

COMPETITION

Canadian Criminal Competition Cases: A Defence Lawyer's Lament

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Introduction

The Canadian criminal competition law climate shares many characteristics with its United States – and, increasingly, worldwide - counterparts: advocacy conducted in meeting rooms rather than courtrooms, and negotiated rather than litigated outcomes. There are, of course, very good reasons for this, falling primarily in the risk management category: a negotiated resolution of criminal charges won't leave anyone on the pleading defendant's side happy, but it will create certainty and a measure of finality, should contain adverse public relations, and allows for the proverbial "turning of the page".

Those benefits exist across jurisdictions and irrespective of the particular legal issues in any jurisdiction. That said, there are a few particular "facts of life" in Canada which seem to lead inexorably to negotiated resolutions of criminal exposure on the competition side. First is the virtual absence of litigated cases, leaving us with no guidance on many crucial points of Canadian law; this is a notable difference to the U.S. situation. The second is the reality of life as a close neighbour to the United States and its aggressive antitrust enforcement authorities (and plaintiffs' class action lawyers): exposure to U.S. proceedings looms large and will almost certainly be addressed, and once exposure in the United States is being resolved, Canadian issues will almost always be resolved as well. The third is the reality that the Canadian volume of commerce is virtually always a fraction (as a rough rule of thumb, 10%) of the U.S. volume of commerce.

So, a company accused of criminal competition law violations in Canada probably faces similar allegations in the United States (and elsewhere these days). If that company is settling its exposure in the United States, a Canadian settlement based (as it almost invariably is) on the Canadian volume of commerce is likely to be seen by the company as a "rounding error".

Hence the Canadian defence lawyer's lament: so many issues, so little opportunity to litigate. This takes us back to the setting for the advocacy opportunity, which ends up being the negotiating table. This is not to say that arguments at a negotiation with one's learned adversaries are less powerful than before a learned member of the judiciary. We in Canada wear legal robes (no wigs, alas, but we do wear robes) in a courtroom. In a negotiation room, the robes stay off, but the arguments get made. This means that vigorously asserting defences, including jurisdictional arguments, and laying out all of the frailties in the prosecution's case is a key role for defence counsel to play, irrespective of the setting.

*An earlier version of this paper was presented at the 2008 ABA/IBA International Cartel Workshop.

This paper deals in a summary way with selected issues for consideration when faced with allegations of breaches of Canadian criminal competition law, focusing on:

- > the negotiation setting
- > points of distinction between the United States and Canada
- > jurisdictional arguments
- > substantive defences
- > sentencing considerations

The Negotiation Setting

The Canadian Competition Bureau, headed by the Commissioner of Competition, investigates alleged anti-competitive conduct and, in the case of criminal matters, recommends prosecution to the Department of Public Prosecutions (or DPP). In practice, negotiations regarding criminal matters are conducted on behalf of the prosecution by representatives of both the Competition Bureau and the DPP.

As a matter of Canadian practice, a defence counsel can engage in negotiations of a criminal competition matter without waiving the client's right to plead not guilty and proceed to trial. Thus, the negotiations are carried out with both sides understanding that the failure to reach a deal means proceeding with the formal prosecution; both sides will have their "best alternative to a negotiated agreement" firmly in mind when making their arguments and listening to other side's arguments. Typically, a discussion of the strengths and weaknesses of each side's case, conducted in a fair and forthright manner (without necessarily revealing every last "arrow in the quiver"), will be the most productive course to follow. Settlement discussions and negotiations are without prejudice and counsel for both sides agree that no evidence regarding the negotiations can be used in any other context by the parties and will not be compellable by any other party.

