



Prepared for the 2012 International Cartel Workshop presented by the ABA Section of Antitrust Law and The International Bar Association (February 2012, Vancouver, Canada)

Canadian Cartel Law: Canada Raises the Stakes

Katherine L. Kay
Stikeman Elliott LLP
kkay@stikeman.com
+1-416-869-5507

Introduction – Important Legal and Policy Changes

While there have been no major litigated cartel cases in Canada in the last several years – and there has never been a litigated international cartel case in Canada – Canada has nevertheless had a great deal of recent activity by way of very significant changes to its cartel conspiracy law and the issuance of important statements regarding the approach of the Canadian antitrust enforcement authority, the Competition Bureau (the “Bureau”), to cartel matters.

By way of rundown of recent Canadian developments on the cartel side:

- The Canadian *Competition Act*¹ was amended to enact a new section cartel law, effective March 12, 2010, which (among other things):
 - changed the law from what had been described as a “partial rule of reason” provision to a *per se* provision;
 - increased the maximum fine from \$10 million per count to \$25 million per count;
 - increased the maximum period of imprisonment for individuals from five years to 14 years; and
 - created a new civil provision for “competitor collaborations”, under which arrangements that are not “naked restraints” will be analyzed in a civil proceeding with a full consideration of the impact on competition.
- At the end of 2009, the Competition Bureau released “Competitor Collaboration Guidelines”² which are, in the words of the Bureau, “intended to assist firms in assessing the likelihood that a competitor collaboration will raise concerns under the criminal or civil provisions of the *Act* and, if so, whether the Commissioner [of Competition] would commence an inquiry in respect of the collaboration.”
- In June 2010, the Competition Bureau updated its Bulletin entitled “Immunity Program Under the *Competition Act*”³ (the “Immunity Bulletin”). The 2010 update reflects legislative amendments but is

* This paper is an update of earlier versions, including one presented at the 2011 Canadian Bar Association Annual Fall Competition Law Conference.

1 (hereinafter, the “Act”), R.S.C. 1985, c. C-34, as amended.

2 Online at <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html>.

3 Online at <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html>.

otherwise essentially the same as the October 2007 Bulletin regarding the immunity program (which replaced the initial Immunity Bulletin from 2000).

- In September 2010, the Bureau released its “Leniency Program Bulletin”⁴ (the “Leniency Bulletin”), which formalizes the Canadian leniency program. The final version of the Leniency Bulletin differs substantially from the prior draft released for consultation, and in its final form does not address sentencing principles as the draft had originally proposed to do.
- In April 2011, the Bureau updated its document “Immunity Program: Frequently Asked Questions”⁵ (the “Immunity FAQs”). The FAQs are expressly said in the new Immunity Bulletin to continue to apply.
- In May 2011, the Bureau released updated “Leniency Program FAQs”⁶, which reflect the new Leniency Bulletin and changes in the legislation.

It should be noted that the Bureau engaged in extensive consultations with members of the Canadian and other bars regarding its immunity and leniency programs and the Competitor Collaboration Guidelines. The Bureau is clearly cognizant of the benefits to the efficient operation of business in Canada for guidance to be issued by the Canadian enforcement authority where practicable.⁷

Before moving to a discussion of these recent developments, a description of the Canadian “setting” (including points of distinction from the U.S. and jurisdictional issues) is useful.

A Word About the Canadian Landscape

The Canadian Competition Bureau, headed by the Commissioner of Competition, investigates alleged anti-competitive conduct in Canada and, in the case of criminal matters, recommends prosecution to the Public Prosecution Service of Canada⁸ (the “PPSC”). In practice, discussions and negotiations regarding criminal matters are conducted on behalf of the Canadian competition enforcement authorities by representatives of both the Competition Bureau and the PPSC. Notwithstanding the practice, as a legal matter the PPSC has the final legal authority in respect of criminal prosecution issues: it decides whether to accept immunity and leniency applications and has the final say in a negotiated resolution.

