



D&O Liability under the Competition Act

LSUC Continuing Legal Education Program
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Theories of Competition Act Liability for Individuals

- Liability for the Company
 - Competition Act liability for corporations is triggered through the acts of their servants, officers, agents and directors
 - *"A corporation necessarily acts through human agents. Its authority and powers are divided among many and each acts with the force of that fictional legal personality. Once that clothing of corporate authority is given the acts of the authorized party are the acts of the corporation. This is a function ... of agency law and corporate law." (Boehm v. National System of Baking Ltd.)*

Theories of Competition Act Liability for Individuals

- Liability for the Individual

- The key criminal provision of the *Act* (section 45) refers to agreements between “competitors”
- The bid-rigging provision (section 47) also refers to the “person” (*i.e.*, usually the company) submitting the bid
- One could argue that directors/officers/servants/agents, as individuals, are not “competitors”, or the “person” submitting the bid, and accordingly would not be exposed to liability
- But...

Theories of Competition Act Liability for Individuals

- Counselling

- Criminal Code s. 22(1): Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence ...
- The offence of counselling involves more serious acts than communicating an intention to commit the offence. The acts or words must be such as to induce a person to commit the offences. Passive communication does not constitute an offence even if its purpose is to have someone inflict those injuries (*R. c. Dionne* (1987))

Theories of Competition Act Liability for Individuals

- Aiding or Abetting

- 21(1) *Criminal Code*: Every one is a party to an offence who
 - (a) actually commits it;
 - (b) does or omits to do anything for the purpose of **aiding** any person to commit it; or
 - (c) **abets** any person in committing it
- “aiding” means help or assist (*R. v. Ford*, 2000)
- “abetting” means support or encourage (*R. v. Ford*, 2000)

Theories of Competition Act Liability for Individuals

- The Competition Bureau's *Competitor Collaboration Guidelines* provide that "individual employees who entered into the agreement may be subject to prosecution under section 45 of the Act" through the operation of sections 21 and 22 of the Criminal Code
- Select provisions of the Act also target employees, directors and officers explicitly:
 - Section 49: Agreements or arrangements of federal financial institutions (*"every director, officer or employee of the federal financial institution who knowingly makes such an agreement or arrangement on behalf of the federal financial institution is guilty of an indictable offence"*)

Theories of Competition Act Liability for Individuals

- Section 65: Contravening section 11 orders (*"any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted"*)

Theories of Competition Act Liability for Individuals

- Sections 52.1/53: Deceptive telemarketing/deceptive prize notification
 - *"any officer or director ... who is in a position to direct or influence the policies of the corporation in respect of conduct prohibited by this section is a party to and guilty of the offence whether or not the corporation has been prosecuted or convicted, unless the officer or director establishes that the officer or director exercised due diligence to prevent the commission of the offence"*
 - *"it is sufficient proof of the offence to establish that it was committed by an employee or agent of the corporation, whether or not the employee or agent is identified, unless the corporation establishes that the corporation exercised due diligence to prevent the commission of the offence."*

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Practice Regarding Liability of Individuals under Canadian Competition Law

- The *Competition Act* effectively applies, as noted above, to both individuals and corporations, and charges are frequently laid against senior managers, officers or directors
- Upon conviction, a corporation is subject to a fine of up to \$25 million and a person is subject to the same fine or imprisonment for up to 14 years per count, or both

Practice Regarding Liability of Individuals under Canadian Competition Law

- The Commissioner has noted in recent speeches that the Bureau will look for appropriate cases in which to prosecute individuals, and seek incarceration as well as fines (and intends to maintain an aggressive approach to enforcement)
 - Interim Commissioner of Competition, January 30, 2013
- *"In both cartel and bid-rigging cases, we will be appropriately aggressive when dealing with individuals. To date, 38 individuals have been charged in the Quebec Octane case, and last December, five individuals were accused of rigging bids for private sector contracts in residential highrise buildings in the Montreal area."*
 - former Commissioner of Competition, October 2011

Practice Regarding Liability of Individuals under Canadian Competition Law

- The Bureau's Immunity Program:
 - The Commissioner will recommend that immunity be granted to a company or individual in the following situations:
 - (a) the Bureau is unaware of an offence, and the party is the first to disclose it; or
 - (b) the Bureau is aware of an offence, and the party is the first to come forward before there is sufficient evidence to warrant a referral of the matter to the Director of Public Prosecutions
 - In other words, the Bureau recommends immunity from prosecution only for the first business organization or individual to apply under the Immunity Program for a marker

