A CANADIAN COURT CONSIDERS THE CROWN'S REPUDIATION OF AN ANTITRUST PLEA AGREEMENT: STILL A WORK IN PROGRESS

Huy Do and Antonio Di Domenico[1]
Fasken Martineau DuMoulin LLP

R v Couche-Tard Inc is the first Canadian decision to consider the Crown's repudiation of an antitrust plea agreement. This article will analyze the Couche-Tard decision and contrast it with the Supreme Court of Canada's decision in R v Nixon, the leading case regarding Crown repudiation of plea agreements. It will then discuss the implications that these decisions, when read together, pose for antitrust plea and immunity agreements in Canada. It comments that it would be helpful for an appellate court to clarify the application of the Supreme Court of Canada's analysis in Nixon to antitrust plea and immunity agreements, including whether Nixon has any application in that context. It concludes that antitrust plea and immunity agreements, and the processes by which accused persons enter into them, are arguably distinguishable enough from "traditional" criminal plea agreements to justify a departure from a strict Nixon analysis.

R c Couche-Tard inc est la première décision canadienne portant sur la révocation par le ministère public d'une entente sur plaidoyer en matière d'antitrust. Cet article analysera la décision Couche-Tard et la comparera à la décision qu'a rendue la Cour suprême du Canada dans R c Nixon, qui constitue le précédent concernant la révocation d'ententes sur plaidoyer par le ministère public. Il abordera ensuite les incidences de ces décisions, interprétées ensemble, pour les ententes de plaidoyer et d'immunité en matière d'antitrust au Canada. Il fait remarquer qu'il serait utile qu'un tribunal d'appel précise l'application de l'analyse suivie par la Cour suprême du Canada dans Nixon aux ententes de plaidoyer et d'immunité en matière d'antitrust, notamment la question de savoir si l'arrêt Nixon s'applique dans ce contexte. L'article conclut en disant que les ententes de plaidoyer et d'immunité en matière d'antitrust ainsi que les processus par lesquels les accusés les concluent se distinguent vraisemblablement assez des ententes « traditionnelles » de plaidoyer en matière pénale pour justifier que l'on s'écarte de l'application stricte de l'analyse effectuée dans l'arrêt Nixon.

I. Overview

For the first time, a Canadian court has considered the Crown's repudiation of an antitrust plea agreement. In *R v Couche-Tard Inc*, the Superior Court of Québec overturned the Director of Public Prosecutions' decision to renege on a plea agreement.[2] Fourteen months earlier, the repudiation of a plea agreement was at issue before the Supreme Court of Canada in *R v Nixon*, an impaired driving case.[3] The Court in *Nixon* confirmed that the Crown's decision to resile from a plea or immunity agreement cannot be overturned failing a successful abuse of process challenge. The Court in *Couche-Tard* did not apply the *Nixon* test and did not appear to consider the case at all. It concluded that the Crown's repudiation of the plea agreement was not an abuse of process but nevertheless overturned the repudiation due to procedural fairness concerns.

This article will analyze the *Couche-Tard* decision and contrast it with the *Nixon* decision. It will then discuss the implications that these decisions, when read together, pose for antitrust plea and immunity agreements in Canada. It comments that it would be helpful for an appellate court to clarify the application of the Supreme Court of Canada's analysis in *Nixon* to antitrust plea and immunity agreements, including whether *Nixon* has any application at all. It concludes that antitrust plea and immunity agreements, and the processes by which accused persons enter into them, are arguably distinguishable enough from "traditional" criminal plea agreements to justify a departure from the strict *Nixon* analysis.

II. *R v Couche-Tard Inc*

(a) Salient Facts

In June 2008, Alimentation Couche-Tard Inc. ("Alimentation") was charged with two counts of fixing retail gasoline prices in Québec contrary to section 45(1)(c) of the *Competition Act*.[4]

Crown counsel and Alimentation's counsel engaged in negotiations between November 16, 2009 and January 14, 2010. The parties reached an agreement on January 14, 2010, the salient terms of which were as follows:

- Alimentation was to pay $3,250,000 to the Receiver General of Canada;

- Alimentation was to provide Crown counsel with its arguments regarding why Alimentation had no corporate responsibility for the charges laid against it;

