DAVIES

dwpv.com

Is Business Becoming Immune to the Canadian Competition Bureau's Immunity Program?

Recent Developments in Antitrust Cartel Enforcement

Antitrust commentators are questioning the continuing significance of immunity and leniency programs that have been at the forefront of anti-cartel enforcement internationally since the U.S. Department of Justice introduced the first leniency program in the early 1990s. Amid evidence of declining applications for leniency, some are asking whether a turning point in criminal antitrust enforcement has been reached, requiring adapted investigatory tools and approaches, or whether this is simply a temporary lull that will soon be forgotten. Here we set out our views on the situation in Canada, where leniency is experiencing a downturn, but at a time when the Canadian Competition Bureau has a new leader with a prosecutorial background and experience heading the criminal enforcement side of the organization.

In our view, business may well increasingly question the merits of self-reporting potential cartel conduct and cooperating with the Bureau in return for various forms of leniency.

Appointment of New Commissioner of Competition

On March 5, 2019, Matthew Boswell was appointed Commissioner of Competition to lead the Bureau for a five-year term. Commissioner Boswell previously occupied senior positions within the Bureau, including most recently as interim Commissioner. He is perhaps most closely associated with his prior tenure as the head of the Bureau's Criminal Matters Branch, as it was then known, which is responsible for the investigation of criminal cartels, bid-rigging and deceptive marketing practices. He was recruited to that position from the Ontario Securities Commission, for which he prosecuted securities fraud and other regulatory offences. And he previously worked as a Crown attorney with the Ministry of the Attorney General of Ontario, prosecuting a wide range of criminal offences. Given Commissioner Boswell's professional background and direct involvement in the Bureau's recent criminal enforcement program, it is timely to reflect on where the Bureau may be heading on cartel enforcement under Commissioner Boswell's leadership and whether the Bureau's immunity and leniency programs are likely to feature prominently.

In our view, business may well increasingly question the merits of self-reporting potential cartel conduct and cooperating with the Bureau in return for various forms of leniency. This results from a number of interrelated factors, and the near-term future of cartel enforcement in Canada is likely to be characterized by the following general trends:

- the diminished effectiveness of the Bureau's Immunity and Leniency Programs as a cornerstone of cartel detection and enforcement;
- increased Bureau efforts to offset reduced immunity and leniency applications through more proactive case development, emphasizing market monitoring, outreach and information-sharing with partner agencies and possible measures to enhance its whistleblower regime; and
- the entrenchment and proliferation of potential adverse consequences of being a target of a cartel investigation or prosecution, even as a leniency applicant.

We elaborate on each of these trends and their underlying causes below.

Trend One: Reduced Effectiveness of Immunity and Leniency Programs

After nearly 12 months and two rounds of public consultations, the Bureau released the final version of revised Immunity and Leniency Programs in September 2018. (The first person or entity to report an offence to the Bureau may qualify for "immunity," without facing any criminal fine or charges. Subsequent applicants in respect of the same offence may qualify for a lower level of "leniency" in

The Bureau's changes to the Immunity and Leniency Programs could have a chilling effect that would reduce the attraction and effectiveness of the programs in the future, ultimately making it more difficult for the Bureau to detect and prosecute conspiracies and other unlawful conduct.

penalties.) As we have discussed in prior publications, the Bureau's changes to the Immunity and Leniency Programs could have a chilling effect that would reduce the attraction and effectiveness of the programs in the future, ultimately making it more difficult for the Bureau to detect and prosecute conspiracies and other unlawful conduct.

GOAL POSTS HAVE SHIFTED ON THE IMMUNITY BARGAIN

The changes to the immunity program impose more onerous cooperation and disclosure obligations on immunity applicants with the goal of allowing the Bureau and the Crown to be sure their cases are "prosecution ready." The new program contemplates that the Bureau may record witness interviews, provides for a new "interim" stage during which the applicant receives only conditional immunity (with full immunity granted only after the Public Prosecution Service of Canada, or PPSC, is satisfied that the applicant's cooperation is no longer required), and requires more comprehensive and timely disclosure for an applicant to benefit from full immunity.

