



Competition Criminal Enforcement in Canada

The Year in Review 2015

By Christopher Naudie and Michelle Lally

OSLER

Table of Contents

Introduction	3
The Bureau’s “Re-Alignment” of Enforcement Resources	4
The Bureau’s Enforcement Activity	5
The Bureau’s Unsuccessful Prosecution in <i>R. v. Durward</i>	9
The Bureau’s Unsuccessful Prosecution in <i>R. v. Nestlé</i>	11
Commissioner’s Response – Lessons Learned & Review of the Immunity Program	15
The Commissioner’s Commitment to Transparency	17
The Canadian Government’s New Integrity Regime	18
Conclusion – The Year Ahead	21



Introduction

At first glance, the Commissioner of Competition's enforcement activities in 2015 might appear to represent another typical year in criminal enforcement in Canada. The cartels directorate remained relatively busy with a number of active investigations, and the Commissioner announced new pleas in several international cartel cases, particularly in the auto-parts and infrastructure sectors.

But 2015 was anything but typical. In short, the Commissioner's enforcement credentials were tested in two significant domestic prosecutions – namely, the Crown's prosecution of a group of chocolate manufacturers for price-fixing in *R. v. Nestlé* and the Crown's prosecution of several IT services companies for bid-rigging in *R. v. Durward*. In both cases, the Crown was unable to secure a conviction; in *R. v. Nestlé*, the Crown voluntarily stayed all remaining charges and in *R. v. Durward*, the jury returned an acquittal and the Competition Bureau subsequently closed the balance of its case. Moreover, in *R. v. Nestlé*, the Public Prosecution Service in Canada undermined the Bureau's immunity program by taking the extraordinary step of seeking compelled production of an immunity applicant's internal investigation files – raising serious questions relating to the Crown's respect for privilege and the future operation of the Bureau's immunity and leniency programs in Canada. Indeed, as a result of these developments, the Commissioner has announced a comprehensive review of the immunity program in 2016, and a major internal review to assess "lessons learned" from these failed prosecutions.¹

In our annual report on antitrust criminal enforcement in Canada, we examine these key developments as part of our survey of the leading investigations by the Commissioner and prosecutions by the Public Prosecution Service in Canada (PPSC).² We also discuss the courts' most important judicial decisions, and consider their implications for domestic and international price-fixing investigations. In addition, we review the Commissioner's latest public statements and compliance guidance related to the immunity and leniency programs, and highlight a number of areas where we can expect significant changes to the programs in 2016.

¹ Similar to other jurisdictions, the Commissioner has adopted immunity and leniency policies in the cartel enforcement area. See Competition Bureau, "Bulletin: Immunity Program under the *Competition Act*" (dated June 7, 2010) and "Bulletin: Leniency Program" (dated September 29, 2010).

² In Canada, the Commissioner is the law enforcement officer that is responsible for the investigation and enforcement of the criminal provisions of the *Competition Act*, R.S.C. 1985, c. C-34 (the *Act*), but he is not empowered to bring criminal proceedings. Rather, the Public Prosecution Service of Canada (the PPSC) is responsible for pursuing criminal prosecutions in the name of the Crown. As a result, the role of the Commissioner is generally focused on investigating offences, making recommendations for immunity/leniency/prosecution, and if a prosecution is brought, to support and assist the PPSC's prosecutors in the conduct of their prosecution.

2

The Bureau's "Re-Alignment" of Enforcement Resources

In early 2015, the Bureau implemented a significant internal restructuring that sought to re-align the enforcement branches of the Bureau.³ More specifically, the Bureau merged some of the branches with a view to creating a "stronger and more adaptive agency" to promote competition throughout Canada.

On the criminal enforcement side, the Bureau merged the former Criminal Matters Branch with the Fair Business Practices Branch, and renamed the new branch the Cartels and Deceptive Marketing Practices Branch. Within the new branch, the Bureau formed two new organizational directorates – the Cartels Directorate (responsible for overseeing investigations into price-fixing, bid-rigging and other criminal matters) and the Deceptive Marketing Practices Directorate (responsible for overseeing investigations into deceptive marketing practices, which may be subject to both criminal as well as civil enforcement action).

The re-alignment resulted in two significant leadership changes at the Bureau. Matt Boswell, the former head of the Criminal Branch, was named Senior Deputy Commissioner with responsibility over the new combined branch. In his place, the Bureau recruited Stéphane Hould, a veteran federal prosecutor from the PPSC to serve as Deputy Commissioner of the Cartels Directorate. The appointment is noteworthy since this is the first time in memory that the Bureau has appointed a former federal prosecutor to lead this branch. His appointment will bring some valuable prosecution experience to the new Cartels Directorate and will hopefully improve coordination between the Bureau and the PPSC.

