

ASSOCIATION OF CORPORATE COUNSEL

Cross-Border Investigations and Litigation: How to Protect Your Client in the U.S. and Canada December 5, 2007

Presented by Osler, Hoskin & Harcourt LLP

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Peter Franklyn: Thank you. Well good afternoon ladies and gentleman. My name's Peter Franklyn and I'm the Chair of the Competition and Antitrust group at Osler, Hoskin and Harcourt in Toronto and I will be your moderator for today's web cast.

We have quite an ambitious agenda for today. In the next hour or so we'll address and discuss the legal and tactical issues facing illegal advisors in conducting internal investigations and managing related litigation in antitrust matters in Canada.

This is an issue that has achieved some prominence in the recent times as a result of the increase in cross border investigations and litigation between Canada and the U.S. Our focus today will be primarily on the antitrust, or what we call in Canada, competition lie area, where there have been a number of these cases in industries such as vitamins, the air cargo industry and a number in the electronics industry.

Well many of the issues we'll talk about today are equally relevant in the securities law contacts where there have been a number of transporter investigations as well.

This is area has also become quite active as a result of the arrival in Canada of cross border class actions where we are now seeing class plaintiffs tracking carefully regulatory developments and investigations in the U.S. as well as in Canada and we're also starting to see class plaintiffs coordinating with U.S. class action firms south of the border.

Before we get into the substance of the program, let me just deal with a couple of procedural matters. First of all, information about the content of today's program is available on the links box that you'll see where you can get information about our firms competition group as well as the info pack that we prepared on Canadian competition law. And that document is also accessible on the ACC's website as well as on our firm's website, ASSCO.com.

In terms of the format of the presentation today, we're going to use a hypothetical fact situation or a series of fact situations in which we will try to peel back the onion and explore some of the key issues relating to the conduct of internal investigations and related issues with particular reference to the important differences that exist between Canada and the U.S. in this area.

We would encourage all listeners to ask questions and you can do that by typing your question in the question box that you'll see on your screen and hitting "send" and we will then receive those questions and we will try to address those at the end of our presentation.

I would also encourage all listeners to please remember to fill out the web cast evaluation form which is also available in the link box.

Before I turn to the-we turn to the substance to this, I just wanted to introduce our panel this afternoon. We're very pleased to have three presenters. First, Carla Swansburg; Carla is a Senior Counsel with the RBC, which is Rural Bank of Canada Law Group. In her capacity at RBC she manages complex litigation involving the bank financial group throughout the world including in the U.S., Europe, Asia, Latin America and the Caribbean dealing with matters such as fraud, banking, securities, breach of contract and trust.

She also frequently leads or supports internal investigations at RBC and is involved in managing complex litigation. She's also spoken and written extensively on topics such as ADR, a privilege litigation management and electronic discovery.

Our next speaker is Chris Naudie. And we're not necessarily going to go in this order. Chris Naudie is a partner in our litigation group here in Toronto. His practice involves antitrust litigation, securities litigations, class action defense and other complex corporate and commercial litigation. Chris has acted as counsel in a number of major antitrust and securities investigations and class actions as well and has also acted as counsel for the Canadian Commissioner of Competition in enforcement proceedings for the competition tribunal and the federal court of appeal and the supreme court of Canada as well.

He has significant experience in conducting internal investigations and in handling cross border antitrust and securities class actions. And Chris was recently recognized by Canadian Legal Lexpert Directory as one of the top 40 lawyers in Canada under the age of 40 years old.

Finally, we're pleased to have with us today, Graham Reynolds, who is a partner in our competition antitrust group. Now Graham has quite a unique background among Canadian competition advisors, having had extensive experience prosecuting competition law cases as well as other criminal and regulatory offenses before he joined our firm.

Graham's practice here involves a representation of both immunity applicants and targets in both domestic and multi national cartel investigations. He's involved regularly in providing strategic and counseling advice to multinational corporations on internal investigative and the wide range of other regulatory matters.

Prior to joining us, as I said, Graham was the senior general counsel at Canada's Competition Bureau in the justice department. And in that capacity he was lead counsel for the bureau and the attorney general in many multinational and domestic cartel investigations and prosecution.

And in that capacity, and as a-actually as a provincial prosecutor, prior to that he was involved in conducting significant commercial fraud, tax evasion and other white collar crime prosecutions as well as involved in-present in setting cases in extradition and mutual legal assistance.

So with those introductions behind us, I want to now turn to the substance of the program. And to do that I'm going to turn the mike over to Chris Naudie, who is going to introduce our first fact situation. Chris-

Chris Naudie: Thanks Peter. As Peter mentioned, to give some context to this discussion and hopefully to make it a bit more entertaining, we thought it'd be useful to use a fact pattern that was drawn from some of the large cross border cases that we have seen in recent years.

So without further ado, let's jump into the facts. You are the new assistant counsel of Global Chemical Solutions, GCS, the leader in the chemicals and plastics industry. GCS is a corporation based in the United States but it operates a subsidiary in Canada called Global Chemical Solutions Canada, or GCS Canada.

GCS Canada is based in Toronto but most of its processing and distribution facilities are in Alberta since GCS is a world leader in producing high performance plastics that are used in equipment in the oil services sectors such as the Alberta sands.

GCS has two major competitors, the Japan Chemical Company, JCC and Deutsche Plastics AG or DP. Similar to GCS, JCC and DP have their own subsidiaries and significant operations in Canada. GCS's leading product is called Plastics, a specialized plastic that is highly resistant to the extreme cold and hot temperatures experienced in the oil sector. JCC and DP distribute functionally identical products under different brand names.