The Canadian criminal competition law climate shares many characteristics with its United States (and, increasingly, worldwide) counterparts: advocacy conducted in meeting rooms rather than courtrooms, and negotiated rather than litigated outcomes. There are, of course, very good reasons for this, falling primarily in the risk management category: a negotiated resolution of criminal charges won’t leave anyone on the pleading defendant’s side happy, but it will create certainty and a measure of finality, should contain adverse public relations, and allows for the proverbial “turning of the page”.

Those benefits exist across jurisdictions and irrespective of the particular legal issues in any jurisdiction. That said, there are a few particular “facts of life” in Canada which seem to lead inexorably to negotiated resolutions of criminal exposure on the competition side. First is the virtual absence of litigated cases, leaving us with no guidance on many crucial points of Canadian law; this is a notable difference to the U.S. situation. The second is the reality of life as a close neighbour to the United States and its aggressive antitrust enforcement authorities (and plaintiffs’ class action lawyers): exposure to U.S. proceedings looms large and will almost certainly be addressed, and once exposure in the United States is being resolved, Canadian issues will almost always be resolved as well. The third is the reality that the Canadian volume of commerce is virtually always a fraction (as a very rough rule of thumb, 10%) of the U.S. volume of commerce. If a company is settling its exposure in the

4 Online at <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03288.html>.

5 Online at <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03250.html>.

6 Online at <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03289.html>

7 Although lavish praise for the Bureau does not flow frequently from this author, the Bureau’s consultation efforts with respect to these publications are laudable and appreciated.

8 The PPSC is also referred to as the Department of Public Prosecutions or DPP. While the Leniency Bulletin refers to the PPSC, the Immunity Bulletin refers to the DPP; both references are to the same entity.

United States, a Canadian settlement based (as it almost invariably is) on the Canadian volume of commerce is likely to be seen by the company as a rounding error.

Hence the Canadian defence lawyer's lament: so many issues, so little opportunity to litigate. As a practical matter, much of the advocacy in Canadian cartel cases takes place at the negotiating table rather than in a courtroom. Nevertheless, vigorously asserting defences, including jurisdictional arguments, and laying out all of the frailties in the prosecution's case is a key role for defence counsel to play, whether the setting is the negotiating table or the courtroom.

A negotiated resolution can take many forms: immunity, where there is actually no prosecution or fine to be negotiated, but there will be a tremendous amount of interplay with the Bureau and the PPSC and much expense and effort (and a fair bit of negotiating, to be sure) in meeting a party's obligations under the immunity program; leniency, where there will be a guilty plea and a fine, to be negotiated and which will include the relevant reduction for the party's status in the leniency program; and a negotiation outside of the leniency program, where virtually all of the same sentencing principles and negotiation dynamics apply.

Points of Distinction Between the United States and Canada

Because of Canada's proximity to the United States, both physically and commercially, most antitrust enforcement activities which occur in the U.S. have at least some spill-over into Canada. Thus, for a company accused of violating Canadian competition law, there are several points of distinction between Canadian and U.S. antitrust law which will be of interest to the company and its non-Canadian legal advisors and which require consideration. Some notable ones are:

- There is no limitation period for criminal offences under the Canadian *Competition Act*.
- As discussed above, the Canadian conspiracy offence has moved from what has been described as a "partial rule of reason" offence to a *per se* offence. We have a brand new criminal conspiracy provision, which is completely untested.
- There are no formal sentencing guidelines in Canada as in the United States.
- In an immunity context, the failure by an immunity applicant to disclose the commission of another competition law offence to the prosecution does not give rise to "penalty plus" in respect of subsequent offences. Instead, the penalty for failure to disclose is said to be revocation of the immunity granted in respect of the first offence.
- In civil actions which follow on criminal investigations (including class actions), treble damages are not available; damages are meant to be compensatory only.

Jurisdictional Issues

There are no cases in Canada which deal with the issue of jurisdiction of Canadian courts in respect of a conspiracy allegation under section 45 of the *Act* (the criminal cartel provision) where the conduct took place wholly outside of Canada but is alleged to have had an impact in Canada.

