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Federal Court Reasons in Sentencing Decision Create Uncertainty for Canadian Competition Bureau's Leniency Program

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Reasons delivered by Chief Justice Paul Crampton of the Federal Court of Canada in relation to sentencing an accused corporation in *R.* v. *Maxzone Auto Parts (Canada) Corp.* create uncertainty for entities considering use of the Competition Bureau's Leniency Program in relation to cartel offences under the Competition Act.

Although Crampton C.J. accepted the joint sentencing submission of the prosecutor and the accused in this case, he made additional comments not necessary for his ruling (and therefore not having the full force of precedent), but which were expressly intended to alter future expectations about the Court's approach to joint sentencing submissions. The reasons suggest that, before accepting a joint sentence proposal pursuant to a plea agreement, the Court may require the record to include significantly enhanced public disclosure of facts and factors beyond the scope of what has traditionally been included in prior sentencing proceedings pursuant to the Leniency Program. For example, the Chief Justice calls for future sentencing submissions to include estimates of both actual and intended effects of the illegal conduct (including not only agreed or contemplated price increases, but potentially also the "deadweight loss" resulting from purchasers substituting to less desirable products), as well as information concerning a range of aggravating factors (such as the accused's degree of planning and covertness, whether the accused was a "ringleader" of the cartel, and whether victims were particularly vulnerable). The reasons also suggest that higher fines may be appropriate where a corporate plea is not accompanied by a plea and term of imprisonment for one or more individual company representatives in Canada. Further uncertainty regarding the operation of the Leniency Program also arises from the suggestion that a Court may not consider restitution to have been addressed by pending private actions and that accused entities ought to settle private actions before proceeding with a guilty plea.

Whether the reasons in this case will influence the approach to prosecuting cartel offences in Canada remains to be seen. If the Bureau were to adopt the principles suggested by these reasons, the Bureau would be facing a significantly increased investigatory burden before it is in a position to proceed with a plea agreement and joint sentencing submission. In order to satisfy the expectations of both the Court and the leniency applicant, the Bureau may also have to consider whether it is willing to delay Court proceedings to approve joint sentencing proposals made pursuant to the Leniency Program until after related private actions have been resolved.

It also remains to be seen whether other judges or Courts will consider it appropriate to pursue the approach suggested by Crampton C.J., or how this approach might be applied in practice. (Indictments and pleas for Competition Act offences can be, and often are, heard in Provincial Courts as well as the Federal Court.) If the Chief Justice's views are adopted by the Courts, the result may be less use of the Leniency Program and more contested proceedings in respect of Competition Act cartel offences.

Background

The first party that discloses an offence and cooperates with the Bureau is eligible for complete immunity under the Bureau's Immunity Program. Parties who agree to plead guilty and cooperate with the Bureau after another party has already received immunity are eligible for reduced fine recommendations under the Leniency Program. The Bureau's Leniency Program states that the first and second applicants who qualify for leniency are eligible for a 50% and 30% reduction, respectively, of the fine that would have otherwise been recommended by the Bureau to the Public Prosecution Service of Canada (PPSC). Subsequent applicants receive reductions based on the relative timeliness of their cooperation.

Under the Bureau's Leniency Program, the usual starting point for a recommended fine is 20% of the cartel participant's affected volume of commerce in Canada throughout the duration of the offence, and is subject to adjustment based on aggravating or mitigating factors. If the Bureau's recommendation is accepted by the PPSC (and the accused), the prosecutor then submits that proposed fine jointly with the accused to the Court.

The determination of the sentence to be imposed is at the sole discretion of the Court, and a judge is not bound by a joint sentencing submission. Nevertheless, the Canadian jurisprudence has generally taken the view that a judge will depart from a joint sentencing submission only where accepting the submission would (1) be contrary to the public interest, or (2) bring the administration of justice into disrepute. This has been seen as a high threshold and is intended to foster confidence that the joint sentencing submission will be accepted by a sentencing judge. To date, the practice for Competition Act leniency matters has been for agreed statements of fact and joint sentencing submissions to be relatively short and not particularly detailed.

