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CANADA

LAW AND PRACTICE:

p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

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Blake, Cassels & Graydon LLP The Blakes Competition & Antitrust group, comprised of 21 partners and 14 lawyers, is one of the largest and most respected in Canada, has frequently been called upon to represent clients investigated and/or charged under the criminal cartel provisions of the Competition Act. Lawyers have been involved in many of the major cartel investigations in Canada and have secured immunity and leniency in relation to some of Canada's most high-profile cartel cases. The team has extensive experience defending corporations in investigations and court

proceedings under the criminal cartel provisions of the Competition Act, including some of the most high profile criminal conspiracy, bid rigging and price maintenance cases in Canadian history, beginning with the PANS case before the Supreme Court of Canada. The firm has been involved in numerous prosecutions in respect of misleading advertising and promotional contest provisions of the Competition Act and have extensive experience negotiating resolutions under the Bureau's compliance and alternative case resolution programmes.

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1. Basic Legal Framework

1.1 Statutory Basis/Bases for Challenging Cartel Behaviour

Section 45 of the Competition Act establishes the prohibition against “hard core” cartel conduct.

Section 46 of the Competition Act establishes the prohibition against foreign directives (ie instruction by a foreign parent company to engage in cartel conduct within Canada).

Section 47 of the Competition Act prohibits bid-rigging.

Section 90.1 of the Competition Act establishes the civil, reviewable (ie non-criminal) competitor collaboration provision. This is a “rule of reason” analysis for determining whether a civil prohibition order may be issued against competitors or potential competitors whose agreement or arrangement is likely to prevent or lessen competition substantially.

1.2 Public Enforcement Agencies

The Competition Bureau, an organisation that exists within the Federal Ministry of Innovation, Science and Economic Development, investigates cartel conduct. The Competition Bureau is headed by the Commissioner of Competition, a non-partisan government official who is appointed pursuant to section 8 of the Competition Act.

The Public Prosecution Service of Canada (PPSC) prosecutes parties who have contravened the criminal cartel provisions of the Competition Act (ie sections 45, 46 and 47).

1.3 Private Right of Action for Challenging Cartel Behaviour

Section 36 of the Competition Act provides that any person who has suffered loss or damage as a result of a contravention of Part VI of the statute (which includes the criminal prohibition against “hard core” cartel conduct as well as the criminal prohibition against bid-rigging) may “sue for and recover from the person who engaged in the conduct [...] an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation with the matter and of proceedings under this section.”

Conviction under one of these provisions of the Competition Act (“hard core” cartel conduct and/or bid-rigging) is, in the absence of any evidence to the contrary, proof that the person against whom the civil damages action is brought engaged in the conduct (and any evidence given in such criminal proceedings as to the effect of the criminal acts on the person bringing the civil damages action is evidence thereof

in the damages action). However, no government intervention is necessary to establish the civil cause of action.

1.4 Potential Liability

There is criminal liability under section 45 (hard core cartel conduct), section 46 (foreign directives), and section 47 (bid-rigging) of the Competition Act. The maximum fine under section 45 is CAD25 million and/or up to 14 years in jail per count, while for instructing a subsidiary corporation to engage in cartel conduct in Canada (ie, section 46, foreign directives), there is no maximum fine. For bid-rigging (section 47) there is no maximum fine and one may also be subject to a term of imprisonment of up to 14 years.

There is civil liability (prohibition order only – no fines possible) under section 90.1, the provision of the Competition Act that addresses competitor collaboration that is likely to prevent or lessen competition substantially.

Civil liability also exists under section 36 of the Competition Act, which permits private plaintiffs to sue for the recovery of damages they have suffered as a result of the cartel, foreign directives instructing a Canadian subsidiary company to engage in cartel conduct, or bid-rigging conduct.

1.5 Statutes Indirectly Taking Account of Alleged Cartel Behaviour

Other than the Competition Act, there are no statutes that take account of alleged cartel behaviour indirectly.

1.6 Definition of “Cartel Conduct”

The criminal cartel offence is established by subsection 45(1) of the Competition Act, which states that “[e]very person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges (a) to fix, maintain, increase or control the price for the supply of the product; (b) to allocate sales, territories, customers or markets for the production or supply of the product; or (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.”

Various defences exist to shield certain conduct from application of the criminal provisions of the Competition Act, the most common of these being the so-called “ancillary restraints defence” (“ARD”). The ARD applies to conduct that would otherwise contravene section 45(1) (ie the conduct described in (a) to (c) above). A person cannot be convicted under this subsection if the person establishes, on a balance of probabilities, that (i) the conduct is ancillary to a broader or separate agreement or arrangement that includes the same parties, and (ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement. The broader or separate agreement or arrangement, considered alone, cannot contravene section 45(1).

