THE LONG-ARM GRASP OF CANADIAN CARTEL LAW ENFORCEMENT

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1. Introduction

Coordinated investigations of international cartels pursuant to mutual legal assistance treaties, competition law cooperation agreement and informal coordination been agencies are now commonplace.[2] Canada's competition authorities (the Competition Bureau as investigative agency and the Attorney General as prosecutor) are active participants, with the United States and various other jurisdictions, in efforts to enforce laws against cartelists located beyond their borders. However, the difficulty of asserting national jurisdiction over an international cartel and its members is still a significant legal and operational concern for enforcement agencies and a critical element for lawyers assessing the defence of their clients.

In order to prosecute international cartel participants in Canada, both subject-matter and personal jurisdiction must be established. Evidence from outside the jurisdiction will usually also need to be obtained.[3] These are critical enforcement challenges:

- *Subject-matter Jurisdiction* — Representatives of the Competition Bureau and the Attorney General have suggested that the parties to a global cartel could be liable to prosecution in Canada based solely on the fact that the cartelised product was sold in Canada. However, subject-matter jurisdiction in Canada, or the authority of a Canadian court to try parties for a crime, is generally limited to offences committed within Canadian territory.[4] In a global economy, activities such as price fixing, bid rigging, and market or customer allocation agreements, will frequently involve components occurring in multiple jurisdictions around the world. The precise factual and legal underpinning

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[2] A notable example of extensive inter-agency coordination is the simultaneous searches in multiple countries by the U.S. Antitrust Division, the EC Directorate-General for Competition, the Canadian Competition Bureau, and the Japanese Fair Trade Commission in February 2003 in the plastic additives industry. See European Commission, Press Release, "Statement on inspections at producers of heat stabilisers as well as impact modifiers and processing aids - International cooperation on inspections" (13 February 2003), online: <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/03/33|0|RAPID&lg=EN>; and R.H. Pate, "Anti-Cartel Enforcement: The Core Antitrust Mission" U.S. DOJ <https://http://www.usdoj.gov/atr/public/speeches /201199.htm#N_19_>.

[3] See generally A.N. Campbell and J.W. Rowley, "Jurisdiction and Litigation Developments in Canadian Competition Law", 45th Annual Antitrust Law Institute (May 2004).

[4] *Criminal Code*, R.S.C. 1985, c. C-46, s. 6(2).

that is required to substantiate the authority of Canadian courts to try such offences is a complex matter of real importance.

- *Personal Jurisdiction* — In Canadian criminal law, jurisdiction over a person can only be established where the person to be served is present within the territory of the court.[5] It is commonplace that some cartel participants will have no presence in Canada, and personal service becomes a serious impediment to Canadian enforcement action. There have been recent efforts to overcome this territorial limitation on service of process and extend the reach of Canadian courts to persons who are outside the jurisdiction. However, it is also possible to charge a Canadian corporation which implemented a foreign-directed conspiracy, which provides a powerful alternative approach.

- *Evidence Gathering* — While much evidence is now obtained through immunity and leniency programs, Canada also has used mutual legal assistance treaties[6] and some novel domestic investigative powers under the *Competition Act* to obtain foreign-located evidence.

Numerous foreign corporations and individuals have agreed to come to Canada, submit to the jurisdiction of the Canadian courts and plead guilty to charges in Canada arising out of the activities of international cartels. It is probable that if they addressed their minds to it, the parties simply chose not to test the subject-matter or personal jurisdictional issues, in a situation where they were resolving their antitrust liabilities on a global basis. However, this does not mean that the parties to the next international cartel will demonstrate similar cooperation, particularly when criminal penalties and civil follow-on damages are on the increase in Canada.[7] This paper will therefore examine the statutory devices available to the Canadian authorities with a view to assessing whether their grasp exceeds their legal reach.

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[5] The discussion which follows is focused on criminal liability. The *Competition Act* also contains a private right of action (in s. 36) that allows any person injured by a violation of any of the offences in the *Act*, including conspiracy, to bring a suit to recover their damages plus litigation and investigation costs. Such an action may proceed regardless of whether a prosecution has occurred in respect of the offence. The precise rules of service for civil claims depend upon the provincial or federal court in which the action is commenced. However, as long as subject-matter jurisdiction appears to exist, they generally contemplate that non-resident individuals and foreign corporations may be served outside of the jurisdiction by following *The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163).

[6] Particularly the *Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters,* 1990, C.T.S. 1990/19 (*Canada Gazette*, Part 1, 1990, at 953) (the *"Canada-U.S. MLAT"*).

[7] The most recent sentence, in the domestic carbonless sheet paper investigation, amounted to 93% of sales by the three main participants during the admitted period of the conspiracies. See Competition Bureau, News Release, "Competition Bureau Investigation Leads to Record Fine in Domestic Conspiracy" (January 9, 2006), online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2018&lg=e>.

2. Canadian Subject-Matter Jurisdiction in International Cartel Cases

(a) The Clash Between Historical Principles and Modern Economic Reality

Canada traditionally has had a strong presumption against the extraterritorial application of criminal laws. The principle of territoriality is paramount: a court has authority to try an offence only if it was committed in Canada.[8] While the facts that constitute the commission of an offence may be scattered through multiple countries, and thus give rise to a dispute about the precise locus of the offence, the territorial restriction of Canadian law is clear. The Supreme Court has confirmed Parliament's legislative authority to enact extraterritorial criminal laws,[9] but it must do so expressly and Parliament has created very few exceptions to the principle of territoriality.[10] Neither the *Criminal Code* nor the *Competition Act*[11] specifically provide for the jurisdiction of the Canadian courts over foreign parties engaged in global cartel activities outside Canada that may have an economic impact in Canada.

As globalization progresses, multinational corporations are increasingly organising their affairs on the basis of rational economic regions rather than the formal structure of country borders. It does not require much imagination to contemplate a member of an international cartel that has organised its business on a *NAFTA* basis, and manages its production and distribution activities as if the U.S. and Canada were a single market. In many cases, there may be no Canadian subsidiary of the foreign entity, and marketing/sales activities for Canada may be handled out of offices in the U.S. Unlike the Lysine or Vitamins cases, where specific Canadian objectives were important to the conspirators, the Canadian market may be purely incidental to American sales and production strategies and the directing minds of a cartel may give no specific thought to Canada or Canadian customers. In circumstances where the only localizing feature is that cartelised sales — the effects of the conspiracy — occurred in Canada, whether Canadian courts have jurisdiction to try such cases is not free from doubt, on both legal and policy grounds.

(b) The Common Law: Real and Substantial Connection

In 1985, the Supreme Court of Canada in *R. v. Libman*[12] rejected the artificial task of selecting one ingredient of an offence as its essential jurisdictional element and holding that the offence occurred in the place where that ingredient occurred.[13] Instead, the Court

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[8] See *R. v. Finta*, [1994] 1. S.C.R. 701 at 805 (S.C.C.); and *Criminal Code*, R.S.C. 1985, c. C-46, s. 6(2).

[9] *Terry v. The Queen*, [1996] 2 S.C.R. 207 at 215 (S.C.C.).

[10] Exceptional cases of clear international concern, usually in conjunction with international agreements, like those that authorise or require Canada to take jurisdiction over certain acts of terrorism or aircraft offences, are the main examples. See, *e.g.*, *Criminal Code*, s. 7.

[11] *Competition Act*, R.S.C. 1985, c. C-34.

[12] *R. v. Libman* (hereinafter, *"Libman"*), [1985] 2 S.C.R. 178.

[13] *Ibid.*, at 182 and 207-208.

focused on the broader question of whether there was a real and substantial link between the offence and Canada. La Forest J. summarized the jurisdictional test in *Libman* as follows:

> All that is necessary to make an offence subject to the jurisdiction of our courts is that *a significant portion of the activities took place in Canada*. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country….[14]

The accused was charged with fraud, as well as with conspiracy to commit fraud under section 423(1)(c) of the *Criminal Code*.[15] The Crown argued that the offences had been committed substantially in Canada.[16] The accused claimed that this provision applied only to conspiracies entered in Canada to commit a substantive offence in Canada, and that the essence of the offence of fraud had occurred in the United States. The Supreme Court considered the case on the basis of the common law principle of territoriality and section 5(2) (now section 6(2)) of the *Criminal Code* [17] which provides that:

> 6(2) Subject to this *Act* or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada.