³ Competition Bureau Press Release, entitled "Competition Bureau restructures to maximize its contribution to a more competitive marketplace" (dated March 25, 2015).

3

The Bureau's Enforcement Activity

The Commissioner continues to have an active book of ongoing investigations. In his most recent quarterly report from the spring of 2015, the Commissioner reported that there were 120 live investigations at the Bureau (including both civil and criminal investigations), representing a modest increase from 2013–2014. At the same time, there appears to have been a significant drop in new immunity and leniency applications. The Commissioner reported that he granted 20 immunity markers and 17 leniency markers in 2014–2015, whereas he granted 82 immunity markers and 40 leniency markers in 2013–2014.⁴

Much of the enforcement activity at the Cartels Directorate has been focused on the Commissioner's ongoing investigation of price-fixing and bid-rigging allegations in the auto-parts sector. In particular, since 2009, international regulators have been investigating allegations of bid-rigging in respect of the pricing of a number of automotive components, including safety systems such as seat belts, airbags, steering wheels and anti-lock brake systems, and critical parts such as anti-vibration rubber, instrument panel clusters, starter motors and wire harnesses. To date, the U.S. Department of Justice has laid charges against 33 corporations and 50 individuals, and has secured criminal pleas that included over US\$2.4 billion in criminal fines.

Given the importance of the automotive sector in Canada, the Commissioner is continuing his own aggressive criminal investigation of these same products that may have affected Canadian consumers. To date, the Commissioner has granted over 200 immunity and leniency markers to 21 co-operating parties – a record for the Cartels Directorate.⁵ The Commissioner has also secured eight guilty pleas and over \$58 million in fines in respect of a number of different products ever since the Commissioner started investigating the auto-parts sector in 2009.⁶ In 2014, the Commissioner secured four additional guilty pleas, and the Commissioner has confirmed that the Bureau benefited extensively from co-operation through the immunity and leniency programs. In 2015, the

⁴ Competition Bureau, Quarterly Report for period ending March 31, 2015.

⁵ See reported markers set out in the Speech by Commissioner of Competition John Pecman, "Cutting through the noise" (dated December 8, 2015).

⁶ Competition Bureau Press Release, "Toyo Tire fined \$1.7 million for participating in bid-rigging conspiracy" (dated December 9, 2015).

Commissioner announced that he had secured one additional plea – in December, he reached a plea agreement with Toyo Tire & Rubber Co., Ltd. (Toyo), whereby Toyo agreed to plead guilty to three counts of bid-rigging and receive a fine of \$1.7 million for its involvement in a bid-rigging conspiracy relating to the supply of anti-vibration components.⁷

In addition to his enforcement activity in connection with international price-fixing investigations, the Commissioner has placed a continuing priority on pursuing allegations of domestic bid-rigging in the infrastructure sector. In its submission to the OECD Competition Committee's October 2015 roundtable on "Serial offenders: a discussion on why some industries seem prone to endemic collusion," the Bureau reported that over the last 20 years, it has investigated more instances of alleged collusion in the Canadian construction industry than in any other industry in Canada. The Bureau's submission discusses the market



⁷ Competition Bureau Press Release, "Toyo Tire fined \$1.7 million for participating in bid-rigging conspiracy" (dated December 9, 2015).

characteristics of the construction industry that are conducive to repeated collusion and provides an overview of the ways in which different levels of government in Canada have reacted to this type of criminal behaviour (e.g., a sector-wide public inquiry in the province of Québec; legislative amendments; and new policy regimes aimed at tightening procurement rules).

In 2015, the Commissioner announced several significant domestic indictments and pleas in respect of the infrastructure sector, particularly in the province of Québec. For example, in June 2015, the Commissioner issued 44 criminal charges against three companies and four individuals relating to an alleged bid-rigging scheme in respect of municipal water services in Québec.⁸ At the same time, the Commissioner announced a plea from one company that received a \$117,000 fine for its role in the alleged bid-rigging scheme. In December 2015, the Commissioner announced an additional plea relating to sewer services in Québec. In particular, a small contracting company pleaded guilty and received a modest fine of \$10,000. As a result, the Commissioner has now secured fines from four companies, and one individual has been ordered to do 100 hours of community service.⁹

The Commissioner also secured a number of new fines in connection with the PPSC's ongoing prosecution of local gas companies in Québec relating to an alleged scheme to fix the price of retail gasoline in Québec. More specifically, in 2014, the Québec Superior Court found an Ontario company, Les Pétroles Global Inc., guilty of price-fixing under the *Act*. In April 2015, the Court sentenced the company to a \$1 million fine. The Court's fine was part of a wider Bureau investigation that resulted in charges being laid against 39 individuals and 15 companies in 2008, 2010 and 2012 for their role in a gasoline price-fixing conspiracy in four local markets in Québec. To date, 33 individuals and seven companies have pleaded or were found guilty with fines totalling over \$4 million. The case is noteworthy since it is one of the few recent cases where the PPSC and the Bureau have successfully secured custodial sentences against individuals (i.e., jail time). Out of the 33 individuals who pleaded or were found guilty, six have been sentenced to terms of imprisonment in Québec totalling 54 months.¹⁰