- Alimentation would consent to a prohibition order (without any admission of committing the offence);

- The Crown would recommend a stay of criminal proceedings against Alimentation; and

- The Competition Bureau (the "Bureau") would recommend to the Public Prosecutions Service of Canada (the "PPSC") that none of the companies belonging to the Couche-Tard group (which included Alimentation), nor their officers, directors or employees should be prosecuted.[5]

The next day, Alimentation's lawyers met with Crown counsel and outlined the factual and legal bases upon which they had planned to argue that Alimentation was not criminally responsible, one of which was that Alimentation did not sell gasoline. In other words, the Crown had charged the wrong company amongst the Couche-Tard group of companies.[6]

During this meeting, Crown counsel told Alimentation that the Bureau no longer liked their agreement. A few days later, on January 21, Crown counsel advised Alimentation that the Director of Public Prosecutions, Brian Saunders, had decided to repudiate the deal. On March 24, 2010, Mr. Saunders wrote to Alimentation and explained that it was not in the public interest to let a group of closely related corporations off the hook because the wrong company had been charged. He also noted that the Bureau's recommendation against charging any company belonging to the Couche-Tard group or their officers, directors or employees was too broad.[7]

Within the next two days, Crown counsel withdrew the charges against Alimentation and, instead, laid charges against Couche-Tard Inc., another member of the Couche-Tard group of companies.[8]

Couche-Tard Inc. applied to the Québec Superior Court for a stay of the criminal charges.

(b) The Decision and Analysis in *R v Couche-Tard Inc*

Justice Tardif of the Superior Court of Québec concluded that the Crown's repudiation of the plea agreement was neither arbitrary nor abusive because the agreement was contrary to public interest.[9] In other words, it did not constitute an abuse of process. In fact, Justice Tardif considered the Crown's decision to repudiate to be appropriate, commenting that the lawyers for both sides got carried away when trying to enter into a deal.[10]

Notwithstanding this finding, Justice Tardif concluded that the Crown had caused irreparable prejudice to the fairness of the trial because it repudiated the plea agreement *after* Alimentation outlined its defence theory. As a result, he stayed the proceeding. In his reasons, Justice Tardif emphasized the accused's right not to testify before the Crown had presented all of its evidence. In fulfilling part of its obligations under the plea agreement, Alimentation provided 12 arguments in support of its lack of corporate liability. Although certain grounds of Alimentation's defence could have been anticipated, the Crown would not have known Alimentation's defence strategy but for the plea agreement. In other words, the fairness of the trial had been compromised because the Crown could not "unlearn" what had been disclosed to it.[11]

Justice Tardif noted that it was beyond the Court's power to assess each of the 12 arguments and to decide whether their disclosure precluded the just and fair trial to which the accused was entitled. He said that a finding that the fairness of the trial had not been irremediably affected would require strong evidence, and that he favored the defence's argument on this point.[12] This suggests that if the Crown could have produced enough evidence to support that it in fact had "unlearned" what was disclosed to it, or if it could demonstrate that it had not learned of any material defence strategy, then the Court may not have found irreparable prejudice.

The Crown appealed the Superior Court's decision to the Quebec Court of Appeal. The Notice of Appeal filed argues, *inter alia*, that the Superior Court erred in concluding that Alimentation's disclosure

prejudiced its right to a fair trial under the *Canadian Charter of Rights and Freedoms* ("*Charter*") and erred in ordering a permanent stay.[13] At the date of this writing, no hearing of the appeal had been scheduled.

The Supreme Court of Canada's decision and analysis in *Nixon* will most likely be considered in the appeal. In *Nixon*, the accused was charged with offences under the *Criminal Code* and Alberta's *Traffic Safety Act* following a motor vehicle accident that killed a husband and wife and injured their young son.[14] 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 concerns, Crown counsel entered into a written plea agreement with the accused, in which the accused 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.[15]

Thereafter, the Acting Assistant Deputy Minister of the Criminal Justice Division of the Office of the Attorney General (the "ADM") reviewed the plea agreement and initiated an inquiry, the results of which led him to instruct Crown counsel to withdraw the agreement and proceed to trial. In response, the accused brought a section 7 application under the *Charter* alleging an abuse of process and seeking a court direction requiring the Crown to live up the plea agreement.[16] The accused was successful at trial but unsuccessful at the Alberta Court of Appeal.[17] The Supreme Court of Canada agreed with the Court of Appeal, and ordered a new trial to proceed.[18]

The Supreme Court found that the Crown's ultimate decision to resile from a plea agreement and to continue the prosecution is an exercise of prosecutorial discretion. An exercise of prosecutorial discretion is subject only to judicial review under the abuse of process doctrine.[19]

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?[20] Indeed, *Nixon* demonstrates that an accused has an enormous legal burden to overcome to make its case to stay a proceeding for an abuse of process.