Even though the conspiracy involved several activities outside of Canada, the Supreme Court of Canada held that the offence was committed within its territorial jurisdiction. An essential element of the fraud — the deprivation of the victim — occurred outside Canadian borders, but preparatory activities that were carried out in Canada were sufficient to constitute a real and substantial link to this country:

> [T]he preparatory activities to perpetrate the fraudulent scheme were in themselves sufficient to warrant a holding that the offence took place in Canada. The scheme was devised here, the whole

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[14] *Ibid.,* at 213 (emphasis added). He added that this jurisdictional test does not require legislative support, since it is simply a matter of judicial interpretation of the concept territoriality and "it was the courts after all that defined the manner in which the doctrine of territoriality applied".

[15] Now *Criminal Code*, s. 465, which is discussed in more detail below.

[16] Pursuant to the directions of the accused, telephone sales personnel called U.S. residents from Canada to induce them to buy shares in two Central American mining companies. Promotional material was then mailed to the victims from Central America. The sales personnel were directed to make and did make material misrepresentations with respect to the quality and value of the shares they were selling. As a result of these misrepresentations, a large number of U.S. residents were convinced to buy virtually worthless shares in the mining companies. The purchase money was sent to Central America, where the accused received a share to take back to Toronto.

[17] In formulating the jurisdictional test, the Court placed no reliance on what is currently ss. 465(3) and (4) of the *Criminal Code* (see further discussion below).

> operation that made it function, the directing minds, the boiler room -- all were situated in Toronto.[18]

The jurisdictional test formulated by Justice La Forest is broad: in considering whether a matter falls outside Canadian territorial jurisdiction, the courts "must take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offence".[19] He also indicated that the "outer limits" of the test are coterminous with the requirements of international comity, where other states may have a strong interest in prosecuting.[20] Interestingly, on the facts in *Libman*, the Supreme Court held that *not* taking jurisdiction over the offence would be contrary to international comity as it would "permit criminals based in this country to prey on [the] citizens" of the United States.[21]

(c) The Reverse Scenario: Canadian Effects Without Canadian Activity

The test articulated in *Libman* would support the jurisdiction of Canadian courts over an international conspiracy where some of the acts in furtherance of the conspiracy take place within Canada. However, there are many cases where international cartel participants are at all times outside Canada, undertake no concrete action in furtherance of the conspiracy within Canada, and the only "Canadian" feature of the offence is that cartelised sales are made in Canada. If there are no other connecting links, it is questionable whether such sales suffice to meet the territorial jurisdiction test of a "real and substantial connection" with Canada. In addition, without any action in Canada and no conscious focus on Canadian purchasers, there is arguably no proof of the mental state necessary to convict an accused of a criminal offence in Canada.

There is no Canadian case that clearly and consciously adopts the view that local effects are a sufficient foundation for subject-matter jurisdiction, as a matter of law.[22] Canadian courts have never overtly invoked the "effects based" jurisdictional test promulgated in the U.S. "*Alcoa*" case.[23] Nevertheless, the Canadian authorities are now taking the position in various investigations that such scenarios may be prosecutable in Canada, and many foreign corporations (as well as some foreign executives) have chosen to come forward, submit to the jurisdiction of a Canadian court, plead guilty to cartel offences and pay a negotiated fine. [24] Some notable examples include:

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[18] *Libman*, *supra,* note 12 at 211.

[19] *Ibid.,* at 211.

[20] *Ibid.,* at 213.

[21] *Ibid.,* at 214.

[22] See D.M. Low and C.W. Halladay, "Cartel Enforcement in Canada", Global Competition Forum, Seoul, Korea (April 23, 2004) at 3, online: <http://www.mcmbm.com/cartels.html>.

[23] *United States v Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945).

[24] See D.M. Low, "Cartel Enforcement, Immunity and Jurisdiction: Some Recent Canadian Developments", International Bar Association Communications and Competition Law Conference, Rome, Italy (May 17-18, 2004) at 10, online:

- *Fax Paper* — In *R.* v. *Mitsubishi Paper Mills Ltd.*[25] and *R.* v. *New Oji Paper Co.*,[26] the parties were Japanese paper manufacturers that participated in the Thermal Fax Paper conspiracy. They sold the paper they produced to apparently unaffiliated Japanese trading companies, in transactions carried out in Japan. The trading houses then re-sold the paper in Canada either directly or through a subsidiary. The manufacturers and the trading houses were all party to a price fixing agreement that was entered into in Japan. The agreement specifically contemplated cartelised sales in the Canadian market and, to the knowledge of all parties, it was to be implemented in both the U.S. and Canada. The risk of arbitrage, or resale by Canadian buyers into the U.S. market, might have made control of the Canadian price a necessary component of the more important U.S. price fixing agreement. In these circumstances, one might argue that the *Libman* test was met because the connection was established through the trading houses, as direct parties to the illegal agreement, and actions by them to apply the agreement in Canada. But the issue of subject-matter jurisdiction was not tested.

- *Citric Acid* — In 1998, Jungbunzlauer International A.G., a Swiss corporation, and Haarmann & Reimer Corporation, a United States subsidiary of Bayer Corporation, pleaded guilty to having participated in a conspiracy to fix prices and share markets for citric acid. Haarmann & Reimer paid a fine of C$4.7 million and Jungbunzlauer paid a fine of C$1.9 million.[27] The citric acid cartel involved a number of non-Canadian firms that fixed prices and allocated market shares among the major producers of citric acid, including for sales in Canada. The parties to the citric acid conspiracy met in Canada and abroad on a continuing basis between 1991 and 1995 in furtherance of the conspiracy.

- *Sorbates* — The parties to the Sorbates cartel focussed on North America overall, not Canada specifically, and there were no meetings or other direct cartel activity within Canada. There was no specific targeting of Canada, apart from a recognition that what

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<http://www.mcmbm.com/cartels.html>. Typically, the parties settle the case on the basis of an agreed statement of facts, which specifies that the accused submits to the jurisdiction for the purpose of the settlement only. That may solve an issue of personal jurisdiction over the accused, but it does little to clarify the question of subject-matter jurisdiction.

[25] See Competition Bureau, News Release, "Mitsubishi Paper Mills Ltd. Pleads Guilty to Two Charges Under the *Competition Act*" (February 17, 1997), online: <http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct01041e.html>.

[26] See Director of Investigation and Research, *Annual Report for the Year Ending March 31, 1997* (Ottawa: Industry Canada, 1997) at 13.

[27] See Competition Bureau, News Release, "$6.7 Million in Fines Paid by Jungbunzlauer International A.G. and Haarmann & Reimer Corporation for Violations of the *Competition Act*" (October 21, 1998), online at: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=640&lg=e>. Jungbunzlauer also paid a C$100,000 fine related to a separate conspiracy to fix prices and allocate market shares for sodium gluconate. The parties in the sodium gluconate conspiracy were also offshore corporations which met on numerous occasions between 1987 and 1995, both in Canada and abroad, to enter into illegal agreements on the amount of each company's sales and the price of sodium gluconate.

they were doing would have had effects in Canada. Nevertheless, various corporations and individuals accepted that those circumstances warranted a guilty plea in Canada.[28]

- *Lysine* — In the Lysine conspiracy, Canadian convictions were obtained from ADM, Ajinomoto and Sewon America, while a fourth participant, Kyowa Hakko, received immunity.[29] At least one meeting of the conspirators occurred in Canada and direct sales were made in Canada. The parties specifically targeted Canadian prices and Canadian customers, and ultimately entered into transactions with those customers for the delivery of the product, at fixed prices, in Canada. Once again, the case was one with several local Canadian events that could have provided a *Libman*-based jurisdiction. However, there was a fifth participant in the Lysine cartel — Cheil Jedang, a Korean corporation[30] — which did not ever sell its product in Canada, had no presence or assets in the jurisdiction, and there was no indication that it withheld its product from Canada as an agreed element of the cartel. No Canadian proceedings were taken against Cheil, even though its liability might have been alleged on the basis that it was a co-conspirator in an offence which was otherwise within Canadian jurisdiction.

There are a number of reasons that foreign companies may choose to “come in” to the Bureau. Jungbunzlauer was proposing to open a plant in Canada. Such downstream corporate intentions could be jeopardized by outstanding conspiracy claims. More importantly, early cooperation with the Bureau’s investigation is often an important factor in the fines that are imposed, so by coming in sooner rather than later a conspirator will almost certainly benefit from considerable favourable treatment. Companies may also wish to resolve all outstanding cartel allegations at one time so that it can get on with rejuvenating its business and customer relationships — it seldom makes little sense to try to negotiate a resolution in one country and not another.

