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Graham Reynolds Q.C
Osler, Hoskin & Harcourt LLP, Toronto

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I. INTRODUCTION

To date, most Canadian antitrust cartel cases have been resolved by means of guilty pleas by defendants. The means of accomplishing this in Canada is through the mechanism of a plea agreement which is negotiated with the Public Prosecution Service of Canada ("PPSC"), the independent prosecuting authority charged with bringing Competition Bureau ("Bureau") cases before the courts. This brief article aims at describing the process and procedure for resolving criminal antitrust cases in Canada, with some comments on distinctions from other jurisdictions.[2]

II. DISCUSSION

The elements of a resolution of a criminal cartel case in Canada are:

- The information or indictment (the actual charge before the Court);
- An agreement or statement of admissions as to facts; and
- A formal plea agreement between the PPSC and the Defendant.

Resolving cases by means of a "plea bargain" or case resolution is of long standing in Canada and has been the subject of positive judicial commentary.[3] As such, an agreement to resolve a criminal case represents a public bargain as between the crown (represented in Canadian antitrust cases by the PPSC) and a defendant to resolve the matter without the necessity of proceeding to a full-blown criminal trial.

One key element for resolving criminal cartel cases in an adversarial criminal justice system such as Canada's is the requirement that the court presiding over the plea proceedings be in a position to make a judicial finding of guilt (*i.e.*, that the factual and legal requirements for the offence charged have been satisfied), and in order to enable this, the PPSC and counsel for the defendant will file formal admissions as to facts.[4] Thus, it will be important for defendants to realize that the statement of admissions will become a public document and may have implications for corporate defendants (such as the ability of plaintiffs to rely upon it for purposes

[1] Graham Reynolds Q.C., is a partner in the Competition and Antitrust practice at Osler, Hoskin & Harcourt LLP, Toronto.

[2] This article does not discuss the potential of resolving antitrust cases through the mechanism of a prohibition order pursuant to subsection 34(2) of the *Competition Act*, where a party "has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence under Part VI," a type of non-prosecution arrangement for cases in which the commission of criminal offences cannot be established.

[3] *Report of the Criminal Justice Review Committee*, Ministry of the Attorney General, Province of Ontario, February 1999, Chapter 6: "Resolution Discussions" *available at* http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/crimjr/#resoutiondiscussions.

[4] The ability of a criminal defendant to make formal admissions as to fact in a criminal case is found in s. 655 of Canada's Criminal *Code*.

of establishing liability in follow-on class action proceedings).[5] The agreement as to fact is a product of negotiation and it will obviously be in the best interests of a defendant to have the most narrowly drawn allegations so as to limit the potential exposure in civil proceedings as well as damage to reputation and other concerns. However, from the prosecution perspective, there will be a wish to present the breadth of the Bureau's allegations based on the entire investigation, so as not to prejudice the Bureau's ability to proceed against other non-pleading defendants.

The statement of admissions will typically contain the following types elements:

- the nature of the agreement and the parties involved;
- the time period involved and the subject product(s) together with details as to volume of commerce;
- the overt acts associated with the agreement (details of meetings, contacts, and associated evidence); and
- [for cases arising under the pre-amended Competition Act], detail of geographic and economic markets together with evidence that competition would be "unduly" prevented or lessened as a result of the agreement

The prosecution will want to be satisfied that there is a sufficient statement of facts and law to enable the Court to properly draw an inference of guilt from the document. While the agreement as to facts is not formally "screened" by the court prior to taking of the plea, a pre-trial hearing process in Canada provides an opportunity for both prosecution and defense to review the matter with a presiding judge, enabling the parties to obtain a certain level of feedback from the Court as to the likely success of the proposed plea.

As noted above, the plea agreement is an essential component of a resolution of a criminal cartel case in Canada. This document will set out the respective rights and obligations, and particularly the cooperation requirements that will frequently be mandated by the Bureau as a condition of settlement of the case. In some cases, these obligations may be quite detailed, and may refer to the production of particular witnesses and evidence in order to assist the Bureau in the conduct of its inquiry. As well, terms of payment of the fine as well as an agreement to enter into a prohibition order (a form of corporate probation) authorized under section 32 of the *Competition Act* may be included.

