

Cartel & Criminal Practice

Committee Newsletter

Spring 2015



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Message from the Chair

by Kathleen Beasley

The Cartel and Criminal Practice Committee is pleased to publish our second newsletter for the 2014-2015 year. On behalf of the Committee, we thank our newsletter editors, Jennifer Dixon and Jeffrey Martino, and YLR Brandon Duke, for their work on the Spring edition.* We also thank our contributing authors. This second edition of our newsletter offers articles on topics relevant to criminal antitrust practice in the United States and abroad. Molly Donovan and Jennifer Stewart discuss antitrust standing in component parts cases after the Seventh Circuit's decision in *Motorola Mobility*. Adam Hemlock and Vanessa Chandis write on situations when grand jury materials are not protected by Rule 6(e). Lisa Phelan discusses the Antitrust Division's diligence in pursuing fugitives. In the International sphere, Guy Pinsonnault and Pierre-Christian Collins Hoffman discuss the Canadian approach to corporate criminal liability in antitrust cases and Charles Tingley and Mark Katz discuss the Canadian Competition Bureau's disclosure obligation in cartel cases. William Dillon and Jorge Andrés de los Ríos Quinoñes discuss Colombia's Cartel Leniency Program and compare it to the U.S. approach. And José Carlos da Matta Berardo, Camilla Paoletti, and Vitor Jardim Machado Barbosa provide an update on recent trends in cartel enforcement in Brazil.

Please join us at the Spring meeting. The Committee will sponsor several programs listed on page 44. We also have an exciting new "Ask Me Anything About . . ." telephone Q&A program featuring a different topic and guest each session. Our first topic was leniency featuring Scott Hammond, and our second topic was dawn raids featuring Lisa Phelan, Chief of one of the Washington D.C. criminal enforcement sections of the U.S. Department of Justice Antitrust Division. We also continue to provide members with periodic updates on criminal antitrust enforcement developments. All Committee events are posted on our website.

* Jennifer M. Dixon and Jeffrey Martino are members of the ABA Antitrust Section's Cartel & Criminal Practice Committee in their personal capacities and this publication does not reflect any position of the Government or the U.S. Department of Justice.

Illinois Brick's Application in Component Part Cases After *Motorola Mobility*

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Brazil: Recent Trends in Cartel Investigations

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and uncertain future may have been a factor in the decision of many fugitive defendants who chose to submit to U.S. jurisdiction, acknowledge their harmful conduct, and accept the legal consequences. For those who have done so, they can then go on with their lives and careers, without having to be concerned about when that long arm of the law may give them an unwelcome tap on the shoulder.

The Canadian Approach to Corporate Criminal Liability for Antitrust Offenses

by Guy Pinsonnault¹ and Pierre-Christian Collins Hoffman²



Guy Pinsonnault

Pierre-Christian Collins Hoffman

Introduction

Organizations in both Canada and the U.S. have to be diligent in taking steps to prevent the perpetration of antitrust offenses by their members, such as implementing and applying effective compliance programs. Indeed, their representatives' criminal behavior may lead to the imposition of substantial fines, reputational damage, government contract debarment, and decrease in stock price. Between jurisdictions, however, the likelihood of being convicted for criminal antitrust offenses varies greatly, ranging from vicarious liability (pursuant to which the employer is liable for the wrongdoings

of any employee) to the opposite end of the spectrum, where only a “directing mind” or *alter ego* of the organization may engage the criminal liability of the organization.³

Between jurisdictions [...] the likelihood of being convicted for criminal antitrust offenses varies greatly, ranging from vicarious liability [...] to the opposite end of the spectrum, where only a “directing mind” or alter ego of the organization may engage the criminal liability of the organization.

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² Lawyer, McMillan LLP. The authors wish to thank Émile Catimel Marchand for his contribution.

³ Moreover, in certain states, such as Germany, corporations are not subject to criminal liability.

This article summarizes the changes brought to the Canadian corporate criminal liability regime in 2004, yet only recently applied in a price-fixing cartel case,⁴ describes the essential aspects of the Canadian approach to corporate criminal liability in light of recent case law and compares the Canadian and U.S. models.

