Comments / Commentaires

ANTI-TRUST IMMUNITY AGREEMENTS AND R. V. NIXON: FAIR DEAL OR FOUL

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La répudiation d'ententes sur le plaidoyer dans des affaires de droit de la concurrence concurrence est un sujet sur lequel les tribunaux canadiens devront probablement se pencher. Récemment dans R. c. Nixon, une affaire de droit criminel, la Cour suprême du Canada a conclu que les procureurs de la Couronne peuvent répudier des ententes sur le plaidoyer, étant donné qu'une telle répudiation relève du pouvoir discrétionnaire en matière de poursuite que ne peut faire l'objet d'un contrôle de la part des tribunaux qu'en cas d'abus de procédure. Le fardeau de preuve pour démontrer un abus de procédure est élevé et incombe à l'accusé. Même si Nixon n'est pas une affaire de droit de la concurrence, cette cause a des implications pour les affaires de droits de la concurrence au Canada. Cet article discute de Nixon et de ses implications en droit de la concurrence canadien.

I. Overview

The repudiation of plea or immunity agreements in anti-trust matters is a topic Canadian courts may be asked to fully consider. Recently in *R. v. Nixon*[2], a general criminal law matter, the Supreme Court of Canada concluded that Crown prosecutors can renege plea agreements as part of their prosecutorial discretion, reviewable only by the courts for abuse of process. The burden of proof for demonstrating an abuse of process is high and lies with the accused. Although *Nixon* does not arise from anti-trust matters, it does have implications for anti-trust matters in Canada.

This article will set out the circumstances of the *Nixon* decision and the Supreme Court's analysis, with a focus on prosecutorial discretion and the evolution and present state of the abuse of process doctrine and the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). It will then set out the potential implications of *Nixon* on anti-trust matters in Canada. In particular, this article will comment on whether *Nixon* has implications for plea or immunity agreements revoked in the so-called *Stolt-Nielsen* scenario which arose in the U.S. (i.e., in a dispute over whether an accused has violated a term(s) of a plea or

immunity agreement). This article will also comment on the evidentiary burden placed upon the Public Prosecution Service of Canada ("PPSC") and possibly the Competition Bureau (the "Bureau") in an abuse of process challenge if and when the PPSC repudiates a plea or immunity agreement.

II. The Circumstances in *Nixon*

Olga Nixon drove her motor home through an intersection and struck another vehicle, killing a husband and wife and injuring their young son. She was charged with offences under the *Criminal Code* and Alberta's *Traffic Safety Act*. Crown counsel with carriage of the matter had concerns about some of the evidence, including the admissibility of breathalyzer results and the probative value of certain eye witness testimony. Having regard to these evidentiary concerns, the Crown prosecutor entered into a written plea agreement with Ms. Nixon according to which Ms. Nixon would plead guilty to a charge under the *Traffic Safety Act* and pay a $1,800 fine. In return, the Crown agreed to withdraw the *Criminal Code* charges.[3]

Thereafter, the Acting Assistant Deputy Minister of the Criminal Justice Division of the Office of the Attorney General (the "ADM") observed the plea agreement and initiated an inquiry, the results of which led him to instruct the Crown prosecutor to withdraw the agreement and proceed to trial. In response, Ms. Nixon brought a section 7 application under the *Charter* alleging an abuse of process and seeking a court direction requiring the Crown to complete the plea agreement. Ms. Nixon was successful at trial but unsuccessful at the Alberta Court of Appeal.[4] The Supreme Court of Canada agreed with the Court of Appeal, and ordered a new trial to proceed.

The legal analysis that led to the Supreme Court's conclusion is noteworthy and outlined below.

III. The Supreme Court's Analysis

(a) Prosecutorial Discretion

Relying on its decision in *Krieger v. Law Society of Alberta*, the Supreme Court found that the Crown's ultimate decision to resile from a plea agreement and to continue the prosecution is an act of prosecutorial discretion. An act of prosecutorial discretion is subject only to judicial review under the abuse of process doctrine.[5]

(b) Preliminary Evidentiary Threshold

The Supreme Court confirmed that there is an evidentiary threshold on an applicant who alleges that an act of prosecutorial discretion constitutes an abuse of process.[6] This is not dissimilar to preliminary threshold requirements

in other areas of criminal law, where trial judges may refuse to embark upon a *Charter* based inquiry on the basis of bare allegations.[7]