The Commissioner obtained a significant penalty against an individual as part of a plea in his ongoing investigation into bid-rigging related to information technology services delivered to Library and Archives Canada – an investigation that resulted in charges against private contractors as well as former public servants. The Commissioner commenced his investigation in 2009, and announced charges against a number of companies and individuals in 2014. In May 2015, the Commissioner stated that Stephen Forgie, a former employee of Microtime Inc., had pleaded guilty to bid-rigging. Mr. Forgie received a fine of \$23,000, and he also received an 18-month conditional sentence where he was required to serve the first six months under house arrest.¹¹

In spite of the level of enforcement activity, the Commissioner experienced a slower year in 2015 in terms of the deterrence – namely the overall amount of fines and sentences imposed by the courts.

8 Competition Bureau Press Release, "Criminal charges laid in a Competition Bureau investigation relating to water services provided by Quebec companies" (dated June 23, 2015).

9 Competition Bureau Press Release, "Guilty plea in Quebec sewer services cartel" (dated December 17, 2015).

10 Competition Bureau Press Release, "Les Pétroles Global Inc. fined \$1 million for gasoline price-fixing in Quebec" (dated April 15, 2015).

11 Competition Bureau Press Release, "Ontario individual sentenced after pleading guilty to bid-rigging" (dated May 21, 2015).

On the deceptive telemarketing front, in 2015, three Montréal-based telemarketers were sentenced by the Court of Québec for their participation in a deceptive telemarketing scheme that sold marketed directories, subscriptions to online directories, office supplies, and medical kits at inflated prices using misleading sales techniques. The three individuals were sentenced, in the aggregate, to conditional sentences of 21 months, 470 hours of community service and ordered to pay more than \$60,000 in fines. The scheme targeted thousands of businesses in Canada and abroad and generated over \$172 million in gross sales. The sentences followed charges laid in 2011 against five participating individuals and four Montréal-based companies for making misleading representations and engaging in deceptive telemarketing under the *Competition Act* and fraud under the *Criminal Code*.

In spite of the level of enforcement activity, the Commissioner experienced a slower year in 2015 in terms of the deterrence – namely the overall amount of fines and sentences imposed by the courts. In 2015, the Commissioner only announced one plea in an international cartel case (Toyo's plea for a fine of \$1.7 million). The Commissioner did announce a number of pleas in domestic cases, but the total fines imposed by Canadian courts for cartel and bid-rigging offences in 2015 was under \$2.9 million.¹² The Commissioner did obtain a significant conditional sentence against individuals in the Library and Archives Canada case and the Montréal telemarketing case, but they included a component of house arrest without any jail time.

As a result, the Commissioner's enforcement record in 2015 has been scrutinized through the lens of his handling of two large domestic criminal prosecutions before the Ontario courts. In both cases, the Commissioner's efforts to achieve deterrence foundered in the courtroom – he was unable to obtain a conviction in either case, and he abandoned any further enforcement activity.

¹² See Competition Bureau, "Penalties Imposed by the Courts (2015)" found at the Competition Bureau's website at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01863.html> (reposted in November 2015, and adjusted to reflect Toyo's plea).



The Bureau's Unsuccessful Prosecution in *R. v. Durward*

In *R. v. Durward*, the Crown suffered a significant courtroom loss in the context of a bid-rigging prosecution under the *Competition Act*.

In brief, in 2005, three government agencies (Canada Border Services Agency, Transport and Public Works) awarded a number of major procurement contracts to a set of information technology service firms pursuant to a competitive process. In response to a complaint from one of the unsuccessful bidders, the Bureau conducted an investigation into potential criminal bid-rigging activity in respect of certain bidding processes associated with the contracts, representing approximately \$65 million in technology services. The Bureau issued search warrants in 2006, and ultimately referred the case to the Public Prosecution Service in 2008. In 2009, the Crown issued charges against 14 individuals and seven companies. Following a small number of pleas, the Crown prosecuted a select number of the remaining entities for the offences of bid-rigging under section 47(1)(b) of the *Competition Act* and conspiracy under section 465(1)(c) of the *Criminal Code*. If convicted, the accused faced possible imprisonment and substantial fines, as well as debarment from conducting business with the federal government for up to 10 years.

