

Audit Report

Audit of Competition Bureau – Criminal Matters Branch

Audit and Evaluation Branch

September 2013

Recommended for Approval to the Deputy Minister by the
Departmental Audit Committee on November 7, 2013.

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Table of Contents

1.0	EXECUTIVE SUMMARY	1
1.1	BACKGROUND.....	1
1.2	AUDIT OBJECTIVE AND CONCLUSION	2
1.3	MAIN FINDINGS AND RECOMMENDATIONS	2
1.4	AUDIT OPINION.....	4
1.5	CONFORMANCE WITH PROFESSIONAL STANDARDS	4
2.0	ABOUT THE AUDIT.....	5
2.1	BACKGROUND.....	5
2.2	OBJECTIVE AND SCOPE	8
2.3	AUDIT APPROACH.....	9
3.0	FINDINGS AND RECOMMENDATIONS	10
3.1	INVESTIGATION MANAGEMENT	10
3.2	RESOURCE MANAGEMENT	12
3.3	MANAGEMENT OF IMMUNITY AND LENIENCY PROGRAMS	14
3.4	ALTERNATIVE CASE RESOLUTION	15
3.5	DISCONTINUANCE OF AN INQUIRY	16
3.6	CONFLICT OF INTEREST FOR CMB EMPLOYEES.....	17
3.7	EXTERNAL RESOURCE MANAGEMENT	18
3.8	MANAGEMENT RESPONSE AND ACTION PLAN	19
4.0	OVERALL CONCLUSION	20
	APPENDIX A: AUDIT CRITERIA.....	21

1.0 Executive Summary

1.1 Background

The Competition Bureau (the “Bureau”), as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. In so doing, the Bureau is responsible for administering and enforcing the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.

Part of the Bureau’s activities involves investigating criminal activity, including cartels, bid-rigging and mass marketing fraud. These investigations are carried out by the Criminal Matters Branch (the CMB) and the Fair Business Practices Branch (the FBPB), both of which have similar processes for conducting criminal investigations.

CMB is responsible for detecting, investigating, and deterring cartels, including agreements between competitors or potential competitors to fix prices, allocate markets, restrict supply or rig bids. CMB is responsible for the investigation of criminal cartel offences under the *Competition Act*. A Memorandum of Understanding (MOU) between the Commissioner of Competition (the Commissioner) and the Director of Public Prosecutions (the DPP) outlines each party’s roles and responsibilities generally and specifically with regard to investigation and prosecution. The Public Prosecution Service of Canada (PPSC) provides legal advice to CMB during the examination and/or inquiry phase of a case. The PPSC independently evaluates if the CMB-referred cases should be prosecuted and determines whether or not to lay charges.

The two most important tools used to detect, investigate and prosecute cartel activity under the *Competition Act* are the Immunity Program and the Leniency Program. These programs operate on a first-come / first-eligible basis, where CMB would recommend that the first qualifying party receive immunity from prosecution under the Immunity Program and that subsequent qualifying parties receive lenient treatment under the Leniency Program. Parties requesting immunity or leniency are provided with markers, which establish their position relative to other applicants for immunity or leniency. Based on interviews conducted during the audit, approximately 90-95% of the cases investigated by CMB fall under one of these two programs. The remaining 5-10% of CMB’s cases are brought in through whistleblowers, complaints or monitoring.

CMB can also use Alternative Case Resolution (ACR), a non-prosecutorial process to enforce compliance with the *Competition Act*.

Investigations of cartel activity are the core operations of CMB and the critical element to how it achieves its objectives. There are several activities that CMB performs during investigations, which include: gathering, organizing, and analyzing initial evidence, developing and obtaining court orders, seizing and analyzing relevant documents pursuant to court orders and information, and conducting interviews and meetings with witnesses.

As a result of the Competition Policy Review Panel's 2008 report and the Conservative Government's tough on crime legislation, significant changes were made to the criminal cartel provisions in the *Competition Act* effective 2010 and the *Safe Streets and Communities Act* was enacted in 2012. These changes increased the penalties for cartel offences under the *Competition Act* and removed the possibility of conditional sentences (such as house arrest) for parties convicted of certain criminal offences under the *Competition Act*. In addition, as part of its Integrity Framework, Public Works and Government Services Canada (PWGSC) recently amended its Code of Conduct for Procurement to remove an exemption available to parties participating in the Leniency Program. Following this change, parties participating in the Leniency Program, including their affiliates and members of their boards of directors, are now ineligible to do business with PWGSC and the Government of Canada following a guilty plea before the courts – one of the requirements of the Leniency Program.

These changes have created an environment that has decreased the likelihood of cases being resolved through negotiated settlements, with the result that cases are being litigated more forcefully by both businesses and individuals than was historically done. For example, most CMB cases were previously handled through immunity and/or leniency plea bargains, with only a few cases per year involving charges against non-cooperating parties. As a result of the above-noted changes, referrals of cases from CMB involving non-cooperating parties have increased.