Of significance, the Supreme Court clarified that the repudiation of a plea agreement is not a bare allegation. Evidence that a plea agreement was entered into and subsequently reneged by the Crown provides the requisite evidentiary threshold to embark on an abuse of process review. When there is sufficient evidence of such an event, the Supreme Court concluded that the Crown bears an evidentiary burden to enlighten the Court on the circumstances and reasons behind its decision to resile from the agreement. Relying on this information, the accused may then make its case to stay the proceeding for abuse of process.[8]

(c) Evolution of the Abuse of Process Doctrine and the Charter

Starting with *R. v. Jewitt*,[9] the Supreme Court recognized that a trial judge has the residual discretion to stay proceedings to remedy an abuse of process. It held that the abuse of process doctrine could be applied in narrow circumstances where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings." For an applicant to successfully invoke the court's common law power to stay proceedings for abuse of process, the burden of proof was the onerous "clearest of cases" standard.[10]

A decade later, the Court in *R. v. O'Connor*[11] sought to merge the self-contained common law abuse of process doctrine with the *Charter*. The merger saw the protection against abuse of process encapsulated by the residual category of conduct caught by section 7 of the *Charter*.[12]

The *O'Connor* decision identified two categories of abuse of process which would be caught by section 7: prosecutorial conduct affecting the fairness of the trial, and prosecutorial conduct that contravenes fundamental notions of justice and therefore undermines the integrity of the judicial process. The Court further elaborated that while the burden of proof for violations of section 7 is on a balance of probabilities, the court must still determine an appropriate remedy under section 24(1) of the *Charter* when a violation is made out. In that regard, the Court held that the "clearest of cases" burden still applies to justify the remedy of a judicial stay of proceedings under s. 24(1) of the *Charter*.

In *Canada (Minister of Citizenship and Immigration) v. Tobiass*,[13] and thereafter in *R. v. Regan*,[14] the Supreme Court reaffirmed the test for granting a stay of proceedings for an abuse of process. A stay of proceedings will only be appropriate where, in the "clearest of cases:" (1) "the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct

of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice."[15]

Although not discussed in *Nixon*, the purported merger of the common law and the *Charter*'s protections against abuse of process in *O'Connor* raises a significant concern for corporations. A corporation, unlike an individual, does not have the right to life, liberty and security of the person as protected under s. 7 of the *Charter*.[16] Therefore, a corporation cannot seek remedies under section 24(1) of the *Charter* for violations under section 7.[17] Some courts have recognized this shortcoming, causing the common law abuse of process doctrine to have some life.[18] This issue, however, warrants further analysis and clarity by the courts.

IV. Findings in *Nixon*

Nixon and preceding jurisprudence from the Supreme Court demonstrate that an accused has an enormous legal burden to overcome to make its case to stay a proceeding for an abuse of process. Indeed, the core question in *Nixon* was as follows: was the Crown's repudiation of the plea agreement so unfair or oppressive to the accused, or so tainted by bad faith or improper motives, that to allow the Crown to proceed with the prosecution would tarnish the integrity of the judicial system?[19]

In *Nixon*, the Supreme Court found no evidence to support a finding of an abuse of process. It found no improper conduct or bad faith in the approach, circumstances or ultimate decision of the ADM to proceed with the prosecution. The ADM determined that Crown counsel's assessment of the strength of the evidence was erroneous. The ADM also had regard to the seriousness of the offence, which resulted in the death of two people and left another orphaned. The ADM concluded that it would not be in the public interest to terminate the prosecution of the criminal charges. The Supreme Court plainly had regard to these circumstances when upholding the Alberta Court of Appeal's decision.

V. The Implications of *Nixon* on Anti-Trust Matters in Canada

The main lesson defence counsel in anti-trust matters should draw from *Nixon* is that the execution of a plea and immunity agreement may not bring a matter to an end. The PPSC may resile a plea or immunity agreement. *Nixon* narrows the court's role in overruling the PPSC's decision to resile a plea or immunity agreement. Failing a successful abuse of process challenge, which is an extremely high threshold for an accused to overcome, the PPSC's decision to resile a plea or immunity agreement will go unchecked. Defence counsel should therefore be especially cautious when negotiating a plea or immunity agreement with the PPSC.

Nixon also raises ambiguity in at least two respects for anti-trust matters: (1) the application of *Nixon* to the revocation of agreements in the *Stolt-Nielsen* scenario; that is, when the PPSC and an accused disagree over whether the accused has violated a term(s) of a plea or immunity agreement; and (2) the scope of the evidentiary burden upon the PPSC, and possibly the Bureau, in an abuse of process challenge by an accused if and when the PPSC repudiates a plea or immunity agreement. Both matters are discussed below.