Situations comparable to that of Cheil can be found in several other cartels that have been prosecuted in Canada, including Vitamins, Citric Acid, and Graphite Electrodes, where no proceedings have been taken against some of the known co-conspirators. What is not clear is whether the lack of prosecution in these cases reflected concern on the part of the competition authorities about the difficulty of establishing subject-matter jurisdiction on a

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[28] See Competition Bureau, News Release, “Competition Bureau Investigation Leads to $1.4 Million Fines in International Price Fixing Conspiracy Case” (July 30, 2001), online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=530&lg=e>.

[29] See Competition Bureau, News Release, “$3. 57 Million in Additional Fines Under the *Competition Act*” (July 23, 1998), online: <http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct01295e.html>; and Competition Bureau, News Release “$16 Million in Fines Paid by Archer Daniels Midland for Violations of the *Competition Act* in the Food and Feed Additive Industries” (May 27, 1998), online: <http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct01240e.html>.

[30] See European Commission, Press Release, “Commission fines ADM, Ajinomoto, others in lysine cartel” (June 7, 2000), online: <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/00/589&format=HTML&aged=1&language=EN&guiLanguage=en>, as well as U.S. Department of Justice, Press Release, “Justice Department's Ongoing Probe Into The Food And Feed Additives Industry Yields Second Largest Fine Ever” (January 29, 1997), online: <http://www.usdoj.gov/opa/pr/1997/January97/039at.htm>.

contested basis, because the facts might have shown that the Canadian ingredients of the cartel were simply irrelevant to a party which did not trade in Canada. Alternatively, it may have been matter of practicality, based on an inability of the Canadian authorities to establish personal jurisdiction and an unwillingness of the party to attorn consensually to the jurisdiction of the Canadian courts. Or it might have been a little of both.

Section 45 can also be influential because of its implications on corporate executives of conspiracy participants. For example:

- In October 1999, Dr. Roland Brönnimann and Mr. Andreas Hauri, both Swiss nationals and former executives of the Swiss company F. Hoffmann-La Roche Ltd, were each convicted and fined C$250,000 for their roles in the vitamins cartel (Mr. Hauri's conviction and fine also related to his involvement in the citric acid cartel).[31] In October 2002, Dr. Kuno Sommer, also a Swiss National and former executive at F. Hoffmann-La Roche Ld. was convicted and fined C$150,000 for his role in the vitamins cartel.[32]

- In September 2000 and July 2001, Takayasu Miyasaka, a former executive of Daicel Chemical Industries, Ltd., and Yoshiyuki Ebara, a former executive of Japan-based Ueno Fine Chemicals Industry Ltd., pleaded guilty to price fixing and volume allocation in the Sorbates conspiracy and were fined C$250,000 and C$150,000 respectively.[33]

- In September 2003 and March 2005, Robert Krass and Robert Hart, both U.S. citizens and former executives of UCAR International Inc. plead guilty for their role in a conspiracy to fix the price of graphite electrodes used in steel production and were fined C$70,000 and C$50,000 respectively.[34]

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[31] See Competition Bureau, News Release, "Former Roche Executive Convicted and Fined For International Conspiracies Under the *Competition Act*" (October 27, 1999), online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=616&lg=e>. And see, Competition Bureau, News Release, "Former Roche Executive Convicted and Fined For International Conspiracies Under the *Competition Act*" (October 25, 1999), online: http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=612&lg=e.

[32] See Competition Bureau, News Release, "Competition Bureau investigation leads to over $4-million in fines for international bulk vitamin conspiracies" (October 16, 2002), online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=456&lg=e>.

[33] See Competition Bureau, News Release, "Fines totalling $2.71 million imposed for international conspiracy under the *Competition Act*" (September 19, 2000), online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=574&lg=e>. And see, Competition Bureau, News Release, "Competition Bureau Investigation Leads to $1.4 Million Fines in International Price Fixing Conspiracy Case" (July 30, 2001), online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=530&lg=e>.

[34] See Competition Bureau, News Release, "Former UCAR Executive Robert Krass Pleads Guilty to Price Fixing" (September 18, 2003), online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=317&lg=e>. And see, Competition Bureau, News Release, "Former UCAR Executive Pleads Guilty to Price Fixing" (March 2, 2005), online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=193&lg=e>.

Since subject-matter jurisdiction cannot be conferred by consent on a Canadian court in a criminal matter, it might be presumed that the judges that accepted the guilty pleas in the foregoing and several other cases have tacitly found that they had subject-matter jurisdiction. In some cases, the practical and legal result of these pleas might be difficult to distinguish from the effects-based, extraterritorial jurisdiction of the U.S. courts, classically expressed in *Alcoa.*[35] It is therefore not surprising that the Competition Bureau and Attorney General are espousing what appear to be "effects test" claims of jurisdiction. However, none of the judges accepting such pleas explicitly addressed the issue of subject-matter jurisdiction. The apparent gap between the effects test and the territoriality principle flows from a dearth of judicial precedent on an important point of law.

(d) Conspiring to Conspire: A Possible Legal Basis for Extraterritorial Cartel Jurisdiction?

Section 465 of the *Criminal Code* is sometimes argued to be a foundation for extraterritorial Canadian subject-matter jurisdiction. It specifically grants jurisdiction to a Canadian court in respect of foreign conspiracies to commit a criminal offence in Canada.[36] Subsection 465(1)(c) of the *Criminal Code* creates a general conspiracy offence: the offence of conspiring with any one to commit an indictable offence, which could ostensibly include the cartel offence under section 45(1) of the *Competition Act*. Section 465(4) then creates a presumption of territoriality, in the case of a conspiracy outside Canada to commit an indictable offence in Canada. The provisions state:

> 465. (1) Conspiracy – Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy:
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> […]
>
> (*c*) every one who conspires with any one to commit an indictable offence not provided for in paragraph (*a*) or (*b*) is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable.
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> […]
>
> (3) Conspiracy to commit offences – Every one who, while in Canada, conspires with any one to do anything referred to in subsection (1) in a place outside Canada that is an offence under

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[35] See *Alcoa*, s*upra* note 23 at 444. The test articulated in that decision requires the proof of direct, substantial, and reasonably foreseeable effects on U.S. commerce as a result of anti-competitive behaviour elsewhere. The fact that the illegal agreement was made or criminal operations took place beyond American borders is irrelevant, if effects of that character are produced within the United States.

[36] *Criminal Code,* s. 465(4).

> the laws of that place shall be deemed to have conspired to do that thing in Canada.
>
> (4) Idem – Every one who, while in a place outside Canada, conspires with any one to do anything referred to in subsection (1) in Canada shall be deemed to have conspired in Canada to do that thing.

It has been suggested that section 465 of the *Criminal Code*, when used in conjunction with section 45(1) of the *Competition Act,* would authorise a prosecution in Canada of an international cartel. The predicate is that the conspiratorial conduct outside Canada is completed by the "undue" prevention or lessening of competition in the Canadian market, contrary to section 45(1), and that the implementation of the conspiracy in Canada completes the offence in Canada.

In *R. v. Ouellette*[37] the "real and substantial link" test of *Libman* was at play, in a case involving the infliction of physical injury outside Canada, followed by death of the victim within Canada. The Court appeared to be heavily influenced by the local consequences of the wrongful physical action abroad. The harm to the Canadian economy that is associated with foreign cartel activity, and the vulnerability of Canada to such cartels, might have a similar influence on a court assessing the argument that section 465(4) provides a legislative foundation for the assertion of Canadian jurisdiction over the offence.

However, the argument seems artificial, both substantively and textually. Section 465(4) is readily applicable in the case of an offshore conspiracy to commit a substantive offence against persons or property in Canada, such as fraud, trafficking in narcotics, extortion, or other criminal conduct that requires concrete action in Canada to complete the offence. But reliance on it to provide jurisdiction over foreign cartel activity implies a conspiracy outside Canada to commit a conspiracy to lessen or prevent competition unduly in Canada (the offence that is proscribed by section 45(1) of the *Competition Act*). The *implementation* of the anticompetitive agreements that are proscribed by section 45 is not, of course, an element of the offence, which is complete on the formation of the illegal agreement, without any requirement for proof of action in furtherance of the agreement. And so, reliance on subsection 465(4) would literally require the Crown to prove an offshore conspiracy to "conspire, combine, agree or arrange"[38] in Canada.