1.2 Audit Objective and Conclusion

In accordance with the Industry Canada 2013-14 to 2015-16 Multi-Year Risk-Based Audit Plan, the Audit and Evaluation Branch (the AEB) undertook an audit of CMB. The objective of this audit was to provide assurance that CMB's processes for establishing and maintaining effective governance, risk management and internal controls support the effective delivery of investigations and the advancement of prosecution in accordance with the *Competition Act*.

While some exceptions were noted, overall the audit revealed that CMB's processes are effective in establishing and maintaining the governance, risk management and internal controls that support the effective delivery of investigations and the advancement of prosecution in accordance with the *Competition Act*.

1.3 Main Findings and Recommendations

Investigation Management

CMB obtains support from the PPSC during its investigation of cartel activity.

Recommendation 1: The Senior Deputy Commissioner (the SDC), CMB, in collaboration with the PPSC, should monitor the impact of the planned additional resources on the time required to handle cases and assess if further measures will be required.

CMB provides support to the PPSC after an Immunity recommendation, a sentencing recommendation for Leniency cases, or a recommendation for the laying of charges against non-cooperating parties.

Resource Management

CMB uses a combination of, case specific work-plans, an enforcement priority table and regular team and management meetings to monitor utilization of resources.

Reports for time spent by PPSC resources for CMB-referred cases have not been requested.

Recommendation 2: The SDC, CMB should obtain periodic reports from the PPSC for the time worked on CMB cases.

Management of Immunity and Leniency Programs

Access to the marker database is restricted to CMB employees.

In 2012-2013, the process for tracking marker requests was enhanced by including a requirement to record not only the date but also the time a marker request is received.

Decisions made by the case teams in the Immunity and Leniency case files were reviewed and approved by senior CMB management, on a consistent and ongoing basis. However, the Case Selection and Prioritization (CSP) form was not consistently completed.

Recommendation 3: The SDC, CMB should clarify the intended use of the CSP form and ensure it is consistently leveraged by all case officers at key points.

Alternative Case Resolution

Case team decisions on ACR files were reviewed and approved by senior CMB management on a consistent, continuous basis.

There are no guidelines to help case officers decide when to involve the PPSC from the ACR process.

Recommendation 4: The SDC, CMB should establish guidelines/thresholds, in consultation with the PPSC, to help case officers determine when the PPSC's involvement is mandatory, strongly recommended or optional during the ACR process.

Discontinuance of Inquiry

Decisions to discontinue an inquiry were executed, documented and approved as per the prescribed process.

Conflict of Interest for CMB Employees

The Bureau has a defined process for self-declaration and assessment of employee's conflict of interest.

External Resource Management

There is lack of documentation to demonstrate the consistent and complete application of the prescribed process when CMB contracts external experts and their research assistants.

Recommendation 5: The SDC, CMB, along with the Deputy Commissioner, Compliance and Operations Branch, should ensure that a consistent approach is followed, and documented, when CMB hires an external expert and their research assistants.

1.4 Audit Opinion

In my opinion, CMB has no material weaknesses in its processes for establishing and maintaining effective governance, risk management and internal controls that support the effective delivery of investigations and the advancement of prosecution in accordance with the *Competition Act*. Improvements are required to address certain weaknesses in the areas of case management and documentation and the management of external resources.

1.5 Conformance with Professional Standards

This audit was conducted in accordance with the Internal Auditing Standards for the Government of Canada, as supported by the results of the Audit and Evaluations Branch's quality assurance and improvement program.

Susan Hart
Chief Audit Executive, Industry Canada

2.0 About the Audit

2.1 Background

In accordance with the Industry Canada 2013-14 to 2015-16, Multi-Year Risk-Based Audit Plan, AEB undertook an audit of CMB.

The Bureau, as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. In so doing, it is responsible for administering and enforcing the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.

Part of the Bureau's role involves investigating criminal activity, including cartels, bid-rigging and mass marketing fraud. These investigations are carried out by CMB and the FBPB.

Under the Commissioner, CMB is led by the SDC, CMB and the Associate Deputy Commissioner of Competition, CMB. Each of CMB's two divisions is headed by an Assistant Deputy Commissioner (ADC) and each employs approximately 20 full time equivalents. CMB also has employees in regional offices in Montreal, Toronto and Vancouver.

CMB is responsible for detecting, investigating, and deterring cartels, including agreements between competitors or potential competitors to fix prices, allocate markets, restrict supply or rig bids. CMB is responsible for the investigation of criminal cartel offences under the *Competition Act*.

A MOU between the Commissioner and the DPP outlines each party's roles and responsibilities. Generally and specifically with regard to investigation and prosecution, the MOU does not outline any service level standards or fee structure.

The PPSC provides legal advice to CMB during the examination and/or inquiry phase of a case. The PPSC independently evaluates if the CMB-referred cases should be prosecuted and determines whether or not to lay charges.

