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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

Contribution from Canada

-- Session II --

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-- Canada --

1. Introduction

1. In today's globalized economy, it is essential that competition enforcement transcend national boundaries to protect the benefits of competitive and honest markets. The borderless workplace for competition enforcers has prompted the Canadian Competition Bureau (the "Bureau") to engage in a broad array of activities to encourage increased collaboration within a global network of enforcement agencies. This is particularly the case with respect to those agencies committed to the detection, investigation, and prosecution of international cartel activity.

2. In addition to the case-specific benefits realized, the lessons learned from increased collaboration have contributed to the convergence of legislation, policies, and practices. The international convergence of immunity and leniency programs^{1,2} is one example of a developing coherence in the international framework for competition enforcement. There is a growing readiness among jurisdictions to consider their competition legislation and practices through the prism of international enforcement cooperation.

3. In 2009, the Government of Canada passed amendments to the *Competition Act*³ (the "Act") that are generally regarded as the most significant reform to Canada's competition laws since the mid 1980s.⁴ Among other things, these amendments significantly changed the Bureau's approach to the treatment of agreements between competitors.⁵

4. One of the amendments repealed the criminal conspiracy provisions and replaced them with (a) a new *per se* criminal offence prohibiting agreements between competitors to fix prices, allocate markets or restrict output (the "Criminal Cartel Provision") and (b) a new civil provision for all other agreements between competitors that prevent or lessen competition substantially (the "Civil Agreements Provision"). These changes were designed to create a more effective criminal enforcement regime for the most egregious forms of cartel agreements, while at the same time removing the threat of criminal

¹ Under the Bureau's Immunity Program, the first party to disclose an offence not yet detected or to provide evidence leading to the filing of charges may receive immunity from prosecution if the party cooperates with the Bureau's investigation and complies with the terms of the Immunity Bulletin, available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html>.

² Under the Bureau's Leniency Program, parties that cooperate with the Bureau's investigation may receive a lenient sentence, if they comply with the terms of the Leniency Program, available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02816.html>

³ The Act is available online at: <http://www.laws.justice.gc.ca/eng/C-34/index.html>.

⁴ These amendments were included in Bill C-10 (*Budget Implementation Act, 2009*).

⁵ Additional information about the amendments is available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_03036.html

sanctions for legitimate collaborations between competitors, in order to avoid discouraging firms from engaging in potentially beneficial alliances.

5. The amendments also increased the maximum fine for violations of the Criminal Cartel Provision from \$10 million to \$25 million and the maximum term of imprisonment from 5 years to 14 years. The maximum term of imprisonment for bid-rigging was also increased from 5 years to 14 years. Under the Civil Agreements Provision, the Competition Tribunal was provided with the power to prohibit any person from doing anything under an agreement or requiring any person, with the consent of that person and the Commissioner, to take any other action.

6. This modernization of law and policy enhances the Bureau's ability to cooperate with foreign competition agencies and coordinate international cartel investigations, providing Canada with a more productive and effective cartel enforcement regime. Furthermore, increased cooperation and coordination will enhance the predictability regarding the manner in which these types of enforcement matters are assessed for businesses operating within the North American market.

2. Tools for International Cooperation

7. International cartel enforcement presents particular challenges for the Bureau as documents and witnesses often reside outside of Canada; however, the Bureau has a range of tools and mechanisms, both formal and informal, at its disposal to facilitate and enable cooperation with its foreign counterparts.

2.1 Formal Cooperation

8. International cooperation agreements and arrangements relating to the application of competition law foster a culture of cooperation among participating agencies. They provide formal mechanisms that expressly favour the exchange of information and formal notifications, except where prohibited by law or contrary to important domestic interests. Under such agreements, parties recognize the value of minimizing conflict and carefully considering one another's interests at all phases of their enforcement activities. Canada currently has 11 international agreements, arrangements, or memoranda of understanding covering 10 jurisdictions.⁶

9. The Bureau may also rely on Canada's Mutual Legal Assistance Treaties ("MLATs") to seek evidence of criminal activity located in other jurisdictions. The MLAT and its enabling statute, the *Mutual Legal Assistance in Criminal Matters Act* ("MLACMA"), permits law enforcers, including competition agencies, to request formal assistance in obtaining and transmitting evidence relating to criminal matters,⁷ for example, by providing documents or executing requests for search and seizure. To date, Canada has entered into more than thirty such treaties.⁸ MLATs are a useful tool when evidence is located abroad and/or foreign counterparts are unable to share information under less formal mechanisms. To date, the Bureau has used MLATs to seek evidence located outside of Canada in 10 investigations and has responded to 6 MLAT requests to provide evidence relating to cartel investigation to foreign agencies.

