

CANADIAN DISCLOSURE AND INVESTIGATIVE PRACTICES: A COMPARATIVE PERSPECTIVE

A Paper prepared for the Seminar “*Criminal Cartel Prosecution and Civil Leniency: International Perspectives on Irreconcilable Differences?*”

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INTRODUCTION

This brief paper aims at providing a concise summary of the key principles of the disclosure process for persons charged with criminal offences in Canada, together with short descriptions of the development of those principles, their relationship to investigative practices, and their application in the investigation and prosecution of criminal competition cases in Canada. Some discussion of the Canadian Competition Bureau’s (“Bureau”) *Immunity Policy Under the Competition Act* in the context of these disclosure principles is also featured. It is hoped that this paper will provide a helpful context from which to examine investigative practices for both U.K. and European cartel investigations.

1. Some Context

It must first be noted that Canada has an adversarial prosecutorial enforcement model for most regulatory infractions, of which the key conspiracy crime under Canada’s *Competition Act*¹ is but one example. Under this model, the regulator makes formal allegations against the accused through the filing of a criminal indictment or charge, typically with a Superior Court, which acts as an independent and impartial decision-maker on a demonstration of proof of the regulator’s allegations to a standard of beyond reasonable doubt. The presumption of innocence remains both at the investigative and prosecutorial phases and the accused is entitled to remain mute in

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the face of such allegations; there is no positive onus placed on the accused to establish innocence.²

Canada maintains a separation between investigative agencies (such as police) that are charged with inquiring into the facts and circumstances of potential offences, and the prosecution of those offences, which is conducted by an independent entity. Canada has had a long tradition of maintaining an independent Attorney General who is neither subject to direction nor control by political or bureaucratic authorities. As famously stated by Viscount Simon, the Attorney General of England:

I understand the duty of the Attorney-General to be this. He should absolutely decline to receive orders from the Prime Minister, or Cabinet or anybody else that he shall prosecute. His first duty is to see that no one is prosecuted with all the majesty of the law unless the Attorney-General, as head of the Bar, is satisfied that the case for prosecution lies against him. He should receive orders from nobody.³

Recently, Canada's existing Common Law tradition of prosecutorial independence was formalized through the creation of the federal *Public Prosecution Service of Canada* ("PPSC") on December 12, 2006, through the enactment of the *Director of Public Prosecutions Act*, being Part III of the *Federal Accountability Act*. The PPSC maintains responsibility for prosecution of offences under more than 50 federal Canadian statutes as well as legal advisory services to government investigators. The Director of Public Prosecutions ("DPP") is the head of the PPSC. Prosecutorial authorities in Canada are collectively referred to as the "Crown", as public prosecutions are, in formal terms, brought on behalf of Her Majesty The Queen.

In discharging prosecutory responsibilities, the Crown exercises a broad range of discretion and is generally not subject to judicial review in the exercise of that discretion by the Courts⁴. Absent facts tending to establish bad faith, impropriety, or other potential malfeasance, the Courts will be loath to interfere in the exercise of Crown discretion.

A particular feature of Canada's administration of justice is the "Open Court" principle. Arising from key decisions of Canada's Supreme Court,⁵ this principle establishes that Court registries, containing documents filed by both government investigative agencies and members of the public, are "public property" and thus available for open view. The extent of the principle has been tested and affirmed in instances where police had sought protection against disclosure of

confidential investigative methodology (this contention was determined to be lacking sufficient risk for the protection of the administration of justice)⁶. This has important implications for Canadian investigative processes, as any formal investigative step requiring judicial preauthorization (such as the execution of a warrant to search premises) will require the filing with the Court of the regulator's application to search together with supporting materials. Absent considerations of privilege, informer protection, and safeguarding of ongoing investigations (in which cases materials may be redacted, or sealed), these documents normally become "public property" soon after completion of the search in question (but before any indictment has been filed). The documents frequently provide a "road map" of the investigation's progress and strategy to both the parties subject to the search, as well as media outlets and potential plaintiff law firms and will in many cases, disclose the existence of an immunity applicant in the process (although both the identity and any identifying details of that applicant are normally redacted from public view).