(a) The Application of *Nixon* to the *Stolt-Nielsen Scenario*

As is now well known, *Stolt-Nielsen* arises from the U.S. Department of Justice Antitrust Division's (the "Division") unsuccessful attempt to resile the conditional leniency agreement (the "Amnesty Agreement") it entered into with the Stolt-Nielsen companies and one of its executives.

The saga began when the Division notified Stolt-Nielsen that it had obtained evidence that Stolt-Nielsen had breached the terms of the Amnesty Agreement. Formal revocation of the Amnesty Agreement soon followed. Stolt-Nielsen and one of its executives commenced a civil action, seeking an injunction to bar the Division from proceeding with the indictment. The District Court concluded that neither Stolt-Nielsen nor its executive had breached the Amnesty Agreement and issued an injunction against the Division.[20] The District Court's decision was reversed on appeal by the Third Circuit Court of Appeals on technical separation of power grounds.[21] Thereafter, a federal grand jury returned an indictment against Stolt-Nielsen and two of its executives.[22] Following a lengthy evidentiary hearing, the U.S. District Court dismissed the indictment.[23]

The outcome in *Stolt-Nielsen* demonstrates that the Division will be held to a rigorous standard in fulfilling its immunity bargains. The outcome of the *Stolt-Nielsen* scenario in the Canadian context, however, is unclear.

Unlike the Division in the United States, the Crown is not subject to an injunction or an order for specific performance but subject to declaratory relief in lieu thereof.[24] Therefore, a pre-indictment injunction against the Crown is not a viable option for an accused in Canada. Further, the Immunity Program under the *Competition Act* explicitly prescribes notice and consultation with an accused before an immunity agreement can be revoked.[25] However, even when the prescribed notice and consultations are exhausted, there is no formal dispute resolution mechanism to resolve disputes regarding whether a term(s) of a plea or immunity agreement has been breached.

Does the *Nixon* analysis apply strictly or at all to the *Stolt-Nielsen* scenario? Consider the following example: the PPSC repudiates an immunity agreement on the basis that the accused did not comply with a term therein. The accused answers by claiming that it did not violate the term at issue. Notice and consultations with the accused do not resolve the dispute, causing the

PPSC to proceed with its prosecution of the accused. What will a court require the accused to prove to overcome the pending prosecution? In particular:

(a) is the accused required to meet the *Nixon* threshold; that is, seek and obtain a stay of the pending prosecution on the basis of abuse of process?; or

(b) can an accused prove – on a balance of probabilities – that it did not violate the term of the immunity agreement, and in so doing, obtain an order declaratory of its rights?

The *Stolt-Nielson* scenario has never been before the courts in Canada. If it does, a court will likely face arguments over whether the *Nixon* analysis applies. While the circumstances of each case will dictate its conduct, it is conceivable that a court will be inclined to compel an accused to meet the *Nixon* threshold in order to overcome the pending prosecution, unless it can be persuaded otherwise. An anti-trust immunity agreement is arguably not distinguishable (or not distinguishable enough) from a plea agreement in "traditional" criminal matters to justify a departure from the *Nixon* analysis set by the Supreme Court of Canada. Indeed, a judge would have to be persuaded that "a square peg does not fit a round hole" in order to depart from the *Nixon* analysis in anti-trust matters.

(b) *Evidentiary Threshold of the PPSC and Possibly the Bureau*

Pursuant to the *Nixon* analysis, the PPSC will bear an evidentiary burden to enlighten the Court on the circumstances and reasons behind its decision to resile a plea or immunity agreement. Relying on this information, the accused can make its case to stay the proceeding for abuse of process.

Is the PPSC required to provide defence counsel with information regarding the circumstances and reasons for its decision to resile a plea agreement? If so, what information is the PPSC required to provide to meet this evidentiary burden? What information, if any, can defence counsel obtain from the PPSC and the Bureau? The Supreme Court commented that "if the Crown provides little or no explanation to the court, this factor should weigh heavily in favour of the applicant in successfully making out an abuse of process."[26] This comment provides little comfort for an accused seeking to overcome the enormous legal burden required to make a case to stay a proceeding for abuse of process.

The courts may well face the situation where defence counsel seeks internal information in the possession or control of the PPSC and the Bureau regarding the repudiation of a plea or immunity agreement, and possibly more, so that it can properly make its case to stay a pending prosecution.

Endnotes

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[2] 2011 SCC 34, [2011] SCJ No 34, [2011] ACS no 34. (*Nixon*).