Cartel conduct in respect of an export cartel may also be shielded from the application of section 45(1).

Bid-rigging could theoretically fall within the definition in section 45, but is also established as a criminal offence in a separate provision of the Competition Act, section 47. Section 47 prohibits the following conduct: (a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request, or (b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers, in either case where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is submitted or withdrawn, as the case may be, by any person who is a party to the agreement or arrangement.

The main defence to bid-rigging is having made the agreement known to the person calling for bids.

Finally, collaborations among competitors that do not fall within the definition of “hard core” cartel conduct as set out in section 45(1) may be subject to a civil review and possible prohibition order under section 90.1 of the Competition Act. Competitor collaborations that do not fall within the criminal prohibition and that would not result in a substantial lessening of competition under the non-criminal provision do not violate the Competition Act.

1.7 Variety of Competition Law Violations

Any conduct described in subsection 45(1) of the Competition Act (which includes price fixing among competitors, output restrictions, and could in theory include bid-rigging) is classified as “cartel behaviour”. Conduct described in section 46 of the Competition Act (a foreign parent company instructing a subsidiary to engage in conduct that would have constituted a violation of subsection 45(1) had the agreement been entered into in Canada) is also criminal cartel conduct. Conduct described in section 47 of the Competition Act is classified as “bid-rigging” (and could potentially also be described as “cartel behaviour” under section 45).

1.8 Limitations Period(s)

With respect to the criminal provisions of the Competition Act (ie section 45 and section 47), there is no limitations period which would restrict the PPSC from bringing charges after a certain time period had elapsed.

With respect to civil damages actions, no action may be brought more than two years from (i) a day on which the conduct was engaged in; or (ii) the day on which any crimi-

nal proceedings relating thereto were finally disposed of, whichever is later.

1.9 Industries, Sectors or Other Activities Exempt from Scrutiny Under Statutes or Precedent

There is a common law defence which is now enshrined in the Competition Act (s. 45(7)), known as the regulated conduct defence (“RCD”). The RCD applies to conduct that is engaged in due to a “requirement or authorisation by or under another Act of Parliament or the legislature of a province”, prohibiting the pursuit of such conduct as an offence under the Competition Act.

Conduct applicable to certain industries is also statutorily exempt from application of the criminal cartel provisions (eg certain conduct involving federally regulated financial institutions).

Cartels that qualify for the export cartel defence also will not be pursued for cartel conduct under the Competition Act.

1.10 Limits on the Exercise of Personal Jurisdiction Over Alleged Cartel Participants

The Competition Act contains a provision that specifically targets foreign directives (ie agreements entered into in jurisdictions outside of Canada but which cause business undertakings in Canada to carry out certain conduct to implement the agreement). Pursuant to section 46 of the Competition Act, “[a]ny corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.”

From a practical perspective, if conduct occurs entirely outside of Canada and does not have any impact on business in Canada, the PPSC is unlikely to attempt to pursue parties who engaged in such conduct in other jurisdictions.

Conduct that only partially took place in Canada will be subject to the jurisdiction of Canadian courts if “a significant portion of the activities took place in Canada.” In other words, provided there is a “real and substantial link” between the offence and Canada, the offence will be subject to the jurisdiction of Canadian courts (*R. v. Libman*, [1985] 2 S.C.R. 178 at 213).

2. Procedural Framework for Cartel Enforcement - Initial Steps

2.1 Initial Investigatory Steps

The sequence of initial investigatory steps taken by the Competition Bureau varies significantly depending on the manner in which it becomes aware of the potentially criminal conduct.

Should an investigation begin with an immunity applicant approaching the Competition Bureau to disclose previously clandestine behaviour and obtain a marker under the Bureau's immunity programme, the Bureau would pursue the investigation initially through the proffer process with that immunity applicant.

If the conduct first comes to the Bureau's attention via a complaint (such as from a customer of one of the parties allegedly engaging in criminal conduct), the Bureau would typically gather evidence from the complainant(s) prior to approaching any of the targets of the investigation.

2.2 Dawn Raids or Surprise Visits

Dawn raids are possible but uncommon in Canada. That said, the Bureau has conducted at least two known dawn raids within the past year (in the bread/grocery sector and the newspaper sector).

The obligations of a firm that is the target of a dawn raid will be set out in the warrant presented by the Competition Bureau when Bureau officers arrive at the premises to be searched. In general, the firm must permit Bureau officers to enter all premises described in the warrant and search such premises for documents and materials that are described in the warrant as being relevant to the Bureau's investigation. The firm must permit any of the Bureau officers named in the warrant to use any computer system on the premises to search any data "contained in or available to" the computer system and to seize a copy of such data.

Outside counsel is permitted to attend a dawn raid and typically will interface between the lead Bureau officer running the raid and the target of the raid (ie, the client).