Investigations of cartel activity are the core operations of CMB and the critical element to how it achieves its objectives. There are several activities that CMB performs during investigations, which include: (1) gathering, organizing, and analyzing initial evidence, (2) developing and obtaining court orders, (3) seizing and analyzing relevant documents pursuant to court orders and information, and (4) conducting interviews and meetings with witnesses.

At some point during an investigation, an inquiry may be commenced under section 10 of the *Competition Act*. Commencing an inquiry is a procedural step that allows CMB to use formal powers under the *Competition Act*, such as production orders under section 11 and search warrants under section 15. An Inquiry can relate to several cases.

Immunity and Leniency Programs

Due to the inherent nature of offences committed under the *Competition Act*, detection is extremely complex. The leads for such crimes are often provided by parties that are involved in the conduct and choose to self-report to the Bureau. This is normally done through the Immunity and/or Leniency Programs. Based on interviews that were conducted during the audit, it was noted that approximately 95% of the incoming cases fall under these two programs.

Under the Bureau's Immunity Program (which is available to both individuals and associations), the first party to disclose an offence not yet detected and to provide evidence leading to the filing of charges may receive immunity from prosecution as long as the party cooperates with the Bureau and any subsequent prosecutions. The most important incentive for Immunity applicants is that they are immune from prosecution, meaning that they will not be charged and subject to fines or imprisonment under the *Competition Act*. If a company qualifies for immunity, all current directors, officers and employees who admit their involvement in the illegal anti-competitive activity as part of the corporate admission, and who provide complete, timely and ongoing cooperation, also qualify for the same recommendation for immunity. Former directors, officers and employees who offer to cooperate with the Bureau's investigation may also qualify for immunity.

Immunity and Leniency programs work on a first-come / first-eligible basis, where CMB would recommend that the first qualifying party receive immunity from prosecution under the Immunity Program and that subsequent qualifying parties receive lenient treatment under the Leniency Program. The Leniency Program offers discounts on penalties and reduction in sentences; however, those parties granted leniency must plead guilty. Parties requesting immunity or leniency are provided with markers, which establish their place in line relative to other applicants for immunity or leniency.

Once the immunity applicant has completed its proffer, and CMB has analyzed it, the SDC, CMB generally signs the recommendation for Immunity (or the sentencing recommendation for the Leniency applicant) and sends it to the PPSC. The reviewing counsel at the PPSC independently evaluates the case and may then agree to proceed with CMB's recommendation, obtain additional support from CMB for further investigation, or proceed with the recommendation after appropriate revisions.

Non-cooperating parties

During its investigations, CMB might become aware of parties other than Immunity and Leniency applicants that have allegedly been involved in cartel activity. These non-cooperating parties (targets) may then also be pursued by CMB. PPSC counsel may be involved in certain aspects of these cases, such as contacting the defence counsel for the targets.

Should CMB determine that a prosecution is warranted in such cases, the SDC, CMB recommends to the PPSC that charges be laid against such targets. As with Immunity and Leniency cases, PPSC reviewing counsel independently evaluates the case and may then agree to proceed with CMB's recommendation, obtain additional support from CMB for further investigation, or proceed with the recommendation after appropriate revisions.

Changes to the Operating Environment

Changes to Legislation

In 2007, the Ministers of Industry and Finance announced the creation of a Competition Policy Review Panel to review Canada's competition and foreign investment policies and to make recommendations to the Minister of Industry for making Canada more competitive in an increasingly global marketplace.

The recommendations in the Panel's 2008 report and the need to modernize the *Competition Act* and to bring it more closely in line with the laws of Canada's major trading partners, led the government to amend the *Competition Act* in March 2009. CMB was directly affected by increases:

- the maximum fine for agreements to fix prices, allocate markets or restrict output increased from \$10M to \$25M; and
- the maximum term of imprisonment for agreements to fix prices, allocate markets, restrict output or rig bids increased from 5 years to 14 years.

In 2011, the Government of Canada introduced the *Safe Streets and Communities Act*. The legislation removed the possibility of conditional sentences, such as house arrest, for anyone convicted of cartel activity under the *Competition Act*. Individuals sentenced to a term of imprisonment must now serve their sentences in a provincial jail or a federal penitentiary.

Changes to Government Procurement

Anti-competitive crimes can have a significant impact on the integrity of the public sector procurement process. Public Works and Government Services Canada (PWGSC) recently amended its Code of Conduct for Procurement to remove an exemption available to parties participating in the Leniency Program. Following this change, parties participating in the Leniency Program, including their affiliates and members of their boards of directors, are now ineligible to do business with PWGSC and the Government of Canada following a guilty plea before the courts – one of the requirements of the Leniency Program.