⁶ A list of Canada's international instruments relating to cooperation in the enforcement of competition law is available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00128.html

⁷ The International Assistance Group (IAG) of the Department of Justice Canada, under the Minister of Justice, is responsible for the review and coordination of requests for investigative assistance in criminal matters.

⁸ A list of Canada's MLATs is available online at: <http://www.treaty-accord.gc.ca/result-resultat.aspx?type=10>

2.2 *Informal Cooperation*

10. The Bureau engages in extensive informal cooperation with foreign agencies. Senior management hold regular bilateral meetings with their counterparts in several jurisdictions, including the United States, the European Union, Australia, New Zealand, and Japan, to discuss case-related issues such as investigative steps, timing, and settlement approaches. Communication is not restricted to senior management, as Bureau investigators routinely coordinate enforcement actions with their counterparts in other agencies; however, legal barriers may, in certain circumstances, limit the Bureau's ability to share information. In the 2010-2011 fiscal year, the Bureau engaged in informal cooperation with 9 jurisdictions.⁹

11. Under section 29 of the Act, communication of information obtained during an investigation, including information produced voluntarily or obtained pursuant to the exercise of formal powers, is permitted "for the purposes of the administration or enforcement of the Act."¹⁰ This allows information that is considered confidential under the Act to be communicated to a foreign counterpart where the purpose is the administration or enforcement of the Act (e.g., where communication of this information would advance a specific investigation).

12. When confidential information is communicated to a foreign agency, the Bureau takes rigorous steps to maintain the confidentiality of the information. This is accomplished via formal international instruments or specific assurances from the foreign agency. The Bureau does not communicate information protected by section 29 of the Act unless it is fully satisfied with the assurances provided by the foreign authority with respect to maintaining the confidentiality of the information and the uses to which it will be put. The Bureau requires the foreign agency to limit the use of the confidential information to the specific purpose for which it was provided. Similarly, the Bureau is willing to provide assurances to a foreign agency that the information provided will be treated confidentially, and will only be used for the administration and enforcement of the Act. The Bureau will provide notice to, and seek the consent of, the foreign agency if it intends to use the information for any other purpose.

13. The Bureau will not disclose the identity or information obtained from an immunity or leniency applicant to any foreign law enforcement agency without the consent of the applicant; however, applicants are encouraged to and routinely grant such consent. Improved communication with foreign agencies has also resulted in situations where the Bureau is alerted to cases by its international counterparts before counsel for immunity applicants approach the Bureau.

14. Finally, the Bureau builds relationships with foreign agencies by providing technical assistance, participating in employee exchanges and internships,¹¹ and participating in multilateral organizations.¹²

⁹ Australia; Chile; European Commission; Japan; Mexico; New Zealand; South Africa; the United Kingdom; and the United States.

¹⁰ For more information see the *Information Bulletin on the Communication of Confidential Information under the Competition Act*, Competition Bureau, October 10, 2007, available online at: <http://www.competitionbureau.gc.ca/eic/site/cbbc.nsf/eng/01277.html>.

¹¹ For example, in early 2010, six employees from Chile's competition agency, the Fiscalía Nacional Económica, completed a two-week internship at the Bureau's head office in Gatineau, Québec.

¹² The Bureau participates in multilateral organizations such as the International Competition Network and the Organisation for Economic Co-operation and Development. Please see below for more information on Multilateral Cooperation.

2.3 *Multilateral Cooperation*

15. The International Competition Network (“ICN”), together with the Organisation for Economic Co-operation and Development (“OECD”), have helped foster international cooperation and enhanced the global effort to investigate and bring competition offenders to justice. These multilateral fora also help facilitate relationships between foreign agencies.