The Modern Canadian Approach

Following the U.K. approach, Canadian courts used to apply the “identification doctrine” whereby only the controlling mind of the corporation could engage its criminal liability for offenses requiring proof of intent (*mens rea*). In 2004, the Parliament of Canada adopted *An Act to Amend the Criminal Code (Criminal Liability of Organizations)* (Bill C-45). This Act sought to broaden corporate criminal liability and, for that purpose, amended the *Criminal Code*,⁵ making organizations accountable for offenses committed by a “senior officer”, being a representative who (1) plays an important role in the establishment of the organization’s policies, (2) is responsible for managing an important aspect of the organization’s activities, or (3) in the case of a corporation, a director, CEO or CFO.⁶

The second definition of “senior officer” is the one that most expanded the sphere of criminal liability for organizations conducting activities in Canada. Insofar as a representative manages an aspect of activities of a certain importance within the organization, even if his/her duties are limited to the application of policies rather than their design, the criminal liability of the organization may be incurred where such representative commits a criminal offense. The net of liability is quite broad, as one could argue that a rational organization will not pursue unimportant activities.

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An organization will be found guilty of a criminal offense where such offense has been committed (1) for its benefit (at least in part) and (2) where one of its senior officers, “(a) acting within the scope of their authority, is a party to the offen[s]e; (b) having the mental state required to be a party to the offen[s]e and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offen[s]e; or (c) knowing that a representative of the organization is or is about to be a party to the offen[s]e, does not take all reasonable measures to stop them from being a party to the offen[s]e.”

⁴ *R v. Pétroles Global inc.*, 2013 QCCS 4262, <http://canlii.ca/t/g0jmc>.

⁵ RSC 1985, c. C-46 (*Criminal Code*), <http://canlii.ca/t/7vf2>.

⁶ *Ibid*, s. 2.

Despite the changes brought in 2004, the Canadian model is still not quite one of vicarious liability (as is described more fully below). Another distinctive feature of the Canadian model is that it covers not only corporations, but also persons who do not possess separate legal personalities.⁷

Comparison with the U.S. Approach

Unlike in the U.S., Canadian courts have rejected the establishment of a criminal liability regime based on vicarious liability. Under such a regime, any employee may engage the organization's liability regardless of rank. Adopted by the U.S. Supreme Court in *New York Central R. Co. v United States*,⁸ the vicarious liability approach extends the tort doctrine of *respondet superior* ("let the master answer") to criminal law.

In the U.S., a corporation may be held criminally liable where an individual of any rank within the organization, acting with the scope of his employment or authority, commits a crime with a view (at least in part) to benefit the organization. That said, the DOJ has included, on its own volition, an internal standard of moral culpability under principle 9-28.500 of the *Principles of Federal Prosecution of Business Organizations* when deciding whether or not to press criminal charges against an organization.⁹ For instance, where an offense has been committed by a rogue employee, the DOJ may be less inclined to commence criminal proceedings against the organization.

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Another interesting distinction with the U.S. is the lack of policies and guidelines with respect to N/DPAs by the Public Prosecution Service of Canada (SPPC). While no N/DPA has been concluded so far in Canada, nothing would prevent the SPPC, in appropriate cases, from entering into a NPA with an organization in exchange for cooperation. Entering into DPAs in Canada does not currently appear possible, however, in the absence of legislation expressly providing for it. Moreover, a parallel may be drawn with s. 34(2) of the *Competition Act*, which provides that a criminal court may issue a "prohibition order" against a person that "has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of an offen[s]e". Similarly to N/DPAs, prohibition orders issued under s. 34(2) provide, *inter alia*, that the organization is forbidden from committing further offenses (and no criminal conviction ensues). Certain prohibition orders have included conditions akin to those of N/DPAs, such as the disclosure of documents and information, the payment of a sum for the government's investigation costs, restitution and the implementation of compliance programs.¹⁰ That said, much like the Antitrust Division of the DOJ who has

⁷ The definition includes "a public body, body corporate, society, company, firm, partnership, trade union or municipality [...]"; *ibid*, s 2.

⁸ 212 U.S. 481 (1909).

⁹ Lucian E. Dervan, *Re-Evaluating Corporate Criminal Liability: The DOJ's Internal Moral Culpability Standard for Corporate Criminal Liability*, *Stetson Law Review* (Mar. 8, 2011), <http://ssrn.com/abstract=1781291>.

¹⁰ Prohibition Order between Her Majesty the Queen and Toyota Canada Inc., T-1065-02, March 27, 2003; Prohibition Order between Her Majesty the Queen and John Deere Limited, T-1836-04, October 19, 2004;

seldom entered into N/DPAs,¹¹ courts have rendered very few prohibition orders in cartel cases, and none in recent years.

