THE STANDARD OF REVIEW FOR COMPETITION CASES IN CANADA

NOTES FOR REMARKS BY

CHIEF JUSTICE PAUL CRAMPTON

FEDERAL COURT

PARIS, JUNE 4, 2019

Introduction

1. The Canadian Commissioner of Competition (the "**Commissioner**") does not exercise adjudicative functions.

    a. In criminal matters, he must refer matters to the Director of Public Prosecutions (the "**DPP**"), who will then decide whether or not to prosecute.

        i. When the DPP decides to prosecute, it is ordinarily before the general courts (and a judge who likely has not had any prior experience with competition law cases).

        ii. The DPP may also institute and conduct any prosecution or other proceedings before the Federal Court under certain sections of the *Competition Act*, including those pertaining to hard core cartels. However, he rarely does so. Accordingly, these remarks will not further address criminal matters.

    b. In non-criminal matters, the Commissioner must seek a remedial order from the Competition Tribunal. He may also seek orders for oral examination, the production of documents, or written returns, on an *ex parte* basis, from any superior Court. In practice, such orders are sought from the Federal Court and appeals are rare**.**

        i. Indeed, one appellate court has held that appeals of such orders are not available: *Canadian Pacific Ltd v Canada (Director of Investigation and Research)*, [1997] OJ No 3762, 103 OAC 310, at paras 8-12.

    c. Therefore, the remainder of these remarks will focus upon appeals from decisions of the Competition Tribunal.

2. Appeals from decisions of the Competition Tribunal are made to the Federal Court of Appeal (the "**FCA**").

    a. Questions of law and questions of mixed fact and law may be appealed without restriction.

b. Questions of fact may only be appealed with Leave from the FCA: *Competition Tribunal Act*, RSC, 1985, c C-34, s. 13

c. Decisions of the FCA may be appealed to the Supreme Court of Canada (the "**Supreme Court**") with Leave, which is seldom granted.

3. Questions of law are reviewable on a standard of correctness: *Tervita Corporation v Canada (Commissioner of Competition)*, 2015 SCC 3, at paras 34-39 ("***Tervita***").

a. Ordinarily, questions of law arising under an administrative tribunal's "home statute" are presumed to be reviewable on a standard of reasonableness: *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31, at paras 27-28.

b. However, for the Competition Tribunal, that presumption was found to be rebutted due to specific language in the *Competition Act* which states that a decision of the Tribunal may be appealed to the FCA "as if it were a judgment of the Federal Court": *Tervita*, *supra.* See also *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47, at para 31.

c. This has resulted in the Competition Tribunal enjoying less deference than other administrative tribunals with respect to questions of law: Linda Plumpton and James Gotowiec, "Competition Bureau Cases Before the Competition Tribunal" in Nikiforos Iatrou, ed, *Litigating Competition Law in Canada*, (Toronto: LexisNexis, 2019) at 48.

4. Questions of mixed fact and law, as well as questions of fact, are reviewable on a standard of reasonableness: *Tervita*, *supra*, at para 40.

5. Questions of mixed fact and law are questions about whether the facts satisfy the applicable legal test. However, "the distinction between the law on the one hand and mixed law and fact on the other" can be difficult to make in some circumstances: *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, at para 35 ("***Southam***").

6. Parties frequently try to take advantage of this difficulty, by characterizing questions of fact as questions of mixed fact and law, either to avoid having to seek "Leave" to appeal questions of fact, or to compensate for their failure to have done so. Alternatively, they try to persuade the FCA to revisit the Tribunal's factual findings, under the guise of challenging a question of mixed fact and law. However, the FCA has generally rejected such efforts. See, e.g.:

   a. *Toronto Real Estate Board v Canada (Commissioner of Competition)*, 2017 FCA 236, at para 122;

   b. *CarGurus, Inc v Trader Corporation*, 2017 FCA 181, at para 15 ("***CarGurus***"); and

   c. *Nadeau Poultry Farm Limited v Groupe Westco Inc*, 2011 FCA 188, at para 47.