2.3 Restrictions on Dawn Raids or Surprise Visits

The Bureau may only take documents and materials described in the warrant. For example, if a firm being searched points out that the Bureau is attempting to review or seize documents or materials not covered by the warrant (and therefore not relevant to their investigation), the Bureau typically will not insist on reviewing or seizing such documents or materials.

The warrant will typically provide that the Bureau may search for and seize all records or other materials that are

contained in, "or available to" any computer system on the premises to be searched (including emails).

2.4 Obligations to Prevent or Avoid Spoliation of Potentially Relevant Information

Section 64 of the Competition Act (the obstruction provision) prohibits any person from impeding or attempting to impede or prevent any inquiry or examination under the statute. Violation of this provision is a criminal offence punishable by up to ten years of imprisonment and an unlimited fine. Targets of a Bureau investigation under the criminal provisions of the Competition Act must therefore take precautions to ensure that they (or their employees) do not violate this provision.

From a practical perspective, in executing a search warrant, the Bureau may itself take the following steps to prevent spoliation of potentially relevant information:

The Bureau will typically seal paper shredders that are located on site when it arrives.

The Bureau may make other requests, such as to search the bags of employees who wish to leave the premises to work elsewhere for the day. However, counsel can usually negotiate with the Bureau with respect to such requests, where there is no express direction in the warrant regarding the specific request.

If a dawn raid spans multiple days, the Bureau will conduct a process of sealing offices and cabinets at the end of each day so as to ensure that no documents or materials are removed from the premises overnight.

Should the Bureau provide the target firm with a list of individual employees whose computers, emails and/or physical documents/offices the Bureau intends to review or search pursuant to a warrant, the target firm should issue a document hold notice to at least the individual employees of interest to the Bureau. The hold notice should be sent out to the affected employees as soon as reasonably practicable after learning of the Bureau's intention to search their office spaces and/or computer systems.

2.5 Responding to Interviews/Questions During the Dawn Raid or Surprise Visit

There is no restriction on the ability of the Competition Bureau officers conducting the raid to ask questions or request interviews, but under Canadian law the subjects of a criminal investigation have the constitutional right to remain silent if they choose. The Competition Bureau can however obtain a court order compelling officers or employees of a target company to attend an examination under oath, although the evidence obtained cannot be used against that person in a criminal prosecution.

Following a dawn raid, the Bureau may request interviews of witnesses who are co-operating with the Bureau under the framework of the Bureau's immunity and leniency programmes. If an employee of an immunity or leniency applicant refuses to co-operate, that person may not be immunised from the possibility of criminal charges being laid against them personally.

2.6 Companies/Interviewees Obtaining Copies of Documents

Typically, parties will have limited ability to obtain copies of seized records during the course of a search. In due course, once the raid has concluded, the Competition Bureau will return all of the originals of the documents seized (after the Bureau has made copies of the documents for its records) and will also identify all electronic records that the Competition Bureau has identified as relevant.

2.7 Right to Counsel

Individuals such as officers and employees being investigated have a right to counsel.

Company counsel (ie in-house counsel) could in theory participate in interviews of employees by external legal counsel (ie as part of an internal investigation into what conduct occurred), although typically they do not do so. External counsel would typically permit employees or ex-employees that they may interview as part of an internal investigation to have their own counsel if desired (although whether the company conducting the investigation would pay for such counsel would need to be determined on a case-by-case basis – there is no general obligation, outside of contractual agreements or company policies, for a company to cover legal costs for individuals).

The Bureau often conducts interviews of individuals who are employed (or formerly employed) by parties that are participating in either the immunity or leniency programme. In such cases, the individual may have counsel present. This may be the individual's own counsel or could be the external counsel to the party that is the immunity or leniency applicant. While in theory there is no bar to in-house counsel also requesting to attend such an interview, this would be unusual.

2.8 Requirement to Obtain Separate Counsel

Individuals are not "required" to obtain separate counsel, although where an individual may be charged separately from the company, the Bureau may insist that the individual be separately represented, or in any event, not be represented by the same counsel that is representing the company. Individuals who are the target of a Bureau investigation may, of course, elect to have their own counsel.

2.9 Principal Initial Steps Undertaken by the Defence Counsel

The principal initial steps that defence counsel should undertake during the initial phase of an enforcement effort will vary with the circumstances of the case, including whether there is an immunity applicant, whether there is or has been a dawn raid, and whether the client has sought and has been granted a marker under the Bureau's leniency programme. However, in general the following steps would be prudent initial steps by defence counsel upon learning that a dawn raid is being conducted in an industry:

First, upon learning of an enforcement effort that is under way (eg, dawn raid), defence counsel should ensure that an outside counsel who specialises in competition law is present on the premises being searched.

