain other criminal offences under the Act (among other federal offences) face automatic ineligibility of 10 years from contracting with the federal government (subject to possible exceptions).

The issue for the Bureau's Immunity/Leniency programs is that the Integrity Regime makes no exceptions for parties that are convicted only as a result of a voluntary plea resulting from an agreement with the prosecution. In addition, Canada's relatively new regime permitting (under certain conditions) deferred prosecution agreements without the entry of convictions in connection with certain offences does not extend to criminal cartel matters under the Act. Therefore, by entering into a leniency agreement with the Bureau, parties are exposing themselves to the risk of debarment for up to 10 years. Depending upon the circumstances, that could be a very serious matter.

That being said, recent settlements of bid-rigging charges without guilty pleas or convictions suggest that the Bureau, or at least the Public Prosecution Service of Canada (the "Crown"), which has formal
carriage of cartel prosecutions, is very much alive to the potentially unqualified and irremediable debarment issue facing companies charged with cartel offences under the Act.

Whether or not the Bureau or Crown will be open to similar settlements without convictions in future cartel matters remains to be seen, but the continued spectre of debarment is another factor that can disincentivize applications to the Bureau for leniency.

(*iv) Lack of Success in Cartel Prosecutions*

Although the Bureau has accumulated a respectable number of convictions for cartel and bid-rigging conduct over recent years, the vast majority of these results have been obtained through guilty pleas rather than contested trials. Indeed, where accused have decided to contest charges in recent cases, the outcomes have resulted in high- profile defeats for the Bureau and the Crown. These include decisions by the Crown to stay prosecutions against alleged cartelists in the confectionary industry and a jury verdict acquitting defendants on more than 60 charges in connection with an alleged scheme to rig bids for government contracts to provide IT services.

The Bureau's inability to win contested cases is obviously an important factor weighing against cooperation under the Immunity/Leniency programs. In a context in which parties have to weigh the value of the "carrots" offered by cooperation versus the "sticks" associated with non-cooperation, the Bureau's inability to effectively wield the stick of prosecution is a compelling argument against self- reporting.

The situation is even worse for the Bureau because in each of the cases mentioned above, the Bureau obtained guilty pleas and penalties against cooperating co-accused under its Leniency program. This difference in outcome sends the unhelpful message (for the Bureau) that cooperation means a criminal conviction whereas fighting the charges means a good chance of exoneration and vindication.

3. What are the Implications?

In our view, there is an increasingly lopsided imbalance between the incentives to cooperate with the Bureau in exchange for immunity/leniency as opposed to those that support refraining from self- reporting. On the one hand there is the theoretical prospect of exposure to substantial penalties, while on the other hand there are the very real problems of the disadvantageous obligations under the Bureau's Immunity/Leniency programs, inevitable exposure to civil damage claims, and the prospect of debarment from participation in public works, while also taking into account the Bureau's underwhelming track record of prosecution.

In view of this imbalance, we believe that parties will increasingly consider very carefully before opting to report possible cartel conduct to the Bureau. It will no longer be a virtually foregone conclusion that cooperation is the only path to take.

For that reason, we expect that the numbers of immunity/leniency applications will continue to stagnate and decline. Which leaves the Bureau with two options: improve the imbalance in incentives or diversify its enforcement weapons.

With respect to the former, we don't expect the Bureau to revise its Immunity/Leniency programs again to remove the recently inserted elements that have hurt their attraction and effectiveness. That is especially so because these recent changes were ostensibly implemented in order to be sure that the Bureau's cartel cases would be "prosecution ready."

That leaves the option of no longer relying so heavily on the Immunity/Leniency programs as the cornerstone of cartel enforcement in Canada.

We have already seen the Bureau take steps in that regard, including information-sharing with domestic public agencies, outreach to procurement authorities, the use of algorithms and analytics on bid data to identify evidence of bid-rigging, the development and promotion of tip-lines and whistleblower protections, and increased resources for intelligence gathering and proactive case selection, such as investigative training from experts at the U.S. Federal Bureau of Investigation.

We expect the above trend to continue and strengthen as the Bureau seeks out replacement detection and enforcement channels. All of which means that, even if the Immunity/Leniency program experiences a permanent prolonged lull, the Bureau will still be active (and indeed proactive) in pursuing cartel enforcement in Canada.

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