

Canadian Cartel Enforcement: Essential Elements, Recent Developments, and the Trend Towards International Cooperation

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*D Martin Low QC, Omar K. Wakil and Todd D. Prendergast**

INTRODUCTION

Canada has a well-developed system of investigation and prosecution of cartel offences, with a number of features that promote its ability to challenge anti-competitive conduct abroad, if such conduct targets the Canadian economy. The Canadian regime therefore creates a worldwide risk to companies engaged in anti-competitive conduct with a substantial connection to the Canadian market.

This paper will address key features of the Canadian enforcement regime, some recent developments and enforcement trends, and the significant increases in legal exposure for companies and individuals in Canada, the US and elsewhere resulting from developments in international cooperation in cartel enforcement.

CANADA'S CARTEL OFFENCES

Conspiracy

Canada has one federal statute, the *Competition Act*¹ (the “Act”), which governs all aspects of competition law. The *Act* contains several specific criminal prohibitions against cartel behaviour. The best known is section 45, the general conspiracy offence. Described by the Supreme Court of Canada as the “core” of the *Act*,² section 45 is a provision which has been used to great effect by Canada’s antitrust regulator, the Competition Bureau (“Bureau”), in recent years in contesting international cartels which were once beyond the effective reach of Canadian enforcement. Since the early 1990s, the Bureau has obtained nearly 70 convictions in international cartel cases (mostly through plea agreements) with fines totalling almost C\$190 million and several convictions against individual executives.³

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¹ R.S.C. 1985, c. C-34.

² See *R. v. Nova Scotia Pharmaceutical Society* (1992), 43 C.P.R. (3d) 1 at 32 [“PANS”].

³ See Appendix A for details.

Section 45 provides that:

Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,

(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property or,

(d) to otherwise restrain or injure competition unduly

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

As this language demonstrates, cartel conduct is not *per se* illegal in Canada. Rather, section 45 prohibits only those conspiracies that have “undue” anti-competitive effects, as determined under a partial rule of reason analysis.⁴ In determining whether the agreement would or did cause an “undue” or significant lessening of competition, courts will consider the structure of the market (including the parties’ market shares) and the behaviour of the parties.

Subsection 45(1)(c) is the specific offence most frequently charged against defendants in conspiracy cases, as it is the most-broadly worded. It covers “hard core” aspects of cartel behaviour, including naked price fixing and customer and market allocation. While there is no formal basis for doing so, it is frequently the case that the Bureau will recommend, and the Attorney-General of Canada (who has exclusive authority to prosecute offenders) will accept, that multiple charges be brought against defendants, relating to anti-competitive agreements affecting either different products, regions or duration of the conspiracy.⁵ Among other things, this practice has the effect of dramatically increasing a defendant’s exposure to penalties (which are capped under section 45 at C\$10 million/5 years’ imprisonment *per count charged*) and hence the prosecutor’s leverage in securing a guilty plea.

In addition to section 45, the *Act* includes several other prohibitions against specific forms of competitor interaction: bid-rigging (section 47), price maintenance (section 61) and implementing a foreign-directed conspiracy (section 46). As more fully described below,

⁴ However, as noted below, there are reform proposals under consideration which would transform section 45 into a *per se* offence against so-called (but vaguely defined) “hard core cartels”: see, e.g., Government of Canada, *Discussion Paper*, “Options for Amending the *Competition Act*: Fostering a Competitive Marketplace” (June 2003), online: <<http://www.ppforum.ca/competitionact/dp2003.html>> [“*Discussion Paper*”].

⁵ For example, F. Hoffman-LaRoche Ltd. was convicted of eight counts of conspiracy and fined a total of \$50.9 million for its role in the bulk vitamins and citric acid cartels: see Competition Bureau, News Release, “Federal Court Imposes Fines Totalling \$88.4 Million For International Vitamin Conspiracies” (September 22, 1999).

each offence has its own particular elements that must be met in order for the Attorney-General to obtain a conviction.

Bid-rigging

Section 47 provides a *per se* criminal prohibition on bid-rigging. The offence is exhaustively defined⁶ to mean: (i) the submission of bids, in response to a call for bids or tenders, that have been arrived at by agreement or arrangement between two or more parties; or (ii) an agreement or arrangement between two or more parties, in response to a call for bids or tenders, under which one or more parties agree not to submit a bid. The defined conduct will only constitute an offence where the parties to the agreement do not provide notice to the tendering authority, before the deadline for the submission of bids, of their agreement.⁷ It is now clear, from *Welland Chemical*, that the illegal agreement must have been entered into *prior* to the submission or withholding of the bid, and that post-bid conduct is not caught by the *Act*.⁸ That is a clear difference between Canadian and American law on bid-rigging. The principle at stake in *Welland Chemical* is that the offence is strictly defined by the language of the statute, which does not catch post-bid agreements.

As noted, section 47 is a *per se* offence. The prosecutor need not prove that the parties held market power or that the illegal agreement had any harmful effect on competition, as the policy basis for the offence is to protect the competitive tendering process itself. Commission of the defined act alone is sufficient for a conviction, which carries penalties of a fine “in the court’s discretion” and/or up to five years’ imprisonment.⁹

Foreign-Directed Conspiracies

Section 46 is a unique provision of Canadian competition law which reflects the vulnerability of the Canadian economy to the influence of offshore corporate decision-making. The section literally provides that a Canadian corporation may be convicted and fined in an unlimited amount for implementing any policy or directive of any foreign person that is in a position to influence the Canadian entity, where the policy or directive would give effect to a foreign cartel in Canada. Notably, under the language of the section, liability can attach even where the Canadian company had no knowledge of the foreign conspiracy:¹⁰

⁶ See, e.g., *R. v. Welland Chemical et al.*, (December 29, 2003), Toronto M82-03 (S.C.J.), as yet unreported [*Welland Chemical*]. Mr. Low appeared as counsel in the *Welland Chemical* case, which involved a determination of whether or not an alleged agreement between two apparent competitors, by which one party agreed to withdraw a bid submitted to a municipality, constituted the offence of bid-rigging. The Ontario Superior Court accepted the submission on behalf of the accused that the offence in section 47 had been exhaustively defined by Parliament, and could therefore not extend to an agreement to withdraw a previously-submitted bid.

⁷ *R. v. Lorne Wilson Transportation Ltd. et al.*, sub nom. *R. v. Charterways Transportation Ltd. et al.* (1982), 67 C.P.R. (2d) 188 (Ont. C.A.).