Second, defence counsel should immediately advise the client of the availability and details of the Competition Bureau's immunity and leniency programmes and, if the client instructs, determine from the Competition Bureau whether an immunity or first in leniency marker is available in respect of the investigation. If the immunity or first in leniency marker is available, counsel should carefully consider with the client whether it makes sense to take that marker while they determine what conduct may have occurred at the company.

Third, defence counsel should ensure that a proper crisis management protocol is in place, including a plan for addressing any media coverage of the matter, briefing employees, disseminating document hold notices, etc.

Fourth, assuming that the client is not already aware of the alleged conduct being investigated at the time of the dawn raid, external counsel should conduct a thorough internal investigation to determine what conduct occurred at the company.

2.10 Obtaining Documentary Evidence or Testimony

For documentary evidence, the Bureau may obtain a search warrant to enter and search a specific location described in the warrant.

To obtain such a warrant, a Competition Bureau officer must swear an affidavit called the "Information to Obtain" ("ITO"), which sets out the grounds for believing that the proposed target of the warrant has engaged in conduct contrary to the criminal provisions of the Competition Act.

Where it is planning to conduct a "dawn raid", the Bureau will apply for a sealing order to keep the existence and contents of the warrant (and the ITO) secret until after the warrant has been executed. This is to preserve the surprise element of the search (ie to avoid any target of the search

taking steps to conceal or destroy evidence in advance of the warrant being executed).

Substantively, the standard for a court issuing a search warrant is that the investigating authority (in this case, the Bureau) must provide reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search.

In reviewing a decision to grant a search warrant the test for a court is whether there was reliable evidence that might reasonably be believed on the basis of which the authorisation could have issued, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorising judge.

2.11 Obtaining Other Types of Information

In Canadian cartel investigations, the Bureau also often obtains information through voluntary information requests, as well as via court production orders (“Section 11 Orders”). The Bureau may use a range of investigative tools to obtain non-documentary evidence in an inquiry as provided under the Competition Act and under Canada’s Criminal Code. These include the provision of written responses to questions, oral examinations and wire tapping.

2.12 Obligation to Produce Documents or Other Evidence

A search warrant executed on a party may include language authorising Competition Bureau officers to search and seize all records or other materials that are contained in, “or available to” any computer system on the premises to be searched.

While the reference to records and materials “available to” a computer system may appear to indicate materials located outside of Canada (eg in the “cloud” or stored on servers that are physically located in other jurisdictions), there may be other aspects of a warrant that would limit its scope to materials inside of Canada. For example, where the alleged conduct that the Bureau is investigating (as described in the warrant) refers only to conduct that allegedly took place in Canada, and in particular where there is no reference to section 46 of the Competition Act (the foreign directives provision), there may be grounds for resisting any attempts by electronic evidence officers (EEOs) to access, search, copy or remove records or other materials located in the “cloud” or otherwise outside of Canada (although in such circumstances information related to Canada located on foreign servers available to the computer system in Canada would likely have to be produced).

2.13 Principles of Attorney-Client Privilege

Section 19 of the Competition Act sets out a formal procedure for dealing with documents or materials requested by a production order (“Section 11 Order”) or uncovered during the course of a Bureau search, which are potentially privileged. In practice the Bureau and the parties may voluntarily agree upon a more expeditious process for identifying and addressing privileged documents. From a practical perspective, principles of attorney-client privilege are applied at all stages of a Bureau investigation and any resulting enforcement action.

2.14 Other Recognised Privileges

Subsection 11(c) of the Canadian Charter of Rights and Freedoms establishes that any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence.

Section 13 of the Canadian Charter of Rights and Freedoms further provides that a witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

2.15 Resisting Initial Requests for Information

There is no legal consequence of refusing to comply with a voluntary request. Individuals and firms will determine in each instance whether or not to comply with a voluntary request. The principal consequence of refusing to comply with a voluntary request is the possibility that the Bureau will exercise formal powers to obtain information (most likely a “Section 11 Order, a production order, as it would be unusual for the Bureau to resort to a search warrant in such circumstances).

2.16 Protecting Confidential or Proprietary Information

Information collected by the Competition Bureau is protected generally under section 29 of the Competition Act. This means that the Bureau is prohibited from disclosing the information except for limited purposes related to the administration and enforcement of the Competition Act.

Third parties typically have no standing to assert protection against the production of information in the possession of a party subject to enforcement action. Depending on the nature of the information, the target may be able to resist production of the information on the basis of relevance. In the context of a voluntary request, the target may be able to rely on contractual restrictions on the production of third-party information. It is common, however, for contractual restrictions specifically to provide that they are subject to legally required production demands.