However sympathetic the result might be for the Canadian competition authorities' desire to prosecute global cartels that impact the Canadian economy, as a matter of statutory construction it is far from clear that section 465(4) of the *Criminal Code* provides a reliable legislative basis for Canadian subject-matter jurisdiction in offshore cartel cases. It might be employed as a jurisdictional fig leaf for consensual plea agreements, and in conjunction with the common law approach of *Libman* it might ultimately be asserted in a contested case to support the exercise of Canadian jurisdiction. But the better view of the provision is that it does

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[37] *R. v. Ouellette* (1998), 126 C.C.C. (3d) 219 (C.S. du Québec).

[38] *Competition Act*, s. 45(1).

not specifically or adequately extend Canadian jurisdiction to permit the prosecution of offshore cartels under section 45 of the *Competition Act*.

(e) A Policy Basis for Expanding Canadian Jurisdiction?

One might argue that the occurrence of significant effects in Canada should establish a palpable Canadian interest in prosecuting cartel members that cause serious harm to the Canadian economy. Because of the increased international recognition of the importance of challenging and penalising international cartel activity, and of cooperating with other competition agencies to accomplish that objective, there might not appear to be any countervailing comity interests of other states that should inhibit the exercise of Canadian criminal jurisdiction over the foreign corporations concerned.[39] And the large number of convictions in the cases to date might now feed an argument of law and policy that minimal connecting factors are necessary to provide a jurisdictional foundation for a Canadian prosecution in such cases: how else could so many judges accept so many pleas, if there was any question of their authority to proceed?

While that might be a plausible policy approach for the Competition Bureau and the Attorney General, such a position has not been publicly explained and supported. Such an approach would be remarkable, in light of the history of Canadian resistance to the extraterritorial enforcement of the United States antitrust and other laws. Extraterritorial assertions of jurisdiction by U.S. agencies and the U.S. courts have been strenuously criticized by Canadian commentators,[40] as well as by the Canadian (and other) governments in cases like *Westinghouse Electric Corporation v. Rio Algom Limited*[41] (although not in *United States* v. *Nippon Paper Industries Co*[42]). Resistance to U.S. extraterritorial jurisdiction also led to the passage of "blocking" statutes, such as the *Foreign Extraterritorial Measures Act,*[43] by Canada and other countries. This approach has been reiterated with attempts to block implementation in

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[39] See, *e.g.*, Organization for Economic Cooperation and Development ("OECD"), "Recommendation of the Council Concerning Effective Action Against Hard Core Cartels", adopted on March 25, 1998, online: http://www.oecd.org/dataoecd/39/4/2350130.pdf>; and "Best Practices For The Formal Exchange Of Information Between Competition Authorities In Hard Core Cartel Investigations", (October 2005), online: <http://www.oecd.org/dataoecd/1/33/35590548.pdf>. Also see, *e.g.*, materials of the International Competition Network's Cartels Working Group, online: <http://www.internationalcompetitionnetwork.org/cartels.html>.

[40] See, *e.g.*, J.G. Castel, *Extraterritoriality in International Trade: Canada and United States Practices Compared* (Butterworths: 1988) at 44-64.

[41] *Westinghouse Electric Corporation v. Rio Algom Limited* (hereinafter, "*Westinghouse*"), 617 F. 2d 1248; 1980 U.S. App. LEXIS 20437; 1980-1 Trade Cas. (CCH) P63,183; 28 Fed. R. Serv. 2d (Callaghan) 1263, September 20 and November 9, 1979, Argued, February 15, 1980, Decided.

[42] *United States* v. *Nippon Paper Industries Co., Ltd.,* (hereinafter, "*Nippon Paper*"), 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998), a case arising out of the Thermal Fax Paper conspiracy. Only Japan, and not Canada, the UK or Australia, submitted an amicus brief to oppose the exercise of American criminal jurisdiction.

[43] *Foreign Extraterritorial Measures Act (*hereinafter,"FEMA"), S.C. 1984, c. 49.

Canada of U.S. sanctions against trade with Cuba.[44] That level of response signifies very serious intellectual and policy-based opposition to the assertion of American extraterritorial jurisdiction.

As recently as 1993, in *Hartford Fire Insurance Co.* v. *California*[45] the Canadian Government encouraged the U.S. courts to take a restrained approach in extraterritorial matters. One of the issues before the court was whether the conduct of foreign corporations in a foreign jurisdiction, acting lawfully and maybe even with foreign encouragement (though without actual *compulsion* of foreign law), was subject to liability under the *Sherman Act.*[46] Canada argued in an *amicus* brief that, even if the U.S. courts had jurisdiction to hear the claims under its domestic law, in such circumstances comity and international law required that they refrain from doing so. That argument did not prevail. The U.S. Supreme Court held that where the requisite effect on U.S. commerce is shown, not even clear compatibility with the law of a foreign sovereign in its own territory can overcome the application of U.S. antitrust jurisdiction.

The Competition Bureau and the Department of Justice may since have had a change of heart on extraterritorial subject-matter jurisdiction in international cartel cases.[47] But if so, the requisite legal and policy thinking has not been laid out for public debate. Even if an effects-based approach to criminal jurisdiction in cartel enforcement might seem like an attractive Canadian competition policy objective, it could hamstring the assertion of other important Canadian policy interests such as the protection of Canadian sovereignty against extraterritorial assertions of jurisdiction by other countries. It remains to be seen whether cartel enforcement will trigger a reversal of Canada's longstanding approach to such matters.

3. Personal Jurisdiction in International Cartel Cases

(a) The Traditional Rule: Presence in the Territory

Even if the subject-matter connection between the offence and Canada can be made out, it is still necessary to establish jurisdiction over the person of the accused. Subject to express statutory exception, a person can only be served if the accused is physically or legally present within the jurisdiction of the court.[48] The traditional rule that *ex juris* service cannot be used to establish personal jurisdiction in a criminal matter in Canada was confirmed in *Shulman*

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[44] See *Foreign Extraterritorial Measures (United States) Order*, S.O.R./1992-584, as amended, which was strengthened in 1996 in response to the enactment of the *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996* , Pub. L. No. 104-114, 110 Stat. 785 (March 12, 1996) (hereinafter, "*Helms-Burton Act").*

[45] *Hartford Fire Insurance Co.* v. *California* (hereinafter, *"Hartford Insurance"*), 509 U.S. 764 (1993).

[46] 15 U.S.C. §§ 1-7.

[47] However, they have joined other enforcement authorities in attempts to resist the extraterritorial demands of civil litigants in the U.S. for records relating to dealings between U.S. cartel defendants and the Canadian, European and other competition agencies. See *e.g.*, *In Re: Vitamins Antitrust Litigation: Re Bioproducts' Rule 53 Objection,* 2002 U.S. Dist. LEXIS 25815. See also, *e.g.*, *F. Hoffman-La Roche Ltd., et al. v. Empagran S.A. et al.*, 542 U.S. 155 (2004).

[48] See generally *Trower & Sons Ltd. v. Ripstein*, [1944] 1 A.C.254 at 261-262. While *Trower* was a civil case emanating from Canada, the rule expressed by Lord Wright is clearly the law in criminal proceedings.

v. The Queen:[49]

> … in penal proceedings such as those here, a summons cannot properly be served on a person outside Canada without such service being authorized by a statute, and that in the absence of a proper service the Court has no jurisdiction over the person, even though it may have jurisdiction over the subject-matter of the complaint.[50]

A criminal prosecution is initiated by serving a summons, or criminal process, on a person who is within the territory of the court. The summons must be served personally on an individual accused.[51] A corporation may be served by physical delivery of a summons to the "manager, secretary or other executive of the corporation or a branch thereof".[52] In either case, the *Criminal Code* does not speak to the possibility of service *ex juris* on a person who is outside Canada. This presents serious issues for both enforcers and defence lawyers to consider, unless the accused is willing to attorn to Canadian jurisdiction.

The inability to establish personal jurisdiction over parties that are outside Canada may have had a bearing on the fact that some of the co-conspirators in cases such as Lysine and Vitamins were not prosecuted in Canada. Hence alternative techniques which may be available to overcome the territorial limitation on personal service take on considerable importance.

(b) Service by Mail

In *R. v. R.J. Reynolds Tobacco (Delaware),*[53] the Crown sent a summons from Ontario by registered mail to the corporate accused at their addresses in the United States. The accused were non-resident corporations with no offices or places of business in Canada. The Crown's argument that this constituted effective service on the accused corporations hinged on the fact that the *Criminal Code* incorporates the service procedures of a province, for the purposes of *Criminal Code* offences.[54] In Ontario, the *Provincial Offences Act* provides that service may be made on a corporation "…by mailing the summons by registered mail to the

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[49] *Shulman v. The Queen* (1975), 58 D.L.R. (3d) 586 (B.C.C.A.), aff'g (1974) 52 D.L.R. (3d) 246 (B.C.S.C.). The accused in *Shulman* was personally served by a Royal Canadian Mountain Police officer in Australia for alleged Canadian income tax violations. Since the accused did not appear at his trial in Canada, the prosecution subsequently made a motion to proceed *ex parte*. The *ex parte* application was granted and the accused then applied for a writ of prohibition on the grounds that service was not properly effected. At trial, the accused's application for prohibition was accepted and the Crown's appeal was dismissed.

