Antitrust Advisory: Cartels

Author(s): Jordan Giurlanda

Often referred to as "the supreme evil of antitrust," the cartel offence is the cornerstone of Canada’s Competition Act and the top priority of the Competition Bureau and antitrust enforcers around the world.

- The Chief Justice of the Federal Court of Canada has stated that price fixing and other hard-core cartel agreements are “nothing less than an assault on our open market economy” and “therefore ought to be treated at least as severely as fraud and theft, if not even more severely than those offences.”

- Over the past 15 years in Canada there have been more than 80 convictions for cartel offences with fines totaling over $300 million. See Osler’s Cartels in Canada: A Snapshot for details.

- Individuals are on the Bureau’s radar. In April 2014, two individuals pleaded guilty to conspiracy charges for their participation in a price-fixing cartel involving various surcharges in the ocean freight industry. In questioning the lack of jail time as part of a joint sentencing submission, the Chief Justice of the Federal Court remarked on the powerful deterrence effect of a potential prison sentence for cartel offences.

- Class actions for millions of dollars in damages based on an alleged violation of the conspiracy provisions of the Competition Act have increased dramatically – even in the absence of a criminal investigation or conviction – and are expected to escalate as a result of the Supreme Court’s 2013 decisions confirming the standing of indirect purchasers (in addition to direct purchasers) to assert competition claims. Read the Osler Update on these decisions.

Here is more about what you need to know about Canada’s cartel offence:

1. **The Offence.** It is a criminal offence for two or more competitors to agree to fix or increase prices, allocate markets or customers, or fix or lessen product supply.

   The prosecution needs to prove that the parties are “competitors” (actual or potential) and that they intentionally entered into an “agreement,” which is often established on the basis of circumstantial evidence. However, the prosecution does not need to establish that the prohibited agreement was implemented (e.g., no need to prove that the competitors engaged in price-fixing) or that such agreement had, is having or is likely to have any anti-competitive effect. The offence is complete upon entering into the agreement itself.
2. **Interaction with the Criminal Code.** Third parties who are not “competitors,” such as trade associations, need to be aware that if they have facilitated the formation of the price-fixing, market allocation or output restriction agreement, they may be subject to prosecution under criminal conspiracy provisions through the operation of the counselling and/or aiding and abetting provisions of the Criminal Code. For more on this topic, refer to our Osler Update.

3. **No Limitation Period.** There is no limitation period in connection with criminal cartel enforcement in Canada; albeit conduct pre-dating March 2010 would be assessed under the former conspiracy provisions which require proof of anti-competitive effect. Cartels are prosecuted as indictable criminal offences and charges may be laid against the firm and individuals such as directors and officers.

Note that when the ancillary restraints defence applies, the Bureau can still challenge the agreement before the Competition Tribunal as a civil matter under section 90.1, if the agreement prevents or lessens, or is likely to prevent or lessen, competition substantially in a relevant market.

4. **The Key Statutory Defences.** Among the defences available are:
   - The “ancillary restraint defence” applies where the challenged agreement is ancillary to, and necessary to give effect to, a broader agreement that is not itself unlawful (e.g., a temporary non-compete covenant in an asset purchase agreement, pursuant to which the seller agrees not to compete with the buyer with respect to the purchased business for three years post-closing).
   - The “regulated conduct defence” applies where conduct that would otherwise violate the Competition Act is authorized and specifically required by other legislation (e.g., a provincial agricultural marketing board legislation that requires producers to limit quantities and sell at specific prices).

5. **Expansive Jurisdiction.** The conspiracy offence contains a specific jurisdiction-extending provision that permits prosecution of Canadian firms for following “directives” of their foreign affiliates to implement (even if unknowingly) cartel agreements entered outside of Canada by such affiliates. This provision is targeted specifically at international cartel activity affecting Canada. It allows the application of the Competition Act even in situations where the actual conspirators are not located or incorporated in Canada. Penalties include a fine in the discretion of the court.

6. **The Enforcers.** In Canada, the investigation and prosecution of cartels is split. The Bureau is responsible for investigating cartels and has several powers available under the Competition Act to seek and compel evidence, including the use of search warrants, wiretap orders, and documentary and testimonial orders. Prosecutions are carried out by an independent agency, the Public Prosecutions Services of Canada (PPSC), of which the Director of Public Prosecutions (DPP) is the head.

While the PPSC will advise and consult with the Bureau on their case referrals, the decision as to whether criminal charges should be brought will be made independently by the DPP according to the following criteria: (i) the proposed prosecution must have a “reasonable prospect” of conviction – being more than a prima facie case; and (ii) any prosecution must be in the public
7. **Global Enforcement Effort.** The globalization of business means cartel activity is increasingly international in scope. As one enforcer put it, “cartels do not stop at national borders, so cartel investigations cannot either.” Coordinated investigations of international cartels pursuant to mutual legal assistance treaties, competition law cooperation agreements and informal coordination is commonplace. Coordinated execution of searches across multiple continents is now a regular occurrence. Most recently, the Bureau worked with the United States Department of Justice Antitrust Division, the Japan Fair Trade Commission, the European Commission, and the Australian Competition and Consumer Commission in securing guilty pleas in the ongoing massive global auto parts investigation.

8. **The Carrot.** The Competition Bureau’s Immunity and Leniency Programs have unquestionably been responsible for detecting, investigating and punishing more domestic and international cartels than any other of its investigative tools such as search warrants and wiretaps. These programs may lead to confessions before an investigation is even opened or may induce companies already under investigation to abandon the cartel, race to the government for immunity or leniency, and provide evidence against the other cartel members.

The incentive created by the Bureau’s programs is exacerbated by the proliferation of similar programs around the world. In the early 1990s, only the United States had a leniency program for cartel participants; today, there are more than 60 jurisdictions with leniency programs. Typically, a firm seeking immunity or leniency in one jurisdiction will seek it in other countries where its products are sold. Greater enforcement cooperation among agencies has led to an increase in coordinated immunity/leniency applications while at the same time has added uncertainty, expense and complexity to the process. This places a premium on companies understanding the extent of their exposure in each jurisdiction and quickly determining their optimal strategy.

9. **The Stick.** Senior management need to take an acute interest. The penalties and related consequences for violating Canada’s criminal cartel law are real and severe:
   - A fine of $25 million per count and/or maximum 14 years imprisonment.
   - Exposure to private actions (individual and class basis) for damages – competition law-based class actions are surging and such damages may be significantly higher than fines available under the *Competition Act*.
   - Exposure to debarment from federal government procurements for 10 years from the date of conviction. Importantly, applicants under the Competition Bureau’s Leniency Program are not exempted from the federal government’s debarment regime. Similar debarment policies exist in the Province of Québec.

10. **Bottom Line:** Stakes are too high for businesses operating in Canada to be complacent – the potential legal, economic and reputational risks of non-compliance with the *Competition Act* are real and must be effectively managed by businesses as part of their overall risk-management strategy. Read more about the Bureau’s detailed guidance on effective compliance programs in our recent Osler Update.

By Michelle Lally, Jordan Giurlanda
An trust Advisory: Cartels

Nov 20, 2014

Here is more about what you need to know about Canada’s cartel offence:

1. Bo om Line

2. The Carrot.

3. The Enforcers.

© Osler, Hoskin & Harcourt LLP. This content is for general information purposes only and does not constitute legal or other professional advice or an opinion of any kind. You can subscribe to receive updates on a range of industry topics at osler.com/subscribe.