⁸ *Welland Chemical*, *supra* note 6.

⁹ *Criminal Code*, R.S.C. 1985, c. C-46, s. 735.

¹⁰ See D.W. Kent, R. Wisner and O.K. Wakil, "Record Fine in Canadian UCAR Case: Competition Bureau Continues to Target International Conspiracies" (Summer, 1999) *International Antitrust Bulletin*.

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, 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. (Emphasis added.)

To date, the section has only been used to reach the Canadian affiliate of a foreign corporate cartel participant. An arguable objective of imposing such a strict liability is to ensure that the economic penalties imposed on the Canadian affiliate will be felt by related parties abroad, where a multi-national entity is involved in an offshore cartel that is carried out in Canada. By facilitating the prosecution of their Canadian affiliates, this provision is aimed at deterring foreign corporations from carrying out international cartels in Canada.¹¹ Unlike bid-rigging cases, fines assessed under section 46 have been substantial.¹² Due to the absence of any statutory cap, fines have on occasion exceeded the maximum fine that could have been levied against a member of the cartel under the general conspiracy offence.¹³

Notably, these companion provisions are *per se* offences, leading perhaps to the conclusion that where the Bureau can make a case against conspirators under one of these offences, it will do so in order to avoid having to prove market power and economic harm as required in a section 45 prosecution. No less an observer than the Industry Committee of the Canadian House of Commons has reached a similar conclusion — in commenting on proposals to abolish the price maintenance offence and treat cases of horizontal price maintenance under section 45, the Committee noted that the Bureau was the “lone dissenter” to this proposal, and that it could “only offer a higher success rate when prosecuting under a *per se* offence as its

¹¹ However, the language of the section, read literally, would apply to any Canadian corporation that is subject to *any* foreign directive. It could clearly be argued that a Canadian arms’ length, third-party distributor for an offshore supplier that is involved in a foreign cartel is liable under the statute. This is discussed more fully in a subsequent section of this paper.

¹² Bid-rigging offences have generally been local in character with limited economic impact. International cartel convictions, on the other hand, have typically involved very significant volumes of commerce, consistent with their statutory status as “*unduly* preventing or lessening competition” in Canada.

¹³ See, e.g., *R v. SGL Carbon AG* (C\$12.5 million) (2000, graphite electrodes) and *R. v. UCAR Inc.* (C\$11 million) (1999, graphite electrodes), where fines exceeded the C\$10 million cap that would have applied had the defendants been charged under section 45. Other corporations that have been convicted and fined under this section include *Sumitomo Canada Limited* (C\$1.25 million) (1993, insecticides), *Chemagro Limited* (C\$1.25 million) (1993, insecticides), *Roussel Canada Inc.* (C\$370,000) (1999, bulk vitamins), *Tokai Carbon Co., Ltd.* (C\$250,000) (2001, graphite electrodes) and *Mitsubishi Canada Limited* (C\$250,000) (1994, thermal fax paper).

reason from departing from expert opinion”.¹⁴ For the present, while it is true that the general conspiracy offence requires a “rule of reason” analysis, companies and their legal counsel should be aware of these instances where cartel behaviour could be prosecuted on a *per se* standard.

Companies should also keep in mind that the lack of any limitation period for Canadian criminal cases can lead to convictions many years down the road, long after prosecution of other conspirators has concluded. For example, in May, 2005, Mitsubishi Corporation was convicted and fined \$1,000,000 for aiding and abetting the implementation in Canada of a foreign directed conspiracy with respect to graphite electrodes.¹⁵ This development came more than six years after an \$11,000,000 fine was levied against UCAR Inc. (Canada) for its role in the conspiracy.

INVESTIGATIVE POWERS OF THE COMPETITION BUREAU

The Bureau has extensive compulsory powers that may be invoked where the Commissioner of the Bureau commences a formal “inquiry” under section 10 of the *Act*. Key investigative powers to obtain information are search warrants, wiretaps and orders for production (under section 11 of the *Act*). These statutory powers supplement information supplied voluntarily by complainants, marketplace participants, immunity applicants¹⁶ or fellow enforcement agencies in other jurisdictions. With co-operation between competition agencies on the rise,¹⁷ it can be expected that this latter category will grow in importance as a source of information for the Bureau.

Search Warrants

Search warrants may be obtained by means of an *ex parte* court order under section 15 of the *Act*. Where there are reasonable grounds to believe that a criminal offence has been or is about to be committed, as well as reasonable grounds to believe that relevant evidence is located on the premises to be searched. It is an almost universal practice in Canada for search warrants to be used in Bureau investigations of cartel activity.

Section 16 of the *Act* expressly provides for the search and seizure of computer records and permits court applications to set the terms and conditions for the operation of a computer system during the search. The Bureau has developed cutting-edge, internal expertise and technology for the conduct of electronic searches, and has shared this expertise with fellow competition agencies. Its powers under section 16 are very broad, though there has been little judicial consideration of these powers. One particular issue relates to the territorial scope of computer searches. In past investigations, Bureau officers have downloaded data stored outside Canada in the course of searching computer systems located in Canada. If the data stored abroad

¹⁴ House of Commons, Standing Committee on Industry, Science and Technology, “A Plan to Modernize Canada’s Competition Regime” (April, 2002) at 75.

¹⁵ See <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1805&lg=e>

¹⁶ See “Immunity Considerations in Canada”, below.

¹⁷ See “International Co-operation”, below.

can be retrieved on a terminal in Canada, there is a strong textual argument that such data can be seized from that location. But there continues to be controversy, not yet tested by judicial consideration, as to the precise limits of a warrant authorising a search of computer systems. Other provisions in the *Act* conferring explicit investigative authority to deal with records physically located abroad could suggest that orders under section 16 should be limited to data stored and retrievable in Canada. The Bureau has exercised care, in practice, where an information system in Canada is linked to other systems abroad. There are practical measures, such as the establishment of inter-office firewalls, that private parties might take to inhibit access by Canadian searchers to foreign-located data. However, to avoid any risk of perceived obstruction or interference with an investigation, which is a criminal offence under the *Act*,¹⁸ such steps should only be undertaken as part of a corporate data management policy, and not as an *ad hoc* response to the execution of a warrant under section 16.