2.17 Persuading the Enforcement Agency to Modify Its Enforcement Action

Submissions may be made at any time in the process once a target is aware that they are being investigated by the Competition Bureau. There is, however, no formal process and such efforts would be a matter of negotiation with the Bureau, with every case (and the likelihood of persuading the Bureau to forego or modify its investigation) turning on its

2.18 Leniency, Immunity and/or Amnesty Regime

The Competition Bureau administers an immunity programme for the first party to come forward and offer cooperation in respect of its participation in criminal conduct with competitors under the Competition Act. The Bureau also administers a leniency programme for subsequent participants in the conduct who offer to co-operate with the Competition Bureau's investigation and any subsequent prosecution efforts by the PPSC. When a party first approaches the Bureau to enquire, they request a "marker".

Immunity and/or leniency may be sought at any time. However, with respect to an investigation that has already commenced, the earlier the better for building goodwill with the Competition Bureau.

The Competition Bureau very frequently grants immunity and leniency to parties in connection with its investigations. The Bureau has stated that the immunity and leniency programmes are its number one tool for detecting, investigating and prosecuting cartel conduct.

3. Procedural Framework for Cartel Enforcement - When Enforcement Activity Proceeds

3.1 Seeking Information Directly from Company Employees

The Bureau could in theory seek information directly from company employees. For example, it could in theory send a target letter to a current employee of a company that is under investigation. However, such a decision would be atypical and, from a practical perspective, may not be effective in eliciting co-operation from the individual (or his or her employer).

A more plausible scenario would be for the Bureau to seek information directly from ex-employees of a target company, who could no longer be reached through the company under investigation.

Sending a target letter does not require approval of any court; the letter does not authorise the Bureau to enter or search any premises, but rather informs an individual that he or she is a target of an ongoing investigation and invites the

individual to co-operate voluntarily or apply for immunity/leniency.

3.2 Seeking Information Directly from the Target Company or Others

The Competition Bureau can seek documentary information directly from a company that is a target of an ongoing investigation under the criminal provisions of the Competition Act.

The Bureau may do so either by requesting the information voluntarily or by obtaining a search warrant or production order from a court of competent jurisdiction.

3.3 Seeking Information Directly from Companies or Individuals Outside the Jurisdiction

The Competition Bureau tends to focus on obtaining information from companies located in Canada. However, where there is information located outside of Canada that is relevant to a Bureau investigation, the Bureau may obtain a search warrant authorising it to search computer systems that may access information located outside of Canada. The Bureau may also request assistance from a foreign jurisdiction to obtain information located outside of Canada under the framework of one of its bilateral or multilateral mutual legal assistance treaties (MLATs).

3.4 Inter-agency Co-operation/Co-ordination

The Competition Bureau cooperates extensively with domestic regulatory and enforcement agencies in all aspects of its mandate.

Pursuant to a Memorandum of Understanding between the Commissioner of Competition and the Director of Public Prosecutions (13 May 2010), the Competition Bureau co-operates extensively with the PPSC in respect of cartel/bid-rigging conduct. The Bureau investigates the conduct and makes recommendations to the PPSC regarding prosecution. There are no limitations on the exchange of information between the Bureau and the PPSC.

The Bureau has also executed MOUs with a large number of other domestic regulatory and enforcement agencies that are relevant to cartel/bid-rigging investigations, including the Royal Canadian Mounted Police, the Ontario Provincial Police, and the Federal Department of Public Works and Government Services (PWGS).

3.5 Co-operating with Enforcement Agencies in Foreign Jurisdictions

The Competition Bureau typically co-operates with enforcement agencies in foreign jurisdictions. While the Bureau has a stated preference for focusing on domestic cartel matters, historically a high proportion of the Bureau's cartel investi-

gations have been in respect of matters being investigated in multiple jurisdictions.

This co-operation has various effects on enforcement in Canada, including the Bureau's timing for laying charges, and attempts to extradite witnesses from other jurisdictions.

3.6 Steps Taken to Issue a Complaint/Indictment Against a Criminal Case

Once the Competition Bureau finishes its investigation, it makes a recommendation to the PPSC regarding the laying of charges. The PPSC will examine the relevant evidence and make a decision regarding laying charges.

Criminal cases are typically brought before provincial superior courts, but may also be brought in federal courts. Criminal matters are not adjudicated by Canada's Competition Tribunal, which is a specialised quasi-judicial body comprised of federal court judges and laypersons (economists), which adjudicates reviewable (civil) matters under the Competition Act (eg mergers, abuse of dominance, civil competitor collaboration matters).

The Bureau presents evidence of its investigation to the PPSC. If the PPSC decides to lay charges and the matter proceeds to trial, the PPSC would present evidence of its case during the trial.

The accused will receive discovery prior to trial. This will include all information relevant to the accused's case which is in the hands of the enforcement agency (including potentially relevant information obtained by the Bureau from third parties, such as competitors that were the subject of a dawn raid). Typically, a preliminary inquiry will be held to determine whether the accused should be committed for trial, but "direct indictment", which avoids a preliminary inquiry, can be employed in the prosecutor's discretion.