7. The Supreme Court has characterized reasonableness as a deferential standard of review.

   a. "An unreasonable standard is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it." *Southam*, *supra*, at para 56.

   b. "[A] result reached by an administrative tribunal is reasonable where it can be 'rationally supported.'" *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, at para 47.

   c. "Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law'. There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and

intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome." [Citations omitted.] *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 59.

d. "Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion. In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met." [Citations omitted.] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para 16.

Discussion

8. Broadly speaking, the FCA has accorded deference to (and upheld) the Competition Tribunal's rulings on questions of fact and on questions of mixed fact and law.

   a. In one recent case, the FCA observed:

      > As this Court stated in *Tervita Corporation v Commissioner of Competition*, 2013 FCA 28, [2014] 2 FCR 352 at para 61, an appellate court may encounter difficulties in fully grasping the economic and commercial aspects of a tribunal's decision, and must therefore defer to its findings on these issues, including the inferences it draws from the evidence.
>
> *CarGurus*, *supra*, at para 32.

9. However, when applying a "correctness" standard to questions of law, the FCA has sometimes overturned the Competition Tribunal, even where the Tribunal's expertise played an important role in its determination. See e.g.:

a. *Director of Investigation and Research v Southam*, [1995] 3 FC 557, at 605-6 and 640: "Market definition is a legal construct, not an economic one." Therefore, "no curial deference is owed to decisions of the Tribunal involving market definition." The FCA proceeded to hold that "the Tribunal erred in focusing predominantly on price sensitivity" and that "the similarity of use between Pacific Dailies and community newspapers, and the competitiveness which existed between them, is sufficient to place both in the same product market."

    i. On further appeal, the Supreme Court agreed that "[i]f the Tribunal did ignore items of evidence that the law requires it to consider, then the Tribunal erred in law." However, it proceeded to find that the Tribunal did not in fact fail to consider any required factors. Accordingly, the dispute between the parties involved a question of mixed fact and law, in respect of which the Tribunal's decision ought to have been reviewed on a reasonableness standard. *Southam*, *supra*, at paras 41-45.

    ii. Ultimately, the Supreme Court concluded that the Tribunal's decision to give greater weight to certain factors than the FCA thought appropriate was not unreasonable. The Supreme Court observed that, if it had decided the case *de novo*, it might not have dismissed certain evidence as readily as the Tribunal appeared to have done. However, the Tribunal's decision had "a logical and evidentiary underpinning," and therefore ought not to have been disturbed by the FCA. *Southam*, *supra*, at para 79.

    iii. Therefore, the Court set aside the FCA's decision on the merits and restored the order of the Tribunal.

b. *Commissioner of Competition v Canada Pipe Ltd*, 2006 FCA 233, at paras 68, 77-79 ("***Canada Pipe***"): The term "practice of anti-competitive acts" in paragraph 79(1)(b) of the abuse of dominance provisions of the *Competition Act* was interpreted to be confined to subjectively or objectively intended effects on a competitor. The FCA held that the Tribunal had erred in requiring the Commissioner to establish a causal

link between the impugned practice and a decrease in competition. The FCA added that the Tribunal had also erred in suggesting that "the impugned practice's effects on the consumer should or could be considered within the paragraph 79(1)(b) analysis."

i. It is also noteworthy that the FCA rejected the Tribunal's view that "consumer welfare benefits" could establish a legitimate business justification: "Simply stated, improved consumer welfare is on its own insufficient to establish a valid business justification for the purposes of paragraph 79(1)(b)." *Canada Pipe*, *supra*, at para 90.

