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## **Canada Gets Serious About Cartels**

**by A. Neil Campbell**

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## CANADA GETS SERIOUS ABOUT CARTELS

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By A. Neil Campbell, McMillan Binch

Canada is becoming a jurisdiction to be reckoned with for companies involved in international cartel activity. 1999 will be remembered as a watershed year in which skyrocketing fines, prosecution of individuals, an aggressive immunity program and class action lawsuits have combined to create a high-risk legal environment.<sup>1</sup>

### 1. FINES

The Competition Bureau has made relentless efforts throughout the 1990's to obtain higher fines in cartel cases. As recently as 1995, there had not been a fine exceeding CDN\$1 million, notwithstanding a maximum fine for conspiracy of CDN\$10 million. In 1995, Canada Pipe was fined CDN\$2.5 million for an unsuccessful conspiracy to boycott a Canadian competitor.<sup>2</sup> By 1998, Archer Daniels Midland had agreed to pay CDN\$16 million in fines relating to the lysine and citric acid conspiracies, and the following year UCAR Inc. plea-bargained a fine of CDN\$11 million on a single count (avoiding the CDN\$10 million fine cap by pleading under the foreign-directed conspiracy offence which has no maximum).<sup>3</sup>

These records were shattered again before the year was out: five vitamin manufacturers were fined a total of CDN\$88.4 million after pleading guilty to vitamin and related conspiracies on September 22, 1999.<sup>4</sup> Hoffman La Roche alone was sentenced to pay over CDN\$50 million pursuant to an eight count indictment which was used to avoid bumping up against the statutory fine cap. These numbers — which reflect significant discounts for co-operation under the Competition Bureau's Immunity Program — appear to have put Canada on the competition law enforcement map. And the uncapped foreign-directed conspiracy offense coupled with the scope for using multiple counts to avoid the CDN\$10 million maximum for conspiracies, means that the sky is the limit for future fines.

### 2. PROSECUTION OF INDIVIDUALS

The Competition Bureau's newest priority for increasing deterrence is to pursue responsible senior officials in addition to corporate fines. It achieved a breakthrough when small individual fines of CDN\$75,000 were levied against two executives in the compressed gas conspiracy in the mid-1990s.<sup>5</sup> In 1997 antitrust enforcers secured a CDN\$550,000 fine against an individual for a single count of conspiracy and a court sentenced two of his colleagues to one year jail terms.<sup>6</sup> More recently, a former executive was sentenced to nine months imprisonment for his part in an extended international conspiracy to fix prices and allocate or share markets for chorine chloride.<sup>7</sup>

The Competition Bureau is displaying increasing interest in foreign as well as domestic executives and this can be expected to continue. Indeed in the vitamin case, two very senior executives of Hoffman La Roche agreed to pay fines of CDN\$250,000, representing the first guilty pleas in Canada from foreign executives.<sup>8</sup> Extradition is also possible for competition law offences, although it has not yet been used in connection with cartel investigations or prosecutions.<sup>9</sup>

### **3. IMMUNITY PROGRAM**

In 1999 the Bureau published proposals for a revised favorable treatment program.<sup>10</sup> The program would reserve considerable discretion to the Attorney General, in contrast to the relatively automatic “first-in” amnesty regime employed in the United States. While the program has not been finalized, senior crown counsel recently indicated that, as a result of the vitamins case and other recent experience, the Bureau is planning to shift towards the U.S. model.<sup>11</sup> Firms that are first in with evidence of a conspiracy where the Bureau does not have a provable case can expect a free pass. Subsequent firms are likely to be offered fine settlements of 13%, 20% and 27% of the relevant volume of commerce, depending upon their position in the queue as well as other aggravating or mitigating factors. Unless a firm intends to put forward substantive and jurisdictional defenses in an effort to avoid liability (but with a risk of even higher fine levels being imposed after a contested conviction), there will be big dollars at stake for coming forward early in Canada.

The Bureau is also going out of its way to make it clear that being first in another jurisdiction will not result in any favorable treatment in Canada. In the vitamins case, the Bureau grudgingly gave Rhone Poulenc a co-operation discount despite being third-in in Canada on the basis that it had perceived that it might prejudice its position as the first-in co-operating party under the U.S. amnesty program. A senior counsel has explicitly stated that the Attorney General does not intend to provide similar credit in the future.<sup>12</sup> The implication for foreign companies and their counsel is clear: the historical tendency to deal with big jurisdictions such as the U.S. or the E.U. first will leave a firm exposed to slipping down the queue in Canada. Counsel will need to consider whether the potential fine savings in Canada offset the possible complications from parallel proffers in multiple jurisdictions.

### **4. CLASS ACTIONS**

Canada has had private rights of action to recover conspiracy damages since 1986, but they have seldom been utilized. This is changing as class action legislation in Ontario, Quebec and British Columbia comes into its own and entrepreneurial plaintiffs’ counsel are seizing the opportunity to apply it to cartel cases. The breakthrough occurred in vitamins, where eight class actions on behalf of various proposed classes of direct and/or indirect purchasers were initiated before any guilty pleas had been made and a ninth has since been filed.

