>perspective

Newfoundland Court Confirms Dismissal of Conspiracy Charges in St. John's Taxi Case for Failure to Establish a Relevant Market

October 23, 2007

On June 26, 2007, the Newfoundland and Labrador Supreme Court – Trial Division denied an application by the Crown for judicial review of a discharge of the accused at the preliminary inquiry. A number of companies and individuals were charged with a conspiracy to prevent or lessen competition "unduly" in relation to an agreement among suppliers of taxi services in St. John's, Newfoundland to collectively refuse to bid on contracts for the exclusive supply of taxi services at certain locations, such as the local airport. At the preliminary inquiry, the presiding judge concluded that the evidence led by the Crown was insufficient for a reasonable jury, properly instructed, to determine that all of the elements of the conspiracy offence had been established. This is a low standard to meet. The key issue on review was whether the Crown had led sufficient evidence at the preliminary inquiry to establish the relevant market with respect to which the undue lessening of competition is to be assessed.

Competition & Foreign Investment Review Group

Recent Major Transactions

Recent Publications and Presentations

Also of interest:

- **Canada Enacts New Prior Approval Process of Transportation Mergers**
- **Canada's Competition and Foreign Investment Rules Under Review**
- **Minister of Industry Outlines Government's Position on Foreign Investment in Canada**

Click here for more information about our Competition & Foreign Investment Review Group.

Relevant Market Is an Essential Element of the Conspiracy Offence

Initially, the Crown argued that proof of competitively injurious behaviour is sufficient to establish an "undue" lessening of competition. However, the reviewing judge confirmed that the Crown must establish an acceptable competitive market as a precondition to the assessment of undueness. With reference to prior case law, including the 1992 decision of the Supreme Court of Canada in the *Nova Scotia Pharmaceutical Society* case, the reviewing judge held that it is imperative to first define the relevant market and "judicial care must be taken to guard against the Crown artificially limiting the market … to suit the available evidence". Having said that, the reviewing judge added that "if the market is too broadly stated, evidence which, while not proving the full breadth of the market definition on indictment, will not defeat the Crown, provided there is enough evidence referable to an acceptable competitive market".

Failure to Prove the Alleged Relevant Market

In the St. John's taxi case, the accused were charged with conspiring to unduly prevent or lessen competition in the purchase of contracted rights to operate taxi cab services from or on the premises of contracting businesses and public institutions in the City of St. John's and elsewhere in the Province of Newfoundland and Labrador. At the preliminary inquiry, the Crown's expert witness asserted that the relevant market was "the market for rights to privileged access by the taxi businesses to establishments to and from which large numbers of people pass, in the City of St. John's".

Under cross-examination, however, the Crown's expert acknowledged the existence of substitutes for privileged access taxi service (e.g., any taxi could deliver passengers to these locations and customers could call any taxi to come and pick them up at such locations). Further, the expert did not identify or quantify those substitutes, nor all the locations involving privileged access. Nor did the expert identify the number of taxis servicing such locations or their revenues.

In contrast to a situation where the Crown may overstate the relevant market, in this case, the Crown expert's evidence indicated that privileged access taxi services were a segment of a larger market. The reviewing judge stated that "the evidence does not direct itself to the measurement and the means of measurement of each of the impugned activities of this un-delineated and un-quantified market". Accordingly, the relevant market was not made out by the Crown's evidence in a manner sufficient to allow the undueness assessment to be engaged.

That finding was sufficient to confirm the discharge of the accused. However, the reviewing judge noted a number of additional points of interest:

- The accused were charged despite internal disagreements both between Transport Canada and the Competition Bureau and within the Competition Bureau itself about whether to prosecute the case.

- The defendants had been encouraged by the local airport manager to combine to form a legal entity to serve the total taxi requirements at the airport.
- The Competition Bureau had advised the taxi owners that they could bid together so long as the arrangement was disclosed.
- There may have been only one potential bidder for at least some of the exclusive supply contracts in any event.

Bid-Rigging Offence

The Crown also argued that the accused should have been committed to trial on a separate bid-rigging charge. (The *Competition Act* includes a separate *per se* offence for, among other things, agreements among bidders not to respond to a tender, unless such agreement is disclosed to the person calling for the tender prior to bids being submitted.) However, the reviewing judge noted that the impugned activity was in all instances disclosed to the person calling for the bids, which provided a full defence. The Crown appears to have argued that greater disclosure of the terms of the agreement was required, namely disclosure of certain penalties for non-compliance with the agreement. The reviewing judge was not persuaded. The reviewing judge was also of the view that the Crown had not seriously developed the bid-rigging case at the preliminary hearing and the dismissal was appropriate in any event.

Implications

Contested conspiracy prosecutions in Canada are rare. This decision is a further reminder of the challenge faced by the Crown in proving a relevant market in a contested conspiracy proceeding. Indeed, both judges in this case referred extensively to a 1995 decision of an Ontario court dismissing conspiracy charges against a group of freight forwarders where the Crown failed to prove, after a full trial, that freight forwarders constituted a distinct market, or that an anticompetitive agreement among freight forwarders constituted an undue lessening of competition in a larger freight transportation market (e.g., including trucking, for example). While it remains to be seen whether the Crown will seek to appeal this decision, the St. John's taxi decision, along with the freight forwarders case, will likely form a reference point for future conspiracy proceedings in Canada.