3.7 Steps Taken to Issue a Complaint/Summons in a Civil Case

If a plaintiff decides to bring a civil damages action (eg, a class action), the plaintiff will compile evidence of the defendant's alleged violation of a criminal provision of the Competition Act. This evidence will be described in a statement of claim, which is filed with a court of competent jurisdiction (eg, a provincial superior court or a federal court) and served on the defendant(s).

In the case of a class action, the proposed class action must first be certified. This detailed process involves a certification hearing in which counsel for the proposed class would make arguments regarding why the matter is appropriately constituted as a class action. Assuming the class action is certified, documentary and oral discovery of all relevant information in the possession of the parties will occur.

Defendants will receive from the Competition Bureau any documents that were seized from their premises. As a general matter, and depending on the circumstances, defendants may be able to subpoena information relevant to the proceeding in the hands of third parties.

3.8 Enforcement Actions Against Multiple Parties in a Single Proceeding

Both criminal and civil proceedings will typically be brought against multiple participants in an alleged cartel in a single proceeding. In Canada, accused individuals have the right to be tried separately from accused corporations.

3.9 Definition and Application of Burden of Proof

For criminal enforcement proceedings brought by the PPSC, the standard is the criminal standard of beyond a reasonable doubt.

For civil damages actions, the lower civil standard of the balance of probabilities applies.

3.10 Finder of Fact in Enforcement Proceedings

In both criminal and civil enforcement proceedings, in the absence of a jury, the judge in the relevant court of law acts as both the finder of fact and the person who applies the law to the relevant facts. In criminal matters under the Competition Act, corporations cannot be tried by jury; individuals have the right to elect to be tried without a jury. Jury trials are theoretically possible in civil matters, but are unusual in Canada, and defendants have the right to oppose trial by jury and have the issue determined by the court. In a jury trial, the jury acts as finder of fact, while the judge determines matters of law.

3.11 Evidence Obtained in One Proceeding Being Used in Other Proceedings

Evidence used in one criminal proceeding should not be used in another (separate) criminal proceeding.

It is an open question whether evidence proffered by an applicant for leniency in one jurisdiction may be used as evidence in Canada without a proper waiver in place.

3.12 Role Typically Played by Retained Experts

There are two types of experts that are commonly retained by defendants in criminal price-fixing investigations, particularly given that such investigations are almost inevitably followed by the commencement of class action litigation.

The first is an industry expert. This is an individual with deep knowledge of and experience in an industry, who may be able to explain historical pricing trends and industry competitive landscape and trends.

The second is an expert economist. An economist may be retained by defendants in a class action (often retained jointly) to present evidence at the stage of the class certification hearing. Such evidence may include whether the plaintiffs will be able to establish a credible way of demonstrating the harm they suffered as a result of the defendants' alleged cartel conduct. A different economist may be retained by each defendant separately in order to provide an estimate of the defendant's possible exposure with respect to damages. This economist may attempt to calculate things such as the overcharge, pass-through rate, and what amount of any increase in price was "undue". Having regard to the fact that no competition law class action has ever been fully litigated in Canada, this economic expert may advise on the quantum that is appropriate for one defendant to settle a class action.

3.13 Recognised Privileges

Solicitor-client privilege, common interest privilege, litigation privilege and settlement privilege are recognised in Canada and may be relevant to investigations and proceedings under the criminal provisions of the Competition Act.

3.14 Multiple or Simultaneous Enforcement Proceedings Involving the Same or Related Facts

The PPSC is statutorily prohibited from commencing proceedings under the "hard core" cartel provision (subsection 45(1)) against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which an order against that person is already being sought by the Commissioner of Competition under the resale price maintenance (section 76), abuse of dominance (section 79), civil competitor collaboration (section 90.1) or merger (section 92) provisions of the Competition Act as well as in any civil proceedings.

4. Sanctions and Remedies in Government Cartel Enforcement

4.1 Investigatory Agency Imposing Sanctions Directly

The Competition Bureau, which investigates cartel and bid-rigging conduct, does not have the authority to impose sanctions directly. For "hard core" cartel conduct and/or bid-rigging conduct, the Bureau may only make a recommendation to the PPSC regarding recommended fines. The PPSC alone has the jurisdiction to enter into a plea agreement with a party that wishes to plead guilty (which agreement must be endorsed by the judge of a court of competent jurisdiction).

For parties that do not co-operate (plead guilty to an offence), the PPSC may bring charges and recommend a fine to the relevant court. The court then has the jurisdiction to determine the relevant fine if the party is convicted.

4.2 Procedure of "Plea Bargaining" or Settlement

There is a procedure for pleading/settling. Parties may decide to plead guilty to an offence and pay an agreed fine ("settling").