[3] *Ibid*. at 6-8.

[4] *Ibid*. at 8-17.

[5] *Ibid*. at 20. See also *Kreiger v. Law Society of Alberta*, 2002 SCC 65, [2002] SCR 372 at 30-32.

[6] *Ibid*. at 61-62.

[7] *Ibid*. at 61. See also *R. v. Pires*, 2005 SCC 66, [2005] 3 SCR 343.

[8] *Ibid*. at 63.

[9] [1985] 2 SCR 128 [*Jewitt*].

[10] *Nixon*, *supra* note 1 at 33-34, citing *Jewitt*, *supra* note 8 at 136-137.

[11] [1995] 4 SCR 411 [*O'Connor*].

[12] *Nixon*, *supra* note 1 at 36.

[13] [1997] 3 SCR 391.

[14] 2002 SCC 12, [2002] 1 SCR 297.

[15] *Ibid*. at 54, citing *O'Connor*, *supra* note 7 at 75.

[16] *O'Connor*, *supra* note 10 at 70. See also *R. v. Zanzibar Tavern Inc.* (c.o.b. Zanzibar Circus Tavern), [2007] OJ No 3381, 2007 ONCJ 401, 37 MPLR (4th) 216 (OCJ) at 228; *R. v. Nelson Granite Ltd.*, [2007] OJ No 2296, 2007 ONCJ 258, 49 CR (6th) 125 (OCJ) at 62; *R. v. Urus Industrial Corp.* (c.o.b. Vacform Plastics Inc.), [2006] OJ No 5139, 2006 ONCJ 477, 72 WCB (2d) 370 (OCJ) at 32-33.

[17] *Big M. Drug Mart, R.* [1985] 1 SCR 295.

[18] See *R. v. Zanzibar Tavern Inc. (c.o.b. Zanzibar Circus Tavern)*, [2007] OJ No. 3381, 2007 ONCJ 401, 37 MPLR (4th) 216 (OCJ) at 228; *R. v. Nelson Granite Ltd.*, [2007] OJ No 2296, 2007 ONCJ 258, 49 CR (6th) 125 (OCJ) at 62; *R. v. Urus Industrial Corp.* (c.o.b. Vacform Plastics Inc.), [2006] OJ No 5139, 2006 ONCJ 477, 72 WCB (2d) 370 (OCJ) at 32-33.

[19] *Nixon*, *supra* note 1 at 59.

[20] *U.S. v. Stolt-Nielsen S.A., Stolt-Nielsen Transportation Group Ltd. And Richard B. Wingfield*, United States District Court for the Eastern District of Pennsylvania, Action No. 04-CV-537, January 14, 2005, [2005] 352 F Supp 553.

[21] *Stolt-Nielsen S.A., Stolt-Nielsen Transportation Group Ltd. And Richard B. Wingfield v. United States of America*, United States Court of Appeals, Third Circuit, Action No. 05-1480, March 23, 2006, 442 F 3d 177.

[22] *United States of America v. Stolt-Nielsen S.A., Stolt-Nielsen Transportation Group Ltd (Liberia), Stolt-Nielsen Transportation Ltd. (Bermuda), Samuel A. Cooperman, and Richard B. Wingfield*, District Court for the Eastern District of Pennsylvania, Action No. 06-466, September 6, 2006.

[23] *United States of America v. Stolt-Nielsen S.A. et al*, United States Court for the Eastern District of Pennsylvania, Action No. 06-cr-466, November 29, 2007.

[24] *Crown Liability and Proceedings Act*, RS 1985, c C-50, s. 22(1).

[25] Pursuant to the Immunity Program under the *Competition Act*, where the Competition Bureau becomes aware that an applicant does not meet the terms and conditions set out in its immunity agreement, the Bureau may make a recommendation to the Director of Public Prosecutions ("DPP") that the applicant's immunity be revoked. The Bureau will in the normal course discuss the situation with the applicant and provide a reasonable opportunity to the applicant to address any shortfalls in its conduct before making a recommendation to the DPP. As a result of the Bureau's recommendation, or on its own initiative, the DPP may revoke an immunity agreement where the applicant does not meet all of the terms and conditions of that agreement, and take appropriate action against the party. Where the DPP determines that a party has failed to fulfil the terms and conditions set out in its immunity agreement, the DPP will provide fourteen days written notice to the party before revoking the immunity agreement. See Competition Bureau "Immunity Program: Frequently Asked Questions" 2007 at Q31, online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02482.html.

[26] *Nixon*, *supra* note 1 at 63.