Rather than implying that the Crown will necessarily have similar difficulty in proving the market in subsequent cases, however, it may be that the Competition Bureau will take guidance from the St. John's taxi case and, in the future, adopt a more precise and deliberate approach to defining relevant markets in conspiracy proceedings, perhaps erring on the side of over-inclusiveness, or bringing criminal proceedings only in cases where market definition is less contentious.

While the Competition Bureau may point to this defeat in support of ongoing efforts to amend the legislation to lower the Crown's burden of proof in conspiracy cases, it is important to note that the court's dismissal of the case followed a failure to establish the relevant market (a fundamental element of most Canadian competition law matters – civil and criminal), and not from difficulty in meeting the undueness threshold within a market.

If you have any questions regarding the foregoing, please contact George Addy, John Bodrug, Mark Katz, Elisa Kearney, Hillel Rosen or any other member of the Competition and Foreign Investment Review Group at Davies Ward Phillips & Vineberg LLP at (416) 863-0900 (Toronto) or (514) 841-6400 (Montréal).

Davies Ward Phillips & Vineberg LLP, with over 235 lawyers, practises nationally and internationally from offices in Toronto, Montréal, New York and an affiliate in Paris and is consistently at the heart of the largest and most complex commercial and financial matters on behalf of its North American and overseas clients.

The information and comments contained herein are for the general information of the reader and are not intended as advice or opinions to be relied upon in relation to any particular circumstances. For particular applications of the law to specific situations, the reader should seek professional advice.

Recent Major Transactions

InnVest REIT and Cadbridge Investors LP - Counsel to InnVest REIT and Cadbridge Investors LP in their $2.5 billion take-over bid for Legacy Hotels REIT.

Reuters Group PLC – Counsel to Reuters Croup PLC in the $17.6 billion merger of Reuters and Thomson Corporation to create Thomson-Reuters Corporation.

Agricore United – Counsel to Agricore United in its acquisition by Saskatchewan Wheat Pool, following a take-over battle with James Richardson International. Agricore United, based in Winnipeg, Manitoba, is Western Canada's largest grain handling and merchandising company.

B-Filer Inc. – Acting for B-Filer Inc. in its appeal of a recent decision of the Competition Tribunal dismissing an application under the refusal to deal provisions. This is the first appeal of its kind to the Federal Court of Appeal.

Abitibi Consolidated Inc. – Acting for Abitibi Consolidated Inc. to obtain *Investment Canada Act* approval in connection with Abitibi's merger with Bowater Inc.

Xstrata PLC – Counsel to Xstrata PLC in its bid to acquire LionOre Mining International Ltd. and counsel to Xstrata in its successful Cdn. $24 billion acquisition of Falconbridge Limited in 2006.

Fortis Inc. – Counsel to Fortis Inc. in its bid to acquire the Canadian natural gas distribution business of Kinder Morgan, Inc. through the purchase of all of the issued and outstanding shares of Terasen Inc.

Hanson Building Materials America, Inc. – Counsel to Hanson Building Materials America, Inc. in the acquisition of Hanson by HeidelbergCement AG.

Click here to view a more comprehensive list of transactions. Top of Article

Recent Publications and Presentations

Canada's Competition and Foreign Investment Rules Under Review - Anita Banicevic, John Bodrug, Mark Katz published in the *North American Free Trade & Investment Report*, Vol. 17, No. 14 (July 31, 2007)

Joint Ventures - Richard Elliott, Mark Katz, Chris Margison, published in *The Antitrust Review of the Americas 2008*, a Global Competition Review publication (October 2007)

Abuse of Dominance - Anita Banicevic, Mark Katz, Elisa Kearney, published in *Fundamentals of Canadian Competition Law*, Canadian Bar Association (October 2007)

George Addy, Panel Moderator, ***State of the Industry and Road Ahead***, Northwind Professional Institute 2007 Telecommunications Invitational Forum, Montebello (April 26, 2007)

Mark Katz, Speaker, ***National Champions and Foreign Investment Review in Canada***, American Bar Association International Law Section Annual Fall Meeting, London (October 4, 2007)

Anita Banicevic, Speaker, ***Abuse of Dominance Remedies – How Far and How Much?***, British Institute of International and Comparative Law and Institute for Consumer Antitrust Studies, The "Antitrust Marathon", Chicago (October 5, 2007)

Kent Thomson, Speaker, ***Reviewable Matters and Private Enforcement – A Two Year Review***, Canadian Bar Association 2007 Annual Fall Conference on Competition Law, Ottawa (October 11, 2007)

Sandra Forbes, Panel Moderator, ***Navigating Through Multi-Jurisdictional Conspiracy Investigations and Parallel Class Actions***, Canadian Bar Association 2007 Annual Fall Conference on Competition Law, Ottawa (October 12, 2007)

George Addy, Panel Moderator, ***Institutional Design of the Competition Act***, Canadian Bar Association 2007 Annual Fall Conference on Competition Law, Ottawa (October 12, 2007)

Click here to view a complete list of our publications. Top of Article