[50] *Ibid.* at 591.

[51] *Criminal Code*, s. 509(2).

[52] *Criminal Code*, s. 703.2.

[53] MacDonnell J., Ontario Court of Justice, October 17, 2000. Note that the case did not involve proceedings under the *Competition Act*. An application for *certiori*, to quash the decision, and for prohibition was granted by Gans J., of the Superior Court of Justice: (2004) 182 C.C.C. (3d) 126, [2004] O.J. No. 548 (February 9, 2004).

[54] *Criminal Code*, s. 701.1.

corporation at an address held out by the corporation to be its address…"[55] Neither provision says anything about whether or not the "address" of a corporation must be located inside Canada.

MacDonnell J. held that the mailed summons was effective to establish personal jurisdiction over the corporate accused. On review, Gans J. reversed on the basis that the *procedure* prescribed for service was distinguishable from its *effectiveness*, and that mere incorporation of provincial procedures for personal service under the *Criminal Code* did not determine the geographical extent of the service that is authorized. In a comment that may be instructive for other creative jurisdictional gambits, he concluded that: "If Parliament wished to provide for service of a summons *ex juris* beyond the borders of Canada, it should have done so in clear and unequivocal language."[56]

(c) Personal Jurisdiction Through an MLAT

Another theoretically possible approach to personal service abroad might be a request for the assistance of foreign authorities, under an MLAT, to effect personal service on corporate cartel participants at locations within the territory of the treaty partner (*e.g.* the United States). The premise would be that the implementing legislation for Canada's mutual legal assistance arrangements provides the requisite statutory authorization for service of a summons abroad.

Article II of the *Canada-U.S. MLAT*[57] specifies that the assistance to be provided between the two countries extends to "serving documents". Literally, perhaps, this could include serving a summons on a corporation in the United States to compel its attendance in a Canadian court to stand trial for an offence under the *Competition Act*. However, the *Canada-U.S. MLAT* has never been used for service abroad of originating process in a Canadian or American prosecution. Because of the common territorial limitations on service of criminal process in both countries, it is an open question whether service of a summons is covered by the treaty language and Canada's implementing legislation.

The enabling legislation for Canada's MLATs is the *Mutual Legal Assistance in Criminal Matters Act*.[58] As a general implementing statute, it gives such treaties the force of law in Canada to the extent necessary to comply with Canada's obligations under a treaty. However, this does not necessarily imply, in the absence of specific language, that Canada's domestic law on service has been changed by the statute to permit a form of service *ex juris*. This view is supported by *R. v. Filinov,*[59] where Dilks, J. said:

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[55] *Provincial Offences Act*, R.S.O. 1990, c. P-33, s. 26(4).

[56] *Supra* note 53 at para 55.

[57] *Supra* note 6.

[58] *Mutual Legal Assistance in Criminal Matters Act* (hereinafter ,"*MLACMA*"), R.S.C. 1985, c. 30 (4th Supp.).

[59] *R. v. Filinov* (1993), 82 C.C.C. (3d) 516 (Ont. Ct. (Gen. Div.)).

> "…the only provisions of the treaty which had to be addressed in new Canadian legislation were those that dealt with the procedure whereby assistance was to be given by Canadian authorities to their counterparts in the United States."[60]

The only *MLACMA* provision that addresses service abroad at all is section 39. It deals with how foreign service may be *proved* in a Canadian proceeding.[61] But there is no mention of the legal effect of "documents" (even if interpreted to include a "summons") that may have been served under Article II of the *Canada-US MLAT*. Following the *R. J. Reynolds* distinction between procedure and effectiveness,[62] the legal effect of serving those documents should be determined by other, specific provisions of Canadian law. If *MLACMA* or the *Canada-U.S. MLAT* had been intended to authorise service of the initiating documents in a criminal prosecution, and thereby establish personal jurisdiction over corporations outside Canada, much greater statutory specificity would presumably have been expected. As a matter of statutory interpretation, the better view is that *MLACMA* and the *Canada U.S. MLAT* did not indirectly insinuate such a significant change into the law relating to personal jurisdiction with such general language.

Canada might also be concerned, on a broader policy level, about the prospect that, as a matter of reciprocity, it might in the future be required to serve comparable "documents" initiating U.S. criminal proceedings against a Canadian company. This could including serving a Canadian to initiate a U.S. prosecution for a U.S. offence that has no counterpart in Canada.[63] Of course, Canada might refuse to comply with a U.S. request in such a case, by invoking the escape hatch under the Treaty where an assistance request would adversely affect Canada's "important interests".[64] But that is a step that encourages unilateralism, in a treaty relationship that is contingent on mutuality of cooperation.

As a result, it remains unclear whether the hypothesis of MLAT service requests in competition cases would be attempted, let alone accepted. Suffice it to say that there appear to be cogent grounds for a legal challenge if the attempt were made, because there is no indication that either the negotiators or the legislators ever contemplated service of the initiating process for a foreign criminal prosecution.

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[60] *Ibid.* at 526. MLACMA also has an effect on domestic Canadian law where there is a need to utilise the product of foreign assistance in a Canadian criminal proceeding. Sections 36 to 39 of MLACMA address the admissibility in Canada of evidence obtained abroad pursuant to an MLAT. For example, *Filinov* concluded that evidence obtained from a foreign state in response to a Canadian request for assistance was admissible as evidence in Canadian proceedings.

[61] *Supra* note 58, s. 39: "The service of a document in the territory over which the state or entity has jurisdiction may be proved by affidavit of the person who served it."

[62] *R. v. R.J. Reynolds Co. (Delaware)*, *supra* note 53.

[63] The *Canada-U.S. MLAT* is not predicated on double criminality. See *Canada-US MLAT*, *supra* note 6, Article II(3): "Assistance shall be provided without regard to whether the conduct under investigation or prosecution in the Requesting State constitutes an offence or may be prosecuted by the Requested State".

[64] *Ibid.* Article V.

(d) Personal Jurisdiction via Extradition

The United States has signalled its interest in using extradition to reach foreign cartel participants.[65] Canada is another jurisdiction where this is possible, to the extent that its criminal competition offences are covered in extradition treaties with other countries (*eg.* the United States).[66] If an extradition request is successful, personal jurisdiction would be established over an individual cartel participant who is extradited to, and thus physically within, Canada.

Canada has already threatened extradition successfully in one prior case. *Thomas Liquidation* involved charges of deceptive marketing practices under the *Competition Act* were laid against parties resident in the United States, as a result of exaggerated claims they made to Canadians.[67] An extradition request was made on behalf of the Attorney General of Canada and an arrest warrant was issued in the United States, preparatory to the commencement of extradition proceedings. However, the individual waived his right to an extradition hearing, came to Canada and pleaded guilty to the offence. Interestingly, the individual did not plead in his personal capacity, but on behalf of the corporate accused.

A corporation is not directly amenable to extradition. Nevertheless, the extradition of a corporate employee might be argued to permit service of a summons on the corporation, if the individual is a senior executive ("manager, secretary or other executive officer").[68] However, this approach has several practical limitations.

One is that an individual's position could be changed (or employment may be terminated), prior to execution of an extradition order. Lower level employees would not represent the company in a role or capacity that allow them to be served on behalf of corporate entity. Moreover, there is case law to suggest that for effective service on a corporation, the corporate officer who is in Canada must be shown to be present on the business of the company.[69] That seems to be an implausible factual premise in the case of a person who has been extradited to Canada for the purpose of trial in his or her personal capacity.

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[65] See, *e.g.*, *United States of America v Ian P Norris*, Superseding Indictment, filed October 15, 2003, Pennsylvania ED, Criminal No 03-632.

[66] *Treaty on Extradition (Amended by Exchange of Notes June 28and July 9, 1974)*, United States and Canada, C.T.S. 1976/03 (entered into force 22 March 1976).

[67] Competition Bureau, News Release, "Thomas Liquidation Inc. Fined $130,000 for One Count of Misleading Advertising Under the Competition Act" (February 7, 1995), online: < http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct00119e.html>.