The changes in the Bureau's environment have brought about an increase in both the degree to which cases are being litigated and the number of referrals of cases involving non-cooperating by CMB to the PPSC. As the size and complexity of cases increase, so do the levels of effort dedicated to each case and the elapsed time between CMB referral and charges being laid. These factors combined could eventually lead to a reduction in the number of cases investigated and prosecuted, which could hinder CMB from fulfilling its mandate.

PPSC Resources

At the time of the audit, the Competition Law Section (the “CLS”) of the PPSC had nine dedicated legal and paralegal resources that supported CMB and FBPB. To assist with the current caseload at the PPSC, CMB has had one employee loaned to the CLS for the past 3 years and recently loaned two additional employees to the CLS.

The Bureau pays the annual salaries of the nine PPSC resources and the three staff on loan. Starting in 2014-2015, the PPSC will move away from a model of full salary recovery to a model based on the hours provided by PPSC Counsel on CMB cases using rates established by Treasury Board Secretariat, which the Bureau expects will translate into an increase in costs for the nine PPSC resources.

To assist in the timely management of its caseload, the PPSC approved in early 2013 the creation of 2 new legal and 1 paralegal positions in the CLS, for a total of 12 PPSC positions to support CMB and FBPB. It could take several months for the new staff to be in place, up-to-speed on files and fully operational.

The annual cost of the nine PPSC resources is approximately \$1.7M. The Bureau estimates an expected increase in costs of \$1.0M for the nine PPSC resources under the proposed 2014-2015 per diem fee structure. The Bureau also estimates additional costs of \$775K once the 3 new positions in the CLS of PPSC are fully staffed.

The Bureau has identified the high cost of PPSC resources as a corporate risk. The mitigation strategy includes temporarily reallocating funds while continuing to look for solutions to relieve financial pressures.

2.2 Objective and Scope

The objective of the audit was to provide assurance that CMB’s processes for establishing and maintaining effective governance, risk management and internal controls support the effective delivery of investigations and the advancement of prosecution in accordance with the *Competition Act*.

The scope of the audit was CMB activities for the period from April 1, 2011 to March 31, 2013.

Scope Limitation

Due to the confidentiality and legal privileges applicable to information provided by immunity and leniency applicants, CMB was unable to grant AEB access to its immunity and leniency marker database, emails relating to the requests for and approval of markers, or vetting emails confirming the accuracy of the marker database through streamlining processes without first redacting the material.

Section 29 of the *Competition Act* deals with the communication of information in the possession or control of the Bureau, whether provided voluntarily or obtained by court order.

This section prohibits communicating both the information and the identity of any persons who provided it, subject to limited exceptions, none of which apply in the case of the audit. Therefore, the audit was unable to conclude on Audit Criterion 6: CMB's processes for ensuring the completeness and accuracy of the marker database are working as designed.

2.3 Audit Approach

The audit was conducted in accordance with the *Internal Auditing Standards for the Government of Canada* and the *Policy on Internal Audit*. With the exception of the scope limitation described above, the audit procedures followed and the data collected are sufficient and appropriate to attest to the accuracy of the conclusions and the opinion expressed in this report. This opinion is based on a review of the situations identified in time and place, based on pre-established audit criteria agreed upon with management. This opinion applies solely to the entity reviewed and the framework described in this report.

During the planning phase of this audit, AEB conducted a risk assessment of the CMB's activities to confirm the audit objective and identify areas requiring a more in-depth review during the conduct phase.

Knowledge of CMB's business, programs, policies and mandate was required to appreciate the scope, impact and relevance of its operations. AEB examined several relevant background documents, and conducted interviews and walkthroughs in order to obtain an understanding of CMB's daily business operations, specific processes and procedures.

Based on the identified risks, AEB developed audit criteria (listed in Appendix A). In doing so, it considered the Treasury Board Secretariat's Management Accountability Framework tool for assessing Core Management Controls,(as defined in March 2011) that linked back to the overall audit objective.

The conduct phase for this audit took place at CMB headquarters from May 2013 to August 2013. The methodology included, but was not limited to, document reviews, interviews and file testing.

CMB provided AEB a list of cases that were open during the fiscal years 2011-2012 and 2012-2013 that included Immunity and/or Leniency applicants. This enabled AEB to examine the processes in place during the period under audit. A sample of 13 cases was selected on a judgmental basis from a population of 46 cases. For a sample of files, redacted documents were examined. AEB reviewed documents, such as legislation, internal policies and guidelines, and conducted interviews with 27 individuals from CMB.

A debrief meeting was held with management on September 25, 2013 to validate the accuracy of the findings contained in this report.

3.0 Findings and Recommendations

This section presents detailed findings from the audit of CMB. The findings are based on evidence and analysis from both the initial risk assessment and the detailed audit work.

In addition to the findings below, AEB has communicated findings of conditions that were non-systemic and/or of low risk to CMB management, in a management letter, for consideration.