Documents that are subject to solicitor-client privilege may not be seized under a search warrant, and the *Act* contains a specific rules for determining the validity of privilege claims, as well as provisions requiring the Commissioner to make a report to the court in order to retain seized documents. Since the affected corporation can ultimately request a retention or privilege hearing, and because evidence procured through an illegal search may be excluded at trial, the courts have generally ruled that search warrant orders may not be appealed.¹⁹ However, a warrant may be set aside in specific circumstances (*e.g.* due to material non-disclosure or misrepresentation in the affidavit supporting the Commissioner's *ex parte* application) and proceedings to challenge such warrants are not unusual.

Amendments to the *Criminal Code* in 1999 gave the Commissioner the additional power to intercept private communications through electronic means, *i.e.* wiretapping.²⁰ This power is restricted to investigations of conspiracy, bid-rigging and serious deceptive marketing cases. It requires prior judicial authorisation. Wiretapping has very significant resource and other implications and its use therefore will likely imply that other investigative tools have produced sufficient probative information to satisfy a judge that the intercept should be authorized.

Section 11 Orders

By means of an order under section 11 of the *Act*, the Commissioner may compel the production of pre-existing records and documents, as well as newly-created, written returns of information.²¹ These orders require a person to produce records and written returns under oath or affirmation within a certain period of time. In the application for a section 11 order, which is *ex parte*, the Commissioner need only satisfy the court that an inquiry has been initiated

¹⁸ Under section 64(1) it is an offence to “in any manner impede or prevent or attempt to impede or prevent any inquiry or examination” under the *Act*. The destruction or alteration of records or any other thing in respect of which a search warrant is issued is an offence under section 65(3). Penalties under section 65(3) include imprisonment for a term of up to five years and a fine of up to C\$50,000.

¹⁹ *R. v. Hoffman-La Roche Ltd.* (1981), 33 O.R. (2d) 694, 125 D.L.R. (3d) 607 (C.A.).

²⁰ S.C. 1999, c. 2, s. 47 (amending s. 183 of the *Criminal Code*, *supra* note 9).

²¹ Section 11(2), discussed later in this paper, applies to foreign affiliates.

and that a person is likely to have relevant documents in his possession or control. Section 11 orders are often used as a follow-up to the execution of search powers under section 15. But they may also be used in lieu of search warrants, because the threshold test for obtaining a section 11 order is lower than that for obtaining a warrant.²²

A significant investigative tool in international cartel investigations is authorized by subsection 11(2). That provision specifically authorizes an order that requires a Canadian affiliate of a foreign corporation to produce records held by the offshore entity. While these orders have been used sparingly in the past, the Bureau appears more ready to press the complex legal issues about the operation of this section that are untested.

Section 11 may also be used to compel witnesses who may have relevant information to appear and answer questions related to the inquiry under oath. The examination takes place before a presiding officer who can determine the propriety of questions asked and the conduct of the examination. Although inquiries must be conducted in private, any person who is the subject of an inquiry is entitled to attend the examination of a witness, unlike the US tradition of Grand Jury secrecy. This may have significant implications, both for the integrity of the investigation and for the party whose employee is being examined, particularly if other subjects of the inquiry become aware of the examinations. However, the presiding officer has the power to safeguard confidential information by excluding representatives of competitors from commercially sensitive aspects of the examination.

A witness is not excused from testifying on the ground that the testimony may incriminate the person, although section 11(3) provides that no evidence obtained from a witness under a section 11 order may be used against that person in any subsequent criminal proceedings. This limitation is consistent with decisions of the Supreme Court of Canada establishing use and derivative use immunity for persons compelled to give evidence under statutory powers of investigation.²³ But where an individual employee of a corporation has been compelled to give evidence under section 11, the evidence is admissible against the corporate accused or co-workers.

IMMUNITY CONSIDERATIONS IN CANADA

Immunity Applications

The Commissioner's *Information Bulletin*, "Immunity Program Under the *Competition Act*",²⁴ sets out the circumstances under which immunity can be obtained and the level of co-operation required to maintain immunity throughout the life of an investigation. The

²² There is some uncertainty about this statutory standard for compelling production of documents: *R. v. Jarvis* [2002] 3 S.C.R. 73.

²³ See, e.g., *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research)*, [1990] 1 S.C.R. 425, 67 D.L.R. (4th) 161; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, 123 D.L.R. (4th) 462.

²⁴ Competition Bureau, "Immunity Program Under the *Competition Act*" (September 21, 2000), online: <<http://strategis.ic.gc.ca/pics/ct/immunitye.pdf>>. See also Competition Bureau, Frequently Asked Questions "Immunity Programme under the *Competition Act*" (November 27, 2001), online: <<http://strategis.ic.gc.ca/SSG/ct02312e.html>>.

Bulletin (and its related FAQs)²⁵ reflects the current practice of the Commissioner and, by extension, the Attorney General. Since its publication in September 2000, there has been a significant increase in the number of immunity requests and, in the early going, the Bureau received about one per month.²⁶ The authors understand that several applications under the new policy involve purely domestic cases.

The Bureau's programme offers immunity or leniency in exchange for co-operation with a Bureau investigation, subject to certain minimal requirements. The Commissioner will recommend to the Attorney General that immunity be granted to a party in the following situations: (i) the Bureau is unaware of an offence, and the party is the first to disclose it; or (ii) the Bureau is aware of an offence, and the party is the first to come forward before there is sufficient evidence to warrant a referral of the matter to the Attorney General.

The requirements for a grant of immunity are as follows:

- the party must take effective steps to terminate its participation in the illegal activity;²⁷
- the party must not have been the instigator or the leader of the illegal activity, nor the sole beneficiary of the activity in Canada;
- the party must provide complete and timely co-operation throughout the course of the Bureau's investigation;
- where possible, the party must make restitution for the illegal activity; and
- if the first party fails to meet the requirements, a subsequent party that does meet the requirements may be recommended for immunity.

While the Commissioner's policy does not legally bind the Attorney General, who has the exclusive authority to grant immunity in competition cases, there is a high degree of probability that a recommendation by the Commissioner will be followed. We are not aware of any case in which a recommendation for immunity has been rejected. The Canadian approach seems a practical way of marrying the interests of an investigative body with the requirements for an independent exercise of prosecutorial discretion.

²⁵ See D. M. Low, Q.C., "The Competition Bureau's Immunity Program: A View of Policy and Practice in Canada" (April, 2001) *Antitrust Report* at 2.

²⁶ Notes for an Address by K. von Finckenstein, Q.C., Commissioner of Competition, to the Canadian Bar Association Competition Law Section Annual Meeting (September 20, 2001) at 5, online: <<http://strategis.ic.gc.ca/pics/ct/kvf0901.pdf>>.

