CANADA'S LENIENCY POLICY: ONE YEAR LATER

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Introduction

Those who have violated the law should be held accountable for their crimes. However, some crimes can only be proved by the testimony of witnesses who are implicated in the same crime or in some other criminal activity. In Canada, as in many other countries, the idea of reliance on criminal informers to promote successful criminal investigations has given rise to mixed feelings.

A common reaction is that it is somewhat unsavoury for investigators to make a 'sweetheart deal' with one participant in an offence, in order to obtain information that helps convict another or others. There is a recognisable risk, particularly with 'jailhouse informants' that false or misleading evidence may be given to investigators, by a culpable party seeking to avoid the consequences of their own offences. On the other hand, with covert, serious, well-organised economic crimes, acknowledging the damage to society that they cause, most law-abiding individuals recognise the imperative need for investigators to seek the most effective evidence available: that of the participants in the planning and execution of the offence. For economic crimes, including cartel offences, the proper emphasis by investigating agencies must be on the detection of the offences and the investigation of the upper echelons of the conspiracies. Those objectives heighten the need to rely on the evidence or assistance of cooperating co-conspirators in cartel cases.

There is no doubt in Canadian law that providing immunity from prosecution in return for the evidence of cooperating parties is lawful. According to the Judicial Committee of the Privy Council:

It has been recognised for centuries that the practice of allowing one co-defendant to "turn Queen's evidence" and obtain an immunity from further process by giving evidence against another was a powerful weapon for bring-

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ing criminals to justice, and although this practice "has been distasteful for at least 300 years to judges, lawyers and members of the public", and although it brings with it an obvious risk that the defendant will give false evidence under this 'most powerful inducement', the same very experienced court which so stigmatised this practice was willing to accept that it was in accordance with the law. *Chan Wai Keung v. The Queen,*[1995] 2 All ER 438 at 444.

Just as society recognises the old maxim that "there is no honour among thieves", so it recognises that the moral character of a witness does not determine truthfulness. As Toy, J. pointedly observed in *Re: Meier*, an unreported case in the British Columbia Supreme Court in 1982:

"The State when it moves in to prosecute those who have allegedly committed crimes does not have the luxury of picking and choosing their witnesses. The state may have to rely on drunks, prostitutes, criminals, perjurers, paid informers as well as solid citizens to prove their case."

So it is with cartel offences. Covert conspiracies, frequently involving individuals from corporations that have no presence in the countries whose economies and consumers they target, are exceptionally difficult to detect and investigate, much less prosecute. The facts of conspiracies like the sorbates and vitamins cartels clearly demonstrate that the parties are conscious of the difficulties that confront the investigators. The evidence is most often abroad, beyond the reach of searches or seizures under the local law. The conspirators are acutely aware not only of their illegality, but also of how to avoid creating or retaining physical evidence that may incriminate them in the places where the economic consequences may be mot severe. Cartel members appreciate the jurisdictional weakness of countries whose cartel enforcement they fear, and so they take steps to avoid meetings or other direct conduct in those countries. They recognise that operating offshore does not inhibit their ability to cartelise industries that have an economic impact throughout the world. They understand the sovereignty sensitivities that surround the concept of extraterritorial enforcement of local competition laws and they play on the perceived difficulties in conducting effective investigative cooperation among competition enforcement agencies. But they have underestimated, until recently, the impact of policies that have converted their co-conspirators into devastating investigative resources: the amnesty or immunity policies.

The concept of these policies is fundamentally simple. Cartels are critically unstable, and not just because of the natural impetus of companies in

competition to compete, and therefore to "cheat" on price fixing, bid rigging or market allocation agreements. In recent years, inspired by the policies of the US Department of Justice's Amnesty Program, cartel participants around the world have been offered an opportunity to withdraw from a cartel, restore competition, and avoid prosecution and penalties for the company and its key executives. All they have to do is to be the first to come forward to cooperate with the investigators, accept their responsibility, and move on. Or they can take a chance. They can hope that every one of the other co-conspirators will hold firmly to the agreements reached among the cartel members. They can trust that their co-conspirators will forever forgo the highly publicised benefits of cooperating with the authorities. They can assume that there is honour among cartel conspirators, if not other thieves. Recent enforcement experience in the United States, Canada, the EU and many other countries, now including Brazil, shows that for many cartel participants, the benefits of participating in the various amnesty or immunity programs far outweigh the costs.