Points of Distinction Between the United States and Canada

Because of Canada's proximity to the United States, both physically and commercially, most antitrust enforcement activities which occur in the U.S. have some spill-over into Canada. Thus, for a company accused of violating Canadian competition law, there are several points of distinction between Canadian and U.S. antitrust law which require consideration. Some notable ones are:

- > There is no limitation period for criminal offences under the Canadian *Competition Act*.
- > The conspiracy offence under Canadian law is not a *per se* offence; described as a "partial rule of reason" offence, section 45 requires the prosecution to prove beyond a reasonable doubt that the agreement, arrangement or combination would result in an undue lessening of competition in the relevant market.
- > There are at present no sentencing guidelines or other formal statement of appropriate penalties for anti-competitive conduct; while general approaches are known to experienced defence counsel, there is presently little transparency with respect to the prosecution's approach to penalty.
- > In an immunity context, the failure by an immunity applicant to disclose the commission of another competition law offence to the prosecution does not give rise to "penalty plus" in respect of subsequent offences. Instead, the penalty for failure to disclose is revocation of the immunity granted in respect of the first offence.
- > In civil actions which follow on criminal investigations (including class actions), treble damages are not available; damages are meant to be compensatory only.

Jurisdictional Arguments

There are no cases in Canada which deal with the issue of jurisdiction of Canadian courts in respect of a conspiracy allegation under section 45 of the *Competition Act*¹ where the conduct took place wholly outside of Canada but is alleged to have had an impact in Canada.

Outside of the competition law area, Canadian legal authority from the Supreme Court of Canada (the country's highest court) states that as a general rule, no person can be convicted in Canada of an offence committed outside Canada.² For a Canadian criminal court to act, there must be a "real and substantial link" between the conduct and Canada.

In a civil context where the issue of criminal liability was not before the court, an Ontario judge observed in a price-fixing class action that "the language of section 45 is not directed to only those conspiracies entered into within Canada".³ One would hope that in a contest between the Supreme Court of Canada's approach to jurisdiction in criminal matters and the musings of an Ontario judge in a civil context, the Supreme Court's approach would be preferred. As noted, however, there is no case which has considered the issue as a matter of Canadian criminal competition law.

In a negotiation, in addressing jurisdictional issues, the Canadian competition authorities will first point to any sort of physical contact with Canada: a meeting in a Toronto airport hotel, a shared limo to a trade association meeting in a resort at Whistler, etc. (all hypothetical examples). Whether such a fleeting contact would be considered sufficient to establish jurisdiction on a "real and substantial link" test has not – of course – been litigated.

Even in the absence of a physical contact with Canada, the prosecution takes the position that a conspiracy entered into outside of Canada in which Canada is addressed (by way of discussions regarding Canadian pricing, for example) provides the requisite "real and substantial link" to Canada. Even more remote, the same conspiracy without an actual mention of Canada but where there is an impact on Canada is also alleged by the prosecution to meet the jurisdictional test for Canada. Again, there has been no judicial consideration of this issue as a matter of Canadian criminal law.

In keeping with the overall theme of this topic, the existence of weighty legal arguments has not stopped dozens of guilty pleas in international price-fixing cases, so the Canadian competition prosecution side understandably does not appear terribly concerned about this small bump on the jurisdictional road. But the legal issues remain, and they are challenging and ripe for litigation.

Even assuming that the Canadian courts have subject-matter jurisdiction over the offence, the matter of personal jurisdiction over the accused needs also to be addressed. Furthermore, the prosecution needs to be able to effect service of legal process (the indictment). There is no express legislative provision authorizing service *ex juris* of legal process in respect of offences under the *Competition Act*. This means that service on a non-Canadian corporation with no physical presence in Canada cannot likely be duly effected as a matter of Canadian law. That said, and in keeping with the theme of this topic, the issue have never been litigated. Instead, we have a myriad of examples of foreign corporations attorning to the jurisdiction of the Canadian courts, again in a negotiated plea bargain context and usually in international cases with coordinated resolution in several jurisdictions.

¹ R.S.C. 1985, c. C-34.

² *Libman v. R.* [1985] S.C.R. 178 at 213.

³ *VitaPharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.*, [2002] O.J. No. 298 (S.C.) (O.L) at para. 59.

