CANADIAN CARTEL NEWS VOLUME 5
ONE PLACE WHERE POSSESSION IS NOT NINE TENTHS OF THE LAW

Posted on January 17, 2015

Categories: Insights, Publications

Section 69(2) of the *Competition Act* provides that, by possessing documents, persons and firms are deemed to know their contents and to have done what the documents say was done. Particularly in the era of terabytes of stored data, this is a nice little provision in the Crown's arsenal in cartel prosecutions. On July 15, 2014, Justice Warkentin of the Ontario Superior Court of Justice, in the case of *R v Durward*, determined that section 69(2) is not all it seems to be. Specifically, she ruled that section 69(2) of the Canadian *Competition Act* was not constitutional in the criminal context.

The Durward case arose in the context of seven individuals and four companies being charged with bid-rigging under the Competition Act and conspiracy to bid-rig under the Canadian *Criminal Code*. Two of these defendants filed an application for a determination that section 69(2) of the *Competition Act* violates the *Canadian Charter of Rights and Freedoms*. In particular, they argued that the use of this provision would violate the presumption of innocence under sections 11(d) and 7 of the *Charter*.

Section 69(2) of the *Competition Act* establishes presumptions that:

> (a) anything done, said or agreed on by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been done, said or agreed on, as the case may be, with the authority of that participant;
>
> (b) a record written or received by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been written or received, as the case may be, with the authority of that participant; and
>
> (c) a record proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is prima facie proof (i) that the participant had knowledge of the record and its contents; (ii) that anything recorded in or by the record as having been done, said or agreed on by any

participant or by an agent of a participant was done, said or agreed on as recorded and, where anything is recorded in or by the record as having been done, said or agreed on by an agent of a participant, that it was done, said or agreed on with the authority of that participant; and (iii) that the record, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.

Justice Warkentin noted that the primary concern with these presumptions is that they presume knowledge on the part of the accused of any materials found on every computer on the premises of the accused, regardless of who the primary user of the computer was. She was also persuaded by the defendants' arguments that, given how we all suffer from "email overload", it cannot be presumed that individuals in an organization read everything in their own inboxes, let alone the contents of other employees' inboxes and computers.

As a result, in the criminal context, Justice Warkentin found section 69(2) of the Act to be unconstitutional. She found that the provision creates evidentiary and legal presumptions leading to a reverse onus on the accused with respect to a material component of an offence. In certain crimes, such as criminal conspiracy, the accused's knowledge will be an essential element of the offence, and the accused should not be required to rebut a presumption that attributes it with knowledge based solely on it having had documents in its possession.

This is a meaningful practical decision. It will make prosecution more difficult – as direct evidence will be required. It is important to note, however, that Justice Warkentin explicitly stated that her decision does not extend to the non-criminal context. In fact, she emphasized that "nothing in these reasons prevents the use of section 69(2) in a Competition Tribunal proceeding" and "s. 69 may be useful as a regulatory statute in *Competition Act* proceedings in the tribunal setting where there are no serious criminal consequences".

The Canadian Public Prosecution Service of Canada has indicated its intention to appeal Justice Warkentin's decision.

by James B. Musgrove and Joshua Chad

A Cautionary Note


mcmillan