GCS is the market leader with a market share of about 40 percent. By comparison, JCC has a 15 percent market share and DP has a 10 percent market share. The rest of the market is made up of smaller players.

GCS and GCS Canada sell plastics directly to a number of major customers but they also sell indirectly through a distributor called Subchain.

On your first day on the job you're advised that many of the large oil service companies in the energy sector have been complaining to GCS about the steep rise in the price of plastics the past two years. Gordon Smith, the COO of GCS based in the United States, dismisses these complaints. His view is that the price increases are attributable to booming demand while material costs and production constraints of GCS is existing manufacturing facilities.

However, you receive an anonymous memo which alleges that Gordon Smith and (Ted Lablong), the President of GCS Canada, have privately met with representatives of JCC and tradeshows, as well as hockey games in Canada to discuss the pricing of plastics products. According to the memo, it does not appear that DP or any other producer was involved in these meetings.

So with those facts, Graham, I have a question for you. Does this give rise to a concern that there may have been an offense, whether in Canada or in the United States?

Graham Reynolds: Well Chris on these facts, it seems to me that the government could apply Canada's antitrust conspiracy offence which is under section 451 sub C of our competition act. That offense is very similar to section one of the Sherman Act with one very notable exception.

In Canada the government must prove that the conspiring parties not only had an agreement but they had market power. So the government has to establish in a criminal case and to the criminal standard both the market definition and potential affects on the market as elements of their case.

In Canada's well I also see the possibility that the government might seek to explore an investigation under an unusual offense that enables the Canadian sub of a conspiring parent offshore or trans border to be convicted of implementing a price directive from an offshore conspiracy whether or not any executive in Canada ever knew of that conspiracy.

A number of people have suggested that that offense is actually constitutionally invalid. And I may have more to say about that later. One thing that I think our listeners should note is that in Canada we do not have a statute of limitations for antitrust offenses. And also finally, generally speaking in Canada, jurisdiction is often an issue because participants and cartels do not often conduct meetings in Canada so therefore the Canadian government has to establish jurisdiction.

And there are strong arguments that Canada does not have jurisdiction unless there is what is called a real and substantial link to Canada among the activities of the cartel or conspiracy. And our Supreme Court indicated that this would be the test and a strongly analogous extradition case stemming from 1985.

Chris Naudie: Well thank you Graham. Carla, over to you. In light of Graham's concern that we may have an offense in Canada or in the United States, do you conduct an investigation even if it's just based on an anonymous note?

Carla Swansburg: Absolutely you should conduct an internal investigation. And the reason that I say that is that no matter how speculative the allegations may be, they're serious enough and as Graham has just described they could be significant enough that in fact you would probably be making a mistake not to do any kind of an investigation.

One of the questions that arises and that you'll see from our notes is the question of who is your client. And this is a bit of a unique problem for in house counsel where chances are you deal day in and day out with any number of executives and other representatives of the corporation who are used to coming to you as in house counsel for advise and it's very important on day one to make it clear who your client is and for you yourself to understand who your client is. And of course in this case your client is the corporation and who your client is not would be any of the senior executives of the corporation.

And it's important to make sure that not only you understand that but that they understand that and that you have to resist the tendency to speak to them and to provide them with advise if they come to you asking about it.

Chris Naudie: Well thanks Carla. So if you do an investigation do you do it on your own or do you engage outside counsel?

Carla Swansburg: This is a matter that of course depends on your perspective. And we can perhaps have a debate with our external counsel about that. Whether or not you engage external

counsel certainly my experience is that, you know, because of resources and other matters we do often engage external counsel but you have to really make a call on whether or not you think you have the internal resources to at least do the preliminary investigation on your own.

And remember we don't have any significant evidence of any kind of offense or wrong doing at this stage so you may want to at least do a preliminary investigation on your own. We at RBC are lucky because we have a significant number of internal resources such as corporate investigative services and a large internal audit group so we often have the capability and the capacity to at least commence these investigations on our own and to retain-and we do retain through law group-these internal resources and get them to act on our behalf in assisting with the investigations.

Chris Naudie: Well thanks Carla. But just to make a pitch for external counsel, don't you see some advantages in having an external counsel that's a bit more independent and that may be able to structure it's investigation in a way that insures that privileges may ((inaudible)) through a formal engagement letter and mechanisms of the like?

Carla Swansburg: Absolutely and at some stage chances are as we precede through our facts, probably at a very early stage we would engage external counsel both because they lend the credibility in terms of being an independent external party but also they have the legal expertise to know how to guide the investigation.

And as soon as the point arises where you are going to engage external counsel the question arises, what their role should be and what in house counsel's role should be, and it will be very important to lineate who does what, who's involved in the investigation and all of those sorts of things.

How extensive the investigation is though depends a lot on not only what internal resources you have but one of the things that I'd like to raise is that when you have a group like internal audit or even external counsel that are preparing reports for legal counsel you want to make sure that the scope of that is limited to what has to be done at the early stages.

And the example that I like to use is where you have an internal audit group that likes to point out systemic problems and make recommendations. And it should be made very clear at an early stage what the scope of any report or investigation will be to avoid running into problems that we'll discuss later on in terms of privilege and sharing the report.