²⁷ This requirement is somewhat ambiguous, and the similar requirement under the US leniency program has resulted in an attempt by the DoJ to revoke leniency previously granted to Stolt-Nielsen for allegedly failing to terminate its part in the parcel tanker price-fixing cartel soon enough. A DoJ official has acknowledged that it is not always possible for a company to ensure that all employees cease all illegal conduct immediately, and a small time-lag in terminating cartel involvement is understandable. The question in both the US and Canada remains: where is the line?

The Canadian program reflects the “first-in” amnesty regime employed in the United States. It is therefore important to stress the advantage of being the first party to approach the Canadian competition authorities. Firms that are “first in” with evidence of a conspiracy where the Bureau does not have a provable case can expect immunity for both the corporation and all implicated officers and employees. However, the party must be “first in” *in Canada*. The Immunity Bulletin is clear that being first in another jurisdiction will *not* result in any favourable treatment in Canada.²⁸ There have been two cases in which the party that obtained amnesty as the first to apply in the US was slow to come forward in Canada; each corporation was required to plead guilty in Canada and subjected to significant fines.²⁹

Because of the acknowledged pressure to be the first to apply, the Competition Bureau has adopted the US Department of Justice’s practice of accepting a “marker”. If a party is certain that an offence has been committed, but is not yet able (due to the state of its internal investigation) to substantiate the matter, it may preserve its place as “first in” by requesting a marker, often by means of a telephone application to reserve its status. There is a clear incentive for the Bureau to encourage parties to take the initiative as early as possible, and the marker practice facilitates that objective. Granting a temporary marker is fair treatment for the first party to recognize and accept its responsibility in Canada. But it is susceptible to strategic practice, if a party learns about the problem from initiatives taken by another amnesty applicant with other enforcement agencies abroad. In one recent case a party applied for a marker in Canada, while another party that had been granted amnesty in the US was trying to ascertain whether the conduct applied to Canada. Parties considering an immunity application should be aware of the importance of coordinated applications to all relevant competition agencies that have adopted leniency or immunity programs.

Related to this concern is the potential for strategic delay by the beneficiary of the marker. Having blocked applications by others to qualify as “first in”, it is unacceptable for the marker holder to stall in providing the requisite evidence to the Bureau. While no specific standards or timetables have been formally laid down by the Bureau for perfecting a marker, it is evident that it is aware of the problem, and in particular, Bureau officials have expressed concern that its investigative needs are being subordinated to a marker holder’s interests elsewhere. It appears that one or more marker holders in Canada have been displaced due to their inability or unwillingness to move forward quickly to provide cooperation, but so far there has been only one public pronouncement to this effect.³⁰ The working standard applied recently by the Bureau is that the marker holder must proceed with urgency, with an expectation that the immunity application will be advanced within 30 days after a marker has been granted. The Bureau has signalled that it will be conducting consultations on possible revisions to the Immunity Program imminently.

²⁸ Immunity Program, *supra* note 24.

²⁹ See Competition Bureau, News Releases, “Federal Court Imposes Fines Totalling \$88.4 Million for International Vitamin Conspiracies” (September 22, 1999); and “Competition Bureau Investigation Nets \$600,000 Fine from Bioproducts Incorporated” (August 19, 2003).

³⁰ Colette Downie, the Assistant Deputy Commissioner of the Competition Bureau’s Criminal Matters Branch, made this statement in her oral remarks at the Canadian Bar Association Competition Law Section 2004 Annual Conference.

The Application Process

The immunity application process typically involves the following steps:

- **Initial Contact:** Anyone may initiate a request for immunity in a cartel case by communicating with the Deputy Commissioner of Competition, Criminal Matters. Some information will need to be provided to determine whether the party qualifies for immunity and, as noted above, a “marker” may be granted.
- **Provisional Guarantee of Immunity:** If the party decides to proceed with the immunity application, there will need to be a description of the illegal activity, usually in hypothetical terms. The Bureau will then present all the relevant information to the Attorney General, who has independent discretion in these matters and who will, if satisfied, issue a written provisional guarantee of immunity.
- **Full Disclosure:** Following the provisional guarantee of immunity, the party must make full disclosure to the Bureau. The disclosure will be on the basis that the Bureau will not use the information against the party, unless there is a failure to comply with the party’s continuing obligations under the immunity agreement.
- **Immunity Agreement:** If the Attorney General accepts the Bureau’s recommendation after full disclosure, the Attorney General will execute an immunity agreement that will include all of the party’s continuing obligations.

The moment that corporate managers become aware that their enterprise is implicated in an international cartel — or conclude that they do not want to continue participating in such a venture — they face a pivotal decision. Whether the corporation should contact authorities with an offer to co-operate or hope that none of its co-conspirators initiate such contact (and take the attendant risk of discovery, prosecution and conviction) becomes the key question. The latter course is a high-risk strategy, especially in light of the existence of amnesty programs. There may be enormous consequences associated with a litigated loss and, therefore, tempting reasons to co-operate.

PROPOSED REFORMS

In June of 2003, Canada’s federal government released a discussion paper entitled *Options for Amending Competition Act: Fostering a Competitive Marketplace*,³¹ which contains numerous (and controversial³²) proposals for reforming the *Act*. The precise place of proposals to amend the criminal provisions of the *Act* in the new government agenda is difficult to predict

³¹ *Supra* note 4.

³² See e.g., D.M. Low, Q.C., “If it ain’t broke...”, *The Globe and Mail* (September 27, 1001) at A15.

at present,³³ but they were not part of the most recently announced package of proposed amendments,³⁴ and legislative action is likely to be deferred for some time. The most controversial proposal³⁵ in the *Discussion Paper* would replace the current “rule of reason” conspiracy offence in section 45 with a *per se* criminal offence aimed at “hard-core cartels” (and a companion civil provision for pre-notifying and reviewing non-criminal alliances among competitors). Among other things, proponents of reform have argued that, by requiring proof of market power and harmful effects on competition, section 45 is too difficult to enforce. The Bureau’s poor record in litigating contested cartel cases is typically cited in support of this assertion.