3.1 Investigation Management

CMB and the PPSC are respectively responsible for conducting criminal investigations and prosecuting criminal offences under the *Competition Act*. As per the MOU between the Commissioner and the DPP, these organizations are required to work together, in close consultation with one another, and consistently support each other on an ongoing basis.

CMB obtains support from the PPSC during its investigation of cartel activity.

Through interviews with CMB management and case officers and through document review, the audit found that:

- a) CMB continuously involves and obtains support and guidance from the PPSC:
 - for the Immunity and Leniency cases before the recommendation for Immunity (or sentencing recommendation for Leniency applicants) has been signed and sent by the SDC, CMB or the Commissioner to the PPSC;
 - when a formal inquiry had commenced, at the outset, and on an ongoing basis throughout the course of the inquiry for the Immunity and Leniency cases that were tested. This included involvement by the PPSC during the completion of the formal inquiry commencement memorandum, in the preparation of documents relating to production orders, search warrants and wire taps, during searches, and in the preparation of reports to the judge, and the return of documents, including e-copies; and
 - on an ongoing basis in cases where the laying of charges was recommended by the SDC, CMB to the PPSC for non-cooperating parties, i.e. “targets”. PPSC was involved in the drafting of the letters to the non-cooperating parties, conducting interviews with targets, providing guidance on the summary of evidence, and other case specific items.
- b) there was evidence of PPSC involvement throughout investigations through:
 - email exchanges;
 - memos to the file;
 - meeting makers, which are meeting requests, between the CMB case team, senior CMB management and the PPSC;
 - presence at Immunity and Leniency proffer meetings or presence in Immunity and Leniency witness interviews;
 - meetings with the defense counsel; and

- discussions with external experts.

In addition, the audit found that CMB obtained guidance from the PPSC on a multitude of issues, such as class action lawsuits, interpretations of complex international trade agreements, and various other issues that were case-specific.

For some of the files reviewed during the audit, delays have occurred between the time referrals were made and charges were laid.

Recommendation 1:

The SDC, CMB, in collaboration with the PPSC, should monitor the impact of the planned additional resources on the time required to handle cases and assess if further measures will be required.

CMB provides support to the PPSC after an Immunity recommendation, a sentencing recommendation (for Leniency cases), or a recommendation for the laying of charges (for non-cooperating parties).

Through interviews with CMB management and case officers and through document review, the audit found that CMB supports the PPSC on an ongoing, continuous basis in Immunity cases after the Immunity recommendation and in Leniency cases after the sentencing recommendation has been signed and sent by the SDC, CMB or the Commissioner to PPSC.

The audit evidence included several emails between the case team, senior CMB management, and PPSC counsel on revisions and changes to the Immunity agreements, summaries of evidence, elements tables, disclosure packages and VOC calculations, as well as participation in negotiations, settlement meetings and preliminary hearings.

CMB undertakes several activities after a case is recommended to the PPSC for prosecution, including: (1) additional development of evidence; (2) analysis of evidence by sorting, organizing and presenting it; (3) preparation of witnesses, including subject matter experts/specialists; and (4) preparation of material for court proceedings.

After the Senior Deputy Commissioner recommends to PPSC the laying of charges against non-cooperating parties, CMB supports PPSC on an ongoing, continuous basis by participating in trials. CMB also prepares presentations of evidence, using a special investigation management system that facilitates the collection of evidence in various formats, and the packaging of evidence in different views, chronological orders, by witness, by location, etc.

3.2 Resource Management

Internal Resources

CMB uses a combination of case specific work-plans, an enforcement priority table and regular team and management meetings to monitor utilization of resources.

During a 2011 re-engineering project CMB determined that the use of detailed work plans would help it maintain its focus during investigations. Work plans are to be drafted collaboratively by the entire case team and provided to the SDC and the relevant ADC.

Each work plan is to be re-examined monthly by the entire case team. Any significant deviations from the work plans are to be brought to the attention of CMB management. All case teams are required to develop realistic work plans for the conduct of both emerging and full investigations.

Through file testing, documentation review and interviews, the audit found that the case officers prepare work plans on a case by case basis; each plan is reviewed by the senior competition law officer. The work plans contained such steps as:

- tasks related to specific events within the Immunity and Leniency programs, such as proffers;
- witness interviews;
- Case Selection and Prioritization form related requirements, such as VOC;
- economist or other expert selections and assignments;
- various items related to case-specific legal issues which in some instances included co-ordination with international legal bodies, consultations on class action lawsuits, etc.;
- immunity agreement and recommendation, as well as Leniency recommendations and discussions;
- searches, wire-taps, and inquiry related tasks;
- analysis of documents;
- summaries of evidence and elements tables; and/or
- disclosure requirements and presentations.

The work plans maintained in the case files set out the resources assigned to each task, target completion dates, and comments/status on the various tasks. Planned expenditures were also detailed with the following information: (1) travel required, search teams and date ranges targeted for the various search sites, (2) estimated hours per CMB resource to identify overtime requirements, (3) resource requirements for preliminary hearing preparations and special motions, and (4) requirements for experts, including details of where and when they are expected to be involved.