Peter Franklyn: OK. Well thanks Carla. So let's move ahead to the next part of our fact pattern here. So you-let's say you do decide to engage external counsel in the U.S. and in Canada to conduct the investigation, in the middle of that investigation ((inaudible)) Canada receives a court order under section 11 of the Competition Act Canada which is issued under the authority of the Senior Deputy Commissioner, the Criminal Matters branch of the Competition Bureau.

This order states that the commissioner of competition has commenced a formal inquiry into the pricing of plastics in Canada and the order requires GCS Canada to produce a variety of materials including all documents relating to the manufacture, sale, distribution and pricing of plastics in Canada but also including any information that's in the possession

of GCS parent company as an affiliate as well as any information that's available on GCS's global server.

So arguably this applies to material that is not actually physically present in Canada but accessible through the server. In addition, the section 11 order requests production of all documents which refer to any communications, agreements or understandings between or among GCS, DP and JCC, including any emails in the possession of GCS parent company and any information that's available on GCS's global server.

GCS has also received a call from it's distributor, Subchain, advising that it's President Ed Ling has been served with a court order under section 11 requiring him to attend for examination to answer questions under oath about the pricing of plastics in Canada and the U.S.

Their external counsel tells you that based on the investigation to date, Ed Ling appears to have attended some of the hockey games where the pricing of plastics was discussed.

So Chris, with those additional facts perhaps you can tell us a little bit about who the competition commissioner is, what her powers are to investigate and explain a little bit the investigative process in Canada and how that differs from the process in the U.S.

Chris Naudie: Sure Peter. I'd be glad to. To start, the Commissioner of Competition is the independent law enforcement official appointed by the federal government of Canada to enforce our Competition Act which is our statute that combines essentially the Sherman Act and the Clayton Act that exists in the United States.

She is the head of the Competition Bureau which is the federal agency that implements the commissioner's investigative reinforcement powers. And it's important to note that in contrast to the U.S. we have one law enforcement agency that investigates and enforces antitrust issues.

But you may expect under our statute the commissioner has very broad powers of investigation. Once the commissioner has initiated inquiry under section 10 of the act the commissioner has a very broad power under section 11 of the act to obtain an Ex-Parte order which can compel a recipient or a company to produce documents, to prepare an information return, which is essentially written answers to interrogatories and finally to also attend an examination and give testimony under oath.

And in our experience the commissioner is not shy about using these powers. In recent years we have seen the commissioner exercise these powers on all three of those levels in respect across border merger cases as well as cross border criminal cases.

And often, as we have seen in this particular fact pattern, we will see that request served on a Canadian entity requesting documents that are in the possession of the U.S. parent. It's also a good opportunity to talk about one of the significant differences in Canadian law relative to U.S. law in the area of regulatory and criminal investigations generally.

In the U.S. an individual like Mr. Ling can invoke the Fifth Amendment and refuse to testify in a regulatory or a criminal investigation. In Canada there is no equivalent right,

rather the protection against self incrimination under ((inaudible)) is much more limited. More specifically, a witness can not refuse to testify but the witness does receive a limited immunity in respect of subsequent proceedings, namely the prosecutor, the crown in Canada can not use that testimony in another proceeding.

Now this fundamental difference in our protection of constitutional rights gives rise to one of the biggest issues that we have to handle in a cross border regulatory or criminal investigation. Namely there is a risk that under informal and formal sharing arrangements between U.S. prosecutors and Canadian prosecutors that U.S. authorities may seek access to compel testimony in Canada even though they have no ability to compel that testimony from inside the United States, which leads to a very grave concern that U.S. regulators may try to do an in run around the individuals implemental price in the United States.

Peter Franklyn: Chris, before we leave that topic, just quickly can you tell us a little bit about what protections are available in terms of confidentiality of information that's collected and what the nature of the commissioners ability is to share that information in the U.S.?

Chris Naudie: Sure. There are some statutory protections under the act when we do give information to the commissioner that do provide that there are limits on their ability-on the commissioners ability to share that information to third parties.

The difficulty is whether or not you go informally or formally. The commissioner will often reserve her rights to share with U.S. authorities particularly where there is a request under a multilateral instrument. As most of you know, there is a-there are a number of mutual legal assistance treaties in place where by U.S. authorities can formally request information from the Competition Bureau as well as other regulators to assist in the prosecution of an offense in the United States.

Graham Reynolds: And then this is just Graham here, just chiming in. I think one of the interesting differences is that under an informal type of sharing agreement, which the commissioner claims to be able to do under the confidentiality provisions of the Competition Act, there are really no guarantees for entities that are involved in an investigation where as of course, as Chris has mentioned, in the multilateral instrument area there are some significant protections available in Canada before information and documents and evidence can be transmitted overseas to another agency.

So moving along now to our next slide, we now want to develop things a little bit further. And based on its inquiries, the bureau and its senior deputy commissioner understand that GCS is conducting an internal investigation.

In order to advance the bureaus investigation the senior deputy commissioner asks GCS for an update on its internal investigation, any business documents that have been collected as part of that investigation, any witness interview notes and any interim reports that your external counsel has prepared.

Now Chris, I'd like to turn to you on this. First of all, is there a claim to privilege in these circumstances? And secondly and more importantly, are there circumstances where a regulator could ask you to waive privilege on your internal investigation and advice?

Chris Naudie: Thanks Graham. Let's start with the first question. The short answer is yes. They're both U.S. and Canadian law. If you structured your investigation the right way and if you engage external counsel in a careful manner and if external counsel is diligent in managing their investigation and their work product you will have a solid foundation for a certain privilege over your counsels work product including their interview notes, their draft report and their communications and advice to the company.