While effective cartel enforcement is obviously a necessary and desirable element in any competitive economy, it is extremely misleading to suggest that simply making an offence easier to prove would result in a more competitive economy. The Bureau’s impressive enforcement record over the last twelve years, since the watershed decision of the Supreme Court of Canada in the *PANS*³⁶ case clarified the application of section 45, suggests that Canada’s cartel law *is* effective: the Bureau has obtained convictions in 25 of 28 conspiracy cases, an 89% success rate.³⁷ Recent fines have exceeded C\$180 million, including several convictions against individual corporate executives. Fines in the lysine and vitamins cases have been the highest monetary penalties ever imposed for any offences in Canadian legal history. As one commentator has noted, “if defendants thought they had a chance at acquittal because of a weak law, one would not expect to see firms consistently entering guilty pleas”.³⁸

It is equally notable that, in each of the three acquittals under section 45, the prosecution’s case contained serious flaws — in one case, the Crown was unable to prove the illegal agreement and, in another, was unable to prove intent. A *per se* offence would not have changed either of these outcomes. Thus, only one case since 1992 has been lost due to the prosecutor’s inability to prove sufficient economic harm, and in that case the court expressly found that the Crown’s evidence was “unreliable and inconclusive” (in part due to the credibility of the Crown’s expert witness).³⁹ In its country report for Canada, the OECD has noted that

³³ Some of the proposals were perceived to have been spearheaded by the former Commissioner of Competition; it remains to be seen what level of priority the new Commissioner and new Minister of Industry assign to the reforms.

³⁴ See Competition Bureau, News Release, “Minister of Industry Tables Amendments to Strengthen the *Competition Act*” (November 2, 2004), online: <<http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02976e.html>>.

³⁵ See, e.g., the opposition to this proposal expressed by the Task Force of Canadian Bar Association’s Competition Law Section, “CBA Competition Law Section – Section 45 Amendments Task Force Report”, 21 Can. Compet. Rec. 3 (Summer, 2003) at 26ff, and by numerous (in fact, a majority) of the written submissions from stakeholders in the government’s consultation process, online: <http://www.ppforum.ca/competitionact/submissions_e.htm>.

³⁶ *Supra* note 2.

³⁷ See H. Chandler and R. Jackson, “Beyond Merriment and Diversion: The Treatment of Conspiracies Under Canada’s *Competition Act*”, Roundtable on *Competition Act* Amendments, May 2000.

³⁸ B.A. Facey and D.H. Asaf, “Innovation, Growth and Prosperity: A Framework for Amending Canada’s Conspiracy Laws” 20 Can. Compet. Rec. 4 (Winter, 2001-2002) 61 at 63.

³⁹ *R. v. Clarke Transport Canada Inc.* (1995), 64 C.P.R. (3d) 290 (Ont. Ct. Gen. Div.) at 325.

[s]ome of the problems in enforcement — notably the record of success in contested conspiracy cases — are explained by inexperience, both of the Bureau’s litigators and of the court [...] the Bureau staff too has reportedly ‘overtried’ cases, failing to focus the analysis and delaying the process.⁴⁰

Obviously, there are other factors that must be considered when evaluating the Bureau’s record in contested conspiracy cases: the uncertainties of litigation, defendants’ retention of specialized antitrust counsel to defend the case, the presumption of innocence and all of the other general rights and protections that an accused person or corporation enjoys when facing criminal charges. Perhaps the more natural expectation is that the Bureau should *not* win all, or even most, of its contested cases: where cases are clear, settlements are the norm. Where the chances of success in a prosecution are uncertain, a loss does *not* mean that the case should not have been prosecuted.

Other issues that require careful consideration at the level of policy development in considering “*per se*” liability are the definitional and administrative difficulties with such a development. The OECD’s *Recommendation on Hard Core Cartels*⁴¹ took years of debate to develop a description of “hard-core cartels” that is by no means sufficiently precise to provide a standard for national criminal legislation. Nor is it apparent that the OECD definition is broader or more tailored to the economic harm associated with cartels than is the current law. In fact, the economic focus of section 45 might be more properly self-defining than a *per se* standard, by concentrating enforcement efforts on those offences that are economically “undue”. The development of US jurisprudence over an extended period provides guideposts for legitimate and illegal conduct. Those standards neither inhibit appropriate self-determination by businesses, in the conduct of their affairs within the law, nor do they risk allocating scarce regulatory resources to trivial, but facially anti-competitive agreements that may have no economic impact in any relevant market. But at a time when even the US is debating the *per se* rule of liability,⁴² it is not obvious that the adoption of the *per se* standard by itself, without concentrating on improved measures of detection, broader international cooperation and more efficient and effective

⁴⁰ Organization for Economic Co-operation and Development, “Regulatory Reform in Canada — The Role of Competition Policy in Regulatory Reform in Canada” (September, 2002) at 42, online: <http://www.oecd.org/infobycountry/0,2646,en_2649_33759_1_70315_119663_1_37463,00.html>.

⁴¹ Organisation for Economic Co-operation and Development, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels* (March 25, 1998) at recommendation A.2, online: <<http://webdomino1.oecd.org/horizontal/oecdacts.nsf/Display/7328AA9E04799859C1256DAA00643D29?OpenDocument>>. The OECD defines “hard core cartel” conduct as “an *anticompetitive* agreement, *anticompetitive* concerted practice, or *anticompetitive* arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.” By very use of the term “anticompetitive” in its definition, the OECD *Recommendation* would require a competitive effects test in determining whether or not an agreement among competitors was a “hard-core cartel” — Canada’s current conspiracy offence already meets this description.

⁴² See, e.g., *In the Matter of Polygram Holdings Inc. et al.*, Docket No. 9298 (July 28, 2003) and *California Dental Association v. F.T.C.* 526 U.S. 756 (1999), and a spirited debate during the Chair’s Showcase Program, “The Challenge of Counselling and Litigating in the Shadow of the *Per Se* Rule” at the recent ABA Antitrust Section Spring Meeting, April 1, 2004.

prosecution, is likely to produce greater success or more desirable regulatory intervention in a sensitive area of economic activity.

