KING & SPALDING

Client Alert

Antitrust Practice Group

February 11, 2015

Global Cartel Practice: Accused in Canadian Price-Fixing Investigation Have a Right to Information Obtained Under the Competition Bureau's Immunity and Leniency Program

On February 4, 2015, the Ontario Superior Court of Justice ruled in *R. v. Nestle Canada Inc.*,[1] that accused parties have a right to information proffered to the Canadian Competition Bureau during the course of a price-fixing investigation in the chocolate confectionary industry. The decision resolved the Crown's application regarding whether the information was protected from disclosure by the "settlement privilege." Although there are distinctions between the scope of relevant privileges and protection under U.S., Canadian, and other countries with leniency regimes, the Ontario court's decision is a concrete example that cooperation by leniency applicants and other entities in international cartel investigations is not subject to absolute confidentiality.

Background

The *Nestle Canada Inc.* decision concerns information provided to the Canadian Competition Bureau ("the Bureau") by Cadbury and Hershey, which cooperated with the Bureau regarding price-fixing allegations in the chocolate confectionary industry. Cadbury first contacted the Bureau in July 2007, and through a series of proffer meetings, Cadbury shared information relating to its internal investigation, including communications that had occurred between Cadbury representatives and parties later accused of price-fixing. Cadbury proceeded under the Bureau's Immunity Program. Hershey subsequently cooperated as a "second in" company and pleaded guilty to price-fixing.

In June 2013, three other companies and three individuals were charged in Canada with price-fixing: Nestlé Canada Inc., Mars Canada Inc., and ITWAL Limited (ITWAL), and Robert Leonidas, former President of Nestlé Canada; Sandra Martinez, former President of Confectionery for Nestlé Canada; and David Glenn Stevens, President and CEO of ITWAL.

In June 2014, the Crown sought the return of what had been disclosed to the accused parties, on the ground that the information was protected by the settlement privilege. The accused parties declined to return or destroy the documents.

For more information, contact:

James M. Griffin
+1 202 661 7971
jgriffin@kslaw.com

Grace M. Rodriguez
+1 202 626 5508
gmrodriguez@kslaw.com

Jeffrey S. Spigel
+1 202 626 2626
jspigel@kslaw.com

Wendy Huang Waszmer
+1 212 556 2124
wwaszmer@kslaw.com

Alan R. Dial
+1 202 661 7977
adial@kslaw.com

King & Spalding
Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 202 737 0500
Fax: +1 202 626 3737

New York
1185 Avenue of the Americas
New York, New York 10036-4003
Tel: +1 212 556 2100
Fax: +1 212 556 2222

www.kslaw.com

The Ontario Superior Court of Justice's Decision Regarding the Settlement Privilege

The Ontario court held that the settlement privilege did not apply to the documents the Bureau received from Cadbury and Hershey, which were produced to accused parties in the criminal proceedings. The court described the settlement privilege as follows:

> Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. Sometimes called the "without prejudice" rule, it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation.[2]

In this case, although the documents were provided to the Bureau in connection with seeking immunity and leniency, the information was not sought for use against Cadbury or Hershey, nor was there a specific threat of private litigation in which the documents could be used against the two companies in the future.[3] Instead, the information was being sought for use by accused parties in criminal proceedings. Accordingly, the rationale of enabling parties to participate in settlement negotiations without fear that information would be used against them was not implicated.

The court also noted in discussing waiver of any privilege that both Cadbury and Hershey knew before their first contact with the Bureau that any success in seeking immunity and leniency would turn on their ability to deliver evidence that could be used against third parties.[4] Cadbury's immunity agreement expressly contemplated the disclosure of information pursuant to the Bureau's disclosure obligations in criminal cases, and the Bureau's leniency bulletin expressly provides that "all information provided by the leniency applicant prior and pursuant to the plea agreement may be used."[5] The court also rejected arguments by Cadbury and Hershey that information provided *before* immunity or a plea should be treated differently than information provided after those events.

Finally, the court found no merit in Hershey's argument that the information was protected from disclosure by solicitor-client privilege, as the information had been revealed to the Bureau.[6]

Comparison with U.S. Law and Enforcement Policy

Although not identical doctrines, there are important parallels with U.S. law and enforcement policy regarding the treatment of information provided to the government in the context of cooperation and settlement negotiations. These points illustrate that cooperating companies should be prepared for potential disclosure of information provided to the government.

