

The International Comparative Legal Guide to:

Cartels & Leniency 2008

A practical insight to cross-border Cartels & Leniency



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THE CARTEL PROHIBITION

1 The Legislation

1.1 What is the basis and general nature of the cartel prohibition?

The basis of the cartel prohibition in Canada is the Competition Act (as amended) (Competition Act), which contains both criminal and civil prohibitions and applies to individuals and companies.

1.2 What are the specific substantive provisions for the cartel prohibition?

Section 45 of the Competition Act sets out the main cartel prohibition. It provides that everyone who conspires, combines, agrees or arranges with another person:

- to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product;
- to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof;
- to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property; or
- to otherwise restrain or injure competition unduly [...]

is guilty of a criminal offence and is liable to imprisonment for a term not exceeding five years or to a fine not exceeding C\$10 million or to both.

Other criminal provisions prohibit corporations from implementing directives from a foreign corporation for the purpose of giving effect to conspiracies entered into outside of Canada (section 46), bid rigging (section 47) and horizontal and vertical price maintenance (section 61).

1.3 Who enforces the cartel prohibition?

The Commissioner of Competition, who heads the Competition Bureau, is charged with enforcing the provisions of the Competition Act. All criminal prosecutions are carried out by Crown prosecutors upon the Commissioner's recommendation to the Director of Public Prosecutions to commence a prosecution.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The Competition Bureau may open an investigation or inquiry on its own initiative, as a result of a complaint or following an application under the Immunity Program (described below). If a formal inquiry is started, Bureau staff may seek court orders to carry out searches or to compel the production of evidence. Following completion of the Bureau investigation, the Commissioner will either discontinue the inquiry or refer the case to the Director of Public Prosecutions for prosecution through proceedings in the Federal Court or the superior court of a province. As noted below, most criminal matters are resolved through a negotiated plea arrangement and a joint recommendation to the court as to sanction.

1.5 Are there any sector-specific offences or exemptions?

The Competition Act creates two industry-specific offences, one for professional sports and the other for financial institutions.

Conspiracies to limit unreasonably the opportunities for any person to participate in a professional sport or to negotiate with the team or club of his or her choice in a professional league are prohibited.

All agreements among federal financial institutions with respect to interest rates, service charges, or the amount and conditions of loans is an offence. Notably, these are per se offences for which no lessening of competition need be proven.

There are also a number of sector-specific exemptions from the Competition Act, including in the areas of labour relations, fisheries, shipping and agricultural products.

1.6 Is cartel conduct outside Canada covered by the prohibition?

As stated above, section 46 of the Competition Act prohibits corporations that carry on business in Canada from implementing foreign directed conspiracies that, if entered into in Canada, would be in contravention of section 45. The Commissioner actively investigates cartel conduct that occurs outside Canada but that affects or is directed at Canada. Numerous foreign corporations have submitted to the jurisdiction of Canadian courts to plead guilty in such cases. However, the precise extent to which Canadian courts have jurisdiction over cartel conduct that takes place outside Canada has not yet been established.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	N/A	Yes*
Carry out compulsory interviews with individuals	N/A	Yes*
Carry out an unannounced search of business premises	N/A	Yes*
Carry out an unannounced search of residential premises	N/A	Yes*
■ Right to 'image' computer hard drives using forensic IT tools	N/A	Yes*
■ Right to retain original documents	N/A	Yes*
■ Right to require an explanation of documents or information supplied	N/A	Yes*
■ Right to secure premises overnight (e.g. by seal)	N/A	Yes*

Please Note: * indicates that the investigatory measure requires the authorisation by a Court or another body independent of the competition authority.

2.2 Specific or unusual features of the investigatory powers referred to in the summary table.

As reflected in the summary table, the Canadian Competition Bureau does not have civil or administrative powers to investigate cartel conduct. However, as described below, individuals or corporations may bring civil proceedings to recover loss or damage suffered as a result of cartel activity. Procedural rules in Canada generally provide parties to civil litigation with broad rights of documentary and oral discovery.

The investigatory powers referred to in the summary table usually require prior judicial authorisation, although the Competition Act does permit searches without warrants in exigent circumstances.

The right to "image" computer hard drives using forensic IT tools may include the ability to download data stored outside of Canada in the course of searches of computer systems located in Canada. The Bureau has done so in several cases, although its legal ability to do so is unclear and has not been judicially tested.

2.3 Are there general surveillance powers (e.g. bugging)?

The Commissioner does have general surveillance powers. With prior judicial authorisation the Bureau may intercept private communications without consent through electronic means. The exercise of this power is generally restricted to cartel and other serious criminal offences.