Outside of the competition law area, Canadian legal authority from the Supreme Court of Canada (the country's highest court) states that as a general rule, no person can be convicted in Canada of an offence committed outside Canada.⁹ For a Canadian criminal court to act, there must be a "real and substantial link" between the conduct and Canada.

In a civil context where the issue of criminal liability was not before the court, a judge in Ontario (the largest province in Canada) observed in a price-fixing class action that "the language of section 45 is not directed to only those conspiracies entered into within Canada."¹⁰ One might expect that in a contest between the Supreme

⁹ *Libman v. R.* [1985] S.C.R. 178 at 213.

¹⁰ *VitaPharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.*, [2002] O.J. No. 298 (S.C.) (Q.L.) at para. 59.

Court of Canada's approach to jurisdiction in criminal matters and the musings of an Ontario judge in a different context, the Supreme Court's approach would be preferred. As noted, however, there is no case which has considered the jurisdictional issue in a criminal cartel context.

In addressing jurisdictional issues where the Bureau has commenced an inquiry regarding a non-Canadian company and is trying to get that company to come to a negotiated resolution, the Canadian competition authorities will first point to any sort of physical contact with Canada: a meeting in a Toronto airport hotel, a shared limo to a trade association meeting in a resort at Whistler, etc. (there are, of course, hypothetical examples). Whether such a fleeting contact would be considered sufficient to establish jurisdiction on a "real and substantial link" test has not been litigated.

Even in the absence of a physical contact with Canada, the prosecution takes the position that a conspiracy entered into outside of Canada in which Canada is addressed (by way of discussions regarding Canadian pricing, for example) provides the requisite "real and substantial link" to Canada. Moving even further from an actual connection to Canada, the same conspiracy without an actual mention of Canada but where there is an impact on Canada (typically, in the form of an alleged price increase for the product in Canada) is also said by the prosecution to meet the jurisdictional test for Canada. Again, there has been no judicial consideration of this issue as a matter of Canadian criminal law.

Even assuming that the Canadian courts have subject-matter jurisdiction over the offence, the matter of personal jurisdiction over the accused also needs to be addressed. Furthermore, the prosecution needs to be able to effect service of legal process (the information or indictment). There is no express legislative provision authorizing service *ex juris* of legal process in respect of offences under the *Competition Act*. This means that service on a non-Canadian company with no physical presence in Canada cannot likely be duly effected as a matter of Canadian law. That said (more lamenting here), that issue has also never been litigated.

The existence of interesting legal arguments regarding the limits of the jurisdictional reach of Canada's cartel law has not stopped dozens of guilty pleas in Canada in international price-fixing cases, typically entered into where companies are resolving their cartel exposure in multiple jurisdictions in the world.

New Criminal Cartel Offence

The former (and longstanding) Canadian criminal conspiracy law required (in addition to proving an arrangement, agreement, understanding or other form of "meeting of the minds" between the alleged co-conspirators) proof of an undue lessening of competition. As of March 12, 2010, the requirement to show market impact is no longer a feature of the conspiracy provision.

New section 45 provides (in part) as follows:

45(1) Conspiracies, agreements or arrangements between competitors –

Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

- (a) to fix, maintain, increase or control the price for the supply of the product;
- (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
- (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

(2) **Penalty** – Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding \$25 million, or to both.

(3) **Evidence of conspiracy, agreement or arrangement** – In a prosecution under subsection (1), the court may infer the existence of a conspiracy,

agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

(4) **Defence** – No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

(a) that person establishes, on a balance of probabilities, that

(i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and

(ii) it is directly related to, and reasonably necessary for giving effect to, the object of that broader or separate agreement or arrangement; and

(b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

Subsection 45(8) defines “competitor” as “includ[ing] a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement...”

All of the defences which had existed under the predecessor section 45 continue to apply, along with the new “ancillary restraints defence” (or “ARD”) in subsection 45(4). In consultations regarding prior proposed language which was similar to the ARD, many parties criticized the ARD as being too narrow and potentially subjecting many widely-accepted agreements (such as exclusive distribution arrangements) to criminal prosecution.