With statutory presumptions that allow convictions — and the agreed statement of facts on which they are based — to be utilized in private suits, such actions will normally focus on damages rather than liability. In addition, a recent lower court decision (under appeal) has rejected the U.S. federal jurisprudence barring recovery by indirect purchasers, thereby inviting complex and overlapping direct and indirect purchaser actions.<sup>13</sup> The likely result is that, absent jurisdictional impediments, international companies engaging in a conspiracy which affects the Canadian market will ultimately end up making restitution of profits to one or more classes of customers in addition to paying a substantial fine.

### **5. SETTLE OR FIGHT?**

The Competition Bureau’s successes on international cartel cases have been based on plea agreements, not contested prosecutions. Damage actions have also tended to be resolved by settlement — there have been few private suits and no class actions litigated to conclusion. As the stakes increase from higher fines, individual prosecutions, powerful amnesty programs and class action damages, foreign companies should be taking a close look at jurisdictional defenses.

While the application of criminal competition law to companies domiciled outside of Canada is not clear-cut, the Bureau is prepared to embrace an “effects test” approach to extraterritoriality (contrary to longstanding Canadian foreign policy objections for extraterritorial enforcement of laws by other countries such as the United States). This point may be moot if the corporation has a Canadian subsidiary that can be prosecuted for implementing a foreign-directed conspiracy, although the knowledge/intent elements of this offence remain open to interpretation. There is also some uncertainty in civil actions relating to jurisdiction, evidence gathering and enforceability of judgments against foreign companies which is open to exploration by defendants in future cases. Judging by the Bureau’s commitment to cartel enforcement as a priority, and the increasingly vibrant plaintiffs’ class action bar, one can expect these issues to be tested in the years ahead.

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<sup>1</sup> Familiar developments have been occurring in the United States: see, e.g., P.A. Proger and D.P. Herman, “The Price of Price-Fixing Through International Cartels,” [1999] Business Lawyer International 24.

<sup>2</sup> See Bureau of Competition Policy, “Canada Pipe Company Pleads Guilty and Pays Record \$2.5 million fine for conspiracy offence under the Competition Act” (Press Release, September 27, 1995).

<sup>3</sup> See D. W. Kent, R. Wisner & O. K. Wakil, “Record Fine in Canadian UCAR Case: Competition Bureau Continues to Target International Conspiracies,” ABA International Antitrust Bulletin, Volume 2, Issue 2 (Summer 1999).

<sup>4</sup> These fines represent approximately four times the annual budget of the Competition Bureau. The author was Canadian counsel to one of the parties involved in these proceedings. For further information, see Competition Bureau, “Federal Court Imposes Fines Totalling \$88.4 million for international Vitamin Conspiracies” (Press Release, September 22, 1999).

<sup>5</sup> See Director of Investigation and Research, Annual Report for the Year Ended March 31, 1994, p. 29.

<sup>6</sup> See Competition Bureau, “Record Fine of \$550,000 imposed on individual for conspiracy offence under the Competition Act” (Press Release, January 29, 1997).

<sup>7</sup> See: Competition Bureau, “Executive Convicted and Sentenced to Nine Months Imprisonment for Price Fixing under the Competition Act” (Press Release, September 27, 1999).

<sup>8</sup> See Competition Bureau, “Former Roche Executive Convicted and Fined for International Conspiracies under the Competition Act” (Press Release, October 25, 1999) and Competition Bureau, “Former Roche Executive Convicted and Fined for International Conspiracies under the Competition Act” (Press Release, October 27, 1999).

<sup>9</sup> See D. W. Kent, S. L. Walker and R. Wisner, “Northern Exposure: Prosecution of non-residents for Competition Act Offences” Competition Law (Volume V, No. 2) pp. 293-297 at p. 295. In the Thomas Liquidation case the extradition process was used for the first time to cause an individual to attend a Canadian Criminal Court and answer charges under the misleading advertising provisions of the Competition Act: see Bureau of Competition Policy, “Thomas Liquidation Inc. fined \$130,000 for one count of misleading advertising under the Competition Act” (Press Release, February 7, 1995).

<sup>10</sup> In addition, the Competition Act was amended to add confidentiality and employment protections for employee whistleblowers: see R. Patton, “Canadian Parliamentary Committee Proposes Whistleblower Legislation” ABA International Antitrust Bulletin, Volume 1, Issue 2 (Summer 1998).

<sup>11</sup> Remarks by D. Martin Low to the Canadian Bar Association Annual Fall Conference on Competition Law, Ottawa, October 1, 1999.

<sup>12</sup> Ibid. See also R.v. Rhone-Poulenc S.A., F.C.T.D., September 22. Transcript, p. 47.

<sup>13</sup> Chadha v. Bayer Inc., [1999] OJ No. 2497 (July 6, 1999), leave to appeal granted [1999] OJ No. 3773 (October 7, 1999).