2.4 Other powers of investigation.

In addition to, but usually in lieu of, a search, the Commissioner is able to seek court orders to require the production of documents and other records, to compel the preparation and delivery of written

returns of information under oath or to require a person to attend for examination under oath on any matter relevant to the Commissioner's inquiry.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Authorised Competition Bureau peace officers may carry out searches of business and/or residential premises, sometimes accompanied by police officers.

The Bureau is not required to wait for legal advisors to arrive before commencing a search, but will typically give legal advisors a short but reasonable amount of time to arrive.

2.6 Is in-house legal advice protected by the rules of privilege?

In-house legal advice is generally protected by the rules of privilege.

2.7 Other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals.

The Competition Act sets out a special procedure for dealing with documents that may be subject to a claim of privilege. Such documents cannot be immediately seized by officers under a search warrant. They must be sealed pending an assessment of the validity of the privilege claim within a limited time.

The Competition Act also provides that, with certain limited exceptions, confidential information obtained through the exercise of the Competition Bureau's investigatory powers may not be communicated to third parties other than a Canadian law enforcement agency.

Section 8 of the Canadian Charter of Rights and Freedoms provides that everyone has the right to be secure against unreasonable search and seizure. The exercise of investigatory powers by Canadian competition authorities must comply with the Charter.

No testimony obtained from a person under an order (referred to in question 2.3, above), can be used against that person in any subsequent criminal proceedings, although information obtained from an individual may be used against a corporation.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used in connection with a cartel investigation?

There are sanctions for the obstruction of cartel investigations under the Competition Act. Obstruction is a criminal offence under the Competition Act and subject to a maximum fine of C\$5,000 or two years in prison, or both. The destruction or alteration of documents and other records where search warrants or court orders requiring the production of documents or records have been issued is a separate offence. Maximum penalties are C\$50,000 in fines or five years in prison, or both.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The maximum sanction for companies under section 45 of the Competition Act is a fine not exceeding C\$10 million, although the

same cartel conduct may allow for numerous charges to be laid. For instance, one defendant in the vitamins cartel paid a fine of C\$51 million. There is no maximum penalty for companies convicted of the offence of bid-rigging or the cartel offence of implementing a foreign-directed conspiracy.

3.2 What are the sanctions for individuals?

Individuals convicted under section 45 of the Competition Act are liable to imprisonment for a term not exceeding five years or to a fine not exceeding C\$10 million or to both.

3.3 What are the applicable limitation periods for the imposition of sanctions for cartel conduct?

There are no limitation periods for the imposition of criminal sanctions for cartel conduct. The limitation period for private actions alleging cartel conduct is two years from a day on which the conduct was engaged in, or the day on which any criminal proceedings relating to the conduct were finally disposed of.

3.4 Is cartel conduct by individuals potentially an extraditable offence?

A breach of the cartel prohibition in the Competition Act is potentially an extraditable offence.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

A company may pay the legal costs and/or financial penalties imposed on a former or current employee.

LENIENCY / WHISTLE-BLOWING

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The Competition Bureau has an Immunity Program for companies (and individuals), pursuant to which they may admit to their involvement in cartel activity and offer to co-operate with the Bureau's inquiry (and any subsequent prosecutions) in exchange for immunity from prosecution.

An application commences with a "marker", discussed in more detail in question 4.2. After a marker is given, an applicant must provide the Bureau with a "proffer" in which the applicant describes in detail the illegal activity for which immunity is sought, its effect in Canada, and the supporting evidence. Proffers are typically hypothetical and are generally provided by an applicant's legal representative.

If the Bureau is satisfied that the applicant meets the requirements of the Immunity Program, the Bureau will recommend that the Director of Public Prosecutions grant them immunity from prosecution. An immunity agreement is then entered into that sets out the terms and conditions under which immunity from prosecution is granted.

Once an immunity agreement is entered into, the applicant must provide full disclosure of all non-privileged information, evidence or records in its possession or control that relate to the anti-competitive conduct. Parties will be expected to provide all documents and other evidence to the Bureau on a timely basis and witnesses will be expected to be interviewed at the Bureau's request.

A party who is not the first to apply for immunity, or who does not meet all the criteria, may still qualify for lenient treatment in return for cooperating with the Bureau's investigation.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

The Bureau has a marker system whereby confirmation is given to an immunity applicant that it is the first party to approach the Bureau requesting a recommendation of immunity with respect to criminal activity involving a particular product.