By contrast, most investigations by U.S. antitrust authorities into criminal conspiracies are conducted pursuant to the U.S. Grand Jury process entirely in secret, with harsh consequences for any party that violates confidentiality obligations.⁷ As a consequence, Canadian investigators on criminal antitrust conspiracies are more often working in a "fishbowl" whereby formal investigative steps are often subject to immediate public and media review.

2. Development of Criminal Disclosure Principles in Canada

Prior to enactment in 1982 of the *Canadian Charter of Rights and Freedoms*⁸ ("Charter") the principal way through which persons accused of crimes learned of the Crown's evidence against them was by means of a preliminary inquiry hearing pursuant to Canada's *Criminal Code*⁹ during which the prosecution would call certain witnesses to testify, and the corresponding ability to obtain statements or summary of the evidence of those witnesses not produced at the preliminary inquiry. Depending on particular practices of individual prosecutors, the defence would sometimes be able to obtain copies of witness statements or proposed documentary evidence to be used in the prosecution prior to trial.¹⁰ In the Province of Ontario, certain guidelines were proclaimed in 1981 to govern disclosure practices in criminal cases, but these were not uniformly followed. Generally, there was no right or practice that routinely enabled parties accused of criminal offences to obtain pre-trial disclosure of the evidence proposed against them.

The occurrence of several high-profile wrongful conviction cases in Canada in the 1980's and beyond also highlighted the weaknesses of then-existing disclosure practices, and in some cases indicated that the failure to make timely and proper disclosure of relevant information led to the wrongful conviction and lengthy imprisonment of innocent persons for serious offences such as homicides.¹¹

Following proclamation of the *Charter* as the supreme law of Canada, a landmark decision of the Supreme Court of Canada established what has become a constitutional standard for the provision of pre-trial disclosure for all indictable offences prosecuted in Canada. From that point on, disclosure ceased to be a haphazard practice subject to the whims of the particular prosecutor, but rather an entitlement as of right on the part of accused persons.

In its decision in *Stinchcombe v. the Queen*¹² the Supreme Court determined that, prior to trial and to the time within which an accused must make an election as to mode of trial, the prosecution is to supply to the defence all relevant non-privileged evidence in its hands relating to the investigation.

The constitutional right to pre-trial disclosure is a component of an accused's constitutional right to make "full answer and defence" to criminal charges, under sections 7¹³ and 11(d)¹⁴ of the *Charter*.

There are significant components of this obligation, as follows¹⁵:

- The Crown is required to disclose the "fruits of the investigation" which do not constitute the property of the Crown for purposes of securing a conviction, but rather are the property of the public to ensure that justice is done¹⁶;
- The disclosure obligation is triggered by a request for disclosure from the defence, where the accused is represented by counsel; where the party is unrepresented, Crown counsel is obliged to advise the accused of his/her/its right to receive disclosure;
- The prosecution is required to disclose all relevant information, whether inculpatory or exculpatory and all information which may assist the accused;

- The failure to disclose all relevant non-privileged information impedes the ability of the accused to make full answer and defence under Section 7 of the *Charter*;
- Consistent with this comprehensive requirement, statements are required not only from persons that the prosecution intends to call as witnesses, but also from persons who will not be called to testify;
- While the prosecutor has a discretion to withhold demonstrably irrelevant material from disclosure, this discretion is reviewable by the Trial Judge;
- Acceptable limitations on full disclosure include withholding information to protect the identity of informers, the safety of witnesses, or the integrity of an ongoing investigation; similarly, information or evidence of a privileged character may also be excluded from disclosure;
- The prosecution's disclosure obligations continue even after conviction of an accused, where there is material and relevant information that may impact the case;

Crown counsel's obligation to disclose the fruits of the investigation to the defence has also been enshrined as an ethical duty which is typically found in Canadian Professional Conduct Rules.

3. Elaboration of the principles

Since the landmark *Stinchcombe* decision, there have been many judicial elaborations of its principles.