The Commissioner suffered his first tactical defeat in the case in 2013. Prior to trial, the accused challenged the constitutionality of section 69(2) of the *Competition Act*. Section 69(2) creates several evidentiary presumptions in favour of the Commissioner under the *Competition Act*, including an evidentiary presumption that certain acts or records in the possession of an agent of a party were done with the authorization or knowledge of that party. The accused challenged section 69(2) as a reverse onus of proof that was unconstitutional under the *Canadian Charter of Rights and Freedoms*. In a pre-trial ruling in 2014, Justice Warkentin agreed section 69(2) was unconstitutional and was of no force and effect in a criminal proceeding. As a result, the Commissioner was unable to rely on an important provision of the *Act* in his ongoing case.

The trial commenced in September 2014 against six individuals and three companies. Following eight months of complex evidence and legal argument, the trial concluded in April 2015. In May, the jury returned an acquittal of the individuals and companies. After some internal consideration, the Commissioner determined not to pursue further proceedings in the case.¹³

The outcome of *R. v. Durward* represented a significant loss for the Commissioner. The Commissioner had conducted an investigation over eight years and had recommended the case for prosecution to the Crown. However, in spite of the investment of enormous investigative resources, the Crown was unable to obtain a conviction against a single defendant. In Canada, juries do not explain the reasons for their decision. However, Justice Warkentin's charge to the jury of more than 300 pages provides some insight into the gaps in the Bureau's investigation and the likely reasons for the jury's decision to acquit. While stating that the Bureau's "investigation as a whole is not on trial," the judge did advise the jury that they may consider the allegations by the defence that the investigation was flawed because of the failure of the investigators to produce a key document and "their failure to investigate the knowledge on the part of government officials of the consortium of the accused." The judge reviewed in detail the legal elements of the bid-rigging offence that the Crown is required to prove *beyond a reasonable doubt* and the evidence relating to each of these elements. Of particular interest is the judge's review of

- whether the RFP in question was a "call for bids or tenders" within the meaning of section 47
- whether, if the RFP was a call for bids or tenders, the accused honestly albeit mistakenly believed that the RFP was not a call for bids or tenders
- assuming there was an agreement or arrangement between the accused on the bids or tenders, whether such agreement or arrangement was "made known" to the person calling for the bids or tenders at or before the time when they were submitted. In this regard the judge instructed the jury that "made known requires express notification to the person calling for bids or tenders" but that express notification may be satisfied by either direct evidence or the circumstantial evidence

The trial judge's review of section 47 is helpful comprehensive guidance on the legal elements the Crown must prove beyond a reasonable doubt to secure a conviction. The evidence as laid out in the trial judge's instructions as well as the outcome in *R. v. Durward* do suggest that the Competition Bureau needs to apply more rigour and discipline in its investigations to establish the offence of bid-rigging in future cases.

The outcome of
R. v. Durward
represented a
significant loss for
the Commissioner.

¹³ Competition Bureau Press Release, "Competition Bureau to consider not-guilty verdicts in major bid-rigging case" (dated April 27, 2015).

5

The Bureau's Unsuccessful Prosecution in *R. v. Nestlé*

For a number of years, the Commissioner had been investigating allegations of price-fixing among chocolate manufacturers in Canada. The Commissioner's investigation attracted significant public and media attention in Canada, since it was a domestic conspiracy case involving a well-recognized consumer product. Moreover, in contrast to a number of local and regional cases emerging from the infrastructure sector, the chocolate case involved allegations of price-fixing on a national level that implicated senior executives.¹⁴

However, similar to the outcome in *R. v. Durward*, the Crown was unable to obtain a conviction at trial. While the Commissioner had recommended the case for prosecution and though the Crown had filed charges in 2013, the Crown concluded two years later that there was no reasonable prospect of conviction and voluntarily stayed the remaining charges against the accused. Perhaps more importantly, the Crown's prosecution exposed some significant fault lines in the Commissioner's immunity and leniency programs. In a highly unusual development, the Crown initiated a contested public dispute with the immunity applicant and the leniency applicant relating to disclosure and privilege, and the Crown took the extraordinary step of issuing subpoenas against legal counsel to obtain production of the immunity and leniency applicants' own internal investigation files.

The background to the Crown's prosecution can be summarized as follows. In 2007, the Commissioner received a confidential application for immunity from a manufacturer in the chocolate industry (subsequently disclosed to be Cadbury) in respect of a potential price-fixing agreement relating to confectionery chocolate products sold across Canada. Pursuant to the requirements of the immunity program, Cadbury applied for a marker and conducted an extensive attorney's proffer with the Competition Bureau.¹⁵

¹⁴ While the Competition Bureau has prosecuted many domestic conspiracies in recent years, most of those conspiracies involved regional conspiracies implemented by mid-level managers or sales representatives (e.g., the Commissioner's recent prosecution of price-fixing allegations in the retail gasoline case in Québec).

¹⁵ These facts relating to the identity of the immunity applicant and the proffer process are publicly reported in the Court's decision.