LONG ARM ENFORCEMENT

Canadian Subject-Matter Jurisdiction

Canada traditionally has had a strong presumption against the extraterritorial application of criminal laws. That policy approach appears to be evolving significantly, from the Bureau's recent practice. Canadian criminal jurisdiction is based on the principle of territoriality: a Court has authority to try an offence only if it is committed in Canada.⁴³ That position is subject to legislative modification, and the Supreme Court has confirmed Parliament's legislative authority to enact extraterritorial criminal laws if it so chooses.⁴⁴ But Parliament has created very few exceptions to the principle of territoriality. One specific example of extraterritorial Canadian subject-matter jurisdiction is section 465 of the *Criminal Code*. That provision seems relevant to international cartel enforcement because it specifically grants jurisdiction to a Canadian court in respect of foreign conspiracies to commit a criminal offence in Canada.⁴⁵ But the application of section 465 of the *Criminal Code* to section 45 of the *Act* (the key cartel offence) has never been judicially determined.⁴⁶

The *Act* itself is silent on the territorial reach of the Canadian courts in cartel cases. It says nothing about the authority to prosecute an international cartel, in the very frequent circumstance where the cartel participants were at all times outside Canada, undertook no concrete action in furtherance of the conspiracy within Canada, and where the only localising feature is that cartelised sales - the effects of the conspiracy - were made in Canada. There has been no Canadian judicial decision in which that jurisdictional question has been confronted in an international cartel context, and the presumption against extraterritoriality would seem to operate. Nevertheless, numerous foreign corporations and individuals have agreed to come to Canada, submit to the personal as well as subject-matter jurisdiction of the Canadian courts and plead guilty to cartel offences. In each of those cases, however, there was specific evidence that the participants directed their minds to and focussed their agreements on the Canadian market and Canadian customers, and then carried out the offence in Canada directly or through local affiliates or distributors. In those circumstances, it appears that the parties simply chose not to test the jurisdictional issue. But it must also be assumed that the judges that accepted the guilty pleas found, by implication at least, that they had jurisdiction, because it is clear in Canadian law that *subject-matter* jurisdiction cannot be conferred on a Court by consent.

Prosecutions have proceeded on numerous occasions against international cartels, including cases where the co-conspirators were never present in Canada. In most of those cases,

⁴³ 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).

⁴⁴ *Terry v. The Queen*, [1996] 2 S.C.R. 207 at 215 (S.C.C.).

⁴⁵ *Criminal Code*, *supra* note 9, s. 465(4).

⁴⁶ It is debatable whether foreign persons could "conspire to conspire" by virtue of the fact that the *Competition Act* offence is a conspiracy, to which the general foreign conspiracy offence in the *Criminal Code* would have to apply.

including the lysine case, the basis for the convictions lay in evidence provided by a co-conspirator that had been granted immunity from prosecution. Almost without exception, there was also specific evidence to show that the parties had targeted Canadian customers and markets. In the lysine case, there was, of course, contemporaneous evidence that the parties had been physically present in Canada in furtherance of the cartel and had reached illegal agreements there.⁴⁷ In other cases, no physical presence in Canada could be shown. A local or horizontal jurisdictional basis was not shown in two prosecutions in the Thermal Fax Paper conspiracy — *R. v. Mitsubishi Paper Mills Ltd.*⁴⁸ and *R. v. New Oji Paper Co.*⁴⁹ In those cases, the manufacturers sold their product in Japan to Japanese trading houses, at prices established by agreement among the manufacturers. As the trading houses were party to that agreement, which was specifically directed to the Canadian market, the manufacturers were held liable even though the agreement took place wholly in Japan and implementation in Canada was left to the trading houses.

However, Canada has never directly espoused the US “effects based” jurisdictional test of *Alcoa*⁵⁰ and *Nippon Paper*⁵¹ and thus there has never been a contested prosecution which sought to apply the leading Canadian decision on jurisdictional questions, *R. v. Libman*⁵², to offshore cartels. In that case, the Supreme Court found Canadian criminal subject matters to exist where there was a “real and substantial connection” between the offence and Canada. This is a practical and flexible test that could be usefully considered in cases of international cartels, even though the facts of *Libman* concerned individuals who were in Canada for most of the acts which made up the offence, while the effects of the offence, or those victimized by the illegal conduct, were abroad.

The Competition Bureau and the Competition Law Division now appear to have the view that a global cartel that directly or indirectly affects Canadian customers, but which involves no physical presence or other activity by cartel members within Canada, is sufficiently connected to Canada to be within the jurisdiction of the Canadian Courts. In the context of international cartel enforcement, the practical and legal result of that position seems indistinguishable from the effects-based, extraterritorial jurisdiction of the US courts, in cases like *Alcoa*,⁵³ *Nippon Paper*⁵⁴ and *Hartford Fire Insurance*.⁵⁵ There has been no public

⁴⁷ See Competition Bureau, News Release, “\$3.57 Million in Additional Fines Under the Competition Act” (July 23, 1998), online: < <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=634&lg=e> >

⁴⁸ See Competition Bureau, News Release, “Mitsubishi Paper Mills Ltd. Pleads Guilty to Two Charges Under the Competition Act” (February 17, 1997).

⁴⁹ See Director of Investigation and Research, *Annual Report for the Year Ending March 31, 1997* (Ottawa: Industry Canada, 1997) at 13.

⁵⁰ *United States v. Aluminium Co. of America*, 148 F.2d 146 (2d Cir. 1945).

⁵¹ *United States v. Nippon Paper Industries, Co.*, 944 F. Supp. 55 (D. Mass. 1996), rev’d 109 F.3d 1 (1st Cir. 1997).

⁵² [1985] 2 S.C.R. 178.

⁵³ *United States v. Aluminum Co.*, 148 F.2nd 416, (2d Cir. 1945).

⁵⁴ *United States v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1 (1st Cir. 1997), cert. denied, 522 U.S. 1044 (1998).

articulation of the precise grounds of the Bureau's legal position on the subject-matter jurisdiction of the Canadian courts in an international cartel case. Historically, there have been very clear differences between Canada and the United States on the legal and policy bases for the assertion of effects-based subject-matter jurisdiction in cross border cartel cases. Indeed, Canada has notoriously opposed the application of US extraterritorial jurisdiction in antitrust cases. A bald assertion by Canadian enforcers of such a ground for Canadian judicial intervention in such cases, in the absence of any analysis or judicial consideration, does not contribute to the development of Canadian law and policy on cartel enforcement.