This paper surveys the new Immunity Program under the Competition Act of Canada, after one year of experience.

The Immunity Bulletin

Canada's Competition Bureau released an Information Bulletin in September, 2000, which set out the terms of the *Immunity Program under the Competition Act*. It sets out the conditions in which a party to an offence under the Act may seek immunity from prosecution in return for full cooperation against the other parties to the offence. The bulletin is a re-codification of practices and procedures that have existed in Canada under the *Competition Act* since 1991, and it aimed to overcome certain shortcomings of the initial approach to immunity.

The previous versions of the Bureau's policy on immunity from prosecution were contained in speeches and other statements by senior officials. That format meant that the policy was difficult for the public – or indeed the legal profession - to access. Moreover, the policy was subject to some uncertainty, as speeches do not necessarily bind public authorities. These statements of the policy also preserved, or appeared to preserve, a significant degree of administrative discretion in the hands of officials of the Competition Bureau. The policy pronouncements spoke about a grant of "leniency", leaving open the prospect that only a reduced penalty, rather than non-prosecution, might be the outcome for party that wished to resolve its liability by helping the authorities to discover an unknown offence or facilitate the prosecution of others.

In some cases, the formulation of the conditions for immunity or leniency led to protracted negotiations about the duties that the cooperating party would accept and occasional controversy on both sides about compliance with those duties, following the grant of immunity. Exceptionally, in one case, an application was refused, for reasons that seemed justifiable to the Bureau, but were not readily open to challenge by the applicant, on the terms of the policy as it existed in these speeches. Finally, as a matter of Canadian law, the Bureau only has the authority to refer prosecutorial decisions to the Attorney General for consideration, and formal, legally binding commitments could not be given by the Bureau to a proposed immunity applicant. The effect of this experience was apparent unpredictability, rooted in informal policy definition and formally discretionary decision making.

In practice, though this was only selectively known, lawyers representing the Attorney General invariably participated in the review of immunity applications, assessing the matter on standard criteria laid down in the Attorney General's policy on immunity. Effectively, there was a relatively high degree of assurance about the availability of immunity and the conditions that would apply. Once again, however, this was not apparent on the face of the policies.

Administration of the policy tended to follow the lead of other enforcement agencies, in particular, the prosecution of international cartels uncovered as a result of the administration of the United States Department of Justice's amnesty program. A limited number of immunity applications were received by the Bureau, probably no more than 15, over the entire period from 1991 to 2000. Until about 1995, only one or two cases surfaced in each year as a result of the policy. Throughout the period, very few immunity applications were focussed only on wholly Canadian offences, as opposed to those that were the Canadian adjuncts to international cartels. While there were upwards of 50 cartel investigations that led to prosecutions in Canada between 1980 and 2000, the immunity policy, after 1991, generated only a few. It started to produce results only very slowly, and for the most part, it gave rise to investigations primarily in cases where the offence might have been expected to emerge publicly in any event, because of successful investigations in other countries.

The history of contested Canadian prosecutions for cartel offences after 1980 is not a record of outstanding success. Of 20 contested cartel prosecutions in the period, only three led to convictions, one in 1982 (the feltmakers' paper conspiracy) and two in 1996-97 (the driving schools and compressed gas conspiracies). In all three, relatively low fines and limited jail terms were the outcome.

Simultaneously, though, in that same period, significant numbers of convictions were being achieved as a result of guilty pleas. After the leniency policy was adopted in 1991, there were well over 30 guilty pleas in total. Fine levels rose dramatically. From a record fine in 1991 of $1.7 million against one party, (compressed gas), the record for fines went to $2.5 million in 1995 (ductile iron pipe), $16 million in 1998 (lysine) and then to $50.9 million in 1999 (vitamins). It is clear that this enhanced incidence of detection and prosecution, the impressive rate of convictions due to guilty pleas and the increase in fine levels were all attributable to evidence received from successful immunity applicants under the Bureau's policy. Confronted with the evidence of a co-conspirator, the most damaging witness to an offence, other parties to the offence were electing to resolve their culpability by agreeing to plead guilty, despite huge financial penalties and a spotty record of successful prosecutions, rather than to contest a prosecution.

