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Information Bulletin

Interception of Private Communications and the *Competition Act*

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INTRODUCTION

The purpose of the *Competition Act* is to maintain and encourage competition in the Canadian marketplace. The Act applies to most businesses in Canada, regardless of size.

The Competition Bureau has powerful investigative tools, subject to judicial authorization. These include search and seizure powers, under section 15 of the Act, and the power to compel any person to submit to examination under oath or provide records, under section 11 of the Act.

Under s. 184.2 of the *Criminal Code*, where there are reasonable grounds to believe that an offence against the *Competition Act* has been or is about to be committed, the Bureau can apply for authorization to intercept a private communication where either the originator of the private communication, or the person intended by the originator to receive the communication, has consented to the interception.

Section 183 of the *Criminal Code* permits the Bureau to apply for judicial authorization to intercept private communications without consent to investigate the following offences under the *Competition Act*: (1) conspiracy in relation to any of the matters referred to in paragraphs 45(4)(a) to (d); (2) bid-rigging (s.47); and (3) deceptive telemarketing (s.52.1(3)). This provision enhances the Bureau's evidence-gathering capability in cases involving the specified offences provided that specific legal criteria are met.

Interception of private communications without consent gives the Bureau a key tool needed to address the growing problem of deceptive telemarketing which by its very nature is carried out over

the telephone. This power also helps the Bureau investigate allegations of conspiracy to fix prices or share markets and bid-rigging, which are serious offences of an inherently collusive and secretive nature.

This Information Bulletin outlines the approach that the Commissioner of Competition is taking in applying for and exercising judicially authorized interceptions of private communications without consent. The guidelines contained in this Bulletin are not law. However, they may be relied upon as reflecting the Commissioner's interpretation of how the law is applied on a consistent basis by Bureau staff.

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GENERAL PRINCIPLES

1. Application

Pursuant to section 186 of the *Criminal Code*, authorization to intercept private communications without consent requires the court to be satisfied that other investigative tools have been tried and failed, that other investigative tools would be unlikely to succeed or that the urgency of the matter is such that it would be impractical to carry out the investigation using only other investigative procedures. Accordingly, the power to intercept private communications without consent will be used under exceptional circumstances, for instance, in cases where the nature of the offence or the difficulties of obtaining evidence through other tools justifies the use of interception of private communications. However, consistent with jurisprudence developed in this matter, the Bureau need not have exhausted all possible investigative steps before resorting to interception of private communications.

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2. Scope

The Bureau can only seek authorization for permission to intercept private communications without consent for cases involving suspected violations of:

(a) The deceptive telemarketing provisions found in section 52.1(3);

(b) The bid rigging provisions found in s. 47; and

(c) The conspiracy provisions found in s. 45 insofar as they relate to price fixing or market sharing.

The Bureau cannot seek authorization regarding suspected violations of the other provisions of the Act. However, if during a judicially authorized interception of private communications, information that appears to be evidence of another offence or reviewable matter is obtained, it may used in other proceedings, whether criminal or civil. Such evidence must be relevant and not excluded by other rules of evidence such as the rule against self-serving evidence and spousal privileges, etc.

Unless there is compelling evidence that a merger or strategic alliance is a sham, intended as a cover for covert criminal behaviour, mergers and strategic alliances are not pursued under section 45. They cannot therefore be the subject of a judicially authorized interception of private communications without consent.

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GUIDELINES

1. Pursuant to section 185 of the *Criminal Code*, the procedures to be followed in any application related to offences under the *Competition Act* require that:

(a) The application for judicial authorization to intercept private communication is signed by the Solicitor General of Canada or an agent specifically designated for this purpose; and

(b) The application is accompanied by an affidavit, sworn by an officer of the Bureau, which sets out:

- The particulars of the alleged offence and the facts upon which the application is based. In conspiracy cases, the application will include evidence that the alleged conspirators have market power and that their conduct has been injurious to competition;

- The type of communications to be intercepted, the names and addresses of the people whose communications would be intercepted, the manner of interception to be used, and the period of time for which the authorization is requested; and

- Whether other types of investigative procedures have been tried and have failed, why it appears that other investigative procedures are unlikely to succeed, or why the matter is so urgent that it would be impractical to carry out the investigation using only other investigative procedures.