It seems reasonable to expect that the “rule of reason” analysis seen in the U.S. will make its way into arguments made in Canada, as our courts interpret the new defence. (This, of course, assumes there will be litigated cases, which would have the salutary collateral benefit of reducing the lamentations).

Along with changing the criminal law to make prosecutions easier, the amendments to the *Act* also introduced a new civil provision, section 90.1, which applies to agreements or arrangements between competitors which prevent or lessen or are likely to prevent or lessen competition substantially in a market. Such cases are dealt with before a specialized administrative tribunal, the Competition Tribunal, in a civil proceeding where a full rule of reason analysis is said to apply.

Competitor Collaboration Guidelines

The Canadian Competition Bureau published the “Competitor Collaboration Guidelines”¹¹ (the “Guidelines”) on December 23, 2009, less than three months before the coming into force of the new criminal cartel provisions and the companion civil provisions. The Guidelines, which were preceded by an earlier consultation draft published in May 2009, answer several questions raised by the new sections 45 and 90.1 of the *Act*, but leave many more to be answered by the courts and the Competition Tribunal.

As noted repeatedly in this paper, under new section 45, agreements between competitors (which the new provisions define to include potential competitors) to fix prices, to allocate sales, customers or markets, or to fix or control production or supply of a product are said to be illegal – whether or not such agreements have any impact on relevant markets. No longer will the prosecution in Canada be required to prove the anti-competitive effect of such agreements in order to obtain a conviction in so-called “hard core” cartel cases.

The more stringent approach to competitor agreements reflected in the new section 45 is accompanied by an alternative, civil track for non-hard core cartels: agreements between competitors that are not appropriate for criminal prosecution but may nonetheless have anti-competitive effects. The new section 90.1 of the *Act* (which came into effect on March 12, 2010), creates a civilly reviewable matter in respect of existing or proposed

¹¹ *Supra* note 2.

agreements between persons, two or more of whom are “competitors”, that prevent or lessen competition substantially (or are likely to do so). The factors to be considered by the Competition Tribunal in undertaking this assessment are effectively the same as those applicable to the existing merger review provisions (i.e., effective remaining competition, barriers to entry, change and innovation, etc.). In terms identical to the existing merger review provisions, an efficiencies defence will apply if the agreement brings about “gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition” and the efficiency gains would not be attained if a prohibition order were issued. In contrast to section 45, available remedies under section 90.1 are purely injunctive in nature, and no private actions for damages are available for alleged breaches of section 90.1.

One concern expressed in relation to the dual-track approach to cartels was that it could permit the Bureau to delay choosing between the criminal and civil tracks, and use the threat of criminal prosecution to encourage civil settlements. To address this concern, the Guidelines state that “at no time will the Bureau use the threat of criminal prosecution to induce settlement in cases proceeding by way of the civil track.” The Guidelines also state that “the Bureau will make every effort to arrive at a timely decision on the appropriate section to be applied in evaluating an agreement.”

As to the question of “what is an agreement”, the Guidelines take the position that both explicit and tacit agreements can violate the criminal prohibition against price-fixing and other hard core cartel behaviour. Accordingly, while so-called conscious parallelism (a few competitors independently deciding, for example, not to compete on the basis of price since to do so would only incite a price war) is recognized not to be illegal, the Guidelines state that conscious parallelism plus facilitating practices such as sharing sensitive pricing information could be enough to prove the existence of an agreement between the parties.

A useful aspect of the Guidelines is the explicit recognition that the Bureau will not view market restriction elements of dual-distribution agreements or franchise agreements as potentially subject to criminal prosecution under section 45 (provided that such agreements are truly limited to the supplier/distributor or franchisor/franchisee in question, and do not mask a broader conspiracy among suppliers, distributors, franchisors or franchisees).