The revised immunity program even reverses the prior fundamental understanding that information provided to the Bureau by immunity applicants under the policy will not be used against them. Under the template grant of interim immunity attached to the current policy, the Bureau and the Crown may use information received from a corporate immunity applicant against that applicant in any subsequent proceedings in the event that the applicant breaches its obligations under the immunity policy, and any privilege that may attach to such information will be deemed to be waived.

In addition to these significant changes to the obligations of immunity applicants, automatic immunity coverage will no longer be provided for 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.

LENIENCY DISCOUNT WILL DEPEND ON AN EX-POST EVALUATION OF MULTIPLE FACTORS

Under the leniency program, applicants were previously 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 new 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.

THE UPSHOT: FEWER APPLICATIONS?

We expect to see fewer immunity and leniency applications in 2019 and beyond, as a reflection of the greater uncertainty created by the new immunity and leniency processes, combined with many of the concurrent trends described further below, including increased exposure to custodial sentences, debarment from bidding on public works, ever-expanding civil damages claims and the Bureau's mixed track record of obtaining convictions in contested prosecutions. Indeed, even in the relatively short time since the Bureau issued initial draft revised immunity and leniency policies for consultation in October 2017, the number of cartel immunity markers granted by the Bureau dropped by nearly 75% in the Bureau's fiscal year ended March 31, 2018, compared with the prior fiscal year (7 versus 27). Further, the Bureau issued only a single immunity marker in the first half of its fiscal year ended March 31, 2019. Similarly, with respect to leniency (as opposed to immunity), it is also notable that only two cartel leniency markers had been granted by the Bureau in the two and a half years before September 30, 2018.[1] That said, the Commissioner recently disclosed that the Bureau is expecting "more to come" in terms of cartel immunity and leniency recommendations to the PPSC, which may suggest that additional markers are being granted.[2]

Trend Two: Development of Alternative Cartel Prosecution Pipelines

As if in anticipation of the revised Immunity and Leniency Programs' chilling effect on self-reporting cartel conduct, the Bureau has quietly been nurturing non-leniency techniques for detecting and deterring cartel conduct. These techniques include 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.

The Bureau has entered into memoranda of understanding (MOUs) or other similar agreements with 32 domestic partners to date, including police forces (Royal Canadian Mounted Police, Ontario Provincial Police), authorities responsible for overseeing public procurement (Public Services and Procurement Canada, Defence Construction Canada, Inspector General of Montréal), and sectoral regulators (Ontario Securities Commission, Ontario Energy Board, Ontario's Independent Electricity System Operator). According to the Bureau, MOUs "establish a framework for interaction, information sharing, cooperation in enforcement or collaboration in other matters of mutual interest." The importance of these relationships to the Bureau's detection of cartel conduct is reflected in the fact that, as recently reported by a senior Bureau official, the largest number of cartel investigations now come from referrals by partner government agencies.[3]

1 See Competition Bureau Performance Measurement & Statistics Report: For the period ending September 30, 2018, at Tables 2.0.11 and 2.0.12, available online at https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04397.html. Statistics are not available beyond September 30, 2018.

2 See speech by Commissioner of Competition Matthew Boswell to the Canadian Bar Association Competition Law Spring Conference 2019 (May 7, 2019), available at https://www.canada.ca/en/competition-bureau/news/2019/05/no-river-too-wide-no-mountain-too-high-enforcing-and-promoting-competition-in-the-digital-age.html.

3 Remarks of Vicky Eatrides, Acting Senior Deputy Commissioner of Competition, Cartels and Deceptive Marketing Practices, at the Fourth Annual Forum on Cartel Enforcement: "The State of Cross-Border Criminal and Cartel Enforcement: Enforcement Trends in the U.S. and Canada," May 21, 2019, Washington, D.C.

It remains to be seen whether the Bureau may seek legislative amendments to permit the payment of monetary rewards to incentivize whistleblowers to come forward.