International Cooperation

In international cartel cases, the Bureau will co-operate closely with the U.S. Department of Justice and other competition agencies, either through formal processes or informally.⁵⁶ Formal procedures in criminal cases may be undertaken via the discussed MLATs and other competition co-operation agreements, which have a civil-focus, such as the recently upgraded positive comity agreement between Canada-US⁵⁷ as well as agreements between Canada and Australia and New Zealand,⁵⁸ Chile,⁵⁹ Costa Rica,⁶⁰ the EU,⁶¹ Mexico⁶² and the United Kingdom.⁶³ Several other agreements are under negotiation. Furthermore, there are often informal contacts between Canadian and foreign investigative agencies on common issues during an inquiry. While they have been used sparingly, the MLATs permit Canada and co-operating countries to undertake formal procedures in their own jurisdictions to obtain evidence for a foreign investigation. These arrangements also permit Canadian and other agencies to coordinate their enforcement activities, exchange confidential information in some circumstances and to meet regularly to discuss case-specific matters. There have been MLAT requests in

⁵⁵ *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993). Canada, along with other countries, submitted an amicus brief in the Supreme Court consideration of this and other effects-based cases in the U.S., to contest the assertion of extraterritorial jurisdiction under the *Sherman Act*.

⁵⁶ See generally, D.M. Low, Q.C., "International Co-operation in the Enforcement of Competition Laws: Recent Canada-United States Criminal Experience," in *Competition Law for the 21st Century: Canadian Bar Association Competition Law Section 1997 Annual Conference* (Huntington, NY: Juris Publishing Inc., 1998).

⁵⁷ See Competition Bureau, News Release, "Canada and the U.S. Sign Cooperation Agreement on Competition Law Enforcement" (October 5, 2004), online: <<http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02958e.html>>.

⁵⁸ See Cooperation Arrangement Between the Commissioner of Competition, the Australian Competition and Consumer Commission and the New Zealand Commerce Commission, online: <<http://strategies.ic.gc.ca/ssc/ct02030e.html#top>>.

⁵⁹ See Competition Bureau, News Release, "Competition Bureau Signs Co-operation Arrangement with Chilean Competition Agency" (December 17, 2001), online: <<http://strategis.ic.gc.ca/SSG/ct02175e.html>>.

⁶⁰ See Competition Bureau, News Release, "Canada-Costa Rica Agreement could provide Framework for Competition Policy in FTTA" (April 23, 2001), online: <<http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02172e.html>>

⁶¹ For commentary regarding the Canada-EU agreement, see O. K. Wakil, J. F. Clifford and N. H. Johnson, "Canada and the European Union Enter into A New Era of Antitrust Enforcement Cooperation" (February 2000) *Antitrust Report* 20.

⁶² See Competition Bureau, News Release, "Canada and Mexico Sign Cooperation Agreement on Competition Law Enforcement" (November 15, 2001), online: <<http://strategis.ic.gc.ca/SSG/ct02307e.html>>.

⁶³ See Competition Bureau, News Release, "Cracking Down on Cross-Border Scams: Competition Bureau Signs Cooperation Arrangement with UK Counterparts" (October 14, 2003), online: <<http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02730e.html>>.

competition cases between Canada and the US and with a number of European countries. With legal developments in the UK, these procedures may become more routine.

Canadian and US authorities conducted their first joint investigation in the summer of 1994. As noted above, the case involved Japanese manufacturers of thermal facsimile paper that agreed to fix the price of fax paper at meetings held in Tokyo. The results of the investigation, in the words of former US Deputy Assistant Attorney General Gary Spratling, “were impressive on both sides of the border”:

In the United States, three American corporations, four Japanese corporations, and a Japanese national have pled guilty to antitrust violations. The corporations paid criminal fines totaling more than \$10 million and the Japanese national paid a fine of \$165,000 [...] In Canada, five corporations — consisting of three American firms, one Canadian firm, and one Japanese firm — have pled guilty and have paid fines of roughly \$3 million.⁶⁴

A similar joint investigation by the Bureau and the US Department of Justice was conducted in the ductile iron pipe investigation resulting in a conviction in Canada. As one former Commissioner has said, “There are [now] no territorial limits to cartel discussions around boardrooms.”⁶⁵

There were also significant, informal, levels of co-ordination (in otherwise independent and parallel investigations) in the lysine, graphite electrodes, sorbates and bulk vitamins cases. Several new matters have highlighted that such co-operation is ongoing. In a major inquiry involving an alleged plastics additives cartel, Canadians participated in co-ordinated searches with American, European and Japanese enforcers.⁶⁶ In May 2004, Canadian enforcers appear to have been involved in co-ordinated international enforcement action relating to investigations in the paper and forest products industry.⁶⁷ In fact, UPM Kymmene appears to have obtained immunity from penalties in the EU, the US and Canada, according to media reports.⁶⁸ This sort of informal co-operation has been very successful and appears likely to be

⁶⁴ See G. Spratling, “Criminal Antitrust Enforcement Against International Cartels” presented at the Advanced Criminal Antitrust Workshop, Phoenix, Arizona (February 21, 1997) at 9.

⁶⁵ See Remarks of G. N. Addy, Director of Investigation and Research, To a Luncheon Address to the Canadian Institute Toronto, Ontario (May 10, 1996), online, <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct01417e.html>>.

⁶⁶ Certainly the most notable recent example of true multi-agency coordination is the simultaneous searches in multiple countries by the US DOJ’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” (February 13, 2003), online: EUROPA <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/03/33|0|RAPID&lg=EN>; and see R.H. Pate, “Anti-Cartel Enforcement: The Core Antitrust Mission” (May 16, 2003), online: US Department of Justice <<http://www.usdoj.gov/atr/public/speeches/201199.htm>>.

⁶⁷ “The Commission’s spokesperson has also confirmed that the inspections have been carried out in close coordination with competition authorities in a number of EU countries, as well as the US and Canada.” See “Spokesperson’s statement on investigation in the paper and forestry products sector” (May 26, 2004) MEMO/04/123.

the norm in future investigations into cartels affecting North American markets. Indeed, it is virtually automatic now for immunity applicants to be asked to waive their right to confidentiality, to permit enforcement agencies in different jurisdictions to consult with each other.

In addition, there are annual international conferences of cartel investigators, which increasingly focus on cooperation and coordination with respect to international cartel investigations. Enforcers at the 2004 conference in Australia noted that many of the agencies in attendance had already cooperated on a number of cartel cases and that global cooperation was only expected to grow in the future.⁶⁹ There is no doubt that these meetings provide a forum for international cross-fertilization on best practices in enforcement and informal discussions about current issues of mutual enforcement interest.

In 1995 and 1999, the competition co-operation agreements between Canada and the United States and the European Union respectively came into force. Both agreements envisage co-ordinated enforcement activities, exchanges of information (though generally of a non-confidential character) and regular meetings to discuss matters of mutual interest. Each jurisdiction must notify the other of enforcement activities that could affect the other's "important interests" and, when requested, each must also assist the other "to the extent compatible with the assisting Party's laws and important interests". The agreements also allow one party to request that the other commence enforcement action for matters affecting the requesting state – an exercise of "positive comity" which has been invoked only very rarely in criminal matters.