But the continuing low rate of reporting and the fact that few, if any, essentially Canadian cartels were being identified was a matter for concern. Were parties staying away because of the lack of clarity and predictability in the operation of the program, as it existed up until September of 2000? Or was there a business risk assessment on the part of possible participants in the program, especially those engaged in internal, Canadian conspiracies: if there was little risk of detection by other enforcement agencies, could they opt not to come forward in the hope that the offence might never be detected in Canada? Finally, there were a limited number of international cartel cases in which the party which received immunity abroad failed to approach the Canadian authorities in time to obtain full immunity in Canada, ostensibly, due to a misunderstanding of the implications of the Bureau's policy. Questions of fairness had to be addressed. It was clear that the policy needed revision and formal, public promulgation, in order to enhance both certainty and predictability, as well as the universal availability of the program.

Under the 2000 Bulletin, the immunity policy now provides an explicit guarantee. The Commissioner of Competition will recommend to the Attorney General of Canada that an applicant receive immunity from prosecution under the *Competition Act* in two circumstances:

i) if the Bureau is unaware of an offence and the party is the first to disclose it; or

ii) if the Bureau is aware of the offence and the party is the first to come forward before there is sufficient evidence to warrant a referral of the matter to the Attorney General for prosecution.

That simple statement of policy provides clarity and predictability as to the position of the Commissioner. A party that comes forward in those situations will benefit from an immunity recommendation. Simultaneously, the Attorney General of Canada has been developing an immunity policy, which is now available in draft form, which provides a corresponding assurance that in circumstances where the Commissioner recommends immunity, the Attorney General will, in fact, grant immunity from prosecution.

There are several specific conditions and qualifications applicable to this assurance by the Commissioner of Competition. The applicant for immunity must have **terminated** its effective **participation in the offence**. It must **not** have been **the instigator or the sole beneficiary** of the offence in Canada, a condition that seeks to ensure that the program's credibility with the Courts and the public is not diminished by exonerating the most culpable of the offenders in the Canadian dimension of the cartel.

Most importantly, the party must agree to provide **full**, continuing and expeditious **cooperation** with the investigation, including, of course, complete and candid disclosure of all relevant information it may have. The party must disclose all offences in which it is implicated; a condition that essentially requires the party to confess all offences that may be relevant to the immunity application. Certainly that would entail disclosure of all competition offences, and it would also require disclosure of offences that would prejudice the credibility of the immunity applicant. There is a timing element here: concerns have been expressed that the delay involved, while the party and its lawyers seek to ensure that they meet this condition, could enable another party to win the race to apply. But it is evident in practice that the requisite disclosure can be made as the immunity application proceeds; the party need not have an entire package of questionable conduct in hand when it first comes forward.

A further issue that deserves mention is that under the Canadian policy, there is no particular evidentiary standard that must be met by an applicant for immunity. That policy position that is the same as the US Amnesty Program, but it is different from the existing EU policy (requiring "decisive evidence" of the offence) and it may be slightly different from the EU's draft revisions to its policy. The Bureau's primary policy objective is to promote voluntary disclosure of covert offences that are very difficult to detect. Quite apart from assisting cartel detection and facilitating prosecutions, that policy objective promotes the termination of hard core, horizontal cartel activity that undermines the benefits of free and competitive markets. The policy was therefore determined to minimise any qualitative requirements, such as the EU evidentiary requirement, that might inhibit parties from coming forward.

The immunity applicant must be prepared, where possible, to make **restitution** to the victims of the offence. That requirement has occasionally meant that the immunity applicant provided voluntary restitution in conjunction with the immunity process, an outcome that appears more readily achievable in cases where the number of victims is limited. But where the party lacks the financial capacity to meet the claims of victims, or where it is prepared to respond in good faith to mass claims by multiple victims in civil litigation based on its involvement in the offence, this condition may be satisfied, though the Bureau will seek objective information to ensure that this is the case.

Where a corporation qualifies for immunity, **all** its current **individuals will be given immunity** automatically if they cooperate. That condition is clearly focussed on maximising the incentives for a party to come forward to disclose the offence. Where previous employees have been involved, they do not obtain an automatic grant of immunity, but their protection is readily negotiable, especially if they have helpful information to provide. And if the corporate applicant does not qualify, for example, where it may have been the instigator of the offence, individuals may qualify in their own right.