Parties may settle at any time.

4.3 Collateral Effects if Liability or Responsibility is Established

There are collateral effects to liability under the criminal provisions of the Competition Act; a conviction or a guilty plea under the criminal cartel or bid-rigging provisions of the Competition Act constitutes prima facie evidence that a defendant has committed the offence alleged by plaintiffs under section 36 private actions for the recovery of damages (commonly class actions). No criminal prosecution or conviction, however, is required for plaintiffs to proceed with a civil claim for damages.

There are also various debarment regimes in Canada which operate to preclude companies that have pleaded guilty to a criminal offence under the Competition Act from participating in certain government tender processes. Parties cannot avoid debarment by entering into a plea agreement.

4.4 Sanctions and Penalties in Criminal Proceedings

For hard core cartel offences, the penalties are a term of imprisonment of up to 14 years and/or a fine not exceeding CAD25 million (per count).

For foreign directives, the penalty is a fine in the discretion of the court.

For bid-rigging, the penalties are a term of imprisonment of up to 14 years and/or a fine in the discretion of the court (ie, there is no statutory maximum fine).

In the context of a leniency agreement and ensuing plea bargain, sanctions and penalties are recommended by the PPSC (which may be based on recommendations from the Bureau, the enforcement agency that investigated the conduct). They are typically determined by agreement with the accused, and are based on the Bureau's sentencing guidelines. In a contested criminal proceeding, the fine will be determined by the court based on the submissions and arguments of counsel in an adversarial process. There are no sentencing guidelines in Canada relating to Competition Act matters, but there are statutory sentencing principles mandating mitigating and aggravating factors that the Court will take into consideration in determining an appropriate sentence.

4.5 Sanctions and Penalties in Civil Proceedings

There is no absolute upper limit or maximum damage award in respect of a civil damages action (typically a class action) under section 36 of the Competition Act.

The damages awarded under a section 36 proceeding may be “an amount equal to the loss or damage proved to have been suffered by [the plaintiff(s)], together with any additional amount that the court may allow not exceeding the full cost to [the plaintiff(s)] of any investigation in connection with the matter and of proceedings under this section.”

No class action commenced under section 36 has ever been fully litigated; instead, all resolutions to date have been settlements. All damage awards to date have therefore been the product of negotiations between plaintiffs and defendants.

4.6 “Effective Compliance Programme”

The Competition Bureau will take into account whether a co-operating party has in place a credible and effective compliance programme in determining the fine it will recommend to the PPSC.

Factors that may influence whether a compliance programme is considered effective include whether the employee(s) in question who allegedly engaged in criminal conduct concealed their conduct from others at the company, whether they received competition compliance training, and whether they were still employed by the company at the time the conduct was discovered.

4.7 Sanctions Extending to Mandatory Consumer Redress

Sanctions in a criminal proceeding commenced by the PPSC cannot extend to mandatory consumer redress. The Competition Bureau may only recommend to the PPSC the maximum sanctions and penalties available under the Competition Act (which do not proscribe consumer redress).

4.8 Forms of Judicial Review or Appeal Available from Decisions in Governmental Enforcement Proceedings

Contested governmental enforcement proceedings would ultimately result in a decision of a court of competent jurisdiction, such as the Ontario Superior Court. For a final decision of the Ontario Superior Court on a criminal matter, an appeal as of right exists to the Ontario Court of Appeal (ie the provincial appellate court). Provincial appellate court decisions are subject to further appeal to the Supreme Court of Canada, with leave.

The standard of review would vary depending on the nature of the question before the appellate court. For questions of law (ie what the proper legal test is, or the scope or meaning of a rule of common law or legislation), the standard of

review is correctness; the appellate court uses its own reasoning to arrive at the decision it believes is correct. For questions of mixed law and fact (ie whether the correct legal test was applied to the given facts correctly), the standard of review is reasonableness; the question is not whether the court agrees with the decision, or what the correct decision would have been, but whether there are tenable reasons supporting the decision (ie reasons that can stand up to a somewhat probing examination). For questions of fact, the standard is a higher standard of reasonableness; significant deference is given to triers of fact on questions of fact.

Appeals from such decisions are because such decisions themselves are rare.

5. Private Civil Litigation Involving Alleged Cartels

5.1 Private Right of Action to Seek Relief

Under section 36 of the Competition Act, private firms and/or individuals have a private right of action to seek relief from effects alleged to have resulted from cartel behaviour.

5.2 Threshold Requirements

Any person who has suffered loss or damage as a result of criminal conduct that contravenes the “hard core” cartel provision or the bid-rigging provision of the Competition Act may sue for and recover from the person who engaged in the conduct an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

Such proceedings may be brought in any court of competent jurisdiction. This could include a provincial superior court or the Federal Court of Canada. Proceedings are commenced by the filing of a statement of claim by the plaintiff(s) in the appropriate court.