Substantive Defences

The conspiracy offence is found in section 45(1) of the *Competition Act*, which provides:

- (1) Conspiracy – Everyone one who conspires, combines, agrees or arranges with another person
 - (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
 - (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
 - (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
 - (d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

There are two principal elements to the Canadian conspiracy offence, each of which requires proof (although not direct proof, as discussed below) of both *mens rea* and *actus reus*: (i) the conduct, or agreement/“meeting of the minds” element and (ii) the market impact element. Unlike the United States, Canadian conspiracy law is not a *per se* offence; even a “naked” price-fixing agreement is not an offence unless that agreement would unduly lessen or prevent competition (referred to as the “ULC” element of the offence).

The degree of conduct sufficient to constitute the “meeting of the minds” is very fact-specific. As a matter of statute, Canadian competition law specifically allows for determination of liability via circumstantial evidence,⁴ without need to show “direct evidence of communication between or among the alleged parties”. In an email age, finding direct evidence of some communication is rarely difficult; far more difficult is determining the point at which two or more parties to a communication have “conspired, combined, agreed or arranged”. It would appear these days that the mere exchange of emails about planned (or even already announced) price increases, for example, is considered by the prosecution to be enough to make out the “conduct” part of the offence. Defence counsel are left to explain how communications which are ill-advised do not meet the requisite legal standard for proof of conspiracy beyond a reasonable doubt under section 45. But these arguments should be advanced in such cases; too often the momentum towards guilty pleas is so great that a careful examination of the actual merits can take a back seat to the rush for resolution. As defence counsel, it is important to keep in mind that the prosecution also has to consider what will happen in a courtroom if no settlement can be reached. And, in a courtroom, one never knows.

Moving from the conduct element of the section 45 conspiracy offence to the market impact or undue lessening or prevention of competition (ULC) element of the offence, even more difficult issues arise. To establish the ULC element of the offence, the prosecution must prove beyond a reasonable doubt the following two elements: (i) a

⁴ Section 45 (2.1) of the *Competition Act* provides as follows:

Evidence of conspiracy – In a prosecution under subsection (1), the court may infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but, for greater certainty, the conspiracy, combination, agreement or arrangement must be proved beyond a reasonable doubt.

moderate degree of market power among the parties to the agreement; and (ii) behaviour that tends to reduce competition or limit entry in the relevant market.⁵ All of that requires determination of the relevant product and geographic market, consideration of market power, including barriers to entry, substitutability, ability to raise prices to a supra-competitive level on a sustained basis, *etcetera, etcetera*. The mind of a criminal judge surely boggles. None of that is to suggest that our courts aren't up to the task; of course they are, but the expert economics and industry evidence required and the time and excruciating detail involved, in a beyond a reasonable doubt setting, surely give some pause to prosecutors portraying keenness to take the case to trial.

Here too, arguments should be fully developed and advanced in a negotiated context. Economics evidence in a negotiation should be of assistance, both as to conduct as well as to market impact. It is clear that the Canadian competition authorities are unhappy with the existence of the ULC element as part of the Canadian law of conspiracy, as they think it makes convictions harder to achieve, and we are told that statutory amendments to remove the ULC element are on their way. This author is a big sceptic on the need for any change in the Canadian law; whether there is merit to the scepticism is an issue for another day. The bottom line is that the law today includes that element, and any negotiations should emphasize all the frailties in the prosecution case on the legal test.

On that note, a recent decision from the province of Newfoundland and Labrador⁶ quashing an indictment following a preliminary inquiry is instructive (and no doubt frustrating to the Competition Bureau). In that case, among other conduct, taxi drivers entered into a written agreement not to bid on any airport contract, which was actually sworn before a commissioner of oaths. The accuseds had been open about their conduct and had advised the taxi licensing authority of their concerns and intention (plus there was that sworn agreement!). Following the preliminary inquiry, the charges were dropped, the judge concluding that no reasonable trier of fact would convict.⁷ Peculiar facts, perhaps, but the vagaries of the litigation context worked to the defendants' advantage, as they so often do.