16. The Senior Deputy Commissioner of the Criminal Matters Branch is the Co-Chair of the Enforcement Techniques Subgroup of the ICN Cartel Working Group (“SG 2”). In order to enhance international cooperation in anti-cartel enforcement, SG 2 is currently undertaking a project that will provide practical summaries of the ways in which members can share cartel-related information with each other. Once completed, the summaries will set out the key characteristics of the information sharing regimes of each member agency and will be made available to all ICN members.¹³ Asia-Pacific Economic Cooperation (“APEC”) is undertaking a similar project this year, although their summaries of information sharing mechanisms will be created for all APEC members and will relate to all aspects of competition law, not just cartel enforcement.

17. The Bureau’s involvement in the ICN complements its contribution to the OECD Competition Committee, the OECD Working Party No. 2 on Competition and Regulation, and the OECD Working Party No. 3 on Enforcement and Cooperation, all of which are designed to strengthen competition law enforcement against cartels. The Bureau routinely provides submissions to the OECD and participates in roundtable discussions addressing cartel enforcement matters.

3. **Emerging Issues**

3.1 *Intelligence Network*

18. An emerging tool for increasing international cooperation is proactive intelligence gathering. The Bureau recognizes that an important means of deterring cartel behaviour is to increase the likelihood of detection. In addition to relying on its Immunity and Leniency Programs to disclose the existence of a cartel, the Bureau proactively profiles product markets that are subject to cartel investigations outside of its borders, with a view to detecting, and ultimately deterring, similar conduct in Canada.

19. With respect to cooperation and information sharing between agencies, the potential posed by developing intelligence and leads on cartel activity has not been fully realized. Even merely furthering the exchange of publicly available information (e.g., information that can be obtained by any interested party without legal restrictions) would be beneficial, as agencies commonly limit information and announcements on their websites to significant case developments, such as case resolutions. The benefits of exchanging publicly available information are demonstrated by the International Consumer Protection and Enforcement Network (“ICPEN”).¹⁴ Agencies that participate in ICPEN share comparatively more information than non-participants. With that in mind, the Bureau explored the creation of an intelligence network with competition agencies in other jurisdictions, but had limited success owing to resource constraints, confidentiality constraints and differing legal enforcement regimes across agencies. There is potential for more work to be done in this area, particularly with respect to sharing publicly available information among foreign agencies. The European Competition Network has had success in exchanging

¹³ SG 2 plans to complete the summaries in time for the 2012 ICN Annual Conference, which will be held in Rio de Janeiro, Brazil from 17-20 April 2012. They will be made available on the ICN website.

¹⁴ For example, when one agency helps another agency gain time by providing information that is already in the public domain, such as information about the market arising from studies carried out by the agency.

intelligence among agencies. Their experiences could be considered as part of a benchmarking exercise for any future developments in this area.

3.2 Coordinated Approach to Outreach

20. A coordinated approach to outreach further enhances public awareness of the severe penalties associated with operating a cartel and should increase the detection, deterrence, and prevention efforts of competition agencies. It is also an excellent method of proactive detection. This approach involves conveying a consistent outreach message¹⁵ on an international scale and requires considerable cooperation, coordination, and communication among competition agencies, similar to the manner in which agencies cooperate internationally on enforcement activities. There is potential for more work to be done in terms of implementing a coherent international approach to outreach and, ultimately, detection, from a domestic to an international scale.

21. The Bureau has recently developed a risk-based outreach strategy. In developing this strategy, the Bureau engaged in substantive international benchmarking. The Bureau also relied on the OECD's 2009 *Guidelines for Fighting Bid-Rigging in Public Procurement*¹⁶ to better understand outreach efforts undertaken by foreign agencies.