From a defendant's perspective, the ability to predict the penalty that will be imposed by a court is crucial. Thus, Canadian plea agreements will feature terms of a joint submission as to the penalty to be put forward by the PPSC and defendant's counsel at the time of the plea. The agreement will also contemplate any other proposed penalty against the defendant, together with any applicable payment terms that could affect the manner and timing of fine payment. The Bureau's practice in resolution of its criminal cartel cases is to use a 20 percent volume of commerce figure (for the product(s) involved over the time period of the alleged conspiracy) as a "starting point" for imposition of fines, depending upon whether the defendant can take

[5] Although the criminal proceedings are not regarded as *res judicada* for civil claims, subsection 36(2) of the *Competition Act* , R.S.C. 1985, c. C-34 provides that evidence taken in the criminal proceedings may be used as proof that the party engaged in conduct contrary to a provision of [the criminal conspiracy provisions] of the *Act*.

advantage of the Bureau's leniency program.[6] While in Canada a judge is not bound to follow the agreement of counsel as to the imposition of a particular fine, a series of appeal cases have indicated that a trial judge should generally follow an agreed submission by counsel, and depart from it in very limited circumstances.[7] In the history of Bureau case resolutions, no joint submission by the PPSC and defense on a resolution of a cartel case has ever been rejected, so the parties may take reasonable comfort from the predictability of proposed dispositions these cases in Canada.

As noted, and unlike proceedings in the United States, the plea agreement between the parties is not made public, as the Bureau and the PPSC believe it would be detrimental to their enforcement program to have the details of such plea agreements in the public domain, and defendants also may have confidentiality concerns about the potential release of terms of settlement.

The plea agreement will also entail an outline of the proposed information or indictment (the wording of the criminal charge against the defendant). This will sometimes be the subject of negotiation, particularly as to the scope of the charge (time period, jurisdictional aspects, scope of products, *etc.*).

In its procedural guidelines, the PPSC has indicated that "charge bargaining" (*i.e.*, the ability of the parties to negotiate the scope and extent of criminal charges) is an acceptable form of case resolution.[8] Once agreed, the prevailing practice of the PPSC is to initially file the charge as an "information" (or charging document) before the presiding Court in the particular province in which the case is to be resolved, with the crown and defense noting for procedural purposes that there is sufficient evidence to commit the defendant for trial. Thereafter, the PPSC files the formal indictment with the court (in this case acting as the superior court) and the plea proceedings then take place.

The presiding court[9] will receive in advance the indictment, admissions as to fact, and any written submissions and case materials provided by the parties. On the date for the plea, the defendant will be formally arraigned (the clerk will read the charge) and the defendant will be asked to enter a plea. On receipt of a plea of guilty, the court will then review the agreement as to facts to determine whether, in its view, there are sufficient factual and legal elements in order to make a determination of guilt. Thereafter, the court will review any written submissions and authorities filed by the parties as to the appropriate penalty to be imposed (as well as oral submissions made in court), and will particularly take into consideration the joint submission as to penalty made by the parties.

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[6] The Bureau has a leniency program (effective September 29, 2010) that enables early-settling defendants to receive more lenient penalty terms: *see* the policy at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03288.html.

[7] *See* e.g. *R. v. Cerasuolo* (2001), 151 C.C.C. (3d) 445 at pgh [8] (Ont.C.A.).

[8] *See* Federal Prosecution Service Deskbook, Chapter 20, *Plea and sentence discussions and issue resolution available at* http://www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/ch20.html.

[9] Pursuant to subsections 67(4) and 73(2) of the *Competition Act* there are no jury trials for corporate defendants.

As noted above, it is most commonly the practice in antitrust cases that courts will agree to the penalty proposed by the parties.

III. DIFFERENCES WITH OTHER JURISDICTIONS

A full discussion of this area is beyond the scope of this short article. However, it should be noted that some of the major differences with practices in U.S. proceedings are:

- plea agreements in Canada are not made public (although any such agreement could eventually be tendered into evidence at a trial against other defendants);
- there is no ability for a party to resile from the plea agreement if the court does not accept the joint positions of the parties as to penalty;[the remedy in that case would be for the party to appeal to a Court of Appeal];
- the admissions as to fact are, in general terms, much more specific than those seen in U.S. antitrust plea procedures.

IV. CONCLUSION

Plea practices in Canada are relatively straightforward but have important implications for both crown and defense, and should be carefully considered in order that advice as to Canadian law and procedure be taken into account as a component of a global resolution strategy.