There are several subsidiary elements to the policy. A key limitation is that **only one grant of immunity** will be given in any cartel investigation. If multiple grants were available, it would have at least two negative effects. The principal objection to multiple passes is that it would diminish the pressure to be the first to come forward. But an equally cogent objection is the perception of fairness, especially of the Courts, if the matter went to trial. The policy must not create an impression of investigators singling out one among many participants in an offence for prosecution. That is especially so, because the policy permits eligibility regardless of the relative degree of culpability of the applicant (other than the instigator). It is therefore imperative to preserve the credibility of the program and the evidence it generates. A perception of targeting, based on immunising multiple parties to an offence, might well have an negative effect on the judicial perception of the evidence generated by the program.

To further promote immunity applications, the Bulletin confirms that the identity of the immunity applicant and the information it provides will be kept confidential. The Bureau considers that it is at liberty to share information with other competition agencies where it would assist in the administration and enforcement of the Act. No subsequent party will receive an assurance of confidentiality. The confidentiality commitment will be of limited duration, as a matter of law, if a contested prosecution ensues, because of the disclosure requirements in favour of an accused person under Canadian criminal law. But if the investigation is concluded with guilty pleas, the confidenti-

ality commitment will continue. And that commitment of confidentiality may provide transitional tactical advantages to the immunity applicant when responding to civil claims, even pending a contested prosecution.

An unstated, but very important, element of the Bulletin is the so-called "immunity plus" feature. Where a party cannot qualify because another party has been the first to apply in connection with a particular offence, it will be required to plead guilty for its involvement in that cartel and will be penalised. If it has also been a participant in another offence, it may choose to disclose the additional offence, in return for immunity for that cartel, and it will receive a reduced penalty on the first offence. That policy has been particularly productive, in generating information that has permitted the initiation of at least eight cartel investigations.

Evaluation

Since the promulgation of the Immunity Bulletin, there have been several positive indicators. One is increased international concordance. The Canadian policy was expressly intended to dovetail with the successful US Amnesty Program, to make it easy for immunity applicants to qualify in Canada and the US at virtually the same time and on similar, if not identical, terms. Since it was adopted, several other jurisdictions, including the UK, Ireland and (to a significant degree in its draft policy) the EU, have adopted programs that are in close harmony with the US and Canadian policies. That is not necessarily an assurance that Canada and the US have got it right. But it does make it evident to potential immunity applicants that they can obtain immunity in several jurisdictions almost simultaneously and under the same conditions, thereby multiplying the material advantages that can flow from a decision to confess and accept responsibility for the cartel offence.

In practical terms, over the last year, the revised Canadian Immunity program under the Competition Act has had quite significant, positive, practical results. In the first place, applications for immunity have increased noticeably. Informal indications are that the Bureau is receiving over one application for immunity per month. Many of these applications relate to conduct that is inherently related only to the Canadian market, opening up for the first time a widening series of investigations into cartels focussed primarily on the domestic economy. Other applications, involving international cartel activity, has enabled the Competition Bureau to work effectively with other competition authorities to challenge the operation of world wide cartels and effectively prosecute those responsible. The rate of case resolution in Canada has been maintained, with several guilty pleas flowing from the operation of the

immunity policy in 2001, and numerous other successful plea agreements having been negotiated and awaiting a Court date.

In a straight cost/benefit analysis, there seems to be no question about the propriety of the policy. Where there may once have been debate about an explicit offer to exonerate a guilty party that is willing to turn in other parties to its offence, the costs of offences like the vitamins cartel, to the economy and to individuals in society, have substantiated the legal value and the social benefits of the immunity program.

The results of Canada's Immunity Program over its first full year of operation has shown its effectiveness and silenced its initial critics. It has converted those who initially doubted its credibility into advocates who can advise their clients with confidence that the integrity of the program - and those who administer it - is demonstrable. And it has produced undeniable results, by threatening the finances and the liberty of those who would undermine the competitiveness of Canada's economy by participating in hard core cartels. If it continues to deter cartels, in conjunction with other enforcement agencies around the world, it will have proved its worth.