First, as to what information may be considered "relevant", it is clear from subsequent Canadian case law that a very low bar is to be applied to the disclosure decision. As noted above, the prosecution is required to disclose both inculpatory and exculpatory evidence and thus the prosecution, in general terms, is not entitled to decide whether a given piece of information or evidence may potentially be helpful or otherwise with respect to the position of the defence¹⁷. If material is to be withheld, the prosecution will have the onus of demonstrating that information is clearly irrelevant or privileged.¹⁸

However, it is only information that is in the possession of the Crown that is required to be disclosed under the *Stinchcombe* principles.¹⁹ While subsequent cases have determined that it is

incumbent upon investigative agencies to provide all relevant information to the prosecution in order to determine disclosure requirements,²⁰ this duty will not extend to government agencies in general, on the premise that such agencies are not part of the investigative apparatus of the government, and thus the requested material would not fall within the general category of “fruits of the investigation”²¹. Where an accused requests information in the hands of third parties, the accused will be required to demonstrate that the information sought is likely to be relevant.²²

Disclosure of material that raises reasonable third-party privacy interests, security interests, or other public interests may be subject to court-imposed conditions that may limit access or other features, in order to protect those interests.²³

However, the developing jurisprudence suggests that there may be some onus on the defence to make timely and reasonable requests for more detailed disclosure. Thus, the Supreme Court has enunciated that defence should be “duly diligent” in pursuing disclosure²⁴.

There is a duty upon the prosecution and the investigative agency to preserve the fruits of the investigation; where evidence is lost or destroyed and cannot be disclosed, there will be an onus upon the prosecution to provide a reasonable explanation for such loss or destruction. If such reasonable explanation is provided, the accused will be required to establish actual prejudice to the right of full answer and defence before a court will order a remedy.²⁵ A stay of the entire proceedings may be ordered in cases of a failure by the Crown to disclose relevant evidence only if the non-disclosure irreparably prejudices either the accused’s ability to make full answer and defence or would impact upon the integrity of the administration of justice.

Other cases have established that the Crown is under a positive duty to investigate “fresh matters” that arise in the case prior to or at trial, consistent with the higher duties owed by the Crown to the administration of justice.²⁶

Finally, it should be noted that accused corporations (or “Organizations” as defined under Canadian Criminal Law)²⁷ are entitled to pre-trial disclosure, as they also are entitled to claim certain procedural rights under the *Charter*.

4. Bureau Investigative Processes and the Application of Disclosure Principles

The Bureau is charged with the investigation and prosecution of criminal antitrust conspiracies contrary to Section 45 of Canada's *Competition Act*. In doing so, it has maintained a formal immunity policy²⁸ for over ten years which, in company with many other global antitrust regulators contains an offer of complete immunity from prosecution for both the company and implicated co-operating individuals provided that the entity is the "first to the door" in seeking immunity and fulfils other associated conditions. The formal grant of immunity in Canada is made by the PPSC, and is conditional upon the applicant's providing complete, timely, and ongoing truthful co-operation with the Bureau in the conduct of its inquiry and investigation. This will entail, *inter alia*, providing all relevant documents that in any way touch upon the matter. This category typically includes all communications and records of communications maintained by participating individuals together with all relevant internal company documents that relate in any way to the creation and operation of the conspiracy.

The onus is on the applicant for immunity to provide full and complete truthful disclosure, on pain of potential revocation of immunity and prosecution for the substantive antitrust crime, as well as spectre of potential charges of obstruction of justice under either the provisions of the *Competition Act*²⁹ or the *Criminal Code*.³⁰ These features create a substantial incentive for entities to completely disclose all relevant information as a component of the immunity application.

Consistent with the procedure adopted by other major regulators in their immunity regimes, the Bureau permits oral "proffers" (following the acceptance of a successful 'marker' to secure first-place status) at which counsel for the entity will provide outlines of the information and evidence proposed to be given by the entity and its witnesses in the course of the immunity application and at an eventual indictment and trial of other participating parties. However, the Bureau does not request production of internal interviews conducted by the applicant for immunity, nor any internal investigative report that may have been compiled by counsel.³¹ Such report would typically be considered privileged matter in any event, particularly if the report was conducted by outside counsel for purposes of advising the applicant as to whether to bring an application for immunity.