But the larger issue that Graham identified is whether or not you will have to waive that privilege under certain circumstances to secure credit for cooperation from either Canadian or U.S. regulators since most regulators will realize the value of your work product. And quite frankly that work product makes life a lot easier for them and a lot more expeditious for them in completing their investigation.

In Canada there is no express policy in the antitrust field or in the securities field that requires you to waive privilege as credit for cooperation. And as many of you know, in the U.S. the tide is currently shifting back towards a position that's similar to Canada where by there is recognition of protection of privilege.

Under the most recent memo issued by the department of justice to it's prosecutors and it states, the McNulty memo, it's now clear that a waiver is not a prerequisite of cooperation and that prosecutors may only request a waiver if there is a legitimate need in their investigation. And there is few procedural hoops that you, as attorneys and prosecutors, have to go through in order to get that permission to request a waiver.

But the reality is that in spite of these rules there remains some expectation on the sides of the regulators that they will get your work product in some form since it will greatly expedite their investigation. So the issue really becomes can you come up with a solution where by you're able to share some of the work product of your investigation with regulators and still assert the privilege vis-à-vis third parties.

The brief answer is unfortunately the law in Canada and the United States is not in your favor but none the less in many of these investigations it's worth a try and there are certain ways to try to do it so that you can produce information to the right regulator under terms where by the regulator will acknowledge that you are trying to preserve privilege vis-à-vis third parties.

Now Carla, in your experience, have you had much luck in terms of implementing these arrangements with regulators? And do you have any views as to their enforce ability?

Carla Swansburg: We actually have been lucky and have had some success including recent success in maintaining privilege vis-à-vis other parties when we've shared information with regulators. For example in cases where we do internal investigations we have a very clear process now where for example if the report is to our general counsel or this would equally apply to external counsel, we make it quite clear from the context of any report that's prepared that it is for and directed to external counsel or general counsel.

We very carefully limit the circulation of that to the extent where we actually number and control the copies of the report. We keep careful notes of who the report is circulated to and

we insure that it specifically states it's not to be shared beyond that so that we have maintained control.

With respect to regulators we do a number of things from a pragmatic perspective to try and preserve the privilege. Where possible we will provide oral reports and volunteer to provide oral updates to regulators if they'll accept that in terms of the process and the conduct of the investigation and then produce whatever underlying documents that are relevant that give the oral report context.

We also-even in situations where we're happy to cooperate with regulators because where a regulation or a law compels production the waiver of privilege is less likely. Even when we're volunteering information we quite often ask if our regulators will provide some sort of order or direction or requirement pursuant to their legislative powers so that in fact there's a record that we're compelled pursuant to regulation or legislation to produce that report, which again, we have had some success in the early stages of court proceedings to protect privilege over those.

Peter Franklyn: I just want to echo what Carla had said. And I'd like to say that in the antitrust and competition area the Competition Bureau has been quite cognizant of the risks that exist for corporations and individuals that come in to seek immunity and they have adopted a virtually paperless procedure where by any information regarding antitrust offense and in the course of an application for immunity can all be done orally and that's much to the advantage of any corporation or individual that is facing a civil litigation trial down the road.

Carla Swansburg: The only one thing that I would add to that however is that we always assume and we tell everyone to assume that there's a good chance that if we share our report or information with a regulator that privilege has been waived. And that's why we go back to my early point about insuring that the scope of any report is particularly tailored to be as narrow as it needs to be and avoid the greater discussion of recommendations or systemic problems.

Peter Franklyn: OK. Well thank you. We'll turn in a moment to the issue of leniency and immunity and Graham will have a bit more to say on that in a second. But before we get there, let's just make this-let's further develop our fact scenario a little bit.

So in the conduct of this investigation, you run into a number of further complications. GCS's external counsel completes its investigation and they report to you that they have found emails that raise an inference that Gordon Smith and (Ted Lablong) met with representatives of JCC and DP on several occasions to set the level of prices for the sale of plastics in Canada.

This email correspondence suggests that an agreement was reached but that it was rather poorly implemented since DP ultimately backed out of the agreement.

This correspondence also suggests the representatives of GCS and JCC may have also met to discuss the pricing of another product, (Toy Right), a more generic chemical that is used in the manufacture of children's toys.

So with these further facts Carla, what actions in your view should GCS take in respect to Gordon Smith in the U.S. and (Ted Lablong) in Canada and what issues do you, as an in house counsel to GCS, need to consider when moving ahead with this?

Carla Swansburg: Well at this stage I think everybody would agree that we do have a problem and it's gone beyond mere speculation and perhaps a more remedial action should be taken. Getting back to our earlier point about who your client is, I think it's important at this point in time that the individuals who are implicated in the wrong doing-that there's some sort of action or disciplinary action taken against them.

In a case as significant as this where there is some evidence of an offence, often we will go so far as to basically send the senior executives home. Not only would we exclude them from the investigation-and that's quite important just to take a step back to insure that they're not involved in any way in the collection of information, the presentation of the facts or the preparation of any kind of report, but at this stage serious thought would have to be given to whether some form of discipline should be imposed.

Now we haven't yet had any findings. In this case we simply have evidence. So you may want to preserve the sending people home with pay for a later stage in the investigation but serious thought should be given to what the discipline is.