Consistent with the prevailing practice in Canada, Cadbury claimed privilege over all of its proffer discussions and negotiations with the Bureau and relied on judicial authorities that confirm that plea negotiations with the Crown are subject to settlement privilege.

In late 2007, the Commissioner executed search warrants against a number of manufacturers of chocolate products (namely, Hershey, Mars and Nestlé) as well as a distributor of chocolate products (namely, ITWAL). The Commissioner subsequently recommended to the PPSC that Cadbury receive immunity from prosecution, and Cadbury negotiated and entered into an immunity agreement with the Crown in 2008. Under that immunity agreement, Cadbury agreed to a number of standard co-operation commitments in respect of the production of non-privileged documents and access to witnesses. Cadbury's co-operation commitments specifically did not extend to privileged information. On that basis, and consistent with the Commissioner's public statements relating to the immunity program,¹⁶ the Competition Bureau and the Crown did not seek access to the immunity applicant's privileged internal investigation files. The Commissioner's prior policy mirrored the policy of the U.S. Department of Justice, which does not require a leniency applicant to waive privilege over its internal investigation to obtain leniency.¹⁷

After a number of years of further investigation, the Commissioner recommended that the Crown bring criminal charges under the *Competition Act*. In 2013, the Crown accepted that recommendation and brought charges against Nestlé, Mars and ITWAL as well as several individual executives. At the same time, the Crown announced that it had reached a plea agreement under the leniency program with Hershey. Hershey pleaded guilty to an offence under the *Competition Act* and accepted a criminal fine of \$4 million. Consistent with the Commissioner's policies under the leniency program, Hershey's executives were spared from further prosecution.¹⁸

At that time, notwithstanding the Competition Bureau's six-year investigation, the Crown's prosecution began to hit troubled water over disclosure issues. Under Canadian law, the Crown is under an obligation to disclose all relevant and non-privileged information in its possession to the accused. The accused demanded production of the Competition Bureau's "proffer notes" – namely, the Bureau's own internal records of its proffer discussions and negotiations with Cadbury and Hershey under the immunity and leniency programs. In response, the Crown produced a number of those notes, without Cadbury's or Hershey's consent or approval. Shortly thereafter, the Crown was reminded that those notes remained subject to a claim of settlement privilege, and the Crown subsequently demanded the return of those notes. Following protests from the accused, the Crown brought an application to determine whether the Crown's proffer notes were subject to privilege. Since Cadbury and Hershey were the claimants of the privilege, the Court granted intervenor status to both parties.

In February 2015, the Court ruled that the Crown was under an obligation to produce its proffer notes to the accused. In his reasons, Justice Nordheimer accepted that an immunity applicant or leniency applicant was entitled to assert settlement privilege over its proffer discussions and negotiations with the Crown.

...the Crown's prosecution exposed some significant fault lines in the Commissioner's immunity and leniency programs.

¹⁶ See Competition Bureau, "Immunity Program FAQs" (dated September 25, 2013), Q. 20.

¹⁷ See U.S. Department of Justice, Antitrust Division, "Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters," Q. 16 (dated November 19, 2008).

¹⁸ Competition Bureau Press Release, "Hershey pleads guilty in price-fixing cartel" (dated June 21, 2013).



However, under the particular circumstances, Justice Nordheimer concluded that any claim of privilege was displaced or subject to an exception in favour of the accused's right of full answer and defence. In his reasons, Justice Nordheimer placed significant reliance on the fact that the accused were subject to a live criminal prosecution, and Cadbury and Hershey had agreed to provide witnesses that would testify against the accused. Moreover, Justice Nordheimer noted that Cadbury and Hershey were not subject to any actual prejudice arising from production of the proffer notes, particularly since they had resolved their potential criminal and civil liability relating to the matter.

Pursuant to that ruling, the Crown produced its proffer notes to the accused. But in a highly unusual move, the Crown then issued a unilateral demand to the immunity and leniency applicants for production of their internal

investigation files. The immunity and leniency applicants refused production, on grounds of privilege as well as on the basis that there was no obligation to produce such files under the Commissioner's policies or their respective immunity and leniency agreements. In response to that refusal, the Crown took the extraordinary step of obtaining an unilateral production order under the *Criminal Code* (a form of compulsive legal process) against the immunity and leniency applicants – as well as against the law firms that represented the immunity and leniency applicants.

The Crown defended its actions on the basis that it was only seeking disclosure of the “facts and information” that were contained in the privileged internal investigation memos prepared by Cadbury's and Hershey's legal counsel. However, the Crown's unilateral action appeared contrary to the Commissioner's own policies. Moreover, the Crown's actions were out of step with other regulators. In their challenge to the production order, Cadbury and Hershey argued that the Crown's production order represented an unprecedented assault on solicitor-client privilege and an unauthorized and unconstitutional seizure of records from a law firm.