Based on document review and interviews with case officers, the audit noted that the ADC has case level discussions on the work plans with the SDC during bilateral meetings.

Through document review and interviews with CMB management, the audit found that the CMB uses an Enforcement Priority table to manage resource utilization and future requirements. The enforcement priority table is generally a fluid and relative analysis that is based on current and upcoming deadlines so that CMB management can allocate resources to priorities areas. The table is also used the tool to assess resource requirements and case progress, reallocate resources as needed and identify potential shortages of resources.

The table itemizes and/or outlines the following:

- Ongoing Cases – itemizing the case name, the CMB Officers and staff assigned to the case and the PPSC counsel assigned;
- Related Mandate and Key Triage Factor – such as domestic or international, the section of the *Act*, high or low profile area;
- Immunity/Leniency Applicants and Counsel;
- Investigative Tools – such as searches, wire taps, target letters;
- Relevant Dates and Events; and
- Narrative Description: Status and Next Steps

The table is updated regularly by case officers and discussed during regular management meetings between the ADCs and the SDC. The SDC also use the table to brief the Commissioner during his regular bilat meetings.

Their frequent discussions about cases and resources amongst the management team, along with the changes to the enforcement priority table that are done every two weeks and the work plans that are generally updated monthly are the primary means that CMB management uses to discuss and assess resource utilization and workload management.

The audit found that neither the work plans nor the enforcement priority table reflect actual time spent by resources per case/per phase. This additional information is not being tracked but could supplement existing information and be considered for resource allocation and case management purposes. CMB management has indicated that since every case is unique, tracking, reporting and monitoring time spent on various aspects of a case would not improve the resource allocation process.

External Resources

Reports for time spent by PPSC resources for CMB-referred cases have not been requested.
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The time spent by PPSC resources as a part of the investigation phase, laying of charges phase and prosecution phase for a given case is currently not provided/reported back to CMB. Although CMB and the PPSC discuss priorities and resource assignments on an ad-hoc basis, resource allocation information will become increasingly important since the two groups will no longer be co-located as of September 2013 and the PPSC will be implementing an hourly fee structure in 2014-2015.

Without tracking and monitoring resource utilization, CMB is unable to determine, forecast and budget for the most efficient use of available resources or clearly identify inefficiencies and shortages.

Recommendation 2:

The SDC, CMB should obtain periodic reports from the PPSC for the time worked on CMB cases.

3.3 Management of Immunity and Leniency Programs

Access to the marker database is restricted to CMB employees.

The Immunity and Leniency marker database contains significant confidential information, such as the name of the company or individual requesting immunity or leniency, the defense counsel involved, the date and the time the marker was requested and approved, details about the nature of the conduct (such as the names of other parties involved, specifics about the products and geographic markets, and the time period of the offence), and the place in the marker queue.

The audit found that the marker database is restricted to authorized CMB employees only.

In 2012-2013, the process for tracking marker requests was enhanced by including a requirement to record not only the date but also the time a marker request is received.

Given the nature of the Immunity and Leniency programs, there is an incentive to be the first party to approach the Bureau, therefore, it is crucial to record not only the date, but also the time an Immunity/Leniency marker was requested and approved. As both the request for an Immunity/Leniency marker by the defense counsel, and the granting of the marker by the SDC are oral in process, an audit trail must be created through e-mails, including both the date and the time an Immunity/Leniency marker was requested and approved. This is necessary given that a time difference of just a few hours can separate an Immunity marker from a Leniency marker.

Prior to 2012-2013, it was only mandatory to record the date of a request. During 2012-2013, CMB enhanced its process of tracking marker requests by including a requirement to record not only the date but also the time of every request. The audit found that although the time was not recorded for every request prior to 2012-2013, the time was being recorded for the 2012-2013 items tested.

Decisions made by the case teams in the Immunity and Leniency case files were reviewed and approved by senior CMB management, on a consistent and ongoing basis. However, the CSP form was not consistently completed.

CMB conducted a Business Process Re-engineering (BPR) exercise of its operations in 2011. This resulted in the streamlining of CMB's processes for selecting, prioritizing and conducting investigations. A formal CSP form was introduced for the Immunity and Leniency cases along with the requirement that it be regularly updated.

The audit found that CSP forms were not present in several Immunity and Leniency case files examined; however, supporting documents and VOC calculations were present in the Immunity and Leniency case files during the investigation process.

The absence of the CSP form could suggest the CMB case team failed to consider a case from various aspects, such as impact on Canadians, affected industries, vulnerability of victims, significant compensating and aggravating factors, and volume of commerce affected, prior to recommending it for decision to the Assistant Deputy Commissioner.