Recent Developments

As previously mentioned, it took almost ten years for the 2004 amended Canadian regime to be applied by a court. The case in question, *R. v. Pétroles Global inc.*,¹² involved charges of conspiracy, agreement or arrangement between competitors under the *Competition Act*,¹³ an offense which requires proof of subjective *mens rea*.

The Superior Court of Quebec had to determine whether Pétroles Global Inc. (Global), a retail gasoline operator, could be held criminally liable for the involvement of its representatives in a price-fixing cartel in certain areas of the Province of Québec. A General Manager of the company pleaded guilty to having conspired with competitors. The prosecution had the task of proving that this General Manager satisfied the definition of “senior officer”, thereby establishing Global’s criminal liability.

The Superior Court held that the evidence demonstrated that Global’s General Manager was a “senior officer” as defined by the *Criminal Code*, since he managed an important aspect of the company’s activities. Indeed, the General Manager supervised over 200 service stations in Québec (which corresponded to approximately two thirds of the stations operated by Global across Canada); he was the third highest paid employee of Global; he ensured the

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application of the “Economics” developed by senior management; and he approved expenditures exceeding \$1,000 before recommending them to senior management. The Superior Court further noted that the fact that certain expenditures required approval from the Vice-President did not reduce the scope of the General Manager’s responsibilities within the company.

In its ruling, the Superior Court ruled that the legislature intended to ease the task of proving the criminal liability of organizations by removing the necessity of the offender having authority with respect to the establishment of the organization’s policies, and that the purpose of the 2004 amendments was not solely meant to extend corporate criminal liability beyond the board of directors. The Court rejected the argument that the term “senior” could only

Prohibition Order between Her Majesty the Queen and Sotheby’s and Sotheby’s (Canada) Inc., T-1529-06, August 28, 2006.

¹¹ Eliot T. Burriss, “The Antitrust Division speaks: trends in criminal enforcement and what to expect next”, DLA Piper, April 24, 2013, <https://www.dlapiper.com/en/global/insights/publications/2013/04/the-antitrust-division-speaks-trends-in-criminal-/>.

¹² See *supra* note 4.

¹³ RSC 1985, c. C-34, <http://canlii.ca/t/7vdy>.

apply to executives empowered with actual decision-making autonomy.

Another case of interest was rendered in 2013 by the Ontario Court of Appeal in *R. v. Metron Construction Corporation*.¹⁴ There, a site supervisor hired by the accused corporation was responsible for supervising the assembly and installation of a scaffold platform to perform repairs on a high-rise building. Due to major safety issues, the platform collapsed, causing the deaths of four employees, including the site supervisor.¹⁵ The company pleaded guilty to charges of criminal negligence. The Court of Appeal considered, in *obiter*, the site supervisor to be a “senior officer” under the second part of the definition, namely a representative managing an important aspect of the organization’s activities (in this case, the health and safety of the employees), despite the fact that he had little authority. This case reinforces the idea that it may be possible, even for day-to-day managers occupying the lowest rung of an organization’s corporate ladder, to qualify as “senior officers” and engage the criminal liability of the organization.

To summarize, in Canada, a mid-level manager can engage the criminal liability of his/her employer when he/she commits an antitrust offense, directs another employee to do so, or fails to take reasonable steps to prevent the offense. This however, does not mean that a low-level employee committing an antitrust crime will necessarily engage the organization’s criminal liability. Such an employee’s criminal behaviour may, however, result in the organization being convicted, where the employee has been directed by a senior officer to commit an offense, or where a senior officer has failed to take reasonable measures to prevent its perpetration, provided that its perpetration is imminent and that the senior officer had knowledge thereof.

Sentencing

After being found guilty, an organization may be fined,¹⁶ and that fine may also be accompanied by a probation order.¹⁷ There is no secondary criminal liability for directors and officers of an organization; they may not be vicariously punished for the criminal offenses committed by senior officers, unless they are otherwise party to the offense by aiding or abetting pursuant to s. 21 of the *Criminal Code*.

In determining that fine, the court must consider, in addition to general sentencing factors applicable to individuals,¹⁸ ten mitigating and aggravating factors, namely: (1) the advantage realized by the organization; (2) the complexity, duration and degree of planning of the offense; (3) the concealment and conversion of assets; (4) the economic viability of the organization and continued employment of its employees; (5) the costs of investigation and prosecution; (6) the concurrent imposition of regulatory penalties on the organization; (7) the prior conviction for a similar offense and the prior regulatory penalties for similar conduct; (8) the organization’s imposition of penalties on

¹⁴ 2013 ONCA 541, <http://canlii.ca/t/g0bl3>.