A consistent theme through the Guidelines is that the Bureau regards section 45 as applying only to so-called “naked restraints” on competition, which it describes as “restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture.” Such an enforcement approach is welcome, and is reflected in several hypothetical examples included in the Guidelines.

The Competition Bureau has said that although it intends to use its new criminal powers to act against hard core cartel activity, it is nonetheless looking for test cases to clarify the ambit of the new law. In addition, it is important to note that the Guidelines reflect the current enforcement approach of the Bureau and the PPSC, and are not binding on private litigants or, indeed, the courts, which will have the ultimate say on the meaning of the new competitor agreement provisions. It also bears noting that the Bureau takes the position that it is not bound by its Guidelines either, so while the guidance is helpful and gratefully received, the comfort offered by the Guidelines is not of the “take it to the bank” variety.

The Canadian Immunity Process

Immunity under the Canadian process¹² means total amnesty or immunity from prosecution. If a defendant qualifies for immunity, no prosecution will be brought against that party, provided the conditions of the immunity program are met. Immunity is available only to the “first-in”, being the first party to contact the Bureau and qualify for immunity. Subsequent cooperating parties who wish to acknowledge their guilt and cooperate with the authorities, including by pleading guilty and providing cooperation by way of evidence, witnesses and documents, may qualify for the leniency program, discussed below.

As in all other jurisdictions in the world, the Bureau’s immunity program has been remarkably successful in allowing for the discovery of cartel activity and in facilitating further prosecutions. As stated in the preface to

¹² The Bureau’s immunity program is contained in the Immunity Bulletin (*supra* note 3) and the FAQs (*supra* note 5).

the Immunity Bulletin, the immunity program “has proven to be the Bureau’s single most powerful means of detecting criminal activity. Its contribution to effective enforcement is unmatched. Its continued appeal to those who would otherwise remain undercover is pivotal to our enforcement efforts.”

As in other jurisdictions, because immunity is available only to the first-in, the quest for immunity can be “a race to the door” in Canada. This is particularly a factor in this country, where Canadian immunity applications are often made in conjunction with amnesty applications in the United States (and elsewhere); the clock is ticking across the world, and there is a great deal of coordination required and consideration of consequences and consistency of approaches is very important (and Canada is not always top of mind for people putting out worldwide fires).

Immunity will be available if the Bureau is not aware of the offence and the party is the first to disclose it, or the Bureau is aware of the offence and the party is the first to come forward before there is sufficient evidence to warrant a referral of the matter to the PPSC.

The party must terminate its participation in the illegal activity.

The party must not have coerced another to be a party to the illegal activity.

Immunity is not available for single party conduct (you only get immunity if you can “rat out” someone else).

Throughout the course of the Bureau’s investigation and subsequent prosecutions, the party must provide complete, timely and ongoing cooperation, including not disclosing its immunity status; revealing all conduct that is an offence under the *Act*; providing full, complete, frank and truthful disclosure of all non-privileged information, evidence and records in its possession, under its control or available to it, wherever located; taking all available measures to secure the cooperation of current directors, officers and employees for the duration of the investigation and any ensuing prosecution and doing so with respect to former employees as agreed by the Bureau; facilitating interviews of current and former personnel; and doing all of that at the party’s own expense and at locations chosen by the Bureau.

An application for immunity may be made by a company or by an individual. If a company qualifies for immunity, all current directors, officers and employees who admit their involvement in the illegal cartel and who provide complete, timely and ongoing cooperation also qualify for immunity. Former directors, officers and employees who offer to cooperate with the Bureau’s investigation may qualify for immunity, based on the Bureau’s review (this is typically a point for negotiation). As noted above, even where a company does not qualify for immunity, current or former directors, officers, employees or agents may be considered for personal immunity.