III. The Implications of the *Couche-Tard* decision on Antitrust Matters in Canada

The key lesson to draw from *Couche-Tard* and *Nixon* is that execution of a plea or immunity agreement may not bring a matter to an end. The Crown can repudiate such an agreement as an exercise of prosecutorial discretion and will do so where it feels it is necessary. The burden is then on the accused to demonstrate that the repudiation was inappropriate under the circumstances. Defence counsel should therefore be especially cautious when negotiating plea or immunity agreements with the Crown.

Ironically, in *Couche-Tard*, full and frank disclosure of the defence strategy before the repudiation caused the court to overturn the repudiation.

IV. What Remains Unanswered After *Couche-Tard*

(a) Overview

Currently, the legal test that defence counsel in antitrust matters must satisfy to overturn the Crown's repudiation of a plea or immunity agreement is unclear. The Supreme Court of Canada in *Nixon* narrowed the Court's power to overrule the Crown's decision to resile from such an agreement, holding that the Crown's decision to resile cannot be overturned failing a successful abuse of process challenge. However, in *Couche-Tard*, Justice Tardif made no reference to *Nixon*.[21] He concluded that the Crown's decision to repudiate was not an abuse of process but nevertheless overturned the repudiation for procedural fairness concerns.

How does the Supreme Court of Canada's analysis in *Nixon* apply to antitrust matters, if at all? In particular, are antitrust plea and immunity agreements and the processes by which accused persons enter into them distinguishable enough from "traditional" criminal plea agreements to justify a departure from the strict *Nixon* analysis?

(b) The Bureau's Immunity and Leniency Programs

It is well known that the Bureau's Immunity and Leniency Programs

are uniquely demanding, beginning with a marker and ending with plea or immunity agreement. Participants are required to provide full, frank, timely and truthful cooperation.[22] Cooperation includes providing the Bureau with non-privileged information, records and other materials, which in many cases can be voluminous and complex. In exchange, participants are at the Bureau's mercy to have their markers preserved and to receive a recommendation of immunity or lenient treatment in sentencing. They are also at the Crown's mercy with regard to the acceptance of the Bureau's recommendation.

Under the Immunity Program, the first party to disclose to the Competition Bureau an offence not yet detected or to provide evidence leading to the filing of charges may receive immunity from prosecution from the Crown provided that the party co-operates with the Bureau.[23] Under the Leniency Program, the Bureau will recommend to the Crown that qualifying applicants be granted recognition for timely and meaningful assistance to the Bureau's investigation and any subsequent prosecution. While leniency candidates are not eligible for a grant of immunity under the Bureau's Immunity Program, their early admission and cooperation respecting their role in a cartel offence can earn them a substantial basis for lenient treatment in sentencing.[24] The degree of lenient treatment will vary depending upon the circumstances of the case.

Participation in the Immunity or Leniency Programs requires that the applicant be granted a marker. A marker is the acknowledgement given by the Bureau to an applicant that records the time of the application to either program. It establishes an applicant's position in line in relation to other individuals or business organizations that were involved in the conduct under investigation and that seek to participate in either program. The marker guarantees this place in line subject to the applicant meeting all other criteria of the applicable program. The Bureau makes clear that it may unilaterally cancel a marker if the participant is not meeting the program requirements.[25]

In fact, the Crown and the Bureau make clear that a plea or immunity agreement can be revoked at any time where either body is of the view that a participant has failed to satisfy all of the applicable conditions under the relevant program.[26] The Bureau's document titled "Immunity FAQs" explicitly prescribes notice to an accused before an immunity

agreement can be revoked.[27] However, even when the prescribed notice is exhausted, there is no formal dispute resolution mechanism available to a participant who has allegedly failed to meet the program requirements. Neither the Immunity or Leniency Program documents nor the PPSC's "Deskbook" discuss the issue of remedies arising from the revocation of plea or immunity agreements.