However, requests by Bureau investigators to interview key individuals involved in the conspiracy have become more frequent as an interim step prior to the positive recommendation

by the Bureau to the PPSC for the grant of immunity. These interviews, typically conducted under a use-immunity form of agreement, are conducted in a confidential manner and the product of the interviews (being investigators' notes and internal memoranda) are required to be kept confidential both under the Bureau's immunity policy and under the provisions of Section 29 of the *Competition Act*. They would also likely be considered privileged matter³² under Canada's privacy regime and associated doctrines. Thus, the material is safeguarded in the hands of the Bureau until such time as the Commissioner refers the matter to the DPP for consideration as to potential prosecution³³ and the filing of a criminal indictment against other participants in the conspiracy. Any notes of these interviews would ultimately find their way into the disclosure materials provided to parties charged with the conspiracy offence.

The Bureau has not made a general practice of tape-recording witness interviews. From the perspective of immunity applicants (as potential defendants in class-action proceedings) this is welcome, as such transcripts or video recordings could form a permanent record and potentially more subject to production under Canadian freedom of information legislation³⁴ or demands under civil litigation processes. However, interviews of foreign witnesses will sometimes be recorded.

Immunity applicants will typically provide copies of all "hard copy" materials supporting the immunity application as well as electronic documents maintained in the applicant's corporate records. All documentary evidence, together with investigator's notes of interviews of witnesses³⁵, as well as other relevant information of the "fruits of the investigation" are typically consolidated and burned onto CD-Rom disks that will constitute Crown pre-trial disclosure materials for the accused charged with the conspiracy. Typically, this disclosure "package" is prepared at the time of referral by the Commissioner of the case to the PPSC and is thus available virtually immediately to counsel for the implicated parties on or about the first appearance in a Canadian Court in answer to the charges.

As noted above, the Crown's disclosure obligations are continuing in nature and any subsequent interview or material contact with the applicant or its potential witnesses would form an additional part of the "fruits of the investigation" and require production to the defence.

Should the defence consider that additional disclosure will be necessary in order to make full answer and defence to the charge, further disclosure requests will likely be sent to the Crown.

These supplementary requests are frequently very detailed and extensive and may require production of various internal documents and communications within the investigative file. If disputes as to the extent of disclosure arise, the Trial Judge may be required to rule on the issues.

Accused parties have sometimes requested production of material from foreign investigative bodies as a component of pre-trial disclosure. In this regard, it should be noted that the Bureau maintains a policy that it will share investigative material with foreign investigative agencies provided that it is for the purpose of the “administration and enforcement of the [Competition] Act”, and where there are appropriate instruments or other guarantees of confidentiality in place by the recipient of the information.³⁶ Reciprocal arrangements by other regulators with the Bureau are also in place. Thus, it may be that in certain cases, information or materials received by the Bureau from foreign regulators and pertaining to the Bureau’s inquiry of a particular industry could form part of the “fruits of the investigation” and subject to disclosure. In other cases, however, purely foreign investigative material may be ‘out of reach’ of a Canadian disclosure request, because it would not qualify as information “in the possession of the Crown”. These principles remain to be tested in the context of an international cartel prosecution in Canada.

In the end, however, the amount and extent of material provided to the Bureau by an immunity applicant lies ultimately within its power and control, since it will not be generally subject to invasive search and seizure by the agency in the course of its immunity application and the Bureau does not otherwise audit the information flow provided by its immunity applicants. In this essentially self-policing system, errors and omissions in the disclosure process would ultimately lie at the feet of the prosecutor, who, as noted above, would be required to provide a reasonable explanation as to why disclosure of materials was not made (or, in a particular case, why evidence or information has been destroyed or lost). In an extreme case, a trial Court might order a complete stay of proceedings if it were found that prejudice to the accused’s rights to make full answer and defence had been irreparably prejudiced.

5. Adverse Use of Disclosure

The wide ambit of the disclosure process in Canada may have certain unintended consequences as follows:

- **Use of disclosure materials to support domestic civil claims:** As noted above, disclosure may be made subject to certain conditions, in order to safeguard that materials prepared and intended for prosecution of criminal case not be used for any ulterior or improper purpose. In this regard, Courts have sometimes required accused parties to specifically undertake that they will not use the materials obtained by way of criminal disclosure for any ancillary purpose. Thus, a 1994 Ontario decision³⁷ determined that production of documents that had been prepared for purposes of criminal proceedings, but were sought “for a collateral or ulterior purpose” (namely a foundation for a civil proceeding against the complainant that had sparked the criminal investigation) was denied, on the basis that the “implied undertaking” (namely that a party to whom documents are produced in the course of a proceeding is subject to an implied undertaking not to use the documents for any purpose extraneous or collateral to the litigation in question, except with leave of the Court or consent of the producing party) applied to the case.
- **Plaintiffs’ demands for disclosure in the hands of civil defendants to antitrust civil claims:** A frequent consequence of global investigation of alleged price-fixing cartels is the filing of class action litigation on behalf of direct and indirect purchasers of the product or service the subject of the conspiracy. In domestic litigation, Counsel for plaintiffs have recently taken to issuing a subpoena or document demand for production of disclosure materials provided by the Crown to defendants in the antitrust civil claim, who are also accused in Bureau prosecutions for the same conspiracy. Canadian courts have devised a balancing process whereby a hearing is convened to examine the competing interests of third parties’ privacy interests (in relation to material that has been provided to the Crown for purposes of the criminal prosecution), the interests of the Crown in safeguarding the administration of justice, and the rights of civil litigants to obtain proper document discovery.³⁸ At the international level, counsel for plaintiffs in trans-border or international cases have developed a high degree of sophistication in the manner in which document production requests are framed. Thus, it is not uncommon for plaintiffs to serve a document demand upon a defendant corporation (which may also be an immunity applicant) that requires production of “all governmental submissions” or “all communications with regulators” over a specified period of time. Such a request could encompass any transmission of materials between an immunity applicant and the

receiving regulatory agency, as well as any associated correspondence or communications relating to the finalization of an immunity arrangement. While certain of these communications could be covered by selective privilege doctrines in one jurisdiction, a requesting jurisdiction may not recognize those doctrines, thus placing a recipient in a dilemma as to ultimate production of the materials³⁹. However, it would seem unlikely in any event that a corporate defendant in civil proceedings would permanently be able to shield production of pre-existing documents and communications, absent questions of privilege, confidentiality related to commercial concerns, or informer protection. In these events, requesting Courts in some jurisdictions will issue protective orders that will limit access to the particular documents or communications as the circumstances may require.

- **Disclosure to Other Regulatory Agencies:** Ordinarily, an antitrust immunity policy will contain a stipulation that the agency will not, without the consent of the applicant, disclose information or materials (or even the fact of the application for immunity by the party) to another agency without the consent of the applicant. However, most regulatory agencies will inquire into and seek a waiver from the applying parties so as to be able to transmit materials on an inter-agency basis. While such waivers are not seen to be a requirement of the co-operation process, regulators will sometimes urge applicants to enable at least some level of inter-agency (typically “procedural”) discussions, particularly where there are multi-national probes into the particular industry. Inter-agency discussions where there is no mutual grant of immunity may be problematic for applicants, as disclosure of information could lead to independent inquiries being pursued, and prejudicial use of the information against the party. Problems of inter-agency communications are particularly highlighted where differential regulatory regimes may give rise to different assessments of the extent of the conspiracy in question⁴⁰.

For non-immunity applicants (i.e. second-in or later parties), agencies will generally refuse to accept any restriction on their ability to share information with other regulators, even when parties are co-operating with the agency; this will extend not only to information provided but also to documentary and other evidence that may be obtained from a non-immunity applicant in the course of co-operation made pursuant to a plea arrangement.

Finally, agencies may also make use of applicable mutual legal assistance regimes to make formal requests for disclosure and use of materials provided to a recipient agency for purposes of their own investigations and prosecutions.⁴¹

5. Conclusion

By now, Canada has had several years' experience in a criminal pre-trial disclosure regime that has arisen through the constitutional mandate from the Supreme Court's decision in *Stinchcombe* and sections 7 and 11(d) of the *Charter*. However, even without this constitutionally-mandated right to pre-trial disclosure, it is likely that the increasing transparency of Court proceedings, coupled with revelations as to wrongful convictions that had been occasioned by incomplete disclosure of evidence or information in the Crown's possession, would likely have generated a robust disclosure process in favour of accused parties. In any event, the Bureau has striven to be fully compliant with existing (and evolving) principles of disclosure in the conduct of its criminal prosecutions.