The steps in the immunity process are as follows:

- **Step 1: Initial Contact (Marker):** a request for immunity is initiated by a communication to the head of the Bureau’s Criminal Matters Branch to discuss the possibility of receiving immunity from prosecution in connection with an offence under the *Act*. Typically the initial call is made by Canadian legal counsel to the defendant who names the product at issue and asks for a “marker” as the first-in, which preserves that party’s place in the immunity queue.
- **Step 2: Proffer:** by way of a proffer, the party provides a detailed description of the illegal activity and discloses sufficient information for the Bureau to determine whether the party qualifies for immunity. The proffer is usually made by legal counsel and can be made on a hypothetical basis. Proffers can be made orally or in writing; the Bureau recognizes the sensitivity to providing written material and frequently Canadian proffers are made orally. The FAQs state that the proffer must be provided within 30 days of the marker request, although the FAQs also acknowledge that extensions can be provided (communication with the Bureau regarding timing challenges is crucial; in practice, if there are good reasons for an extension, one will be given). Question 19 in the FAQs describes in some detail that on a proffer the Bureau will expect to receive information regarding: the parties, the product, the industry, market definition (which will be less relevant under the new law), the conduct, impact of the conduct, evidentiary process (available witnesses, records, etc.), and immunity applications in other jurisdictions. The Bureau may ask to interview an employee or other company witness before deciding on the immunity application. If the Bureau concludes

that the party will provide cooperation and meet the requirements of the program, the Bureau will recommend to the PPSC that immunity be granted. The PPSC has an independent discretion as to whether to accept the Bureau's recommendation.

- **Step 3: Immunity Agreement:** if the PPSC accepts the recommendation, a written immunity agreement will be entered into between the party and the authority.
- **Step 4: Full Disclosure and Cooperation:** after the immunity agreement is entered into, the obligation to provide full disclosure and cooperation applies.

The Bureau treats as confidential the identity of a party requesting immunity, except as required by law, is necessary for judicial authorization or to secure the assistance of a Canadian law enforcement agency, if the party consents, if the immunity status has already been disclosed, or if necessary to prevent the commission of a serious criminal offence. The Bureau will share information with a foreign enforcement authority if a waiver is provided by the immunity applicant; the Bureau will expect a waiver where immunity applications have been made in other jurisdictions.

If, after receiving immunity, the party fails to comply with its obligations under the immunity agreement, the PPSC may revoke a party's immunity and take action against the party. A witness that refuses to provide complete, timely and ongoing cooperation with the Bureau's investigation may be "carved out" of the immunity agreement. The FAQs state (and the practice is) that the Bureau will in the normal course discuss the situation with the immunity applicant and provide a reasonable opportunity to the applicant to address any shortfalls in its conduct before the Bureau would recommend revocation to the PPSC. The PPSC will provide 14 days written notice to the party before revocation. Where a company loses immunity, its employees continue to be immunized, except for employees who fail to meet their cooperation obligations.

The Canadian immunity program includes "Immunity Plus", whereby a company may not qualify for immunity in respect of Offence A because it was not first-in, but it may disclose to the Bureau a new (typically related) Offence B, previously unknown to the Bureau. The company will get immunity with respect to Offence B (assuming it otherwise qualifies), and will receive a credit (or "plus"), which is not specified, but is typically significant, in respect of Offence A.

The Canadian Leniency Process

The Bureau has formalized its leniency program in the form of the Leniency Bulletin,¹³ which had been released in draft in 2009 for public consultation. As noted above, the draft Bulletin had contained discussion of the Bureau's approach regarding sentencing recommendations, but those portions of the draft were deleted before the Bulletin was finalized.

Leniency in Canada applies to a party which is not the first-in (the first-in party gets immunity), but comes in to the Bureau further down the line, would like to admit its guilt and qualify for lenient treatment. Although formalized by way of the Leniency Bulletin, a form of leniency process has in fact existed in Canada for many years. The Leniency Bulletin and FAQs provide more specific guidance and create a framework which was not in place previously, and address some issues about which there had previously been uncertainty.

As with the immunity program, the leniency program is an important part of the Bureau's enforcement efforts. As noted in the preface to the Bulletin: "Parties are more likely to come forward, cooperate and plead guilty (rather than litigate) when they are aware of the relevant leniency considerations and when they are confident that the Bureau will follow them in its leniency recommendations to the PPSC."