[68] See s*upra* note 52.

[69] While there is no jurisprudence under the *Criminal Code* dealing with circumstances in which an executive officer is present in Canada, decisions under Ontario's *Rules of Civil Procedure* suggest that a representative of a foreign corporation will not properly be served in Canada unless he or she is in the country to carry on the business of the corporation: see *Santa Marina Shipping Co. v. Lunham & Moore Ltd.* (1978), 18 O.R. (2d) 315 (H.C.J.).

4. Using Jurisdiction Over Canadian Distributors to Reach Foreign Conspirators

(a) The Foreign-Directed Conspiracy Offence

Section 46 of the *Competition Act* makes it an offence for a Canadian corporation to implement a foreign-directed conspiracy:

> 46. (1) Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45 [the general conspiracy offence], is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.[70]

The purpose of this provision is to make the Canadian corporation responsible for the sins of its foreign parent or other affiliates, where the latter engage in an offshore cartel. It avoids the difficulties inherent in establishing personal jurisdiction over a foreign corporation that is not present in Canada. Section 46 effectively employs an enterprise-wide approach to liability which could be seen as a counterpart to the enterprise benefits derived by a multinational enterprise from doing business in Canada.

(b) Historical Use

Section 46 has been successfully invoked in a number of cases, but every conviction to date has been the result of a plea agreement.[71] Some of the more notable cases include:

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[70] *Competition Act*, s. 46(1) (emphasis added). The conspiracy offence currently requires that an agreement or arrangement be "likely to lessen competition unduly." (The participants must also have subjective knowledge/intent regarding the agreement, but an objective "reasonable business person" test is applied for the portion of the knowledge/intent element relating to the likelihood of such an undue lessening of competition.) The Government has been considering amendments that would replace this competitive effects test with a *per se* prohibition of a defined list of "hard-core cartel" activities: see Government of Canada, *Options for Amending the Competition Act: Fostering a Competitive Marketplace* (2003), at 13-16, online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1711&lg=e>. This proposal has generated significant opposition from the business and legal communities on the basis that the proposed attempts to define cartel conduct overreach and would criminalize substantial amounts of non-anti-competitive activity.

[71] See the summary of fines in Competition Bureau, Penalties Imposed by the Courts, online: <http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/h_ct01709e.html>.

- *Insecticides* — The first convictions under section 46 were registered in 1993. Chemagro Limited and Sumitomo Canada Limited pleaded guilty to charges of implementing a foreign-directed conspiracy to share the chemical insecticide market in Canada during 1987 and 1988.[72] Provincial forest agencies and private companies in Newfoundland and New Brunswick used their products to control the spread of spruce budworm and gypsy moths. The market sharing agreement was adopted outside Canada by their parent companies, Sumitomo Chemical Co. Ltd. of Japan and Bayer AG of Germany. Each of the Canadian subsidiaries pleaded guilty and paid a fine of C$1.25 million on conviction of the offence under Section 46. No proceedings were taken against the foreign parents.

- *Thermal Fax Paper* — As part of a chain of arrangements to fix the North American prices for thermal fax paper, the Japanese paper manufacturer, Mitsubishi Paper Mills Ltd., agreed with its Japanese trading house, Mitsubishi Corporation (and with other Japanese suppliers), to increase prices for the product in the US and Canada. In July 1994, the two companies pleaded guilty to an offence under Section 45 for having conspired to fix prices for thermal fax paper in 1991 and 1992,[73] and Mitsubishi Corporation's Canadian subsidiary (Mitsubishi Canada Limited) pleaded guilty under Section 46 for having implemented the foreign-directed conspiracy in Canada.[74] The total fines in this case amounted to C$3.45 million, including the C$250,000 fine under Section 46. The case is significant because pleas were taken from both the local Canadian corporation and from the foreign companies that were implicated in the substantive cartel agreement.

- *Graphite Electrodes* — Members of this international cartel agreed to fix prices and to divide world markets for graphite electrodes over a five year period, in which Canadian sales amounted to approximately C$214 million. UCAR Inc. (Canada) pleaded guilty to one count under Section 46 for implementing a directive from its parent, UCAR International Inc., and was fined C$11 million (in addition to paying restitution agreed upon with Canadian customers in excess of C$19 million).[75] Proceedings were not taken against UCAR International. In 2000, SGL Carbon AG also pleaded guilty to fixing

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[72] Unfortunately, this case has not been reported. *The Queen v. Chemagro Limited,* C.S. Quebec, 200-01-012459-925, 11 June 1993 (Desjardins J.). For a description of the case, see Competition Bureau, Speeches, "Beyond Merriment and Diversion: The Treatment of Conspiracies under Canada's Competition Act" (May 25, 2000), online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1197&lg=e> at Appendix II.

[73] See discussion *supra* p. 6. In a companion plea, Kanzaki Specialty Papers pleaded guilty and was sentenced to a fine of C$950,000 under Section 45: *R. v. Kanzaki Specialty Papers Inc*. (1994), 56 C.P.R. (3d) 467 (F.C.T.D.). In July 1996, Kanzaki's Japanese paper manufacturer, New Oji Paper, was convicted and sentenced to pay a fine of C$600,000 under Section 45 even though it did not sell paper in Canada. *Ibid.*

[74] See Competition Bureau, News Release, "Mitsubishi Paper Mills Ltd. Pleads Guilty to Two Charges Under the *Competition Act*" (February 17, 1997), online: <http://www.ic.gc.ca/cmb/welcomeic.nsf/0/08eb3695d830806785256612004d9056?OpenDocument>.

[75] *R. v. UCAR Inc.,* (1999), 164 F.T.R 85.

prices through its subsidiary S.G.L. Canada Inc.,[76] and paid a fine of C$12.5 million, which remains the largest fine ever imposed on a single count under Section 46 of the *Competition Act*.[77] In both cases, it is notable that the fines paid were higher than the maximum fine amount that could have been levied on the cartel participants themselves for the substantive cartel offence under Section 45 of the *Act*. A number of other participants in the graphite electrodes conspiracy have subsequently been convicted of Section 46 offences and paid small fines.[78]

- *Vitamin B12* — Roussel Canada Inc., a subsidiary of Hoechst Marion Roussel S.A., pleaded guilty under Section 46 for its role in the international conspiracy relating to vitamin B12.[79] The cartel involved an agreement to fix prices and allocate customers for pharma-grade vitamin B12 between 1990 and 1997. Roussel Canada Inc. was sentenced to pay a fine of C$370,000 for implementing the foreign-directed conspiracy, but no proceedings were taken against its foreign affiliates.[80]

The record of convictions pursuant to Section 46 suggests that it has been highly effective in imposing liability for the effects of offshore cartels in Canada, at least in the consensual resolution of conspiracy charges by way of plea agreements. It remains to be seen whether Section 46 will be so successful in a contested case in light of four controversial features of this provision.

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[76] See Competition Bureau, News Release, "Foreign Corporation Fined $12.5 Million for Price Fixing" (July 18, 2000), online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=566&lg=e>.

[77] See *supra* note 72.

[78] They include Japanese corporation Tokai Carbon Co., Ltd., which pleaded guilty in 2001 to aiding its competitors to implement a foreign-directed conspiracy in Canada and paid C$250,000 (see Competition Bureau, News Release, "Corporation Pleads Guilty to price Fixing" (February 5, 2001), online: http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=485&lg=e); Tokyo-based Mitsubishi Corporation, which fined C$1 million in May 2005 for aiding and abetting the implementation in Canada of a foreign-directed conspiracy (see Competition Bureau, News Release, "Mitsubishi Fined $1,000,000 for Aiding and Abetting Graphite Electrode Cartel" (May 12, 2005), online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1805&lg=e> (during the period between February 1991 and January 1995, Mitsubishi was a part owner of UCAR International Inc. and a former Mitsubishi manager facilitated a number of conspiracy meetings by arranging transportation and acting as a translator for the cartel's members); and in December 2005, Nippon Carbon Co. Ltd. pleaded guilty and was fined C$100,000 for aiding and abetting the graphite electrodes conspiracy (see Competition Bureau, News Release, "Nippon Carbon Pleads Guilty to Participating in International Graphite Electrodes Cartel" (December 8, 2005), online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2009&lg=e>). In all, seven parties have been convicted for their roles in the graphite electrodes cartel and fined a total of nearly C$25 million.

[79] See Competition Bureau, News Release, "Federal Court Imposes a Fine of $370,000 For a Foreign-directed Conspiracy Under The *Competition Act*", (October 26, 1999), online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=614&lg=e>.