It's also important at this stage that while earlier you would have warned Ted and Gordon, for example, that you are not as internal counsel, their lawyer and external counsel presumably would be similarly protected but this is where you ought to consider recommending counsel, if they don't have it already, to your implicated individuals.

In terms of legal fees or indemnification, it's usually a matter of internal policy and sometimes it's a matter of what a company is capable of doing in terms of paying legal fees for the officers or senior executives but you should consider what rights the individuals have, either by employment contract or otherwise, and insure that everybody's protected, everybody's aware of who's representing whom and who's capable of taking care of what legal fees and taking charge of what parts of the investigation.

Peter Franklyn: Sure Carla. With a that I have a question for you. Obviously one of the practical challenges in this sort of scenario is these individuals obviously have some information that certainly the company would like to know and the regulators will be asking for.

Can you give us some practical tips or advice in terms of how to manage this in a way to try to secure that information from them while at the same time, you know, keeping your distance from these individuals and making sure that they get independent legal representation?

Carla Swansburg: Absolutely. And at the earlier stage when the investigation was first started, hopefully at that stage some steps were taken to obtain information and obtain documents. And in fact you're well positioned if you've done that before more serious evidence emerges. And perhaps that's in the process of which you would find the more serious evidence.

But as I said, it's important to make sure that it's not those individuals who are providing that information for you. You should have someone else review their files and obtain

information and documents and you should, as soon as there's any suggestion of wrong doing, meet with these individuals while explaining that you are not an external counsel, not their counsel and offering them their own rights to counsel.

It's important that you get to that stage as soon as possible because once everybody is separately represented and if things get worse before they get better it's going to get much harder for you to get that information from them.

Chris Naudie: Just to keep you on the seat Carla, I've got one other question for you. As you would have seen in the news in the United States, you know Judge Kaplan in the KPMG case was very critical of KPMG in the matter in which they threw their executives in front the bus in terms of indemnification of legal fees and the like.

I'm curious, in Canada in your experience, to what degree do regulators expect you to sever all ties, if you will, and perhaps even sever the legal fees?

Carla Swansburg: In our experience the regulators haven't been quite that harsh and haven't-in fact haven't been too involved in the process or in the determination. And generally senior people are provided with indemnities under most circumstances where-at least until there's some not just evidence but proof of wrong doing legal fees will be indemnified, in particular if whatever allegations arise happen in the context of their employment and the exercise of their usual duties where it becomes a problem for example for a highly regulated bank such as RBC is where the line is drawn.

For example if there are actual penalties or fines levied, you simply can not indemnify people for that sort of thing.

Peter Franklyn: OK. Thanks Carla. Graham touched on the issue of leniency and immunity a moment ago. In light of the fact that we've now just discussed Graham, what steps do you think GCS and it's Canadian affiliates can take to seek leniency in the U.S. or potentially immunity in Canada? And maybe you can also comment on what some of the substantive differences are between the Canadian and U.S. immunity leniency programs and what the benefits and risks are.

Graham Reynolds: Well thanks Peter. I think on the facts that we now have, we obviously have a new development in the matter that we have a new product, the (Toy Right) that's been the subject of what looked like to be many competitive discussions among the participants.

So the immediate factor that comes to mind is whether or not the company should be seeking some form of immunity on that particular product to take advantage of-or potential advantages that could be available to them through the joint immunity programs of Canada and the United States.

Now I would certainly recommend that in these circumstances the company try to take advantage of what are called the leniency plus or immunity plus provisions of the immunity programs of both the Canada and the United States.

Under these programs, which by the way are quite similar, a company that comes in with an additional product while not having achieved immunity on the initial product will be given

credit on their resolution of the initial file at the time that they do that because they have come in-they've come in to get immunity on that additional product and have provided assistance to the investigative agencies to do so.

And as I said, that will be very, very substantially advantageous for the company because certainly when you're looking at-in Canada potential penalties of \$10 million fines and five years imprisonment and if you're looking at the directives events that I mentioned earlier, a potentially unlimited fine to be imposed by the courts. There are very, very substantial advantages to be made in those circumstances. So I'd certainly advise the company to think about doing that.

Now, as I mentioned before, the immunity policies of Canada and the United States in the antitrust area are very closely aligned. And I think you will find that there's a great degree of coordination between the two agencies. They do talk a lot. They cooperate on their investigations both formally and informally.

I've recently written a paper which is available through our Osler website on some changes that have been made to Canada's immunity policy that have recently been put into effect as of October. And we think that this very, very closely aligns Canada's immunity policy with that of other agencies such as the U.S. antitrust division.

One development that only very recently occurred of course is the release by the district court in Philadelphia of the Stolt Nielsen decision in the U.S. And as many of you will know, that's the case that involved the replication of immunity by the antitrust division against Stolt Nielsen.

The district court pretty resoundingly rejected the position of the division in that area. And it remains to be seen what effect this will have-assuming that the division does not appeal the decision further what effect it will have on the ultimate immunity policies and the wordings particularly of immunity letters and agreements, conditional leniency letters that the division undertakes and whether or not that in turn might have an application in Canada.

Although I do mention that that's only been-it has never been actually occurred in Canada where immunity has been firmly revoked.

Chris Naudie: Graham, I've got a question for you. You mentioned that the immunity policies in the two jurisdictions are aligned but obviously in a cross border case a company wants one certainty that if it's going to go for immunity that it gets it in both jurisdictions.

Have you seen circumstances and is it possible that you would only get immunity in one jurisdiction and not in the other?