2. To grant an authorization, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 of the *Criminal Code* must be satisfied that:

(a) The authorization would be in the best interests of the administration of justice. In order to show this, it would have to be established that there are reasonable and probable grounds to believe that the offence has been or is about to be committed, and that the authorization sought will afford evidence of that offence; and

(b) Other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed, or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

3. The *Criminal Code* also requires that notice of the interception be given to the person who was subject to the interception within ninety days after the period for which authorization was given. This notice period may be extended up to a maximum of three years.

4. The Bureau wants to make clear that it supports the principle of minimization. If there is a strong likelihood of inappropriate material being collected, for example privileged communications, the Bureau will outline this probability in its application. The Bureau will also include a requirement for "direct" or ongoing monitoring under which interception must be discontinued as soon as it becomes clear that inappropriate material is involved. Similarly, in the case of a public phone or a phone used by many individuals for many reasons, the application will include a requirement that interception must be discontinued after a specified time, for example two minutes, unless the monitor believes, on reasonable grounds, that one of the targeted individuals is a party to the communications. Current jurisprudence and law enforcement practices in relation to minimization will be followed, and changes made as necessary.

Examples outlining circumstances under which interception of private communications without consent might be used are in Appendix 1.

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TREATMENT OF INFORMATION OBTAINED BY INTERCEPTING PRIVATE COMMUNICATIONS

Information obtained by interception of private communication is subject to section 193 of the *Criminal Code* which makes it an indictable offence to disclose the existence of such communication or its content. This section provides certain exemptions to these disclosure restrictions. One exemption is that intercepted communication may be disclosed to a person or authority with responsibility in a foreign state for prosecutions or investigations if it is intended to be in the interests of the administration of justice.

The Bureau's treatment of intercepted private communication will be consistent with its policy in respect of confidential information which is described in the Bureau's 1995 Statement of Practices entitled, "Communication of Confidential Information under the *Competition Act*". Accordingly, intercepted private communications may be shared with a foreign law enforcement agency for the purpose of receiving the assistance or cooperation of that agency regarding an investigation under the *Competition Act*.

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HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act* or file a complaint under the provisions of the Act should contact the Competition Bureau's Information Centre.

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Appendix 1
Examples of Using Interception of Private Communications Without Consent

Example #1: Deceptive telemarketing

A person complains to the Competition Bureau of recently being "taken" by a deceptive telemarketer. The complainant had received a phone call from someone purporting to be a representative of a company. This representative explained that the complainant had won an award of a gold pen and pencil set worth $500. The representative further explained that very few people win this award and that if the complainant did not agree to accept the award during the phone call it would be forfeited to the next person on the list. The representative also explained that because of a tax law requirement, before the complainant could receive the award the complainant had to be a customer of the company. To become a customer, it was explained, all the complainant had to do was buy a product which would cost $100.

The complainant agreed to purchase the $100 product in return for receiving the award. The complainant sent the money to the company and a few days later received the pen and pencil set. Much to the complainant's dismay, the pen and pencil set turned out to be a standard yellow plastic disposable pen and a yellow school pencil--not gold at all. The complainant was out $100.

This was one of many similar complaints received regarding this company. It is known that people associated with this group have a history of setting up operations for extremely short periods of time and shutting down before sufficient evidence can be collected for a prosecution.

Typically, as in many cases like this, the telemarketers do not use their real names over the telephone. The prosecution, by means of the Bureau's standard investigative tools, of specific individuals that are continually involved in this conduct has proven extremely difficult. In the past, the Bureau has also had trouble linking key people who finance and direct these operations to the offences.

Offending calls are initiated from a single location, but made to a wide range of locations throughout Canada and the United States.

Under these circumstances, the Bureau could seek authorization to intercept telephone communications made by the telemarketers and their managers without consent on the grounds that:

- it would allow the collection of evidence which would establish multiple, consistent representations that were false or misleading in a material respect, which could not be obtained using other investigative tools;
- it would provide evidence which could be tracked back to specific individuals through voice recognition;
- it would allow interception of calls between managers of the boiler rooms and the individuals financing and directing the operations;
- previous attempts to collect evidence using the traditional tools available to the Bureau had been unsuccessful; and,
- past conduct of these telemarketers suggested that they would only maintain their current location for a short period of time and that there was, therefore, an element of urgency to the extent that it would be impractical to carry out the investigation using only other investigative procedures.