c. *Commissioner of Competition v Superior Propane Inc* 2001 FCA 104, at paras 139-142: The FCA found that the Competition Tribunal erred when it concluded that the anti-competitive effects of a merger contemplated by the efficiency defence in s. 96 of the *Competition Act* are limited to the adverse effects of the merger on total surplus. Instead, the FCA stated that the "balancing weights" approach advocated by the Commissioner better reflected the various purposes of the *Competition Act*, as set forth in s. 1.1 of that legislation. Pursuant to that approach, the "wealth transfer" component of a price increase that is considered to be neutral in the total surplus approach may be given varying weights, depending upon the extent to which one or more groups of customers may value a dollar, relative to the shareholders of the merged entity.

i. At trial, the Competition Tribunal rejected the "balancing weights" approach on the basis that it would render the efficiency defence unavailable, for all practical purposes. *Commissioner of Competition v Superior Propane Inc*, 2000 Comp Trib 15, at para 434.

10. Similarly, in *Tervita*, *supra*, the Supreme Court substituted its view of the "correct" interpretation of the efficiencies defence set forth in s. 96 of the *Competition Act*, over the interpretation adopted by the Tribunal (and the FCA).

a. The Tribunal found that the "very minor" cognizable efficiencies that were demonstrated by the merging parties were outweighed by both the quantitative and the qualitative anti-competitive effects. For greater certainty, it stated that even if the quantifiable anti-competitive effects were given a zero weighting (due to the Commissioner's failure to estimate those effects until after the respondent's expert had submitted his report), the qualitative anti-competitive effects alone outweighed the proven efficiencies: *Commissioner of Competition v CCS Corp.*, 2012 Comp Trib 14, at para 314 ("***CCS***").

b. "Most importantly," the Tribunal found that the qualitative anti-competitive effects included the fact that "the Merger will maintain a monopolistic structure in the relevant market" and thereby "preclude the benefits of competition that will arise in ways that will define prediction." *CCS*, *supra*, at para 317.

c. However, the Supreme Court de-emphasized the importance of qualitative anti-competitive effects when it observed that "in most cases the qualitative effects will be of lesser importance": *Tervita*, *supra*, at para 146. It then proceeded to find that none of the quantitative or qualitative anti-competitive effects had been proven by the Commissioner. In the result, it found that the very minor efficiency gains that had been established by the merging parties were sufficient to meet the requirements of the efficiency defence: *Tervita*, *supra*, at para 165.

11. *Quaere* whether non-expert appellate courts should review findings on such topics by an expert first instance competition adjudicative body on a "correctness" standard. That is to say, should such a standard be applied to matters such as market definition, the meaning of the term "practice of anti-competitive acts," the scope of the concept of "anti-competitive effects," or the approach that should be taken to qualitative (i.e., non-quantifiable) anti-competitive effects?

12. More generally, it may be legitimate to ask whether the correctness standard of review is appropriate for questions of law that involve the interpretation of a first instance competition law adjudicator's home statute, or the

interpretation of other legal questions that may be said to be within the scope of that adjudicator's expertise, as broadly defined.

13. The Canadian experience described above provides some support for the proposition that it is not an optimal institutional design to permit rulings by an expert first instance competition law adjudicator on such issues to be reviewed on a correctness standard.

    a. It bears underscoring that if it were not for the peculiar wording of s. 13 of the *Competition Tribunal Act*, the Competition Tribunal's interpretation of the *Competition Act* would be subject to review on a reasonableness standard. (See paragraph 3 above.)

    b. It also bears underscoring that the expert first instance competition adjudicator in Canada is separate from the enforcement authority, namely, the Commissioner of Competition. Caution should be exercised in drawing upon the Canadian experience to inform the debate about the appropriate standard of review of decisions made by a first instance adjudicative body that is also the competition enforcement agency in its jurisdiction.

14. Expert first instance competition law adjudicators who are independent from the enforcement authority are arguably better placed than non-expert appellate courts to assess the competition law implications of alternate interpretations of competition legislation.

15. The situation in Canada is further complicated by the fact that appeals on questions of law and questions of mixed fact and law may be taken without restriction. As a result, appeals of final and interlocutory decisions by the Competition Tribunal are common.