Graham Reynolds: It is possible Chris. In certain circumstances where for example if the Canadian Bureau, for example, takes the view that it does not have a proper market, it can not define the market in the way that's necessary to prove the Canadian's offense, it may say to the company sorry, you've come to the market but we can't find an offence so therefore you can't give it.

And I might say as well that the agencies don't look at reciprocal markers as being determinative of each other. That is, you can get a mark of immunity or leniency in one jurisdiction but not in another and they don't necessarily have to work together.

It's obviously better if they do but I think in those circumstances, you know, you have to be careful and try to analyze your facts as best as you can.

Peter Franklyn: OK, Graham, one other question. Is there a prize for second best? Obviously in these facts it looks like DP was not intimately involved in the conspiracy and may have pulled out and they may already be in on an immunity program in Canada or the United States.

If you are, you know, second to the finish line does that count at all?

Graham Reynolds: Well if you're second of course you lose out on immunity and you just don't get the benefits of completing immunity from prosecution and of course in the-in the United States on antitrust improvements legislation the immunity for trouble, damages and other things.

However, agencies that indicated that if you come in as a second in arrival in the process you can get substantial credit for cooperating with the government. Unfortunately, certainly in Canada, we don't have a system of ((inaudible)) guidelines as there are in the United States where you could provide the calculus and advice a corporation on precisely or at least close to what the reduction in a fine could be.

But the Competition Bureau officials had indicated in their recent provisions that they're going to consider publication of an actual guideline for entities and corporations that are thinking about coming in not of the immunity applicant but as a second in the process and that would be very, very welcome because it would allow advisors such as our firm and others to provide more concrete advice to corporations and individuals that might have lost out on the first place but they could still get some advantages by coming in second.

Chris Naudie: Thanks Graham. I had a question as a civil litigator. If you get immunity does it give you any protection vis-à-vis potential civil liability in class actions?

Graham Reynolds: Well Chris, as I just mentioned, under the antitrust improvement legislation of the United States, the-a defendant in a civil action who is also an immunity applicant will receive some very substantial relief from the trouble damages provisions in the United States.

Unfortunately, in Canada we do not have any such provision. The good news is that we do not have trouble damages, as I think Chris will outline shortly when he's talking about the civil implications of these matters, but we do have damages and, as Chris will also outline, we have of course burgeoning class action bar in Canada.

The short answer is that unfortunately you do not get immunity from civil proceedings or civil litigation in Canada arising from your immunity application. One small footnote to that is though that in the Competition Act there is a provision that allows derivative actions

to be filed and those derivative actions in Canada have been most successful where there has been a conviction or a plea of guilty by a party.

In other words it allows a plaintiff to go into a civil court and file the record of proceedings and use that to base a follow on action in civil proceedings. An immunity applicant does not have that kind of a record of proceedings. So to the extent to which the immunity applicant maintains its status it will not have a public guilty plea upon which a plaintiff could rely to do a follow on action in Canada.

Chris Naudie: OK. Well thanks Graham. That's very useful background. Now let's assume, as is almost inevitably the case in these matters that private litigation flows from the fact that we've discussed. So the media reports at the US DOJ and the Canadian Bureau are conducting a joint investigation regarding the pricing of chemicals and plastics used in the oil sector and shortly after that GCS and GCS Canada are then served with a number of proposed class actions in the U.S. Federal Courts as well as four class actions in Canada, in Ontario, Quebec, Alberta and British Columbia.

The four class actions in Canada are brought on behalf of all direct purchases of plastics as well as indirect purchases of plastics through the sub chain organization in the respective provinces.

Peter Franklyn: So I guess Chris this raises a whole new set of issues. Perhaps you could explain very briefly what you know what the environment is in Canada for private litigation, how it differs from the U.S. and in factors that you need to consider when you find yourself in this situation?

Chris Naudie: Sure. Thanks Peter. And as you mentioned, unfortunately this fact pattern is becoming a lot more common in Canada because of certain changes that have happened in our legal environment. But let me start with the basics.

We do have a private action for damages, for anti competitive conduct in Canada but it's a bit more modest than that right under section ((inaudible)). More specifically there is a private right of damages for harm arising from criminal conduct under the act including conspiracy but is only a right of single ((inaudible)) and it is limited to criminal conduct.

And as many of you likely know, there are large portions of our act that are not regulated criminally especially in the area of monopolization as well as vertical distribution practice. There's no right of damages in respect of those activities.

As well, one of the other big differences in Canada is that it is generally assumed in Canada that there are rights of contribution between coconspirators whereas in the United States there's a hard rule that ours in a contribution in the event there's liability in an antitrust case.

Now typically in Canada, certainly since the 1990's, these claims have been asserted by way of class action. And I should also point out that in Canada, in contrast to the United States; we do have claims that have been brought on behalf of indirect purchasers. In other words we have no equivalent to the Illinois brick rule in the United States.

With respect to forum, these cases are typically brought in provincial court and typically we see these actions brought in multiple provincial jurisdictions at the same time, principally Ontario, Quebec as well as B.C. And this is because in contrast to the United States, we don't have an MDL system that allows you to consolidate proceedings in front of one judge. So unfortunately a defendant who's caught up in class action litigation in a large cross border case in Canada has to fight the same issues in multiple forums across the country.

Now we have class proceedings legislation in most of our provinces. And with one exception the test for certification in these jurisdictions is very similar to the test or certification under federal rule 23 in the United States.