[80] Of all the convictions entered against domestic and foreign companies in the Vitamins cartel cases, Roussel Canada was the only conviction under Section 46.

(c) Strict Liability?

Section 46 purports to create an offence of strict liability. It does not require knowledge of, or intention to participate in, the conspiracy on the part of the corporation carrying on business in Canada or its directors / officers / employees. This departure from the fundamental requirement of *mens rea* as an essential element of criminal liability would likely be subjected to rigorous judicial scrutiny in a contested criminal trial.

(d) Unlimited Fines?

The absence of an explicit fine limit in Section 46 has led the Canadian competition authorities to invoke it when they perceive that the volume of affected commerce and other relevant factors would justify a fine in excess of the C$10 million maximum applicable to the main conspiracy offence.[81] This position is regularly asserted in plea negotiations. But despite the plea agreements of UCAR and SGL, it is still an open question whether the section properly authorises fines in excess of the C$10 million maximum for the substantive conspiracy charge that could be laid under Section 45.[82] While the Bureau and Attorney General may now consider that the judicial imposition of those fines confirms that the provision does authorise fines in excess of C$10 million, the issue was not argued before or addressed by the two judges who accepted the plea agreements and the recommended fines in those cases.

As a matter of statutory construction, it might be argued that the penalty for an ancillary anti-avoidance provision, which does not involve any mental element of fault on the part of the accused, should not be construed to exceed the maximum fine that could be imposed on a domestic or foreign company on the *mens rea* offence. Alternatively, even in the absence of an implied legal restriction on the penalty that could be imposed under Section 46, it is difficult to rationalise under standard sentencing principles the imposition of a fine under this provision that exceeds the C$10 million cap for the substantive offence for which it is a substitute. We would expect this argument to be advanced vigorously by any accused corporation that is prosecuted on a contested basis under section 46 of the *Act*.

(e) Liability for the Conduct of Unaffiliated Companies?

Section 46 is conventionally regarded as a mechanism for reaching offshore corporations by prosecuting and fining their Canadian subsidiaries. However, absence of a specific reference to “affiliates” in the provision has led the Canadian competition authorities to assert for a broader application to other, unrelated parties. In a number of recent investigations, they have suggested that an independent, third-party, domestic distributor may be held strictly liable under Section 46 for importing and reselling products that were allegedly subject to a foreign conspiracy, even though the Canadian distributor operated at arm’s length and had no equity or other corporate connection to the offshore supplier nor any knowledge of the foreign misconduct.

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[81] *Competition Act*, s. 45(1).

[82] See UCAR, *supra* note 75; and SGL, *supra* note 76.

This seems to be a harsh position in the case of distributors that may have had no reason to think that they were involved in the distribution of price-fixed goods in Canada. As a matter of practice, cartel participants are unlikely to share information about their illegal conduct with an arm's length Canadian distributor. The alleged application of the section to such corporations is the result of interpreting the language of the provision in a very technical manner, which runs counter to the general rule that criminal law is to be interpreted most favourably to the accused.[83]

It is not at all clear that simply marking-up the price established by a price-fixing supplier constitutes the implementation of a directive or other communication. Nor is it clear that an unrelated supplier is in a position to direct or influence the Canadian company by establishing such a price, in the absence of an allegation that the foreign supplier requires its distributors to maintain specific prices for resale (a criminal offence in itself, under section 61 of the *Act*). This is another issue that is ripe for judicial determination if the Attorney General were to pursue a prosecution in such circumstances.

(f) Double Jeopardy?

Section 46 is also notable for the absence of any double-jeopardy protection relative to the substantive conspiracy offence. The *Act* requires the Bureau and Attorney General to select between the conspiracy, abuse of dominance and merger provisions in respect of conduct that could be pursued under more than one of these sections of the *Act*.[84] However, there is no explicit ban against prosecuting a foreign conspirator under Section 45 of the *Act* and its Canadian subsidiary under Section 46 for implementing the same conspiracy. This is either an omission of legislative drafting or a further indication that Section 45 was not intended to reach foreign conspiracies. In any event, we would expect that an attempt by the competition authorities to prosecute under both sections would be the subject of a legal challenge.

(g) Closing Comments on Section 46

Notwithstanding its controversial elements, this section has been very effective in bridging the gaps in the Competition Bureau's reach, when seeking to apply the *Act* to offshore cartel conduct by foreign corporations. Section 46 is a creative policy approach for addressing a common jurisdictional issue that affects the enforceability of anti-cartel laws, where the participants in a cartel are difficult to reach. It obviates the need to effect personal service on a foreign party that may not be willing to attorn to the jurisdiction of the Canadian courts for the purposes of prosecution. It does, however, depend on the availability of a local Canadian corporation to be penalised in the place of the primary foreign cartel participant for the negative economic effects of the implementation of the cartel in Canada. With an increasingly continental market in North America, local Canadian corporations are not the only or even necessarily the preferred means of doing business in Canada. That may explain the rather aggressive interpretation that the section could apply to unrelated corporations. But such attempts to

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[83] Kent Roach, *Criminal Law*, 3rd ed. (Toronto: Irwin Law, 2004) at 75-76.

[84] *Competition Act*, ss. 45.1, 79(7) and 98.

maximize the power of the provision raise serious questions of interpretation and policy, challenges that will be derived from traditional principles of Canadian criminal law.

5. Extraterritorial Outreach

Whatever may evolve in Canada with respect to subject-matter and personal jurisdiction, as well as the use of section 46, it is clear that there are serious practical challenges in obtaining the evidence needed to prosecute foreign conspirators. All enforcement agencies face these difficulties, and mutual assistance agreements have not yet proven to be a complete solution. A unilateral alternative is available in the form of extraterritorial attempts to compel production but it raises significant comity and legal concerns. Canada has not pursued this path directly, but has developed a clever variation which latches onto companies within the jurisdiction as conduits for reaching affiliated foreign entities.

The *Competition Act* contains two measures of this sort. They facilitate the ability of the Competition Bureau to obtain evidence that is held abroad, while avoiding the problems associated with compelling a foreign party to submit to the exercise of Canadian jurisdiction. These mechanisms are increasingly being used to enhance the grasp of the Bureau. While there has been little judicial consideration of these devices, they may become models for other national competition enforcement agencies that seek to investigate cartel participants beyond their borders.

(a) Inter-Company Document Subpoenas

Section 11 of the *Competition Act* provides a broad authority to obtain court orders that may require parties to produce "records" or documents, "written returns" of information under oath (essentially, the *creation* of documents that may relate to the market or other relevant circumstances) and "oral examinations" (or depositions), of individuals under oath.[85]

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[85] See *Competition Act*, s. 11. (1) (emphasis added):

> 11(1). If, on the *ex parte* application of the Commissioner or his or her authorized representative, a judge of a superior or county court is satisfied by information on oath or solemn affirmation that an inquiry is being made under section 10 and that a person has or is likely to have information that is relevant to the inquiry, the judge may order the person to
>
> (a) attend as specified in the order and be examined on oath or solemn affirmation by the Commissioner or the authorized representative of the Commissioner on any matter that is relevant to the inquiry before a person, in this section and sections 12 to 14 referred to as a "presiding officer", designated in the order;
>
> (b) produce to the Commissioner or the authorized representative of the Commissioner within a time and at a place specified in the order, a record, a copy of a record certified by affidavit to be a true copy, or any other thing, specified in the order; or
>
> (c) make and deliver to the Commissioner or the authorized representative of the Commissioner, within a time specified in the order, a written return under oath or solemn affirmation showing in detail such information as is by the order required.

With respect to "records", the force of this compulsory production of documents is made much more effective than a typical subpoena by virtue of section 69(2) of the *Act*.[86] In essence, once a "record" has been produced pursuant to section 11, it is both admissible in evidence, without any need for a witness to prove the document, and it has *prima facie* probative effect for the contents of the document. It thus bypasses any need for a witness to authenticate the document, and it cuts through the hearsay doctrine by establishing the *prima facie* inferences that anything recorded in the document was in fact done or agreed, that the contents of the record were known to the party concerned and were undertaken with authority of that party, and that the contents accurately attest to whatever is recorded therein. The sole pre-condition for this highly prejudicial evidentiary effect is that the record must have been in the possession of the party that is the subject of the legal proceedings. That would normally be the case with documents produced to the Bureau under compulsion of a section 11 order.