The Maxzone Case

Following an international investigation, in May 2012 Maxzone Auto Parts (Canada) Corp., the Canadian subsidiary of a Taiwan-based international automotive parts company, pleaded guilty under section 46 of the Competition Act to implementing directives to give effect to a foreign conspiracy to fix the sale prices of aftermarket replacement automotive lighting parts between January 2004 and September 2008. Maxzone Canada's U.S. affiliate pleaded guilty to similar charges in the United States in November 2011, for which it was ordered to pay a fine of U.S.$43 million. In addition, two senior executives of foreign affiliates of Maxzone Canada had pleaded guilty and were sentenced to serve 180 days and nine months, respectively, in a U.S. prison.

Maxzone Canada cooperated with the investigation of the Competition Bureau pursuant to the Bureau's Leniency Program. The joint sentencing submission proposed a $1.5 million fine to reflect approximately 10% of Maxzone Canada's relevant volume of commerce during the period of the offence - a 50% reduction of the 20% starting point.

Although Crampton C.J. accepted the jointly recommended $1.5 million sentence in accordance with past practice, he specifically stated that his reasons were meant to "alter future expectations" with respect to the information that a judge needs to assess a joint sentencing submission. He stated that, in the future, "the Court may very well require a more fulsome evidentiary record, or a modified approach to the determination of a jointly recommended sentence, as well as more detailed submissions, to become satisfied that such a sentence would not be contrary to the public interest and would not bring the administration of justice into disrepute".

The Chief Justice stated that the Court needs sufficient evidence and submissions to assess the application of the sentencing principles, as set forth in section 718 of the *Criminal Code* and by jurisprudence, in light of the public interest and administration of justice criteria. He identified four relevant sentencing factors for the sentencing judge to consider:

i. the fundamental purpose and objectives of sentencing, namely, "denunciation, general and specific deterrence, separation of offenders, rehabilitation, reparation to victims, and promoting a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community";

ii. the proportionality of the sentence with respect to the gravity of the offence;

iii. aggravating and mitigating factors; and

iv. other principles, including any advantage realized by the organization as a result of the offence, the degree of planning involved in carrying out the offence and its duration and complexity, and any restitution the organization has paid to the victims of the offence.

The Chief Justice noted that the brief joint sentencing submissions in the Maxzone case did not fully address some of the listed factors, and stated that "the Court will expect more in the future". He also raised concerns about the "arithmetical manner that was followed in this case" to arrive at the proposed fine. Specifically, the reasons suggest that future sentencing submissions should explain why a fine alone (i.e., without an accompanying prison sentence for representatives of the accused entity) would suffice to achieve general and specific deterrence. Crampton C.J. also called for the submissions to provide at least either a "ballpark" sense of the illegal gains contemplated by and ultimately derived from the conduct, or evidence that the accused has paid restitution to the ultimate victims. He also noted that the Court "requires a good sense of any relevant aggravating and mitigating factors and how they influenced the jointly recommended fine".

Implications

Quite apart from the discussion of evidentiary expectations reviewed in the reasons, the case raises a number of practical issues, not the least of which is the desire for disclosure of sentencing intentions relative to parties, such as individuals, who may not be before the court when the plea agreement is considered. It remains to be seen whether Crampton C.J.'s reasons in the Maxzone case will be adopted and implemented in subsequent proceedings, particularly in Provincial criminal Courts which routinely deal with a wide range of criminal pleas, or affect the Bureau's and the PPSC's approach to the Leniency Program. In the meantime, entities considering use of the Bureau's Leniency Program should carefully consider the implications for them of the uncertainties created by the reasons in the Maxzone case.

The full reasons can be found at: *R.* v. *Maxzone Auto Parts (Canada) Corp.*, 2012 FC 1117, online: <http://decisions.fct-cf.gc.ca/en/2012/2012fc1117/2012fc1117.html>

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