The lack of a formal dispute resolution process and guidance creates uncertainty for participants who have had their markers cancelled or plea or immunity agreements revoked. What remedies can these participants seek? Does the remedy vary depending on when the settlement breakdown between the participant and the Bureau or Crown took place? Consider the following two scenarios:

(a) The Stolt-Nielsen scenario

The well-known case *US v Stolt-Nielson SA* arose from the U.S. Department of Justice Antitrust Division's (the "Division") unsuccessful attempt to resile from the conditional leniency agreement (the "Amnesty Agreement") it entered into with the Stolt-Nielsen companies ("Stolt-Nielson") and a Stolt-Nielsen executive.[28] 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 for the Eastern District of Pennsylvania concluded that neither Stolt-Nielsen nor its executive had breached the Amnesty Agreement and issued an injunction against the Division. The District Court's decision was reversed on appeal by the Third Circuit Court of Appeals on technical separation of power grounds. Thereafter, a federal grand jury returned an indictment against Stolt-Nielsen and two of its executives. Following a lengthy evidentiary hearing, the U.S. District Court dismissed the indictment.

What remedy can an accused faced with the *Stolt-Neilsen* scenario in Canada seek? Unlike the Division in the United States, the Crown is not subject to an injunction or an order for specific performance but is subject to declaratory relief in lieu thereof.[29] Therefore, a pre-indictment injunction against the Crown is not a viable option for an

accused in Canada. Is an accused required to seek and obtain a stay of the pending prosecution for abuse of process based on the *Nixon* standard? Alternatively, can an accused prove on a balance of probabilities that it did not violate the terms of a plea or immunity agreement and, in so doing, obtain an order declaratory of its rights?[30]

It is conceivable that a court would not apply the strict *Nixon* threshold to a *Stolt-Nielson* scenario. Unlike in *Nixon*, where the Crown disagreed with the plea arrangement entered into by a Crown prosecutor and exercised its discretion to renege the arrangement, *Stolt-Nielson* concerned a *factual* dispute over whether a participant breached terms of a plea agreement. Depending on the circumstances, a court may be persuaded that a participant did not violate the terms of its agreement without proof of an abuse of process.

(b) The Revoked Marker

As noted above, the Bureau makes clear that it may unilaterally cancel a marker if a participant is not meeting the requirements of the Immunity or Leniency Program. In other words, the Bureau does not require the approval of the Crown to revoke a marker. Accordingly, what remedy can a participant faced with a revoked marker seek?

To date, the *Nixon* threshold has only been applied to a plea agreement revoked by the Crown. It is therefore unclear if *Nixon* applies to decisions made by the Bureau and whether a participant faced with a cancelled marker would be required to seek and obtain a stay of the pending prosecution on the basis of abuse of process.

Decisions of the Commissioner of Competition (the "Commissioner") can be judicially reviewed by the Federal Court pursuant to sections 18 and 18.1 of the *Federal Courts Act*.[31] Section 18.1(3) gives the Federal Court the power to order the Commissioner to "do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing" or to "declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain" a decision of the Commissioner.

To date, a court has not considered the Bureau's decision to revoke

a marker. However, there is precedent for judicially reviewing a decision of the Commissioner. For example, in *Charette v Commissioner of Competition*, the applicant commenced a judicial review of the Commissioner's decision not to launch an inquiry into his complaint pursuant to section 10(1)(a) of the *Competition Act*.[32] The key issue in this case was whether the Commissioner was required under section 10(1)(a) to initiate a formal inquiry into the Appellant's complaints of anti-competitive activity, given that the Commissioner had already thoroughly investigated the claims and found them not to warrant further inquiry. After thoroughly examining the facts and circumstances of the matter, the Federal Court of Appeal concluded that the Commissioner had already fulfilled his duties under section 10(1)(a).[33]

On the other hand, the Bureau's decision to cancel a marker may be beyond the ambit of judicial review. In *Ochapawace First Nation v Canada (Attorney General)*, the Federal Court of Appeal held that an RCMP decision not to press charges was within the scope of police discretion and should only be interfered with by a court in the "clearest cases of abuse."[34] It is possible that a federal court may extend the same deference to the Bureau with regard to a decision to cancel a marker, which effectively is a decision to pursue a prosecution under the *Competition Act*.