Legal barriers to more formal international co-operation, particularly with the United States, have lowered following a recent court of appeal decision that considered the thresholds for formal co-operation under the auspices of the *Canada-US MLAT*. In *Canada (Commissioner of Competition) v. Falconbridge*⁷⁰, the Bureau had, at the request of the US Department of Justice, executed search warrants and evidence-gathering orders against Canadian companies. It subsequently sought a "sending order" authorising the delivery of materials gathered in connection with the search to the US Department of Justice. A lower court issued the order, and the parties subject to the search appealed, claiming that the warrants were invalid and that the *Canada-US MLAT* did not authorise the exchange. Two key arguments were relied upon by the appellants, on grounds that would certainly have borne weight in a challenge to a warrant in domestic criminal proceedings:

⁶⁸ See UPM reports, "UPM receives conditional full immunity from competition authorities" (May 25, 2004), online: <[http://w3.upm-kymmene.com/upm/internet/cms/upmcms.nsf/\(\\$all\)/9979c08dde3c1d42c2256e9f003c3935?OpenDocument&qm=menu,0,0,9](http://w3.upm-kymmene.com/upm/internet/cms/upmcms.nsf/($all)/9979c08dde3c1d42c2256e9f003c3935?OpenDocument&qm=menu,0,0,9)>; see Securities and Exchange Commission Form 6-K, "Report on Foreign Issuer" (May, 2004), online: <<http://www.sec.gov/Archives/edgar/data/1089642/000119312504094004/d6k.htm>>; and see EU business, "EU raids major forestry firms over paper cartel allegations" (May 26, 2004), online: <<http://www.eubusiness.com/afp/040525141115.m0hemykl>>.

⁶⁹ See "Busting cartels – an international priority", Australian Competition and Consumer Commission, New Release (November 23, 2004), online: <<http://www.accc.gov.au/content/index.phtml/itemId/550376/fromItemId/459302/pageDefinitionItemId/16940>>.

⁷⁰ (2003) 173 C.C.C. (3rd) 466; 12 C.R.(6th) 243; 225 D.L.R. (4th) 1; leave to appeal to the Supreme Court of Canada denied 179 C.C.C. (3rd) v; 28 C.P.R. (4th) vi. MBDOCS_1525775.5

- The sworn informations to obtain the warrants were deficient in that they failed to disclose grounds for obtaining the warrants; in particular that there were no reasonable grounds to believe that evidence relating to the offence would be found at the place where the search was conducted.
- The *Sherman Act* offences in question could not constitute the basis of a valid request because they were not “offences” as defined by the *Canada-US MLAT* and because the substance of the American offence had no Canadian counterpart as required by the Treaty.

The Court rejected both arguments. It considered the informations adequate, even though the Canadian officials were relying on “double hearsay”. The factual basis for the warrants was information obtained from an unnamed informant, which had been passed on to the Canadian authorities by US enforcement officials. The Court found that the information was credible because of the level of detail provided and the fact that the Canadians were relying on US officials with whom they had previously worked and whom they considered to be honest. The Court concluded that there was no need for Canadian enforcers to independently verify the information. The Court also rejected the appellant’s technical arguments that the *Sherman Act* offences were not “offences” for the purposes of the Treaty, as well as arguments that there was a “reciprocal offence requirement.” The Court made it clear that it was not necessary for the conduct in question to violate Canadian laws before Canadian enforcers could assist American colleagues: it is sufficient that the conduct be an “offence” as defined in the Treaty. The decision has clearly established a low threshold for the Bureau to carry out searches in connection with an American investigation and removed doubts as to whether a US offence must have a Canadian analogue before assistance can be provided and information exchanged. The apparent deference shown by the Court in *Falconbridge* to the interests of international cooperation in criminal matters is hardly exceptional, and it is likely that the disposition in this long running case will smooth the way for future Canada-US cooperation in the investigation of competition offences under the MLAT.

Unlike the Canada-US MLAT, the Canada-EU accord does not allow the respective enforcement agencies to gather and exchange confidential information for the use of the other party. Any interaction between enforcement agencies can nevertheless play an important role in international investigations, having regard in particular to the notification requirements that apply to the agencies’ work. This was considered during a recent roundtable discussion among four experts with extensive experience on both sides of the courtroom.⁷¹ While investigators will respect the limits on their authority to share confidential information, they may “tip” their international colleagues by providing helpful signposts, including parties with whom they should speak and events into which they should enquire. It is therefore even more necessary for companies with Canadian interests to consider the international implications of an antitrust investigation before initiating contact with investigative agencies or responding to investigative initiatives.

⁷¹ See “Roundtable: Cutting Edge Issues in Cartels”, 8 *Global Competition Review* 3 (April, 2005), 22 at 30-31.

In light of the MLAT and the Canada-EU and Canada-US accords, a company defending a cartel investigation that has multi-jurisdictional implications, and particularly one involving the US or the EU, should be highly sensitive to the potential involvement of the Bureau. Co-operation and the provision of mutual assistance between Canadian and US enforcement officials in international conspiracies cases have now become routine. The trend is clearly moving toward greater co-operation among international agencies.⁷²

A co-ordinated approach to the defence of international cartel cases is therefore increasingly critical to an effective strategy. The timing of approaches to the regulators in each jurisdiction should be considered carefully. The exposure of key individuals to prosecution in Canada is a factor of particular concern -- in developing a coherent defence strategy.

CONCLUSION

The above survey of Canadian law, investigative practice and recent developments has been to highlight a number of Canadian procedures that may be of interest with respect to international efforts to deter and punish cartels. Tremendous achievements in cartel enforcement have been recorded in recent years, which have made significant contributions to the restoration of competitive markets. Other initiatives are awaiting development in Canada and elsewhere. As the discussion and examples shows, the efforts of enforcers to pursue cartel misconduct continue to evolve, and cooperation among enforcement agencies continues to reduce the significance of international borders in the investigation and prosecution of cartel activity.

⁷² The Commissioner of Competition noted in 1998 that “[c]ompetition law agencies around the world are increasingly co-operating to combat global cartels [...] criminal behaviour is unacceptable and perpetrators cannot expect to escape sanction in Canada by carrying out their illegal conduct outside the country”: see 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://statégis.ic.gc.ca/SSG/ct01240e.html>>.