In addition to establishing deeper ties with other agencies that may possess information of interest to the Bureau's investigative efforts, the Bureau has conducted extensive education and outreach to help these and other third parties (e.g., procurement authorities, customers and whistleblowers) identify and report potential bid-rigging and cartel behaviour:

– The Bureau reported having held 70 meetings with domestic agencies and regulators in the first half of the Bureau's most recent fiscal year alone and delivering 27 bid-rigging presentations to nearly 1,400 external attendees in the 18 months prior to September 30, 2018.[4]

– The Bureau has been developing bid-screening algorithms to scour electronic bidding data for possible signs of collusion based, for example, on the dispersion of bid prices or the amount by which bid prices differ from estimates internally generated by procurement authorities. It has also developed a standard document for use by procurement authorities that requires bidders to certify the independence of their bids and to provide information that may assist in detecting potential collusion among bidders.

– In 2017, the Bureau launched a dedicated tip line and online form to accept anonymous tips about suspected fraud, collusion or corruption in federal government contracts and real property agreements. It also periodically raises awareness about the legal protections for whistleblowers against employer reprisals. For all of these efforts, however, the Bureau's published statistics indicate that no whistleblower has come forward under its program to date. It remains to be seen whether the Bureau may seek legislative amendments to permit the payment of monetary rewards to incentivize whistleblowers to come forward. Such incentives exist under analogous regulatory regimes in Canada (e.g., Ontario Securities Commission) and abroad (e.g., in the United Kingdom, where tipsters can receive up to £100,000 in bounties). The Bureau is openly considering whether to advocate for the adoption of bounties to reinforce its whistleblower policy.

In addition to all of the foregoing, the Bureau is dedicating more resources to its intelligence and market monitoring capabilities generally, including with a view to detecting potential cartel conduct. In June 2018, the then-interim Commissioner Boswell estimated that roughly half of the Bureau's cartel investigations at that time were commenced *ex officio* rather than being the product of immunity or leniency applications. As noted above, another Bureau official has confirmed that the single largest source of cartel investigations is referral by partner government agencies. In addition, the Commissioner recently disclosed that that the Bureau has created a new Criminal Intelligence Unit aimed at providing tactical and strategic intelligence support to promote a more

4 See Competition Bureau Performance Measurement & Statistics Report: For the period ending September 30, 2018, *supra* note 1 at Tables 5.01, 5.02 and 7.08.

proactive "intelligence-led" approach to enforcement.[5] And in a commitment to bolster the Bureau's enforcement capabilities, Bureau personnel have received investigative training from experts at the U.S. Federal Bureau of Investigation.

Trend Three: Continued Proliferation of Adverse Consequences of Cartel Allegations

As noted above, the Bureau's Leniency and Immunity Programs may already be undersubscribed due in part to the increasingly lopsided tradeoff between, on the one hand, avoiding or mitigating a potential criminal prosecution and resulting fines or prison terms and, on the other hand, the increasing monetary and resource costs of cooperating with the Bureau and exposure to civil damages and potential debarment from public contracting. We do not see this general tradeoff analysis returning to balance any time soon, in light of ongoing developments such as entrenched risks of follow-on civil damages claims, increased exposure to custodial sentences for cartel conduct, uncertainty around debarment and deferred prosecution policies and an underwhelming track record of Crown success in contested cartel prosecutions supported by immunity applicants.

COMPETITION CLASS ACTIONS ARE COMMON AND MAY INCLUDE SIGNIFICANTLY EXPANDED CLAIMS

Follow-on class actions for damages resulting from conduct alleged to be in breach of the Act's criminal provisions have long been a well-established feature of the Canadian enforcement landscape and have only gained further traction since the Supreme Court of Canada (SCC) ruled in 2013 that indirect purchaser claims may be certified as class actions. That ruling, among other things, reinstated the certification of a competition class action brought by indirect purchasers of Microsoft Windows and Office software that culminated in a settlement requiring Microsoft to fund class claims and counsel fees up to $517 million, with a minimum settlement value of $312 million.[6] The magnitude of the nationwide settlement, which was approved by a British Columbia trial court in November 2018, is a new record for private action settlements under the Act.