The Leniency Bulletin "sets out the factors and principles that the Bureau considers in making a recommendation to the PPSC for lenient treatment in the sentencing of individuals or business organizations accused of criminal cartel offences".

¹³ *Supra* note 4.

As in other jurisdictions, the context for the leniency program is a negotiated resolution which will involve the party pleading guilty and the negotiation of an agreed sentence (typically a fine), subject to approval of the court. Although the court can depart from the PPSC recommendation, in practice courts will approve sentencing recommendations made by the PPSC. A judge will only depart from a sentencing recommendation where accepting the recommendation would either be contrary to the public interest or bring the administration of justice into disrepute.

The following basic conditions apply in order to qualify for the leniency program:

- The party must have terminated its participation in the illegal activity.
- The party must cooperate fully and in a timely manner, at its own expense, with the Bureau's investigation and any subsequent prosecution of the other cartel participants by the PPSC.
- The party must agree to plead guilty.

Under the leniency program, applicants are required to provide full, frank, timely and truthful cooperation. Timely cooperation is said to be of paramount importance to the Bureau's determination of the leniency discount it will recommend to the PPSC in respect of any leniency applicant. The earlier the cooperation, the better the mitigation of the sentence.

The first leniency applicant who meets (and continues to meet) the Bureau's qualifications is eligible for a reduction of up to 50% of the fine that would otherwise be recommended. Where the party is a business organization, the Bureau will also typically recommend that no separate charges be laid against the applicant's directors, officers and employees (subject to exceptions in extreme cases of wrongdoing). Subsequent leniency applicants may qualify for reductions in fines of up to 30%.

The Bulletin describes six steps for leniency applications, similar to those applicable to immunity:

- Initial Contact/Marker Request.
- The Proffer.
- Leniency Recommendation to the PPSC.
- The Plea Agreement.
- Full Disclosure.
- Court Proceedings.

The initial contact with the Bureau is usually made by the party's Canadian legal counsel and a place in the leniency queue (as in the immunity context, referred to as a "marker") is provided by the Bureau (second-in, etc.). The proffer is to follow within 30 days. The proffer is made on a "without prejudice" basis, and must describe in detail the anti-competitive activity, including the participants to the offence, the nature of the agreement, the affected volume of commerce in Canada and any other factors relevant to culpability. In preparing the proffer, leniency applicants are expected to conduct thorough internal investigations to locate all relevant evidence, wherever located. The Bureau will make its leniency recommendation to the PPSC only after the applicant has completed its proffer and provided all relevant information. The Leniency Bulletin states that "The PPSC retains full discretion whether to follow the Bureau's recommendation, but will give the Bureau's recommendation due consideration."

A plea agreement is entered into with the PPSC and is conditional on full and timely cooperation of the leniency applicant and those covered thereunder (employees, typically). Once the plea agreement is concluded, the leniency applicant is expected to complete its production of evidence, information, records, and other material to the Bureau; individuals will attend interviews and be prepared to testify at a trial; and the corporate applicant is to facilitate the cooperation of directors, officers and employees (including former people in those categories,

if they qualify for lenient treatment under the plea agreement). After the plea agreement is reached, a date for the entering of a guilty plea is arranged.

The Bureau will treat as confidential the identity of the party requesting leniency (and the information provided by the party in furtherance of that request) except where that information is already public, disclosure is required by law, to a Canadian law enforcement agency for the purposes of the administration and enforcement of the *Act*, is necessary to prevent the commission of a serious criminal offence, or disclosure is authorized by the party. A leniency applicant is required to keep its contact with the Bureau confidential; its leniency application is not to be disclosed to anyone without the consent of the Bureau, which will not be unreasonably withheld. The Bureau states that it will not disclose the existence of a leniency application or information obtained thereunder to competition authorities in other jurisdictions, but the Bulletin makes clear that the Bureau will request and expect to receive a waiver entitling it to do so from any leniency applicant.