Canada's Revised Antitrust Conspiracy Law

OFFENCES IN RELATION TO COMPETITION

Conspiracies, agreements or arrangements between competitors

45. (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

- (a) to fix, maintain, increase or control the price for the supply of the product;
- (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
- (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

Penalty

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding \$25 million, or to both.

Evidence of conspiracy, agreement or arrangement

(3) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

Defence

(4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

- (a) that person establishes, on a balance of probabilities, that

(i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and

(ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and

(b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

Defence

(5) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada, unless the conspiracy, agreement or arrangement

(a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

(b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or

(c) is in respect only of the supply of services that facilitate the export of products from Canada.

Exception

(6) Subsection (1) does not apply if the conspiracy, agreement or arrangement

(a) is entered into only by companies each of which is, in respect of every one of the others, an affiliate; or

(b) is between federal financial institutions and is described in subsection 49(1).

Common law principles — regulated conduct

(7) The rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) of this Act, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1).

Definitions

(8) The following definitions apply in this section.

“competitor”

« concurrent »

“competitor” includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c).

“price”

« prix »

“price” includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product.

R.S., 1985, c. C-34, s. 45; R.S., 1985, c. 19 (2nd Supp.), s. 30; 1991, c. 45, s. 547, c. 46, s. 590, c. 47, s. 714; 2009, c. 2, s. 410.

Where application made under section 76, 79, 90.1 or 92

45.1 No proceedings may be commenced under subsection 45(1) against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which an order against that person is sought by the Commissioner under section 76, 79, 90.1 or 92.

R.S., 1985, c. 19 (2nd Supp.), s. 31; 2009, c. 2, s. 410.

1 R.S.C. 1985, c. C-34, s. 45; the alternative ‘second track’ option for the Commissioner of Competition to proceed before
Canada’s Competition Tribunal within the civil regulatory regime under the *Competition Act* (s. 90.1) is unavailable for so-called
“hard-core” criminal conspiracy competition offences and is therefore not discussed in this paper.

2 This proposition of course is subject to some qualification, particularly in relation to corporate entities, for which the Supreme
Court has long established that individual corporate employees may be called to testify against the corporation, which has a
separate legal identity: see e.g. the early case of *R. v. N.M. Paterson & Sons Ltd.* [1980] 2 S.C.R. 679.

3 J. Edwards, *The Law Officers of the Crown* (London: Sweet and Maxwell, 1964) at 215.

4 For example, the following precept was quoted with approval by L’Heureux-Dubé, J. in the Supreme Court’s decision in *R. v.*
Power [1994] 1 S.C.R. 601 at 621-23: *It is fundamental to our system of justice that criminal proceedings be conducted in public*
before an independent and impartial tribunal. If the court is to review the prosecutor’s exercise of his discretion the court
becomes a supervising prosecutor. It ceases to be an independent tribunal.

5 *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835; *Toronto Star Newspapers Ltd. v. Ontario* [2005] 2 S.C.R. 188.

6 *R. v. Mentuck* [2001] 3 S.C.R. 442.

7 The obligations are set out in Fed. R. Crim. P. 6(e); individuals that violate these provisions may be charged with contempt and
receive sentences of potential imprisonment.

8 Being Part 1 of the *Constitution Act, 1982, Canada Act, 1982* (U.K.), c. 11, R.S.C. 1985, Appendix II, No. 44, (as am.).

9 R.S.C. 1985, c. 46.

10 As an example of the idiosyncronicity of the practice, the following excerpt appeared in a 1987 Article from the *Criminal Law*
Quarterly; [the person being quoted is a Canadian prosecutor] “...the defence counsel who comes in to you, sits down and
honestly indicates to you what his defence is, this results in further communication between the two of you, and as a result of that
communication, he is going to get more disclosure because first of all, you have to say to yourself: ‘this counsel is not too bad;
he is a fairly honest fellow’ “ *Disclosure by the Prosecution: Reconciling Duty and Discretion*, Barry K. Grossman, 30 Crim
L.Q. 346.

11 A discussion of this area is beyond the scope of this short paper; however, for one relevant reference in this regard see the *Royal*
Commission on the Donald Marshall Jr. Prosecution (Nova Scotia), Commissioner’s Report: Findings and Recommendations,
vol. 1; Halifax: The Royal Commission, 1989 [the “Marshall Commission Report”].