16. This adds to the time, cost and uncertainty associated with contesting conclusions reached by the Competition Commissioner. As a result, parties frequently settle their disputes with the Commissioner, particularly in the merger area, where timing and certainty are often critical.

a. Those settlements are typically reflected in the terms of a consent agreement that is registered with the Competition Tribunal.

b. The ability of third parties to challenge such agreements is extremely limited. In particular, they are not able to contest substantive findings made by the Commissioner, e.g., with respect to issues such as whether an anti-competitive agreement was reached or is likely to prevent or lessen competition substantially: *Kobo Inc v The Commissioner of Competition*, 2014 Comp Trib 14, aff'd *Rakuten Kobo Inc v Canada (Commissioner of Competition)*, 2015 FCA 149, leave to appeal to SCC refused, 36554 (14 January 2016).

17. The common practice of entering into settlements with the Commissioner of Competition has the practical effect of putting the Commissioner in the position of being both the investigator and the adjudicator.

a. To the extent that narrowing the scope of appellate review of the Competition Tribunal's decisions would reduce the time, costs and uncertainty associated with contesting conclusions reached by the Commissioner, it would make the Competition Tribunal more attractive to the business community in Canada than is currently the case.

b. In turn, as a practical matter, this would strengthen the ability of the Competition Tribunal to act as a "check" on the Commissioner, and toprovide the adjudicative oversight that the Parliament of Canada intended when it established the Competition Tribunal.

c. Instead of agreeing to the Commissioner's terms of settlement when they believe they would prevail if they had the time and resources to resort to contested proceedings, parties whose conduct is subject to challenge under the Competition Act may be more likely to avail themselves of the Competition Tribunal.

18. There is one further consideration that arguably is relevant to this discussion regarding the optimal standard of review in competition law cases. In brief, in recognition of the fact that some or all of the members of a non-expert appellate body will have little or no background in competition law,

litigating parties can be expected to raise and emphasize other types of legal arguments that either were not raised or not materially addressed at first instance. Parties will know that these issues may well resonate much better with the generalist appellate judges. To the extent that this creates scope for rendering contested proceedings more costly and time consuming, and less predictable, it cannot be ignored in this discussion.

a. Competition law barristers can be expected to resist any suggestion that rights of appeal be constrained, or that procedural rights (such as the scope of discovery) be limited in any way, as part of an effort to streamline contested proceedings and make them more expeditious, less costly and/or more informal. That has certainly been the recent Canadian experience.

Conclusion

19. The experience in Canada raises a legitimate question as to whether questions of statutory interpretation and other questions of law that relate to the core expertise of first instance competition law adjudicators ought to be reviewable by a non-expert appellate body on a *correctness* standard of review.

20. A more optimal institutional design may be to have a single standard of reasonableness review for all questions of law and of mixed fact and law that may be raised by decisions of first instance competition law adjudicators who are independent of the competition enforcement agency in their jurisdiction. (Quaere whether findings on questions of fact should be reviewable at all.)

21. Another possibility would be to further narrow the grounds for the potential appeal by including a fairly strong privative clause in the competition legislation. An example of such a clause can be found in the *Canada Labour Code*, RSC 1985, c L-2:

> *Orders not to be reviewed by court*
>
> *22 (1) Subject to this Part, every order or decision of the Board is final and shall not be questioned or reviewed in any court, except in*

accordance with the Federal Courts Act *on the grounds referred to in paragraph 18.1(4)(a), (b) or (e) of that Act.*

i. This provision restricts intervention by a reviewing court to circumstances where the Board:

a. acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

b. failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

[…]

(e). acted, or failed to act, by reason of fraud or perjured evidence;

22. Caution should be exercised in drawing upon the Canadian experience to inform the debate about the appropriate standard of review of decisions made by a first instance adjudicative body that is also the competition enforcement agency in its jurisdiction.