22. In 2010-2011, the ICN Cartel Working Group facilitated a series of enforcer discussions relating to cartel awareness and outreach. Through this series of 'roundtable' discussions, members were able to share expertise and exchange practical ideas on effective anti-cartel enforcement. The roundtable series was complemented by a collection of examples of public messages and materials used by competition agencies from around the world in their respective cartel-related outreach efforts. The collection of examples facilitates the sharing of experiences and ideas as to how to raise awareness around issues such as the prevention, reporting and prosecution of anti-cartel conduct.¹⁷

3.3 Cooperation Following Exercise of Formal Powers

23. International cooperation and coordination is fairly advanced during the covert stage of investigations that begin with immunity applications. Agencies involved in multi-jurisdictional investigations of this nature do an excellent job at coordinating the execution of formal powers, such as searches, dawn raids, and production orders. Commentators have noted that better coordination between agencies could be undertaken once investigations go overt; for example, in regards to immunity and leniency marker management, fine calculation methodologies, ability to pay issues, charging individuals and comity considerations. Timing issues, as well as different settlement procedures in various jurisdictions may limit the ability to improve this type of coordination.

24. In Canada, as well as in many other jurisdictions, settlement discussions are privileged; accordingly, the Bureau is typically restricted in the settlement information it can share with foreign agencies. For example, information sharing may be limited to a general discussion of the factors considered in reaching a settlement, rather than a detailed discussion of settlement terms. Seeking waivers from cooperating parties may be one option to consider to facilitate in-depth settlement discussions with foreign counterparts.

¹⁵ For example, signalling that cartelists will not be allowed to hide behind international borders.

¹⁶ For more information, see the *Guidelines for Fighting Bid-Rigging in Public Procurement*, March 12, 2009, available online at:
http://www.oecd.org/document/29/0,3343,en_2649_40381615_42230813_1_1_1_1,00.html

¹⁷ For more information see the Cartel Awareness and Outreach compilation, available online at:
<http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness.aspx>

4. Some Remaining Challenges

25. There are many challenges associated with international cooperation and information sharing.

4.1 *Legal Barriers*

26. Most jurisdictions have provisions in their national laws that restrict the communication of some or all confidential information in a cartel investigation to foreign agencies.¹⁸ For example, many agencies are restricted from sharing confidential information, which definition differs across jurisdictions.¹⁹ Some of these issues can be addressed with a formal cooperation agreement or arrangement, as described above; however, establishing these formal instruments can be a lengthy and resource intensive process, and may not be possible for some agencies. Furthermore, if the conditions in which the information was gathered in the sending jurisdiction do not meet the requirements in the requesting jurisdiction, the information may not be admissible as evidence in the requesting jurisdiction.²⁰

27. Barriers to sharing information are even greater when agencies operate in different legal frameworks. In particular, agencies operating in a civil or administrative enforcement regime may face additional challenges regarding the sharing of information with an agency operating in a criminal enforcement regime if there is a possibility that the information will be used for the purpose of seeking custodial sanctions against an individual.

4.2 *Evidence*

28. Trials and public hearings in one jurisdiction may have implications for other jurisdictions. Issues have emerged recently with respect to the disclosure of internal investigation documents by cooperating parties. Suffice to say, if evidence or testimony varies across jurisdictions, the disclosure of such material could seriously impact each involved agency's investigation and subsequent prosecution, for example, by impeaching the credibility of cooperating witnesses. There may be a need to coordinate across multiple jurisdictions to ensure consistent witness statements. One possible method of coordinating witness evidence could be to obtain shared witness declarations that could be used in multiple jurisdictions.

5. Conclusion

29. This submission provides an overview of the Bureau's existing tools for international cooperation, as well as identifying some recent developments in international cooperation in Canadian cartel investigations. As described above, there remain many challenges with respect to international cooperation and information sharing. Some of these barriers may be addressed with formal cooperation agreements or arrangements, while others would require a change in framework or policy. Some of the challenges identified may benefit from closer review by the OECD Competition Committee in the context of its strategic theme on international cooperation.

30. The amended conspiracy provisions have streamlined Canada's cartel laws to provide appropriate, internationally harmonized standards to address cartels. This convergence in laws, particularly with the United States, Canada's largest trading partner, enhances the Bureau's ability to cooperate with foreign agencies.

¹⁸ See above for more information on section 29 of the Act, which permits the sharing of confidential information for the administration and enforcement of the Act.

¹⁹ For more information, see the ICN report on "Cooperation between competition agencies in cartel investigations", available online at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc348.pdf>

²⁰ Ibid.