¹⁵ In particular, the evidence revealed the presence of marijuana in the systems of three out of the four deceased, including the supervisor, and that the four employees who died in the accident were not wearing safety belts.

¹⁶ *Criminal Code*, s 735(1).

¹⁷ *Ibid*, s. 732.1(3.1).

¹⁸ *Ibid*, ss. 718-718.2.

its offending representatives; (9) the restitution or voluntary indemnification of victims; and (10) the measures taken to prevent recidivism.¹⁹ Regarding that last factor, it is worth noting that the implementation of an effective and credible compliance program will be a mitigating consideration when it comes to sentencing. While judges are afforded great discretion in determining an adequate fine, they must remain cognizant of the fundamental principles of sentencing: proportionality to the seriousness of the offense and level of involvement of the offender.²⁰

In antitrust law cases, courts have developed additional factors that may be relevant in sentencing organizations. In a foreign price-fixing directives case, the Federal Court of Canada in *Maxzone*²¹ found that taking leadership in an antitrust scheme and committing offenses against vulnerable victims can be aggravating factors²² and so can the scope of the economic harm caused. Interestingly, the Federal Court refused to consider fines paid in another jurisdiction (in the U.S.) as mitigating in order to ensure that the objectives of specific and general crime deterrence in Canada are met.

The fine must also be more than a mere cost of doing business. In the words of the Court, it must meet the objectives of “(i) ensur[ing] that the accused corporation does not profit from its illegal conduct, and (ii) includ[ing] an additional significant amount to communicate the Court’s recognition of the very serious nature of such illegal conduct, its substantial adverse impact on the economy, and society’s abhorrence of the crime.”²³ The Court also noted that it would punish illegal cartel participants severely, commenting that “price fixing and other hard core cartel agreements therefore ought to be treated at least as severely as fraud and theft, if not even more severely than those offen[s]es.”²⁴

Defenses

An accused organization may raise several defenses. Generally, it can try to raise a reasonable doubt with respect to one of the elements of the offense. For example, an organization may argue that an offense was not committed for the organization’s benefit, or that the offending employee was not a “senior officer” or was acting outside the scope of his/her authority.²⁵

Pursuant to section 22.2(c) of the *Criminal Code*, the organization may also contend that it exercised due diligence, in

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¹⁹ *Criminal Code*, 718.21.

²⁰ *Criminal Code*, s. 718.1.

²¹ *Canada v Maxzone Auto Parts (Canada) Corp.*, 2012 FC 1117, http://www.canlii.org/en/ca/fct/doc/2012/2012fc1117/2012fc_1117.html.

²² *Ibid*, at para 96.

²³ *Ibid*, at para 57.

²⁴ *Ibid*, at para 56.

²⁵ This defense would only apply to subparagraphs (a) and (b) of s. 22.2 of the *Criminal Code*. Subparagraph (c) does not contain the requirement that the senior officer was acting within the scope of his/her authority.

that it took all “reasonable measures” to prevent a representative from being part of the offense. It goes without saying that a policy not to commit crime within the organization is insufficient; the organization must take concrete steps to put an end to a discovered offense or prevent an imminent one, for example by diligently applying an adequate compliance policy in a timely manner. Careful selection and careful supervision of employees are also insufficient to avoid criminal liability on the part of the organization, although they may constitute mitigating factors in sentencing.

In a Nutshell

The criminal liability of organizations in Canada may be triggered by the perpetration of any criminal offense, including antitrust offenses and other economic crimes (*e.g.*, bid-rigging, price-fixing, corruption, fraud, etc.). The fact that a member of an organization has committed a criminal antitrust offense will not inexorably lead to a conviction of the organization; the system is not one of vicarious liability as found in the U.S. Instead, the Canadian approach examines the behaviour of the “senior officers” of the organization, being representatives playing an important role in the establishment of policies or representatives responsible for managing an important aspect of the organization’s activities and, in the case of corporations, directors, chief executive officers and chief financial officers. Recent case

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law teaches us that this definition may extend to quite low levels in the corporate hierarchy; certain mid-level managers may engage the criminal liability of the organization by committing antitrust offenses. Finally, organizations doing business in Canada should take note that a compliance program, even where credible and applied effectively, is no defense to the commission of an offense, but is considered as a mitigating factor for sentencing.