The big difference is in Canada we do not have requirements of typicality and predominance in our class proceedings legislation. And as a general observation, our class proceedings task is a little less formalistic and a little more principled in terms of evaluating the case and whether or not the profile is sufficient to merit certification in light of the purposes of our act.

More specifically, in Canada the focus on certification is whether or not the proposed proceeding raises a viable cause of action, whether or not the plaintiffs have proposed an identifiable class, whether or not as well there are a number of common issues that merit determination in a common issues trial and the big requirement is whether or not the class action is a preferable procedure that will significantly advance the proceeding in light of the purposes of the objective-in light of the purposes of the act.

And finally, the court will also examine whether or not the plaintiff is an adequate representative plaintiff that has a workable litigation plan for pushing forward the litigation.

Now I refer to the one exception and it's important to stress in Canada, we do have one outlier jurisdiction, namely Quebec. It has really carved its own path in terms of establishing its own certification test and requirements. And without getting into the details of it, Quebec has a very low test on the substantive test for certification as well as there are very demanding procedural restrictions on a defendant's ability to contest certification prior to the motion.

And as a result of that we've seen a significant amount of class action activity in Quebec as well as a bit of foreign shopping in terms of plaintiffs who obviously want to bring their proceeding and try to get certified in the-in the jurisdiction that has the most lenient tests.

Peter Franklyn: OK Chris. Thanks very much. A couple of questions on that-on that topic. You mentioned a moment ago that there is no equivalent of the MDL coordination that you see in the U.S. to consolidate cases. How is that handled in Canada when in a case like this you have multiple actions brought in several different provinces?

Chris Naudie: Well it depends. But the practice that we are seeing is with the growing rise of the number of class actions we are seeing the plaintiffs bar in Canada get a little more coordinated on a formal level. More specifically we're seeing class action firms in Ontario coordinate with their breath win in BC as well as Quebec in terms of coordinating their class actions.

Typically how these matters will evolve is if the class action firms are getting along you will typically see one firm act as the lead class plaintiff in the lead jurisdiction and the other proceedings would not necessarily be held in advance but would track the developments that are proceeding in the lead jurisdiction.

And depending on that case, the certification motion would either be Ontario, Quebec or BC. Certainly there's other instances where we've seen there have been no coordination amongst the class action firms and we have seen proceedings in multiple motions on the same issues happening in each forum.

We've also seen an increasing amount of coordination between the class action firms here in Canada as well as the notable and well known class action firms in the antitrust and securities area in the United States which has lead to circumstances where once a regulatory investigation has been announced or a plea agreement has been reached or a significant story is reported in the "New York Times" within days we will see coordinated class actions that are virtually identical in terms of their allegations brought in the U.S. courts as well as brought in Ontario, BC as well as Quebec.

Carla Swansburg: Let me just pipe in on that point. The other phenomena that we often see is that as cases are successful in the U.S., class actions are successful and there's some success on the part of the plaintiff, there's a bit of a lag time but then the Canadian plaintiffs bar are closely tracking the U.S. and working in fact in cooperative agreements with U.S. counsel and we will then start to see the same kinds of actions brought in Canada.

A recent example, which was surprising people in the U.S. is that we only fairly recently had our first class action relating to wage and overtime liabilities and that's a fairly evolved area in the U.S.

Peter Franklyn: OK. Well thanks Carla. Chris maybe you can just comment on what you've seen. I know there's been a lot more class action activity in the antitrust area. What trends do you see emerging from recent decisions in this area?

Chris Naudie: Sure. You know to date antitrust class actions in Canada have actually been relatively unsuccessful because the big issue is whether or not the plaintiffs are able to discharge their ((inaudible)) of showing a common issue of loss or injury in respect of a class proceeding. And that's very difficult to prove on the evidence especially where you have a differentiated product and when you have various levels of distribution where there's passing of alleged over charges.

And in the cases that have gone to certification to date mostly all of them have not been certified except for one case where there was a narrow allegation in respect to resale price maintenance that was certified. So the trend to date has been that these cases have not been getting certified.

That said, you know the law moves very quickly and over the past couple of weeks our Ontario court of appeal, which is widely regarded as one of the leading courts of appeal in Canada, has indicated that in cases outside the antitrust area that they're going to be very flexible on means of proof as well as legal arguments in terms of whether or not the plaintiffs can show a common issue of injury, a common issue of harm.

So if I was going to predict I think the trends that we will be seeing is these cases are going to be getting easier to certify and that we will be approaching the status of matters in the United States where certainly we do see antitrust of class actions getting certified on a fairly regular basis in the U.S. courts.

Peter Franklyn: OK. Thanks Chris. We have a few minutes left. If any of the listeners have questions you can forward them to us electronically via the link box. While we're waiting for those questions to come in maybe one additional question Chris.

Graham had pointed out earlier that on the criminal side, unlike in the U.S., there's no statute of limitations, there's no limitation period on criminal offenses in Canada. What's the situation on private damage claims?

Chris Naudie: Private damage claims, under our act there is a limitation period. Generally its two years from the date of the conduct or two years from the conclusion of criminal proceedings. So it's an odd limitation period where it's disjunctive and you have to track those events.

But certainly given the speed with which these cases move limitation periods tend not to be an issue because as soon as the conduct is announced plaintiffs say that's when they discover ((inaudible)) and certainly they move within days rather than within years.