In advance of a scheduled hearing date, Cadbury and Hershey withdrew their challenge, voluntarily complied with the production order and produced their respective redacted internal investigative memos to the Crown in July 2015 – and the Crown focused its efforts on seeking to secure a trial date. However, for reasons that were not fully explained, in September 2015, the Crown voluntarily stayed its charges against Mars and ITWAL and their former executives. Two months later, in November 2015, the Crown stayed its charges against Nestlé and its former chief executive officer. As a result of that decision, the Bureau closed its eight-year criminal investigation in respect of alleged price-fixing relating to chocolate confectionery products.

The Crown's abandonment of the prosecution in *R. v. Nestlé* in 2015 represented another setback for the Commissioner's enforcement credentials. In spite of the Commissioner's investment of substantial investigative resources over eight years, the Crown was again unable to secure a conviction in a major domestic cartel case. The Crown's decision to withdraw its charges was particularly striking given that the Bureau had recommended prosecution and the Crown had accepted that recommendation in 2013. In short, it is difficult to understand what transpired between 2013 and 2015 to cause the Crown to reverse their views on the prospects for conviction. Moreover, the Crown and the Bureau faced significant criticism from the bar for their heavy-handed tactics in seeking to seize documents from legal counsel for the immunity and leniency applicants, and their use of compulsory legal process to seize privileged documents appears to have done little to advance the Crown's prosecution.

Cadbury and Hershey argued that the Crown's production order represented an unprecedented assault on solicitor-client privilege and an unauthorized and unconstitutional seizure of records from a law firm.

6

Commissioner's Response – Lessons Learned & Review of the Immunity Program

Following the outcome of these cases, the Commissioner made a series of public statements that offered a candid assessment of the Bureau's enforcement record. As the Commissioner stated at a public speaking event at the end of the year, "We've had some successes in our recent history. We have also had some setbacks. I won't pretend otherwise."¹⁹

To address these setbacks, the Commissioner announced that the Bureau was undertaking four concrete steps to review and potentially improve its existing enforcement practices:

- ① The Bureau will be conducting a review of the immunity and leniency programs in 2016 to determine whether changes or clarifications are necessary. To the extent that changes or clarifications are considered, he has committed to consult with the competition bar.
- ② The Bureau has initiated an internal "lessons learned" evaluation process with respect to its investigative procedures, "to determine whether there is anything we need to do differently."
- ③ The Bureau is developing an internal "criminal intelligence unit." In particular, similar to other regulators, the unit will include a central repository for information gathered from all cartel investigations, complaints and intelligence from law enforcement agencies.
- ④ The Bureau has committed to solidifying its domestic partnerships. In particular, the Bureau has signed MOUs with Public Works and Government Services Canada, the Ontario Provincial Police and, in November 2015, the RCMP.

The most significant component of the Commissioner's plan is his commitment to review the immunity and leniency programs. His review is unusual, particularly given that the Competition Bureau conducted an

¹⁹ Speech by Commissioner of Competition John Pecman, "Cutting through the noise" (dated December 8, 2015).

extensive review of the program roughly two years ago that resulted in the publication of a detailed FAQ. However, it is expected that the review of the program will focus on the fissures that were identified in the *R. v. Nestlé* case – namely, issues of disclosure or privilege. In public statements, members of the Cartel Directorate have indicated that the Bureau is currently looking at increased use of recorded statements and “Queen for a Day” letters as well as disclosure requirements. Unfortunately, the Commissioner has made no public statements regarding the most contested issue in *R. v. Nestlé* – namely, whether the Commissioner will require and/or expect immunity and leniency applicants to produce privileged work product relating to their internal investigation in order to secure immunity or leniency. While the PPSC demanded such production in *R. v. Nestlé*, any such requirement is arguably unconstitutional – a state actor arguably cannot demand that a company or individual surrender its fundamental right to solicitor-client privilege as a condition of a plea bargain. Hopefully, the Commissioner will provide further clarity on those issues in 2016.





The Commissioner's Commitment to Transparency

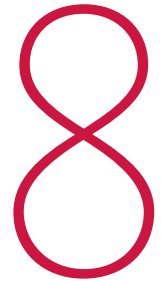
Since his appointment as Commissioner in 2013, Commissioner John Pecman has made “transparency” a defining hallmark of his tenure at the Bureau. In his public statements, the Commissioner has repeatedly expressed his commitment to improving transparency of decision-making at the Bureau, including in respect of the Bureau’s enforcement discretion.