Section 11 of the *Act* is therefore a very powerful tool in the arsenal of cartel enforcement, for parties within Canada. Where the cartel participants are abroad, however, its effectiveness is less clear given the absence of any statutory power or international authority to serve such orders outside Canada. Accordingly, to access documents located outside the jurisdiction, section 11(2) authorises a court to order a corporation (not an individual or other unincorporated business entity) to obtain and produce responsive "records" from a foreign affiliate, even though the records are held outside Canada:

> 11(2). Where the person against whom an order is sought under paragraph (1)(*b*) [the document production power] in relation to an inquiry is a corporation and the judge to whom the application is

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[86] *Ibid*., s. 69(2) (emphasis added):

> 69(2). In any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act,
>
> (a) anything done, said or agreed on by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been done, said or agreed on, as the case may be, with the authority of that participant;
>
> (b) a record written or received by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been written or received, as the case may be, with the authority of that participant; and
>
> (c) a record proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is prima facie proof
>
> (i) that the participant had knowledge of the record and its contents,
>
> (ii) that anything recorded in or by the record as having been done, said or agreed on by any participant or by an agent of a participant was done, said or agreed on as recorded and, where anything is recorded in or by the record as having been done, said or agreed on by an agent of a participant, that it was done, said or agreed on with the authority of that participant, and
>
> (iii) that the record, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.

> made under subsection (1) is satisfied by information on oath or solemn affirmation that an affiliate of the corporation, whether the affiliate is located in Canada or outside Canada, has records that are relevant to the inquiry, the judge may order the corporation to produce the records.[87]

Such an order is not addressed to a party outside Canada and it does not purport to compel a foreign entity to do anything in Canada, or to subject itself to Canadian jurisdiction. The force of the order is focussed entirely on an entity within Canada, and envisions that such entity will take whatever steps may be required to achieve compliance. If the foreign affiliate that has possession and control of the relevant records does not enable the Canadian company to produce the documents required by the order, the local company will be exposed to potentially significant penalties:

- Under section 65 of the *Act*, failure to comply with a section 11 order is punishable by a fine not exceeding C$5000, which might by multiplied on a daily basis, if that fine were insufficient to procure compliance.[88]

- More significantly, any "officer, director or agent" of the non-compliant corporation (*i.e*. the local Canadian entity, not the offshore affiliate) would be liable to a personal fine and/or up to two years imprisonment.[89]

Evidently, section 11(2) has teeth, although there is an open issue of whether a court would convict and impose a significant sentence if the Canadian corporation and its officers/directors have made real attempts to obtain the required records sought from the foreign affiliate but have been rebuffed.

The rationale for section 11(2) is clearest where a Canadian subsidiary is importing and distributing products manufactured (and priced) by a foreign affiliate that may have been party to an international cartel. Records held in Canada will frequently contain little or no direct evidence of the misconduct that occurred abroad.[90] It effectively contemplates

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[88] *Ibid*., s. 65(1).

[89] *Ibid*., s. 65(4):

> "Where a corporation commits an offence under this section, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted."

[90] Many MLAT treaties do not authorise evidence gathering in the absence of double criminality, and are thus ineffective for records held in countries that do not characterise a cartel as a criminal offence. Competition Cooperation Agreements do not typically permit the exchange of confidential documents that may have been obtained from entities outside Canada. And so, with the exception of those few countries that treat cartel activity as a criminal offence, there is limited ability to obtain inculpatory, foreign-held records through the arrangements for international cooperation among cartel enforcement agencies.

enterprise-wide fulfillment of the obligations imposed by the order, without much regard for the separate legal personality of related entities.

Given the incidence of international cartels in recent years, and the otherwise limited ability of the Competition Bureau to obtain probative records from foreign parties, it might be expected that the Bureau would routinely seek orders under section 11(2) to obtain evidence in cartel cases. However, the Bureau's historical practice has been rather circumspect and there has been little judicial consideration of this provision (except in a few unreported decisions that have not dealt with the key legal issues that are at play in the exercise of this authority):

- In an unreported proceeding involving non-criminal reviewable practices in Part VIII of the *Act*, the Bureau obtained an order in 1997 against Columbia House Canada, which in part required it to seek and produce records held outside Canada by Columbia House USA, pursuant to section 11(2).[91] An application to quash the order was unsuccessful, but counsel for the Bureau consented to withdrawal of the section 11(2) aspect of the order on the basis that the entities concerned were limited partnerships, not corporations.

- Section 11(2) was also used in the MCAA cartel investigation. The Bureau obtained an order against Akzo Nobel Canada seeking records of its foreign parent, Akzo Nobel NV. An application to quash the order was filed but was never adjudicated because Akzo ultimately resolved its MCAA exposure with a guilty plea.[92]

- The Bureau is understood to have obtained an order based on section 11(2) in the Fine Arts Auction case against a Canadian corporation requiring it to produce records held by its foreign parent. The order appears to have been challenged, but the precise status of the matter is difficult to ascertain because the Federal Court granted an order to seal the file in December 2003.[93]

It seems curious that this important investigative tool has not been used more extensively in the two decades since it was created. This may be the result of prudence by the Bureau, avoiding resort to a legally complex and controversial power until the circumstances really require it. Institutional pragmatism may also be at play: the human and financial costs to

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[91] Unreported Order dated September 9, 1997, *Director of Investigation and Research v. Warner Music of Canada Ltd., Warner Music Group Inc and WEA International Inc.* (F.C.T.D.), cf:T-1959-97.

[92] See Competition Bureau, News Release, "Competition Bureau Probe Nets $2.9 Million in Fines and Guilty Plea from Akzo Nobel Chemicals BV" (August 19, 2003), online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemid=310&lg=e>.

[93] See: *Commissioner of Competition v Confidential*, Federal Court Trial Division, T2426-03, Harrington, J. The proceedings apparently involve an application to quash the order on constitutional grounds. The sealing order in this matter might now be subject to question, in light of the decision of the Supreme Court of Canada in *Toronto Star Newspapers Ltd. v. Ontario* (2005), 253 D.L.R. (4th) 577. It should be noted that the constitutional validity of the predecessor of section 11 was upheld in *Thomson Newspapers Ltd v. Canada (Commissioner of Competition),* [1990] S.C.R. 425, but that provision did not contain authority similar to subsection 11(2).

the Bureau of managing, translating and analysing the large volumes of records that could be produced by foreign parties are significant. The extent of cooperation under immunity and leniency programs may be a further factor as compelling evidence may be provided by cooperating co-conspirators that have been granted immunity. Nevertheless, it appears that the Canadian authorities are expanding their use of this tool. The Bureau has obtained section 11(2) orders in several recent cartel investigations. In at least two situations that are not yet publicly reported, the Bureau has employed section 11(2) against Canadian companies which are essentially bystanders – they are not involved in the distribution of the products of the foreign affiliate that are the subject of the investigation.[94] In the circumstances, it seems opportune that a judicial evaluation of the provision is already in the offing, and further challenges can be expected if the competition authorities persist in applying it to entities that have no involvement in distributing the products under investigation.

(b) Cross-Border Computer Searches

The *Competition Act* specifically contemplates the search of electronic records and databases by providing for access to computer systems during a search of premises. Section 16(1) provides that any person authorized by a warrant to search a premises may "use or cause to be used" during the search any computer system on the premises "to search any data in or available to the computer system".[95] In addition, the person in possession or control of the computer system is obliged to allow the searchers "to search any data contained in or available to the computer system".[96] In a world of connection mainframes, servers and networks, the possibility to reach beyond national borders for records and data held electronically by corporate affiliates outside of Canada is very real. The Bureau believes that it is entitled to do so. However, this extraterritorial treatment of the search power has yet to be tested and it seems peculiar that extraterritorial electronic searches would be allowable when the *Act* does not contemplate physical searches beyond Canadian borders. This is yet another tool by which investigators may leverage their access to Canadian entities in pursuit of a foreign cartel evidence.

6. Conclusion

The Competition Bureau has had considerable success in applying the *Competition Act* to international cartels. Canada is recognized as a jurisdiction that corporate and individual cartels must pay attention to in any defence strategy. But we are entering a period where the Canadian authorities' interest in pursuing non-cooperating foreign parties is likely to be tested by parties who are prepared to explore whether Canada's jurisdictional grasp exceeds its legal reach, and whether the availability of Canadian corporations as surrogates for liability and evidence gathering is also more limited than the authorities contend.

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[94] For example, a Canadian subsidiary which sells "widget services" is served with a section 11 order seeking documents from a foreign affiliate that sells "gadget products" directly to third parties in Canada.

[95] *Ibid*., s. 16(1).

[96] *Ibid*., s. 16(2).