Recommendation 3:

The SDC, CMB should clarify the intended use of the CSP form and ensure it is consistently leveraged by all case officers at key points such as:

- prior to the recommendation for Immunity;
- prior to the sentencing recommendation (for the Leniency applicant);
- prior to the recommendation for the laying of charges being made to the PPSC (for non-cooperating parties); or
- prior to pursuing an ACR.

3.4 Alternative Case Resolution

Case team decisions on ACR files were reviewed and approved by senior CMB management, on a consistent, continuous basis.

Alternative Case Resolution (ACR) is a non-prosecutorial method that CMB sometimes employs to enforce compliance with the *Competition Act*. It includes voluntary undertakings by companies and individuals to correct the impact of anti-competitive conduct, and prohibition orders.

CMB assesses whether ACR is appropriate on a case-by-case basis. ACR measures can be used alone, or in combination with other techniques.

ACR is part of the overall enforcement toolkit of CMB. It allows the Bureau to resolve some issues quickly and easily without a full inquiry or judicial proceeding, thereby reducing uncertainty, maximizing the use of Bureau resources, and helping CMB focus on priorities.

As per the ACR Guidance document, the following levels of approvals are needed for ACR actions:

1. Information Letters – ADC or SDC signature
2. Information Visit – ADC involvement
3. Warning Letters – ADC or SDC signature
4. Undertakings – PPSC counsel involvement
5. Subsection 34 (2) Prohibition Orders – PPSC counsel involvement.

The audit found that the senior officers, Associate Deputy Commissioner, Special Advisor and Acting Senior Deputy Commissioner reviewed and approved decisions made during the triage process for the ACR. Audit evidence included emails, memos to file and other documentation showing that aspects of the case, such as impact on Canadians, significant mitigating factors, and volume of commerce affected, were discussed.

There are no guidelines to help case officers decide when to involve the PPSC in the ACR process.

Based on interviews and file testing, the audit found that, even though ACR falls within the responsibility of the Commissioner, the PPSC is generally consulted during the ACR process. The PPSC was not, however, involved in one (1) of the four (4) ACR cases examined, during the audit. In this particular case, the affected VOC was less than \$50,000 and the impact on Canadians minimal. CMB indicated that because of the nature and size of the issue, it decided not to involve the PPSC. CMB has no formal guidelines indicating when it is appropriate to include or exclude the PPSC from the ACR process.

Without thresholds to guide case, inefficient utilization of PPSC resources could result.

Recommendation 4:

The SDC should establish guidelines/thresholds, in consultation with the PPSC, to help case officers determine when the PPSC's involvement is mandatory, strongly recommended or optional during the ACR process.

3.5 Discontinuance of an Inquiry

Decisions to discontinue an inquiry were executed, documented and approved as per the prescribed process.

Discontinuance of an inquiry is a formal process at CMB. A decision to discontinue has to be approved by the SDC or the Commissioner, who then informs the Minister of Industry in writing. The number of discontinuances is published in the Bureau's annual report.

Through file testing and interviews, the audit found that for each discontinuance of an inquiry, the decisions and supporting reasons were prepared by the case team, and approved by the ADC

or Associate Deputy Commissioner, who then informed the SDC. The Commissioner or the SDC then sent the required signed letter to the Minister of Industry confirming the discontinuance. The Immunity and Leniency applicants, as well as the targets of the inquiry, were also notified.

Although the decision to discontinue an inquiry is the responsibility of the Commissioner, the audit found that CMB consistently consulted with the PPSC during each discontinuance process. This finding was supported by the existence of emails, memos and meeting makers between CMB and the PPSC during the discontinuance process.

3.6 Conflict of Interest for CMB employees

The Bureau has a defined process for self-declaration and assessment of employee's conflict of interest.

Because CMB deals with issues of a criminal nature, it is inherently important that its employees declare any conflicts of interest and that individuals with conflicts be denied access to case. A formal policy and procedure is in place to ensure that all individuals are aware of their obligations to declare all conflicts and to remove themselves from any situation that could cause harm to the Bureau, themselves, a case, etc.

The audit found that:

- The Bureau has Conflict of Interest Guidelines that outlines specific obligations of Bureau employees under the Industry Canada Code for Values and Ethics. The guidelines are currently being revised to address the use of social media, and to remind employees of key factors (such as the requirement to make a confidential report, assets and liabilities that require reporting and those that are exempt, various conflict of interest scenarios and related guidance, etc.). These guidelines are meant to complement the relevant policies and guidelines of Industry Canada and Treasury Board.
- The Deputy Commissioner of Competition (DC), Compliance and Operations Branch (C&O) is responsible for Values and Ethics at the Bureau. The DC, C&O reminds CMB staff annually of their obligations (i.e. the requirement to report in writing, on an ongoing basis, whether real or apparent conflict of interest has occurred).
- As the delegated authority for Values and Ethics, the DC, C&O assesses self-declarations by CMB employees in a confidential manner and advises CMB staff on the results of the assessment. The DC also presents a Values and Ethics Annual report to the Senior Management Committee (SMC members). For fiscal 2011-2012 and 2012-2013, this report outlined the nature and types of conflicts reported by categories such as Ownership Assets, Political Activity, Annual Statements, Arm's Length, Former Lawyer, Outside Activities and Other.
- CMB employees are governed by Section 29 of the *Competition Act* regarding confidentiality. AEB verified that Section 29 of the *Competition Act* specifically addresses the requirement to maintain strict confidentiality on cases and case-related information at CMB.