Pursuant to that commitment, in late 2015, the Commissioner published a comprehensive “Competition and Compliance Framework” that articulated a set of five guiding principles that will govern his enforcement powers – namely, the principles of confidentiality, fairness, predictability, timeliness and transparency.²⁰ While these principles are general in application, the Commissioner’s framework provides some helpful guidance for parties that are the subject of criminal investigations and enforcement proceedings in Canada:

- ① The Commissioner has publicly acknowledged, in a formal framework, that enforcement is only one tool for securing compliance with the Act. In particular, the Commissioner noted that he has a range of tools to achieve compliance, and “the Bureau’s objective is to select the most effective and efficient instrument or instruments to address the specific situation.” In that respect, the Commissioner acknowledged that contested enforcement proceedings are “costly and time-intensive,” and may not be appropriate for every case.
- ② The Commissioner identified a list of factors that he will consider in exercising his enforcement discretion: economic impact, prevalence of conduct, evidence of market power, party conduct and case history, recidivism and deterring effect. Depending on the mix of factors involved, a particular matter may be more suited for a consensual resolution, or alternatively, may warrant a reduced sentence.

The significance of the Competition and Compliance Framework is that it provides a new roadmap of principles for targets of criminal enforcement to plead their case before the Bureau. For example, a target in an international cartel investigation may submit that a particular case does not merit enforcement in view of the absence of any economic impact in Canada, or may argue in favour of a lenient sentence on the basis of the absence of any need for deterrence within Canada.

²⁰ Competition Bureau, “Bulletin: Competition and Compliance Framework” (dated November 10, 2015).



The Canadian Government's New Integrity Regime

In a significant development that will potentially impact leniency applicants and non-co-operating parties in criminal antitrust investigations in Canada, the Canadian government implemented some welcome changes to its policies relating to debarment in federal contracting and procurement.

For a number of years, the Canadian government has had public integrity rules that place limits on parties that may contract with the federal government. In particular, under these rules, potential suppliers who seek to conduct business with the federal government are required to certify that they had not been convicted of specific integrity-related offences. In October 2010, the federal government expanded the list of integrity-related offences to include corruption, collusion or other anti-competitive activity under the *Competition Act*. However, at the time, the federal government softened the impact of these rules by including an express exemption from debarment where a company had co-operated with the Competition Bureau as part of the leniency program.

In 2012, the federal government removed the leniency program exemption. As a result of this amendment, a supplier that had co-operated with the Bureau and pleaded guilty to an offence under the *Competition Act* through its participation in the leniency program, or any entity that was otherwise convicted of a criminal offence under the *Act*, was subject to automatic debarment for 10 years. Moreover, under these rules, a supplier could be debarred if it had a corporate affiliate that had pleaded guilty or been convicted under the *Competition Act* or even a foreign antitrust offence – even if the supplier had no involvement in the matter or no control over the affiliate.

Given the potential consequences of debarment for companies that conduct business with the federal government, many were concerned that the debarment rules might discourage self-reporting and might impair the operation of the leniency program. In addition, under these rules, a number of significant global contractors with the federal government (including HP, Siemens and other multinationals) faced potential debarment in Canada as a result of pleas and fines that had been imposed upon distant affiliates in other jurisdictions. In the media, some suppliers openly criticized the federal government's "meat-cleaver" approach to debarment.²¹

²¹ *The Globe and Mail*, "Ottawa relaxes integrity rules for firms doing business with government" (dated July 6, 2015).



In response to submissions from organizations ranging from the Canadian Chamber of Commerce to the Canadian Bar Association, the federal government implemented some welcome changes to these rules that became effective in July 2015. In particular, the federal government adopted two critical changes:

- ① The federal government replaced the automatic debarment period of 10 years with a default debarment period of 10 years. In particular, a supplier can seek to reduce the debarment period to five years if the supplier can demonstrate it has co-operated with law enforcement authorities or has undertaken remedial action to address the wrongdoing.
- ② The federal government removed the automatic debarment that flowed from the actions of an affiliate. Rather, under the new rules, if an affiliate of a supplier has been convicted of a listed offence or a similar offence abroad, the federal government will conduct an “assessment” to determine if there was “any participation or involvement from the supplier in the actions that led to the affiliate’s conviction.” If that is determined to be the case, the supplier will be rendered ineligible.

However, in a less welcome change, the federal government also raised the spectre of debarment where a company is merely charged with a listed offence, as opposed to being convicted. In particular, under the new rules, a supplier may be ineligible to conduct business with the federal government if it is charged or “admits guilt” to one of the listed offences. The “admits guilt” provision is particularly troubling, since it could result in debarment of participants to an immunity agreement who receive immunity but who are required to admit misconduct as part of the agreement. This period of ineligibility may be extended if judicial proceedings are underway.²²

To mitigate the potential impact of debarment on a company that had solely been charged with an offence, the federal government reserved the ability to take alternative action by imposing an interim agreement on the supplier. Once this power of alternative action was announced, many observers speculated whether the federal government would exercise that power in respect of SNC-Lavalin. SNC-Lavalin is a leading engineering firm based in Canada and is the principal contractor on many significant infrastructure projects. Following an extensive investigation, in early 2015, the Crown laid corruption and associated fraud charges against SNC-Lavalin and two subsidiaries relating to corruption allegations associated with certain international projects in Libya. In December 2015, the federal government announced that it had imposed an administrative agreement on SNC-Lavalin that will permit it to continue conducting business with the federal government. The terms of the agreement are confidential, but it is presumed to include a significant number of compliance measures that will advance the goals of the integrity regime.²³

...the Canadian government implemented some welcome changes to its policies relating to debarment in federal contracting and procurement.