Negotiating a Resolution

While many negotiations with the Bureau and PPSC take place in the context of the leniency process, settlement discussions are very similar whether they occur “in” or “out” of the formal leniency process. With the move to a more formal leniency process, the Bureau is taking the position that a party must declare “up front” its guilt in order to qualify for leniency. In practice, however, a party can enter the leniency process as the second-in (for example) and if a negotiated resolution cannot be achieved because (for example) the Bureau’s view of the relevant volume of commerce is simply not consistent with what the party would accept as the basis for an agreed fine, the party might say “we are done talking” and would no longer be part of the formal leniency process and would not qualify for the 50% reduction its second-in status would otherwise generate. In real life, it’s all a negotiation with several moving pieces: time frame, volume of commerce, affected products, any evidence of actual overcharge, credit for cooperation, leniency discount, etc.

It is, of course, in negotiating the penalty that “the rubber hits the road”. The Bureau/PPSC generally start any discussion of fine amounts based on 20% of the relevant volume of commerce, with adjustments for aggravating and mitigating circumstances. As noted above, the draft Leniency Bulletin had a fairly lengthy discussion of sentencing principles and calculation of fine amounts, including a discussion of the role of indirect commerce, but that entire discussion was deleted. In order to understand the approach to sentencing in cartel cases in Canada, therefore, one must rely on the knowledge of those who have done it before, perhaps supplemented by locating transcripts of submissions made on sentencing during a plea hearing or written submissions of the PPSC.

Plea/sentence negotiations with the PPSC/Bureau are vigorous, including regarding the time period of the conduct to be pleaded to and products covered by the plea. Demonstrable price war or “cheating” periods can sometimes be negotiated out of the volume of commerce calculation for the negotiated fine amount. Quite apart from the obvious incentives to keep the time period and list of price-fixed products as narrow as possible in terms of the criminal penalty, the consequences in subsequent civil (class action) litigation can be considerable. As a matter of Canadian practice, guilty pleas are accompanied by agreed statements of fact or statements of admissions filed by both parties with the court and publicly available thereafter, in which the particulars of the offence are described. Defence counsel work hard at limiting the damage which will inevitably occur in future class and other civil actions based on the court filings.

The negotiation of guilty pleas almost invariably involves offering up the valuable assistance which this now-cooperating defendant can provide in order that the Bureau can pursue other participants in the alleged conspiracy, who can be persuaded to plead guilty only if the negotiating accused provides the evidence tantalizingly offered during the plea negotiations and the cooperation discussions. This sets up the distasteful spectre of company employees wracking their corporate brains for recall of who was present at a meeting at a golf club, or what additional products were discussed, etc. The obligation to cooperate with the Bureau as part of its ongoing investigation is typically part of the agreed resolution, even outside of a formal leniency application. The way the game is played, of course, the threat of the cooperating party’s evidence is enough to ensure that there are other cooperating parties, and so on, and so on.

One of the key advantages to a negotiated resolution (even outside of a formal leniency application) is the potential ability to negotiate an agreement from the prosecution that no or only limited company individuals will be “carved out” or exposed to being pursued personally for the alleged offences under the *Competition Act*. While Canadian antitrust authorities do not put notches in their enforcement belts based on person-days in jail (as a cynical Canadian would portray the U.S. enforcement attitude), the threat of individual prosecution is nevertheless a real one in Canada and its removal is of considerable value to a corporation and its employees. Often a negotiated resolution for a company will end the exposure for its directors, officers and employees provided they agree to cooperate (exceptions to this include where the employee occupied a leadership or ringleader position in the conspiracy).

What Next?

The next phase of Canada cartel law will indeed be interesting. Hope springs eternal that the defence lawyer’s lament will be answered in the form of cases to test the new law. It seems more likely, though, that with the higher stakes and a more rigorous set of principles guiding immunity and leniency applications, there will be increased and increasingly vigorous settlement negotiations with the Bureau and the PPSC. Much is new and there are many areas for debate and challenge, so there will be no shortage of activity.