Overall, it is unclear what available remedies a party has after having its marker revoked by the Bureau. Given that an applicant in the Immunity or Leniency Program discloses information in reliance upon its agreement with the Bureau, it could be argued that the Bureau's decision to take away a marker should not be granted the deference that was given to the RCMP in *Ochapawace*.

Conclusion

As the first Canadian court to consider the Crown's repudiation of an antitrust plea agreement, *Couche-Tard* is noteworthy and its final disposition will likely be significant. The appellate court(s) will inevitably need to clarify the application of *Nixon* to antitrust plea and immunity agreements, including whether *Nixon* has any application at all. Having regard to the uniqueness of such agreements, and particularly the process by which accused persons enter into these agreements, it is difficult to conceive of a "one size fits all" approach.

Endnotes

[1] Huy Do is a partner and co-leader of Fasken Martineau's Antitrust/Competition group. Tony Di Domenico is a Partner in Fasken Martineau's Litigation and Antitrust/Competition groups. Both have significant experience with civil and criminal litigation under the *Competition Act*, including the investigation and prosecution of cartels and other anti-competitive conduct.
[2] [2012] JQ No 9567 [*Couche-Tard*].
[3] [2011] 2 SCR 566 [*Nixon*]. *See also* Huy Do and Antonio Di Domenico, "Anti-Trust Immunity Agreements and *R v Nixon*: Fair Deal or Foul" (2012), 25 Can Comp L Rev 144.
[4] RSC 1985, c C-34; *Couche-Tard*, *supra* note 1 at para 3.
[5] *Couche-Tard, ibid* at para 4.
[6] *Ibid* at paras 6, 30.
[7] *Ibid* at para 7-9.
[8] *Ibid* at para 10.
[9] *Ibid* at para 15.
[10] *Ibid* at para 17.
[11] *Ibid* at paras 23-32.
[12] *Ibid* at para 32.
[13] 1982, c 11 (UK), Schedule B.
[14] RSC, 1985, c c-46; RSA, 2000, c T-6.
[15] *Nixon, supra* note 2 at paras 6-8.
[16] *Ibid* at para 10-11.
[17] *Ibid* at para 8-16.
[18] *Ibid* at para 71.
[19] *Ibid* at para 20. See also *Kreiger v Law Society of Alberta*, 2002 SCC 65, [2002] SCR 372 at 30-32.
[20] *Nixon*, *supra* note 2 at para 59.
[21] It is unclear whether the parties to the *Couche-Tard* proceeding brought *Nixon* to the Court's attention.
[22] "Immunity Program Under the Competition Act" (2010), online: Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html> at para 17 [Immunity Program]; "Leniency Program" (2010), online: Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03288.html> at para 28 [Leniency Program].
[23] Immunity Program, *ibid* at para 13.
[24] Leniency Program, *supra* note 22 at paras 8-10.
[25] "Immunity Program: Frequently Asked Questions" (2011), online: Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03250.html> at Q1, Q14 [Immunity FAQ]; "Leniency Program - FAQ's" (2011), online: Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03289.html> at Q1, Q12 [Leniency FAQ].

[26] "The Federal Prosecution Service Deskbook" (2000), online: Public Prosecution Service of Canada <http://www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/> at s 38.5; Immunity FAQ, *ibid* at Q14; Leniency FAQ, *ibid* at Q12.
[27] Immunity FAQ, *ibid* at Q27.
[28] [2005] 352 F Supp 2d 553 [*Stolt-Nielson*].
[29] *Crown Liability and Proceedings Act*, RS 1985, c C-50, s 22(1).
[30] *Supra* note 2 at 148-149.
[31] RSC 1985, c F-7.
[32] 2003 FCA 426 at para 44.
[33] *Ibid* at para 79.
[34] 2009 FCA 124 (CanLII) at para 29; leave to appeal refused, 2009 CanLII 5751 (SCC).