Practice Regarding Liability of Individuals under Canadian Competition Law

- The Bureau's Leniency Program:
 - *"The first-in leniency applicant is eligible for a 50 percent reduction in the fine that they would have otherwise been subject to. The Bureau will also recommend to the Public Prosecution Service of Canada that no separate charges be laid against the applicant's current directors, officers or employees, provided that they cooperate with the investigation."*
 - Interim Commissioner of Competition, October 2012
 - Further leniency applicants qualify for a reduced penalty in exchange for their co-operation – but there is no assurance that separate charges will not be laid against the applicant's directors, officers, or employees

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The U.S. Situation

- In the US, aggressively targeting individuals has been the approach for more than two decades
- The average sentence for individuals has been increasing since 1990:
 - 1990-1999: 8 months
 - 2000-2009: 19 months
 - 2010-2011: 24 months
- Average sentences for foreign nationals following charges commenced by the DOJ Antitrust division in 2011: 10 months

The U.S. Situation

- Extradition Regime
 - Persons located in the Canada can be extradited to the US pursuant to the *Canada–US Extradition Treaty*, which permits each state to request from the other extradition of individuals who are charged with or convicted of certain offences within the jurisdiction of the requesting state
 - Extradition will only be granted for offences punishable by imprisonment for a term of more than one year

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The Canadian Practice Regarding Imprisonment

- *"If a company qualifies for immunity, all current directors, officers and employees who admit their involvement in the illegal anti-competitive activity as part of the corporate admission, and who provide complete, timely and ongoing co-operation, also qualify for the same recommendation for immunity. Former directors, officers and employees who offer to co-operate with the Bureau's investigation may qualify for immunity."*

- Immunity Program Guidelines

- *"At the request of the first-in leniency applicant that is a business organization, the Bureau will recommend that no separate charges be laid against the applicant's current directors, officers or employees ..."*

- Leniency Program Guidelines

The Canadian Practice Regarding Imprisonment

- *"For the second and any subsequent leniency applicant, current and former directors, officers, employees and agents may be charged depending on their role in the offence."*

- Leniency Program Guidelines

- In the past, criminal convictions under the *Competition Act* have not typically carried custodial sentences – fines and conditional sentences have been more common

The Canadian Practice Regarding Imprisonment

- There have been some exceptions, including for example:
 - In 1999, a former VP of Chinook Group Limited was sentenced to nine months in prison for his part in an international conspiracy to fix prices and share markets for choline chloride, an additive used in the animal feed industry)
 - In 2005, an individual was sentenced to 18 months in prison in connection with a deceptive telemarketing scam involving business directories
 - In 2011, an individual was sentenced to 12 months in prison after being convicted of making false or misleading representations in connection with an employment opportunity scam involving counterfeit cheques

The Canadian Practice Regarding Imprisonment

- The *Safe Streets and Communities Act*, which became law in 2012, removed conditional sentences for offences carrying a maximum sentence of 14 years+ imprisonment
- The Competition Act contains several offences that carry a maximum of 14+ years imprisonment, including:
 - misleading advertising (criminal track)
 - cartel
 - bid-rigging

The Canadian Practice Regarding Imprisonment

- Recent Federal Court decision (*Maxzone Auto Parts*) suggests that the court will no longer rubber stamp joint sentencing submissions following successful leniency applications

“In the absence of a serious and very realistic threat of at least some imprisonment in a penal institution, directors, officers and employees who may otherwise contemplate participating in an agreement proscribed by section 45 of the Act, or who may have been directed to implement such an agreement in Canada in contravention of section 46 of the Act, are unlikely to be sufficiently deterred from entering into or implementing such agreements by mere fines.”

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Implications of Criminal Convictions

- Imprisonment
- Fines
- Stigma
- Travel
 - May be required to declare criminal conviction prior to entry into foreign country; may be refused entry

Implications of Criminal Convictions

- For example: a criminal record must be disclosed prior to obtaining a visa or gaining entry into the U.S.
 - This is an ongoing requirement even after a pardon has been granted
 - Only certain offences result in ineligibility (“crimes of moral turpitude” e.g., murder, manslaughter, theft, bribery, forgery, aggravated battery, fraud, etc.)
 - May apply for a waiver to enter the U.S.