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Example #2: Bid-rigging

A businessperson informs the Competition Bureau that he or she was approached by a competitor with respect to a call for tenders involving a market in which the complainant rarely participates Within the past year, however, the complainant had won a number of tenders and had recently picked up the necessary bidding documents for an upcoming contract.

The competitor informed the complainant that regular participants in this market had recognized the need to share the available business at reasonable prices if anyone was to survive. Accordingly, a system had been set up under which each participant agreed to allow other competitors to win certain bids.

When the complainant suggested that this might be illegal, the competitor noted that it was necessary; that the participants were careful; that they exchanged information either over the telephone or through informal meetings, rather than in writing. The competitor continually emphasized the need not to create incriminating documents and that there were other safeguards in place, e.g., measures to prevent the detection of an obvious pattern. Apparently recognizing the reluctance of the complainant to co-operate, the competitor suggested that the complainant could come to the next meeting just to meet some of the other people and listen to their concerns.

Nevertheless, the complainant decided not to take any risks and refused to participate. The complainant decided not to submit a bid on the relevant tender, and decided not to submit future bids in the relevant market, for fear of reprisal from the competitor or possibly others.

Although willing to guess, the complainant did not know the names of the other bid-riggers with certainty — but knew that the next meeting would take place in two weeks. While the complainant initially agreed to attend and tape the next meeting, the complainant later declined because of the risks involved.

Under these circumstances, the Bureau could seek authorization to intercept the telephone communications of the competitor without consent on the grounds that:

- the information outlined above, supported by a sworn affidavit from the complainant, indicates that one or more bid-rigging offences have been or about to be committed;
- the interception of private communications by the known competitor over the competitor's telephone, as well as at the upcoming meeting, will afford evidence of these offences;
- other investigative procedures are unlikely to succeed; and
- the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

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Example #3: Price fixing conspiracy

The Bureau is approached by two people who indicate that they overheard an informal conversation strongly suggesting that the managers of two competitors, whom the complainants knew on a business basis, were involved in some form of price fixing and market sharing. These competitors supplied a line of products for which there were no close substitutes.

Additional investigation and interviews raised further suspicions. For example, purchasing agents outlined a history of widely varying prices and product choice. Several years ago, however, this pattern changed and prices are now usually the same, if not identical, on similar products. A purchasing agent provided the name of an executive who used to work for one of the competitors before a downsizing exercise, and suggested that the Bureau might want to talk to this person.

The former executive had not been directly involved in marketing or pricing but had attended management meetings chaired by the firm's President, where problems concerning low prices in the industry were discussed as part of a general review of financial results. The former executive could confirm that the Vice President, Marketing, made comments several times indicating that "contact" had been established with an unknown executive in the other firm and that the latter shared similar views about the need to improve pricing. Everyone understood, however, that this might involve illegal activity; few questions were asked; and the President directed that nothing should be put in writing nor should there be any record directly or indirectly suggesting that these kinds of discussions

had taken place. By the time the former executive left the company, prices and profits had increased and the company's financial results were excellent.

The former executive was also able to introduce Bureau officials to a lower-level source from the executive's former company. After being promised protection of identity, the second source was willing to swear an affidavit confirming that the previously mentioned Vice President, Marketing, regularly talked over the telephone to a senior executive from the other major competitor and that these conversations sometimes concerned prices. Furthermore, this second source had never seen anything about these conversations in writing.

Under these circumstances, the Bureau could seek authorization to intercept the telephone communications of the Vice President, Marketing, at the place of business, without consent on the grounds that:

- there is evidence from two different sources indicating a conspiracy to unduly lessen competition conducted, at least in part, over the telephone;
- there is information to suggest that it is unlikely that the required evidence will be found during searches or, without some strong supporting evidence, during oral examinations; and,
- the interception of the telephone communications of the Vice President, Marketing would afford evidence of these offences.

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