- Every CMB employee signs a Confidentiality Forms at the time of commencement of employment with the Bureau and if his or her personal situation (e.g. marital status) changes.
- CMB employees self-declare potential conflicts of interest and the appropriate senior management representatives are involved in the assessing these declarations.

Overall, the Bureau has a fully defined process for declaring, assessing and managing conflict of interest CMB staff follow that process.

3.7 External Resource Management

There is lack of documentation to demonstrate the consistent and complete application of the prescribed process when CMB contracts external experts and their research assistants.

CMB engages external experts, such as economists, engineers and actuaries, on a temporary basis for technical advice. In contracting with these experts, CMB employs a due diligence process that includes formal and informal reference checks and obtaining supporting documentation for qualifications, publications, formal and informal reference checks, and proof of price. The SDC or the Commissioner must sign and approve all the contracts.

The audit found evidence of specific due diligence activities performed in relation to external expert qualifications and suitability for working on a case. The evidence included copies of their published articles and formal/informal inquiries to check references.

Sections 25 and 26 of the *Competition Act* enable the Bureau to engage external experts on a temporary basis as required. As a result, CMB is exempt from Treasury Board's standard contracting requirements for the temporary hiring of external experts such as witnesses; CMB can sole source contracts to these experts.

CMB case officers prepare a memorandum with the rationale for contracting an external expert, and this is sent to the ADC, along with the Statement of Work, for approval. Following approval, C&O proceeds with the contract. In some cases, the memo provides supporting information for the rate charged by the external expert, such as previous rates charged on past projects with CMB (when applicable).

However, evidence was lacking to demonstrate that the processes were followed consistently for experts and their assistants, who are sometimes also included in the contracts with external experts. The following inconsistencies were noted:

- the process to formally verify that the rate charged by the external expert is reasonable vs. market rate is not consistently completed for all contracts;
- verification of references was not always noted; and
- conflict of interest and/or confidentiality forms were not always signed by the expert witness and/or their research assistants.

The Terms and Conditions attached to the external experts' contracts and amendments included several confidentiality and ethics clauses that were signed, or initialled and dated by the external expert. However, there is lack of evidence that confidentiality forms are signed by the assistants.

The audit did find that the SDC or the Commissioner sign and approve all the contracts.

Recommendation 5:

The SDC CMB, along with the DC, C&O, should ensure that a consistent approach is followed, and documented, when CMB hires external experts and their research assistants.

3.8 Management Response and Action Plan

The findings and recommendations of this audit were presented to the CMB's management. Management agreed with the findings and will take actions to address the recommendations by July 31, 2014.

CMB management will work closely with the PPSC to monitor and address resource utilization and cost issues; review and reinforce processes for case selection and contracting of external experts; and update the ACR guidance to clearly identify when to involve the PPSC.

4.0 Overall Conclusion

The results of the audit revealed that, with some exceptions, CMB's processes are effective in establishing and maintaining the governance, risk management and internal controls that support the effective delivery of investigations and the advancement of prosecution in accordance with the *Competition Act*.

Improvements are required to address certain weaknesses in the areas of case management and documentation and the management of external resources.

Appendix A: Audit Criteria

Audit Criteria	Met, Met with Exception or Not Met
Investigation Management	
1. CMB obtains support from PPSC during investigation processes for cases.	Met with exception
2. CMB provides support to PPSC during their decision making process with regard to the laying of charges.	Met
3. CMB provides support to PPSC during the prosecution phase of a case.	Met
Resource Management	
4. Sufficient oversight is in place to manage resource utilization within CMB.	Met with exception
Management of Immunity and Leniency Programs	
5. The Immunity and Leniency marker database is access restricted to authorized CMB employees.	Met with exception
6. CMB's processes for ensuring the completeness and accuracy of the marker database are working as designed.	Unable to Conclude
7. Decisions made during the Immunity/Leniency management process are approved and documented.	Met
Alternative Case Resolution	
8. Decisions made during CMB's Alternative Case Resolution (ACR) process are approved and documented.	Met with exception
Discontinuance of Inquiry	
9. Discontinuance of inquiries are reviewed, approved and documented.	Met
Conflict of Interest for CMB employees	
10. Processes are in place within the Competition Bureau to ensure that conflict of interest and/or issues of confidentiality in CMB are identified and addressed.	Met
External resource management	
11. There is evidence of due diligence, i.e. conflict of interest, proof of price etc., when engaging temporary external experts.	Met with exception