Now the SCC is considering yet further potential expansions to permissible class action claims brought in connection with alleged competition 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 market price, thereby also causing firms that did not participate in the cartel to raise their prices. The SCC is also expected to provide guidance on a number of additional issues at the core of competition class actions, including the requirement that the plaintiff provide a reasonable methodology for establishing harm on a class-wide basis in order to meet the

5 See speech by Commissioner of Competition Matthew Boswell to the Canadian Bar Association Competition Law Spring Conference 2019 (May 7, 2019), *supra* note 2.

6 *Pro-Sys Consultants Ltd. v Microsoft Corporation,* 2018 BCSC 209.

As the Bureau's cartel enforcement caseload increasingly focuses on conduct post-dating the introduction of the 2012 sentencing rules, the severity of custodial sentences sought and obtained by the Crown for competition offences is likely to increase significantly.

certification test applicable in most Canadian jurisdictions, and guidance on whether the Act is a complete code for price-fixing conspiracy claims, potentially displacing the common law conspiracy causes of action in these cases.

While class action plaintiffs have been enjoying the general run of play recently, it is worth noting the Ontario Court of Appeal decision, on April 17, 2019, in *Hughes v Liquor Control Board of Ontario,* which affirmed a $2.35-million costs award to defendants who successfully moved for summary judgment dismissing a competition law class action in its entirety on the basis that the practices complained of were the result of well-considered, long-standing and recently affirmed provincial government policy, and therefore immune from suit under the "regulated conduct defence" that has been enshrined in Canadian law for close to a hundred years. In addition to the potential for its significant adverse costs award to discipline tenuous competition class actions, at least in Ontario, the Court of Appeal's decision espoused a view of the regulated conduct defence in line with controlling precedent, confirming that conduct will be immunized even when it is not expressly mandated in detailed primary or secondary legislation, but instead flows implicitly from regulatory authority.

HARD TIME FOR HARD-CORE CARTEL OFFENCES MORE LIKELY THAN EVER

Following amendments to the *Criminal Code* in 2012, an individual convicted and sentenced to prison under the Act's current criminal conspiracy, bid-rigging and certain deceptive marketing provisions can no longer serve his or her sentence in the community. Prior to these amendments, a conditional sentence (or house arrest) could be imposed when an offence (like the Act's cartel provision) was not punishable by a mandatory minimum sentence and the court handed down a prison sentence of less than two years. To date, conditional sentences have been the custodial sentence of choice for cartel offences under the Act; however, as the Bureau's cartel enforcement caseload increasingly focuses on conduct post-dating the introduction of the new sentencing rules, the severity of custodial sentences sought and obtained by the Crown for competition offences is likely to increase significantly. It is also worth keeping in mind that individuals convicted of cartel or bid-rigging conduct under the Act potentially face up to 14 years in prison, which is on the very high end of custodial exposure for competition regimes worldwide.

Indeed, the Bureau continues to be vocal in its views that individuals should be held accountable for criminal cartel conduct. The Bureau's enforcement statistics support these views to an extent, with nine individuals having been sentenced to a combined 95 months of imprisonment (including service in the community) for cartel offences in the last five years.[7]

7 See Competition Bureau Performance Measurement & Statistics Report: For the period ending September 30, 2018, *supra* note 2 at Tables 2.3.11 and 2.3.13. In addition (and included in the total noted above), since September 30, 2018, two individuals have pleaded guilty and received 12-month and 18-month sentences (served in the community) for bid-rigging offences.