- ***Disclosure of documents in DOJ cartel prosecutions***: Under DOJ's leniency program, the identity of an amnesty applicant is kept confidential, but when criminal charges are brought against other parties, documents and other information gained from an amnesty applicant and other cooperators can and will be disclosed in criminal proceedings. Indeed DOJ's model corporate leniency letter also expressly warns that should the Antitrust Division learn of a basis for revoking amnesty from an applicant, it "may use against Applicant in any such prosecution any documents, statements, or other information provided to the Division at any time pursuant to this Agreement by Applicant or by any of its current [or former] directors, officers, or employees."[7] There are certain temporal limitations that govern the timing of DOJ's disclosure of information prior to the filing of criminal charges, for example, the Federal Rule of Criminal Procedure 6(e) prohibits disclosure by DOJ of certain material during the course of grand jury processes.[8] Once criminal charges have been filed, however, as noted by the Ontario court with regard to the Crown prosecutors, DOJ prosecutors have disclosure obligations to provide relevant information to charged defendants.

- ***Federal Rules of Evidence 408 and 410 Limit Admissibility, But Are Not Rules of Privilege***: FRE 408 and 410 are not rules of privilege, rather are rules of admissibility, but provide for limitation on admissibility of settlement discussions in criminal and civil cases. FRE 408 provides that in federal court proceedings, evidence of offers or promises to compromise are not admissible by any party to prove or disprove the validity of the amount or to impeach a prior inconsistent statement. Among the limited exceptions to this Rule are when such evidence is offered in a criminal proceeding. FRE 410 limits the admissibility of evidence such as statements made to prosecutors during the course of plea negotiations if no plea was entered or the plea was subsequently withdrawn. Exceptions to FRE 410 include where a defendant is being tried for perjury or where statements are included for completeness.

  Counsel are prudent in making clear what communications are subject to FRE 408, 410, and other rules governing settlement-related evidence. In at least one recent case in the Auto Lights Investigation, DOJ asserted its ability to introduce a defendant's statements during the course of cooperation where it did not consider those statements to be a part of a plea negotiation. The DOJ's brief stated: "Steps taken to cooperate with a government investigation are not inadmissible under FRE 410, even if those steps are taken with the hopes of leniency and are contemplated in the course of plea negotiations."[9]

- ***Selective Waiver Has Been Rejected by Most Courts***: Similar to the *Nestle Canada, Inc.* court's conclusion that the solicitor-client privilege did not protect the documents from disclosure once the material had been shared with the Bureau, in the U.S., the concept of selective waiver, *i.e.*, that a party can disclose to one party without waiving attorney-client privilege, has been rejected by all except for the Eighth Circuit.[10] In the U.S., parties nevertheless frequently negotiate confidentiality provisions when producing information to the government to prevent broader dissemination of privileged or otherwise sensitive material.

These realities of cooperation and the potential for disclosure at different stages of investigation and follow-on litigation should therefore be discussed early, in both domestic and multi-jurisdictional matters.

* * *

---

1 2015 ONSC 810 (Can LII).
2 *See id*. at ¶ 39.
3 *See id*. at ¶¶ 64-66.
4 *See id*. at ¶ 65.
5 *See id*. at ¶¶ 79-81.
6 *See id*. at ¶¶ 33-38.
7 *See* Department of Justice, Antitrust Division, Model Corporate Leniency letter, at ¶ 3, *available at* http://www.justice.gov/atr/public/criminal/239524.htm
8 *See* Fed. R. Crim. P. 6(e).
9 *See* United States' Opposition to Defendant's Motion in *Limine* to Exclude Documents and Communications Pursuant to FRE 410 and FRCP 11, *United States v. Eagle Eyes Traffic Industrial, Ltd*., 3:11-cr-00488 (N.D. Cal.) (RS).
10 *See In re Pacific Pictures Corp*., 679 F.3d 1121 (9th Cir. 2012); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig*., 293 F.3d 289, 295-304 (6th Cir. 2002). *But see Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir.1978) (en banc).