Peter Franklyn: OK. Thanks Chris. Carla a question for you. I mean what-you've got this very messy fact pattern here. What-in these kinds of situations what obligations do you have to preserve records at various stages of an investigation and what steps should you take as an in house counsel to actually protect your client over those issues?

Carla Swansburg: Well as anyone who's dealt-who's dealt with these issues would know that's another sort of full day seminar in terms of record retention and so forth. We have a little bit of a rule internally that we say to people as an in house lawyer. If you find yourself compelled to write privileged and confidential in the Re line of your email, chances are you're past the point where you should have taken steps to preserve records.

So at the very outside of a case like this where there is speculation raised and where there is a potential wrong doing is significant and could involve criminal sanctions, we would take steps immediately to issue a very broadly disseminated internal memo to say preserve your document.

Preserving documents often means for a lot of large organizations actually pulling documents. So for example when you have microfiche records or huge email vaulting systems, rather than just telling people to preserve them you ought to actually start to pull together whatever evidence you think is necessary.

In fact the day that you get a call that talks about potential allegations of wrong doing you should be starting to take steps to preserve that information. And as I said, it's a full day seminar in terms of how and what you do but it's important to be wary of your obligations immediately.

And there has been a lot of law in the U.S., as everyone's aware, in terms of criticizing corporations for not properly being able to save and retrieve documents. In Canada there's a lot less law. We haven't become very evolved in terms of our (discovery) rules and guidelines. We're working on it but there haven't been a lot of significant cases yet.

In Canada nobody wants to be the company that gets whacked in the first case. So I think it's just important to make sure you take those steps very early and do everything you think you need to. And as the scope of what the wrong doing may be expands you have to continually update your obligations in terms of letting people know that that the scope of what they have to preserve and pull has actually continued to increase.

Graham Reynolds: I just have a comment on what Carla said. It's-first of all, that's absolute gospel from the point of view of running an internal investigation and responding to a potential government inquiry.

I'd just like to comment that in Canada sometimes the Competition Bureau and the commissioner will proceed informally and they will issue what are called target letters to subjects of an investigation. And those target letters are effective in kind of notifying the entity if there's an investigation going on, it hasn't quite reached the point of a formal inquiry under the Competition Act but it serves notice than the company's required to maintain its documents and to preserve its documents.

So effectively once you get one of those letters its affective notice that you must implement the document retention policy and start to implement it in accordance with the letter and the terms of it. One thing that I should mention that I think is an emerging trend in antitrust investigations and prosecutions generally and the Competition Bureau is getting on this bandwagon and that is the increasing use of obstruction investigations and prosecutions as a tool for antitrust investigations if you like a backdoor route into antitrust investigations.

Just as we saw in the Martha Stewart case and other cases in the U.S. and there have been one or two in Canada very often the government may not be in the position of being able to prove the substantiated offense but it can prove much more easily the offence of obstruction. So you get into situations where somebody could be-destroying documents or shredding or modifying things, this will put them in a very serious position vis-à-vis the regulatory agencies, as we've all found out.

When I was a counsel to the bureau I was in charge of a case where a very substantial fine was imposed on a corporation in Canada. I think it was the largest fine that has ever been imposed for obstruction in Canada and there are very serious consequences to doing that which of course include possible imprisonment under Canada's criminal code.

Peter Franklyn: Thanks Graham. We have two final questions, one from one of our listeners and the other really just relates to the question about-who actually decides whether to prosecute the case in Canada and what's the legal standard they have to-have to apply in deciding whether the facts are sufficient to actually lay a charge?

Graham Reynolds: Thanks Peter. Well as Chris I think earlier mentioned in his remarks, Canada has a dual system certainly in terms of antitrust offenses and most other regulatory inquiries.

We have a DPP or a director of public prosecutions in Canada that is a separate, an independent agency from the investigative bodies.

So what they have to do is-it really more like the British system where they provide a brief of evidence to the DPP who then decides whether a charge can proceed. In Canada we have a test that the prosecutor must be able to uphold in order to bring a prosecution forward and that is that there must be a reasonable prospect of conviction.

And sometimes that gives a target a chance to be able to submit to the prosecutor that maybe their case doesn't look as good as it seems and you may have an angle there to be able to convince the prosecutor that not by standing the agencies having a-what they think is a case, it might not be in the interest of the justice system and everybody to proceed with the prosecution.

Of course in the criminal standard we're the same as every other common law jurisdiction. Proof in a criminal matter must be made beyond reasonable doubt and that's a standard has to apply to all antitrust and regulatory offences as well.

Peter Franklyn: OK. Graham thanks very much. We have a question from one of our listeners inquiring about whether there's a place that they can go to get more detailed briefing about the status of the law in these-in this area both in Canada and in the U.S.

There is in fact the info pack that I referred to at the outset that we prepared in collaboration with the ACC is available both on the links box that you see in front of you as well as on the ACC website and through our website. And I think you'll find that it's quite a comprehensive-gives quite comprehensive coverage of the issues we've talked about today as well as other areas that we haven't had time to touch on today such as merger enforcement, vertical practices, which Chris referred to earlier and a variety of matters that are relevant to antitrust enforcement in Canada.

We're just approaching an hour now. Unless there are any further questions I think I'd like to wrap it up at this point and to thank our participants this morning for-or this afternoon rather for what I think has been a very comprehensive and, I found, very helpful presentation on this topic.

I hope that listeners found this to be equally useful and I would remind all listeners to please complete their evaluation form that is available on the links box on the-on the page in front of them. Unless there are any other questions, I think that's it and thank you for joining us today.

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