5.3 Actions Styled as “Class Actions” or Other Forms of Collective Action

Such private damages actions can be styled as class actions.

Consumer groups would not have automatic standing in a class action but could seek standing.

5.4 Handling Questions of Indirect Purchasers or “Passing-on” Defences in Private Actions

There is no automatic bar to recovery for indirect purchasers in Canada. There is no “passing on” defence.

5.5 Process for Hearing and Resolving Claims

A proposed class action must be certified before it may proceed to a full hearing on the merits.

No price-fixing class action in Canada has to date proceeded to a full hearing to prove the extent of the plaintiffs' damages; all such matters have either been discontinued or settled.

5.6 Evidence from Governmental Investigations or Proceedings

If the plaintiffs can obtain evidence from governmental investigations or proceedings, it may be admissible in a private damages proceeding.

5.7 Differences in Standards for Relief in a Private Civil Action and Governmental Proceedings

Governmental proceedings are criminal proceedings and therefore alleged conduct must be proven on a criminal standard of proof (ie beyond a reasonable doubt).

The lower civil standard of proof (ie the alleged conduct must be proven on a balance of probabilities) is the applicable standard in civil actions for the recovery of damages caused by cartel or bid-rigging conduct.

5.8 Forms of Relief That Can Be Sought by the Claimant

Damages awarded under a section 36 proceeding may be "an amount equal to the loss or damage proved to have been suffered by [the plaintiff(s)], together with any additional amount that the court may allow not exceeding the full cost to [the plaintiff(s)] of any investigation in connection with the matter and of proceedings under this section."

5.9 Forms of Relief Commonly Obtained

Treble damages are not available in Canada but plaintiffs may seek punitive damages. Plaintiffs typically combine claims under Section 36 of the Competition Act with common law tort claims, and may seek restitution as an alternative to damages.

Negotiated damage settlements have been the most common relief obtained.

5.10 Claims Proceeding to Completed Litigation as Opposed to Dismissal or Settlement

There has been no class action claim in Canada that has been fully litigated; all class actions to date have resulted in dismissal or negotiated settlement. Every case turns on its own facts, but one to four years is a typical timeframe from inception to resolution.

5.11 Compensating Successful Attorneys

Plaintiffs' counsel can and do receive a percentage share (negotiated at first instance with the representative plaintiff) of

any final settlement amount (or court award of damages, if a case ever ended up being litigated, which no class action to date has been). The court that is seized of a class action must approve each settlement (ie, plaintiffs' agreement with each defendant) as being fair and reasonable. This determination incorporates an assessment of whether the proposed fees for the class action plaintiffs are fair and reasonable.

5.12 Obligation for the Unsuccessful Claimants to Pay Defence Costs and/or Attorneys' Fees

In individual proceedings in Canada, costs ordinarily follow the event and unsuccessful plaintiffs will typically be required to pay a portion of the defence legal fees. Liability for litigation costs in class proceedings varies by jurisdiction within Canada, but where required, plaintiffs will have to pay a portion of the successful defendants' legal fees.

5.13 Forms of Judicial Review or Appeal Available from Decisions Involving Private Civil Litigation

There has never been a fully litigated decision in a price-fixing class action to date; as such, there is no precedent for appealing from such a decision.

The path for appeal would depend upon the court in which the civil damages decision had been made and the nature of the decision (final or interlocutory). For example, if a final decision were made in the Ontario Superior Court of Justice, an appeal would lie to the Ontario Court of Appeal.

The standard of review would vary depending on the nature of the question before the appellate court. For questions of law (ie what the proper legal test is, or the scope or meaning of a rule of common law or legislation), the standard of review is correctness; the appellate court uses its own reasoning to arrive at the decision it believes is correct. For questions of mixed law and fact (ie whether the correct legal test was applied to the given facts correctly), the standard of review is reasonableness; the question is not whether the court agrees with the decision, or what the correct decision would have been, but whether there are tenable reasons supporting the decision (ie reasons that can stand up to a somewhat probing examination). For questions of fact, the standard is a higher standard of reasonableness; significant deference is given to triers of fact on questions of fact.

6. Supplementary Information

6.1 Governmental Authorities Publishing Written Guides

The Competition Bureau has published the following materials related to cartel conduct and enforcement:

- Competition Bureau Immunity Program

- Competition Bureau Immunity Program Frequently Asked Questions
- Competition Bureau Leniency Program
- Competition Bureau Leniency Program Frequently Asked Questions
- Competition Bureau's Draft 2018 Revision to the Immunity and Leniency Programs (public consultation is open until 29 June 2018)
- Competition Bureau Competitor Collaboration Guidelines

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