Judicial review of the case was sought by the prosecution, but the review was dismissed,⁸ with the result that the defendants are discharged and do not have to stand trial. The appeal decision provides a more considered review of the ULC element and describes the prosecution's failure to properly define the market.

The success enjoyed by the defence in the *St. John's Taxi* case does not displace the settlement "value proposition", nor should it. But the case does show that conduct which appears to an antitrust enforcer to be "slam dunk" criminal behaviour, when tried in a criminal court with judges who are used to the beyond a reasonable doubt standard and who listen to witnesses for a living, may not be so heinous after all.

Sentencing Considerations

Under the present Canadian law, the maximum sentence for conspiracy under section 45 is \$10 million per count, with individual jail terms of up to five years.

While not formally stated in any sentencing guideline or statement issued by the Competition Bureau, the Bureau's approach to penalty is based on a percentage of the relevant volume of Canadian commerce over the period of the alleged conspiracy. As a very general rule, 20% of the volume of commerce is seen as an appropriate penalty, but a

⁵ *Canadian v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606.

⁶ *R. v. Bugdens Taxi*, [2006] N.J. No. 250 (NL Prov. Ct.), commonly referred to as the *St. John's Taxi* case.

⁷ On a preliminary inquiry, the beyond a reasonable doubt standard does not apply; the issue is whether, based on the evidence presented at the preliminary inquiry, a reasonable trier of fact, properly instructed, could return a verdict of guilty at trial. The hurdle is said to be "not a high one".

⁸ [2007] N.J. No. 322 (NL S.C. – T.D.)

review of negotiated fines seen on guilty pleas compared to the reported volume of commerce shows sometimes wild swings in percentage terms.

It is, of course, in negotiating the penalty that “the rubber hits the road”. Negotiations are vigorous over the time period of the conduct to be pleaded to and products covered by the plea. Demonstrable price war or “cheating” periods can sometimes be negotiated out of the volume of commerce calculation for the penalty. Quite apart from the obvious incentives to keep the time period and list of price-fixed products as narrow as possible in terms of the criminal penalty, the consequences in subsequent civil (class action) litigation can be considerable. As a matter of Canadian practice, guilty pleas are accompanied by agreed statements of fact or statements of admissions filed by both parties with the court and publicly available thereafter, in which the particulars of the offence are described. Defence counsel work hard at limiting the damage which will inevitably occur in future based on the court filings.

Apart from the common approach of the Competition Bureau in applying a percentage to the relevant volume of commerce, *Canada’s Criminal Code* sets out the factors that a sentencing court is to take into consideration with respect to sentencing an organization:

718.21 A court that imposes a sentence on an organization shall also take into consideration the following factors:

- (a) any advantage realized by the organization as a result of the offence;
- (b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
- (c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;
- (d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
- (e) the cost to public authorities of the investigation and prosecution of the offence;
- (f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;
- (g) whether the organization was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
- (h) any penalty imposed by the organization on a representative for their role in the commission of the offence;
- (i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and

any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

As should be apparent, this leaves much room for advocacy in negotiation!

Furthermore, although not stated formally, parties who agree to plead guilty and who cooperate at the early stages qualify for some form of discount from what would otherwise be the penalty. So, those who did not qualify for immunity but were “second in” and who cooperate and provide information may receive up to a 50% “discount” from what would otherwise be the applicable fine; “third-in” may get up to a 30% “discount”. All of this is part of the negotiation, which a cynic might call “fun with numbers”, but there are many factors and arguments at play, and it behooves defence counsel to use them all optimally.

An important consideration under the sentencing topic is that the negotiation of guilty pleas almost invariably involves offering up the valuable assistance which this now-cooperating defendant can provide in order that the Competition Bureau can pursue other participants in the alleged conspiracy, who can be persuaded to plead guilty only if the negotiating accused provides the evidence tantalizingly offered during the plea negotiations and the cooperation discussions. This sets up the spectre of accuseds wracking their corporate brains for recall of who was present at a meeting at a golf club, or what additional products were discussed, *etcetera, etcetera*. The obligation to cooperate with the Competition Bureau as part of its ongoing investigation is typically part of the agreed resolution. The way the game is played, of course, the threat of the cooperating party’s evidence is enough to ensure that there are other cooperating parties, and so on, and so on.