12 [1991] 3 S.C.R. 326.

13 Section 7 of the *Charter* states: *Everyone has the right to life, liberty, and security of the person and the right not to be deprived*
thereof except in accordance with the principles of fundamental justice.

14 Subsection 11(d) of the *Charter* states: *Any person charged with an offence has the right...(d) to be presumed innocent until*
proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

15 This discussion is loosely drawn from the 1993 *Report of the Attorney General’s Advisory Committee on Charge Screening,*
Disclosure, and Resolution Discussions Hon. G. Arthur Martin, Chair, Ministry of the Attorney General, and particularly Chapter
3 “Disclosure”.

16 *Stinchcombe*, *supra.* note 12 at 334.

17 *R. v. Egger*, [1993] 2 S.C.R. 451.

18 *R. v. Chaplin* [1995] 1 S.C.R. 727.

19 *R. v. McNeil* [2009] 1 S.C.R. 66.

20 See, in this regard, *R. v. T.(L.A.)* (1993) 84 C.C.C. (3rd) 90 (Ont. C.A.).

21 See, in this regard *R. v. Gingras* (1992) 71 C.C.C. (3rd) 53 (Alta. C.A.).

22 *R. v. O'Connor* [1995] 4 S.C.R. 411 and *R. v. McNeil*, *supra*. note 19.

23 *R. v. Blencowe* [1997] O.J. No. 3619 (Ont. S.C.).

24 *R. v. Dixon* [1988] 1 S.C.R. 244.

25 *R. v. La* [1977] 2 S.C.R. 680.

26 See in this regard the case of *R. v. Ahluwalia* (2000) 149 C.C.C. (3d) 193 (Ont. C.A.) wherein the Crown learned that a key witness had committed perjury during testimony (which had remained undisclosed to the defence) and was sharply criticized for not having made further inquiries into the matter.

27 See *Criminal Code*, *supra*. Note 9 at section 2 “organization” defined.

28 *Immunity Program under the Competition Act*, Competition Bureau Information Bulletin, October 11 2007, available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02483e.html>.

29 Section 64 *Competition Act*, *supra*.

30 Subsection 139(2) *Criminal Code*, *supra*.

31 Whether such material could conceivably be seen as “fruits of the investigation” where the preparation of the interview or report occurs in the course of an immunity application is an interesting question that has not yet been explored by Canadian courts; further, because Canada maintains a doctrine of “limited waiver” that safeguards solicitor-client and other forms of privilege in the face of mandated production to government agencies, challenging issues could arise in relation to jurisdictions such as the U.S. where such production may be characterized as a complete waiver of privilege;

32 Public authorities often rely upon the doctrine of Public Interest Privilege to safeguard such material.

33 Subsection 23(1) *Competition Act*, *supra*.

34 *Access to Information Act* R.S.C. 1985, c. A-1.

35 As for production of notes of witness interviews, the *Stinchcombe* decision, *supra*. is instructive, stating: “...all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied.” (at [33]).

36 See the Bureau’s 2007 bulletin *Communication of Confidential Information Under the Competition Act* and particularly section 4.2.2 “Foreign Authorities” thereof, available online at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01277.html#four_two_two.

37 *Hedley v. Air Canada* [1994] 23 C.P.C. (3rd) 352 (Ont. Ct. Gen. Div.).

38 See in this regard the decision of the Ontario Court of Appeal in *P. (D.) v. Wagg* (2004), 239 D.L.R. (4th) 501 (Ont. C.A.).

39 See the decision of the U.S. District Court (DC Ct.) in *Re Vitamins Antitrust Litigation* No. 99-197 (TFH) MDL No. 1285 (April 4, 2002) and the underlying production orders which did not recognize the Canadian doctrine of “settlement privilege”.

40 Canada, for example, has no statutory period of limitation for prosecution of its antitrust conspiracy offence; by consequence, materials in support of an immunity application in Canada could conceivably extend back to a time period beyond which other agencies would be entitled to regulatory relief, because of statutory or other limitations on jurisdiction.

41 See, for example, Canada’s *Mutual Legal Assistance in Criminal Matters Act* R.S.C. 1984, c. 30 (4th supp.) and associated treaty arrangements.