The Bureau has also highlighted a recent decision of the Québec Court of Appeal[8] as underlining the need for severe penalties in cartel matters, suggesting that the Bureau may be seeking serious jail time for competition offences in the future. In that case, the Court of Appeal reversed a trial judge's sentencing decision and imposed prison terms ranging from 18 to 36 months for three individuals who colluded to obtain public works contracts worth more than $15 million. The Court found that the trial judge incorrectly minimized the seriousness of the crimes, which did not involve offences under the Act, but included fraud, conspiracy to commit fraud and forgery charges under the *Criminal Code*. The Court emphasized interference with public contracting and taxpayer money as an aggravating factor. Significantly, even though two of the three substituted sentences were for less than two years and the offending conduct pre-dated the amendments to the *Criminal Code* noted above, the Court of Appeal reversed the trial judge's conditional sentences and required each of the individuals to serve their time in jail, rather than in the community.

While in some respects the prospect of hard prison time enhances the benefits of obtaining *immunity*, the increased personal stakes involved for individuals pleading guilty as part of a *leniency* agreement, or subsequently being charged pursuant to a corporation's cooperation with the Bureau, may incentivize individuals to contest charges, leading to drawn-out criminal proceedings in the public eye as a result of an immunity or a leniency agreement.

DEBARMENT: NEW DPA REGIME NOT AVAILABLE FOR *COMPETITION ACT* OFFENCES

For businesses that routinely transact with public entities in Canada, another – potentially catastrophic – outcome of a conviction for cartel and certain other offences under the Act is ineligibility to bid on public contracts. The Canadian government's integrity regime was first adopted in November 2012 and has gone through several iterations since then, in part to address criticisms on various grounds, including the severity of the ineligibility penalties it imposes and the criteria used for determining ineligibility.

Under the current version of the integrity regime, suppliers convicted of certain criminal cartel, bid-rigging and deceptive marketing conduct under the Act (among other federal offences) face automatic ineligibility for 10 years, with the possibility of obtaining a reduction of up to five years under a negotiated "administrative agreement" with Public Services and Procurement Canada (PSPC) if the supplier can demonstrate that it cooperated with law enforcement authorities or has undertaken remedial actions to address the conduct that led to its ineligibility.[9] In addition, PSPC may in its discretion declare a supplier ineligible for 10 years if it is convicted of similar offences outside Canada, or it is directly implicated in its affiliate's commission of relevant competition offences under the Act or foreign legislation. Furthermore, PSPC has the authority to suspend a supplier for 18 months if it has been charged with or admits guilt to such offences under the Act or in a jurisdiction other than Canada.

8 *R v Fedele*, 2018 QCCA 1901 (available in French only).

9 Proposed revisions to the integrity regime published in the fall of 2018 would introduce an additional measure of flexibility to reduce the period of ineligibility through administrative agreements, but these proposals have not been implemented and their status is presently uncertain.

Recent settlements of bid-rigging charges without guilty pleas or convictions suggest that Canadian prosecutors may be very much alive to the potentially unqualified and irremediable debarment issue facing companies charged with offences under the *Competition Act*.

Despite the adoption of a deferred prosecution agreement (DPA) regime in September 2018 (referred to as "remediation agreements"), which was meant, in part, to address the potentially disproportionate negative effects of a criminal conviction on innocent parties (e.g., employees, customers) beyond the immediate wrongdoers, DPAs are not available for companies charged with competition offences under the Act. Under the DPA regime, the Crown may grant a corporation amnesty in exchange for the corporation's agreement to adhere to certain terms and conditions, the fulfilment of which will result in charges being withdrawn (and no criminal conviction) upon expiry of the DPA. Some of the more common requirements of a DPA are an admission of responsibility, payment of financial penalties and/or reparation, reform of corporate policies and practices, and full cooperation with the government's investigation. Although companies charged with certain offences, such as fraud and bribery, that may lead to debarment under the integrity regime may benefit from DPAs, it is not clear why the new regime is not available to companies facing charges for cartel and bid-rigging conduct under the Act.