²² For a more detailed review of these revised rules, see Osler Update, “Ottawa Revises Integrity Framework for Public Procurement Contracts” (dated July 6, 2015).

²³ Osler Blog Post, “SNC-Lavalin Avoids Federal Bidding Suspension” (dated December 15, 2015).



Conclusion – The Year Ahead

The year ahead will likely prove to be a watershed year for criminal antitrust enforcement in Canada. Most significantly, we can expect the Commissioner to complete his review of the immunity and leniency programs and his investigative process and protocols following the outcomes in *R. v. Durward* and *R. v. Nestlé*. Based on public statements, members of the Cartel Directorate have indicated that the Bureau is currently looking at increased use of recorded statements and Queen for a Day letters as well as disclosure requirements.

However, it remains to be seen whether the Bureau is looking at further changes, or whether the Bureau is going to require and/or expect immunity and leniency applicants to produce privileged work product relating to their internal investigation in order to secure immunity or leniency. The Commissioner's next steps on these matters will be of immense interest to the bar and to targets of criminal investigation.

In addition, we expect that the Commissioner will be emboldened to reassert his enforcement credentials in 2016. The Commissioner's ability to achieve deterrence is closely tied to his ability to successfully bring charges that lead to conviction in a courtroom. Given the outcomes in *R. v. Durward* and *R. v. Nestlé*, we can expect that the Commissioner will be incentivized to demonstrate his ability to achieve a conviction at trial, particularly in a domestic conspiracy case. As a result, we can expect renewed enforcement activity at the Cartels Directorate, and perhaps an increased willingness to prosecute cases at trial rather than to reach plea agreements.

Cartel and Criminal Antitrust Investigations practice group

Osler has extensive experience in providing clients who are faced with a Competition Bureau investigation or potential prosecution with responsive and practical legal advice. We assess and recommend ways to mitigate risk through preventative and compliance measures, and provide strategic advice when an initial inquiry becomes a full-blown investigation, whether on a domestic matter or one involving multi-jurisdictional activities. Where an investigation points to possible criminal liability, we assist clients in making the critical decision of whether to seek a marker under the Competition Bureau's immunity or leniency policies, or to prepare to defend against an eventual prosecution. Whatever route is chosen, Osler can provide assistance from the initial inquiry through to the grant of immunity, negotiation of a leniency-based guilty plea or a full criminal trial.

To find out more about Osler's Cartel and Criminal Antitrust Investigations practice group, please visit osler.com/criminal.

AUTHORS



MICHELLE LALLY
Chair, Competition/
Antitrust & Foreign
Investment
mlally@osler.com
416.862.5925



CHRISTOPHER NAUDIE
Partner, Litigation
cnaudie@osler.com
416.862.6811



PETER FRANKLYN
Partner, Competition/
Antitrust & Foreign
Investment
pfranklyn@osler.com
416.862.6494



SHULI RODAL
Partner, Competition/
Antitrust & Foreign
Investment
srodal@osler.com
416.862.4858



LAWRENCE E. RITCHIE
Partner, Litigation
lritchie@osler.com
416.862.6608



KAELEIGH KUZMA
Associate, Competition/
Antitrust & Foreign
Investment
kkuzma@osler.com
416.862.6407



PETER GLOSSOP
Partner, Competition/
Antitrust & Foreign
Investment
pglossop@osler.com
416.862.6554



MAHMUD JAMAL
Partner, Litigation
mjamal@osler.com
416.862.6764



RIYAZ DATTU
Partner, Competition/
Antitrust & Foreign
Investment
rdattu@osler.com
416.862.6569

About Osler, Hoskin & Harcourt LLP

Osler is a leading law firm with a singular focus – your business. From Toronto, Montréal, Calgary, Ottawa, Vancouver and New York, we advise our Canadian, U.S. and international clients on an array of domestic and cross-border legal issues. Our collaborative “one firm” approach draws on the expertise of over 400 lawyers to provide responsive, proactive and practical legal solutions driven by your business needs. For over 150 years, we’ve built a reputation for solving problems, removing obstacles, and providing the answers you need, when you need them. It’s law that works.

Osler, Hoskin & Harcourt LLP

Toronto Montréal Calgary Ottawa Vancouver New York | osler.com

OSLER