One of the key advantages to a negotiated resolution is the potential ability to negotiate an agreement from the prosecution that no company individuals will be pursued personally for the alleged offences under the *Competition Act*. While Canadian antitrust authorities do not put notches in their enforcement belts based on person-days in jail (as a cynical Canadian would portray the U.S. enforcement attitude), the threat of individual prosecution is nevertheless a real one in Canada and removal of that threat is of considerable value to a corporation and its employees. While the Competition Bureau has no (formal or informal) policy on this issue, often a negotiated resolution for a company will end the exposure for its directors, officers and employees, provided they agree to cooperate (exceptions to this include where the employee occupied a leadership or ringleader position in the conspiracy).

Wrapping Up

It is an unwise litigator who seeks to litigate every issue; indeed, it is almost always better agreeing to an outcome than having it foisted upon you. That said, in the world of antitrust enforcement, it often seems like the enforcers believe they hold all the cards and are therefore in a position to do the foisting; yet it is only in the playing that the winner is determined. Of course, allegations of criminal conduct are not card games, and a trial is certainly not a playful setting. One would think, however, that the prospect of a court determination on a great many of these challenging and interesting and difficult issues would serve both sides well, and would lead to more disciplined negotiated results.

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Katherine Kay is a partner with the Litigation and Competition Departments in the Toronto office of Stikeman Elliott. Her practice is concentrated on complex commercial litigation, frequently involving the overlap between regulatory, civil and criminal law regimes, and multiple jurisdictions. She heads the firm's competition litigation practice and is lead counsel on a broad range of cases dealing with all aspects of competition law, including criminal defence work, class and other civil actions, mergers, abuse of dominance and other reviewable matters before the Competition Tribunal. A major focus of Katherine's practice is defence of class actions, where she has extensive experience across a range of cases, including those alleging anti-competitive conduct and securities law violations, as well as product liability cases.

Katherine's practice emphasizes the key aspects of formulating and coordinating strategic responses, often working very closely with counsel in the United States, Europe and other jurisdictions; coordinating and directing multiple class actions across several Canadian jurisdictions; vigorous and highly effective advocacy before the relevant courts and tribunals; and negotiating, securing court approval and implementing settlements where appropriate.

Katherine regularly acts for clients in regulatory and criminal proceedings arising from both competition and securities investigations. She has extensive advocacy experience before all levels of trial and appellate courts in Ontario, British Columbia, Quebec, the Yukon Territory, the Federal Court of Canada, and the Supreme Court of Canada, as well as various administrative tribunals. She has frequently appeared before the Competition Tribunal and the Ontario Securities Commission, and other securities regulatory bodies.

Katherine is listed and recognized in the following publications:

- > The 2008 edition of *Best Lawyers in Canada* in the area of Competition/Antitrust;
- > Lexpert/American Lawyer *2008 Guide to the Leading 500 Lawyers in Canada*, and ranked by Lexpert, as a leading practitioner in the areas of Competition Litigation and Class Action Litigation, and as a practitioner "consistently recommended" in the Competition Law sector;
- > Chambers Global's 2008 *The World's Leading Lawyers for Business* as a recommended lawyer in Competition/Antitrust and in 2006 Chambers noted Katherine as among "the brightest litigators of her generation";
- > Katherine is recognized in several publications, including: Global Competition Review's *2008 International Who's Who of Business Lawyers* and *2008 International Who's Who of Competition Lawyers* as well as being ranked as one of the "100 Women in Antitrust" in the world;
- > The 2008 *PLC Which Lawyer?*, as a highly recommended in Competition/Anti-trust and PLC's *Cross-border Handbook 2007-2008*;
- > The 2007 *Lexpert Guide of the Leading Canada/US Cross-Border Litigation Lawyers in Canada*.

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