This approach is in contrast to DPA regimes elsewhere, such as in the United States, where DPAs are available for antitrust offences. Indeed, the U.S. Department of Justice recently announced the conclusion of a DPA with a generic pharmaceutical company that was charged with conspiring to fix prices, rig bids and allocate customers for a medicine used to treat diabetes. In its press release, the Department of Justice noted that a factor in reaching the DPA was that "a conviction (including a guilty plea) would likely result in [...] mandatory exclusion of [the company] from all federal health care programs for a period of at least five years, which would result in substantial consequences, including to American consumers."[10]

In Canada, it may be that the government considered the function of a DPA regime in a competition law context to already (and more appropriately) be served by the Bureau's Immunity and Leniency Programs. However, two recent settlements of bid-rigging charges without guilty pleas or convictions suggest that Canadian prosecutors may be very much alive to the potentially unqualified and irremediable debarment issue facing companies charged with offences under the *Competition Act*.[11] According to court documents, a significant factor in these settlements, which involved fines and prohibition orders only,[12] was the participation by the accused parties in a voluntary reimbursement program established by the Province of Québec, which gave companies an opportunity to reimburse amounts improperly paid by public bodies in the course of tendering, awarding or managing a public

10 See: https://www.justice.gov/opa/pr/pharmaceutical-company-admits-price-fixing-violation-antitrust-law-resolves-related-false.

11 See, e.g.: https://www.canada.ca/en/competition-bureau/news/2019/03/engineering-firm-to-pay-4-million-in-quebec-bid-rigging-settlement.html; and https://www.canada.ca/en/competition-bureau/news/2019/02/dessau-to-pay-19-million-in-settlement-over-bid-rigging-on-public-contracts-in-quebec.html.

12 One of the orders also required adoption and maintenance of a competition law compliance program.

contract. Whether or not the PPSC will be open to similar settlements without convictions in future cartel matters remains to be seen,[13] but the continued spectre of debarment is another factor that may disincentivize applications to the Bureau for leniency and push defendants into contesting charges of cartel conduct.

EXISTENCE OF INFORMERS MAY NOT PREDICT PROSECUTION SUCCESS

Although the Bureau has accumulated a respectable number of convictions for cartel and bid-rigging conduct over the years, the vast majority of these results have been obtained through guilty pleas by cooperating parties under the Bureau's leniency program. More recently, however, a number of accused have decided to contest charges and put the Bureau to its proof, resulting in some high-profile defeats for the Bureau. 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. In each of these cases, the Bureau had the benefit of an immunity applicant and had obtained guilty pleas and penalties against cooperating co-accused under the leniency program.

In addition, in November 2017, a superior court judge in Québec acquitted an individual charged with rigging bids for ventilation services despite the testimony of two Crown witnesses cooperating under plea agreements for the same conduct and who claimed they had agreed to the scheme directly with the accused at a local restaurant.[14] Among other adverse findings in the case, the Court preferred the evidence of the accused (who testified in his defence) to that of his alleged co-conspirators, which the Court described as imprecise, inconsistent and often incoherent. The Court also noted that one of the cooperating witnesses had inexplicably destroyed contemporaneous records as well as drafts of his "will say" statement.

These cases serve as a reminder that the existence of guilty pleas and cooperating witnesses is not necessarily a predictor of prosecution success against remaining accused parties in contested criminal competition law cases. In each instance, the coherence of the Crown's case theory, the quality of evidence and, in particular, the credibility and reliability of witnesses (including the accused, if he or she testifies) remain crucial factors. These and similar cases also likely contributed to the recent revisions to the Bureau's Leniency and Immunity Programs that place a greater onus on applicants to provide reliable and timely evidence to the Bureau; however, as discussed above, such revisions may themselves tend to dissuade parties from seeking leniency in certain circumstances.

13 The prosecutorial discretion to do so in any particular case rests with the PPSC, but it would be reasonable for the PPSC to consult with the Bureau on the issue. As to the Bureau's possible views on the matter, it may be noted that the Bureau's press releases announcing these settlements did not specifically identify the fact that they proceeded on the basis of prohibition orders without convictions.

14 *See R v Rousseau*, 2018 QCCS 640 (available in French only).

DAVIES

For more information, please contact:

John Bodrug
jbodrug@dwpv.com
416.863.5576

Charles Tingley
ctingley@dwpv.com
416.367.6963

Léon Moubayed
lmoubayed@dwpv.com
514.841.6461