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Canada's New Cartel Offence – What Does It Mean for You?

What are the legislative amendments to the criminal cartel provisions?

Effective March 12, 2010, Canada's existing conspiracy provisions will be replaced by a *per se* criminal offence for agreements between competitors to fix prices, affect production or supply levels of a product, or allocate sales, customers or territories. Unlike the current conspiracy offence, the new offence does not require proof that the conspiracy, if implemented, would prevent or lessen competition unduly. The new offence will, however, still require proof (beyond a reasonable doubt) of an agreement between competitors that falls into one of the categories listed above.

Maximum penalties under the new conspiracy offence are 14 years imprisonment and a C\$25 million fine, a significant increase from the previous maximum of five years and C\$10 million.

Are there any defences or exemptions?

Under the new cartel offence, liability can be avoided if the agreement is "ancillary" to a broader agreement that does not contravene the new conspiracy offence and is reasonably necessary for giving effect to the objective of that broader agreement. However, until the courts consider this point, the scope of activities that will fall under the ancillary restraints defence will remain uncertain.

Some of the defences previously available, including for agreements or arrangements relating to the exchange of statistics or credit information, cooperation in research and development and the defining of product standards, have been removed from the new cartel offence. Other exemptions, including those for specialization agreements, agreements between affiliates and agreements relating only to the export of products from Canada, remain available.

What is the practical impact of the new cartel offence?

The introduction of a *per se* offence for agreements between competitors represents a fundamental shift in one of the cornerstones of Canadian competition law, eliminating as it does the requirement to prove that the agreement, if implemented, would have a significant negative impact on competition in the relevant market.

Under the new offence, even legitimate collaboration between competitors that involves an agreement to fix prices, affect production or supply levels of a product, or allocate markets may raise issues under a literal reading of the provisions. Although the Bureau has taken the position in its recently issued Competitor Collaboration Guidelines that it will seek to prosecute only "hard core" cartels under the new offence, these guidelines are not binding on the courts, private parties or even the Bureau itself. Accordingly, any arrangements between competitors that meet the above criteria could be the subject of civil litigation or be used by parties as justification to avoid contracts.

Furthermore, agreements between competitors that do not fall into any of the *per se* categories but are likely to substantially lessen competition may be reviewable under a new civil provision that also becomes effective as of March 12, 2010.

Parties doing business in Canada would be well advised to review any existing arrangements with competitors (e.g., joint ventures, product swaps, patent settlements) to determine whether such arrangements raise any issues under the new cartel offence. The potential consequences for violations are even more serious than before.

Conspiracies and Competitor Collaborations – Practice Profile

The Davies Competition & Foreign Investment group continues to be at the forefront of both domestic and international cartel cases. We have represented both individuals and corporations in criminal antitrust prosecutions and have been involved in some of Canada's most significant and complex cartel cases, including cases that have entailed cross-border enforcement cooperation among national competition authorities around the world.

We also routinely advise clients on how to evaluate and implement joint ventures and other types of strategic alliances in order to minimize competition law risk. This issue will take on increasing importance with the new conspiracy offence coming into force on March 12, 2010.

In many matters, our involvement is not a matter of public record. However, the following examples are representative of the range of cartel-related matters in which we are asked to assist clients:

- Represent clients that are targets or subjects of criminal investigations by the Competition Bureau (we have been involved on behalf of clients in industries such as carbonless paper, vitamins, pipe, poultry processing, airlines, confectioneries, fax paper, retail gasoline, electrical contracting, construction and insecticides).
- Provide immediate on-site representation and advice to clients served with search warrants.
- Successfully negotiate immunity from prosecution for corporations and individuals, including individuals initially targeted for prosecution in Competition Bureau investigations.
- Assist clients in responding to compulsory written interrogatories and document production orders.
- Develop comprehensive antitrust compliance programs, including seminars and written materials, for various corporations, including the Canadian subsidiaries of major U.S. companies.
- Advise parties in respect of numerous civil "follow on" litigation matters arising from prosecutions under the *Competition Act*.

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