To obtain a marker, the applicant must provide the Bureau with a precise product definition, including a description of any sub-products covered by the marker request so that the Bureau has sufficient information to determine whether an applicant is "first-in" under the Immunity Program.

The marker guarantees the applicant's place at the front of the line as long as the applicant meets all other criteria of the Immunity Program. The applicant then has a limited period of time, usually 30 days, to provide the Bureau with a proffer, discussed in more detail in question 4.1 above.

4.3 Can applications be made orally (to minimise any possible subsequent disclosure risks in the context of civil damages follow-on litigation)?

Applications can be made orally to minimise possible subsequent disclosure risks in the context of civil (damages) follow-on litigation. However, as part of their co-operation with the Bureau, applicants have to provide all evidence, including documents and other records, relating to the offences under investigation.

4.4 To what extent will the application be treated confidentially and for how long?

Typically, the identity of an immunity applicant will remain confidential until charges against other participants to the offence are laid and disclosure of the Crown's case to the accused is required. Disclosure may occur in other circumstances (e.g., in order for the Bureau to obtain a search warrant) but the Bureau will take all reasonable steps to ensure that this type of early disclosure does not occur, except where absolutely necessary.

Applicants must also treat their applications as confidential. The only exceptions are when the application is made public by the Commissioner or the Director of Public Prosecutions or when the applicant is required by law to disclose the information.

4.5 At what point does the continuous cooperation requirement cease to apply?

The continuous co-operation requirement ceases to apply at the conclusion of the Competition Bureau's investigation and the conclusion of any subsequent prosecution (including appeals).

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

The Immunity Program permits individuals to report cartel conduct independently of their employer. The Competition Act also has a

number of safeguards for employees that have reported violations of the Act, including a prohibition against employers from dismissing “whistle-blowing” employees.

6 Plea Bargaining Arrangements

6.1 Are there settlement or plea bargaining procedures (other than leniency)?

A company or individual facing criminal charges for cartel conduct may negotiate a plea with the Crown. The negotiation of the plea often occurs in the course of the Competition Bureau’s inquiry and may precede the laying of criminal charges.

APPEALS AND DAMAGES ACTIONS

7 Appeal Process

7.1 What is the appeal process?

In a prosecution conducted in the Federal Court, an appeal lies to the Federal Court of Appeal and from the Federal Court of Appeal to the Supreme Court of Canada. Appeals from prosecutions in the superior court of a province lie to the Court of Appeal of that province and then to the Supreme Court of Canada.

7.2 Do courts frequently adjust the level of penalty imposed by the competition authority? If so, on what grounds?

Penalties are imposed by the Federal Court of Canada or by the superior court of any province. Penalties are usually imposed following a negotiated plea on the joint recommendation of the Crown and the accused party but may also be imposed upon conviction in a contested prosecution proceeding. Although trial judges have discretion to impose any penalty permitted under the Act, they typically follow the recommendation of counsel where a joint recommendation is made. Appellate courts rarely adjust the level of penalty imposed for competition offences.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct?

Section 36 of the Competition Act grants a person who has suffered loss or damage as a result of, among other things, cartel conduct the right to sue for and recover the loss or damage proved to have been suffered, together with the costs of investigating the matter and of bringing civil proceedings. A victim of cartel conduct may also assert tort claims against conspirators. Claims for civil damages (including class actions) may be brought in the Federal Court or in the superior court of any province.

8.2 Do your procedural rules allow for class-action or representative claims?

Procedural rules in Canada allow for class actions. Class actions almost always follow a conviction under the cartel provisions of the Competition Act.

8.3 Have there been successful civil damages claims in the past?

Civil damage claims arising from cartel conduct have been successful in the past. Many of these claims are settled following the resolution of criminal proceedings.

OTHER MATTERS

9 Miscellaneous

9.1 Provide brief details of significant recent or imminent statutory or other developments in the field of cartels and leniency.

In late 2007, the Competition Bureau updated its Immunity Program. Three changes have effectively broadened the eligibility criteria for immunity: leaders or instigators of illegal activity are no longer ineligible for immunity - only applicants that have coerced others into participating in illegal activity are disqualified; “sole beneficiaries” of illegal activity in Canada are now eligible for immunity - only when an applicant is the sole party involved in illegal activity will the applicant be disqualified; and agents of the applicant may now qualify for immunity on a case-by-case basis.

9.2 Please mention any other issues of particular interest in Canada not covered by the above.

Increasing the maximum fine levels and removing the need to prove that cartel conduct unduly lessened competition are among the changes being considered by the Competition Bureau and Government and may form the basis of future amendment proposals.

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