Implications of Criminal Convictions

- Employment
 - An employer may request a criminal background check as part of hiring process
 - However, s. 24(1) of the *Ontario Human Rights Code* prohibits discrimination based upon pardoned offences
 - Professional organizations may revoke license (i.e. license to practice law)
 - Law Society of Upper Canada, Bylaw 8, s. 2(1)(a) requires that all criminal *charges* be reported
- Restraints on other activities (e.g., firearms)

Implications of Criminal Convictions

- Deportation
 - An individual without Canadian citizenship may be denied a visa, refused entry to, or removed from Canada on several grounds, including committing a serious crime that would be punishable by a maximum prison term of at least 10 years in Canada (e.g., cartel offences)
 - Individuals who are criminally inadmissible may be able to enter Canada if the individual has been:
 - deemed rehabilitated;
 - applied for rehabilitation and has been approved;
 - granted a pardon; or
 - granted a temporary resident permit.

Implications of Criminal Convictions

- Pardons
 - A “record suspension” (commonly known as a pardon) is evidence that a conviction should no longer reflect negatively on a person's character
 - The 2012 *Safe Streets and Communities Act* eliminated the ability to apply for a record suspension for certain offences and increased the eligibility period for other offences
 - summary offences: 5 years
 - indictable offences: 10 years

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D&O Insurance for Criminal Fines/Civil Liability for Intentional Acts

- Both the *Ontario Business Corporations Act* ("OBCA"), ss. 136(4.3) and the *Canada Business Corporations Act* ("CBCA"), ss. 124(6) permit corporations to obtain insurance for directors and officers
 - However, a corporation may not indemnify an individual for criminal or administrative action or proceeding that is enforced by a monetary penalty unless the individual had reasonable grounds for believing that the conduct was lawful (OBCA s. 136(4) and CBCA s. 124(3)(b))
 - Underlying policy goal is that the punishment for misconduct should generally be borne by the individual

D&O Insurance for Criminal Fines/Civil Liability for Intentional Acts

- Section 118 of the *Insurance Act* (Ontario):

“Unless the contract otherwise provides, a contravention of any criminal or other law in force in Ontario or elsewhere does not, by that fact alone, render unenforceable a claim for indemnity under a contract of insurance except where the contravention is committed by the insured ... with intent to bring about loss or damage ...”

- Provision designed to get around public policy prohibition on insurance with respect to unlawful conduct, so it may be possible to insure against *Competition Act* fines

D&O Insurance for Criminal Fines/Civil Liability for Intentional Acts

- However, as a practical matter, most D&O policies exclude fines and penalties for criminal conduct
- No coverage will result and the insurer has no duty to defend an action where a criminal exclusion clause is unambiguous (*Clausen v. Royal & SunAlliance Insurance*)
- Generally, employers will pay for counsel for an employee if he or she is cooperating with the company – but they need not do so

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Securities Law Related Risks

- If there is an ongoing *Competition Act* investigation, what capital markets disclosure is required:
 - Nothing?
 - Factual Statement without comment?
 - Factual statement and “co-operating fully with investigation”?
 - Statement of situation and assurance of no wrong-doing?
- If you say “no wrongdoing”, do you create public markets liability?
- If you do not disclose at all, do you create public markets liability?
- If you disclose, do you create class action antitrust liability?

Securities Law Related Risks

- In 2012, RBS Group stated in its Q3 Interim Management Statement that it was “co-operating fully” with various competition authorities in respect of LIBOR investigations
 - Bureau issued a press release alleging that the statement was false, since RBS had in fact challenged a production order issued in respect of the Bureau’s investigation
- Bureau has, in the past, suggested that failure to mention Bureau investigation in securities documents could constitute misleading advertising

Securities Law Related Risks

- Prospectus Requirements
 - In order to issue a prospectus, the Issuer is required to have the following individuals disclose criminal convictions (including pardoned offences) (*Instrument 41-101*):
 - each director and executive officer of an issuer
 - if the issuer is an investment fund, each director and executive officer of the manager of the issuer
 - each promoter of the issuer, and
 - if the promoter is not an individual, each director and executive officer of the promoter, for whom the issuer has not previously filed or delivered
 - It is an offence to provide false or misleading information (e.g., omit a criminal conviction)

Securities Law Related Risks

- Listing on the TSX
 - Listing Applications also require disclosure of criminal records for each director, officer, Promoter and other Insider of the Issuer
 - If any of these Persons is not an individual, the criminal records must be disclosed of each director, officer and each Control Person of that Person.

Thank You

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