

**CARTEL ENFORCEMENT, IMMUNITY  
AND JURISDICTION:  
SOME RECENT CANADIAN DEVELOPMENTS**

*D. Martin Low, QC*

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## 1. INTRODUCTION<sup>1</sup>

Over the last several years, international cartel enforcement has produced tremendous results. In multiple jurisdictions, there has been a wave of significant prosecutions or administrative decisions, huge monetary penalties, and in some countries, increasing numbers and duration of individual prison terms. Some perceive a rebalancing of the traditional comparative advantages of enforcement officials and defendants. Where once cartel participants could try to avoid the consequences of their conduct by keeping incriminating records and implicated employees out of the jurisdictions that would penalise their activity, that is less and less a workable strategy, as the enforcers have enhanced their efforts to reach offshore evidence and offshore defendants through aggressive new tactics, information sharing, and other forms of international cooperation. It is arguable that nothing has made a greater contribution to these results than the advent of amnesty, originally in the U.S. and now ubiquitous internationally.

Canada has been in the vanguard of the trend, as one of the few countries that have historically treated hard-core cartel conduct as serious criminal activity. Practices and procedures that a generation ago were unheard of in the defence of Canadian competition law cases have become commonplace. Canadians have had to adapt to coordinated, multi-jurisdictional efforts to penalize multi-national corporations and their individuals for international cartel behaviour. Tactics and strategies have shifted, most often without the clear guidance of Canadian judicial decisions. Legal principles have occasionally blurred, as teams of defence lawyers have had to accommodate their local legal positions and tactics to a multi-jurisdictional defence strategy that fits the needs of a global penal exposure.

Canadian enforcers have had the benefit of a tendency of defence lawyers to pull their punches, in response to aggressive enforcement positions, because their clients have been focussed on the need to resolve their cartel exposure globally, and are therefore litigation averse in any particular jurisdiction. The most prominent shift has seen plea negotiations essentially supplant the traditional standoff between prosecutors and defence counsel in the adversarial trial process in competition cases, as a result of the success of immunity policies in providing the prosecutors with first hand evidence of the offence. That tendency may be changing, however, as several contested proceedings have recently surfaced.

There have been a number of recent Canadian developments in which these influences are evident, and the purpose of the present paper is to outline some of the recent results of Canadian enforcement efforts, some developments and interpretations that seek to enhance Canadian enforcement capacity, and some interesting questions that would benefit from judicial interpretation or administrative guidance.

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<sup>1</sup> The author is a partner in McMillan Binch LLP of Toronto. Much appreciation is due to Casey W. Halladay and Lisa Parliament, both of McMillan Binch LLP, for their assistance in the preparation of this paper.

## 2. THE CANADIAN ENFORCEMENT ENVIRONMENT

The Canadian Competition Bureau, and its prosecutorial arm, the Competition Law Division of the Canadian Department of Justice, have had a very strong string of success stories from the mid-1990s. Between 1995 and 2001, convictions were registered against 29 corporations and 5 individuals under the general anti-cartel prohibition, section 45 of the *Competition Act*. Fines approaching C\$150 million were imposed. From 2002 to the present, 10 corporations and two individuals have been convicted in cartel cases, resulting in fines of nearly C\$10 million. Nine of those more recent corporate convictions occurred as a result of investigations that had been initiated much earlier, in the Sorbates<sup>2</sup>, Bulk Vitamins<sup>3</sup>, Choline Chloride<sup>4</sup> and Graphite Electrodes Inquiries<sup>5</sup>.

That list does not, of course, exhaust the recent work product of the Competition Bureau's Criminal Matters Branch. The Bureau reputedly has some 30 active inquiries underway, including continuing inquiries into many of the cartels in which convictions have already been obtained. On new matters, public attention has been devoted to a major inquiry involving an alleged plastics additives cartel, in which Canada participated in a coordinated search with American, European and Japanese enforcers.<sup>6</sup> Numerous other inquiries of great complexity, economic significance and international concern are under way.<sup>7</sup> On the domestic front, an enormous effort has been devoted since 2003 to an inquiry into the distribution of paper products in Canada,<sup>8</sup> a market involving some C\$2 billion in annual sales. Those proceedings involve extensive procedural litigation by the parties, and correspondingly heavy resource allocation by the Competition Bureau and the Department of Justice.

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<sup>2</sup> "Competition Bureau Investigation in International Price Fixing Conspiracy Leads to \$100,000 Fine" (18 December 2002), online: Competition Bureau <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02487e.html>>.

<sup>3</sup> "Competition Bureau investigation leads to over \$4-million in fines for international bulk vitamin conspiracies" (16 October 2002), online: Competition Bureau <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02437e.html>>.

<sup>4</sup> "Competition Bureau Probe Nets \$2.9 Million in Fines and Guilty Plea from Akzo Nobel Chemicals BV" (19 August 2003), online: Competition Bureau <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02711e.html>>; "Competition Bureau Investigation Nets \$600,000 Fine from Bioproducts Incorporated" (19 August 2003), online: Competition Bureau <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02712e.html>>.

<sup>5</sup> "Former UCAR Executive Robert Krass Pleads Guilty to Price-Fixing" (18 September 2003), online: Competition Bureau <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02723e.html>>.

<sup>6</sup> Certainly the most notable recent example of true multi-agency coordination is the simultaneous searches in multiple countries by the U.S. 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" (13 February 2003), online: EUROPA <[http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=MEMO/03/33|0|RAPID&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/03/33|0|RAPID&lg=EN)>; 19 April 2004); and see R.H. Pate, "Anti-Cartel Enforcement: The Core Antitrust Mission" (16 May 2003), online: U.S. Department of Justice <<http://www.usdoj.gov/atr/public/speeches/201199.htm>>.

<sup>7</sup> For example, the polyester staple inquiry: "Competition Bureau Nets \$1.5 Million Fine in Polyester Staple Fibre Price Fixing Conspiracy" (29 August 2003), online: Competition Bureau <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02715e.html>>.

<sup>8</sup> See e.g. *Canada (Commissioner of Competition) v. Cascades Fine Papers Group Inc.* (23 January 2004), 2004 FC 95, 2004 CarswellNat 334 (F.C.), online: eCarswell <<http://www.ecarswell.com>>.

The pace of investigation and disposition of these matters has seemed to lag, by comparison with the flood of earlier convictions, but the same perception might be applicable to the recent resolution rate of other enforcers. The lack of instant resolution may be attributable to the economic and legal complexity of some of the current matters facing the Competition Bureau. It might be due to a shift in tactics by defendants, some of which, as indicated, have begun to test the Bureau's proof of its allegations and its view of the law through the courts. That level of resistance may have something to do with the Bureau's aggressive approach to the issues in some of its cases. But overall, it is widely felt that the investigative resources and capacity of the Bureau are stretched, with only 47 investigative officers engaged in cartel and other criminal work. From all indicators, though, business appears brisk for the Criminal Matters Branch, but the most that can be said is that progress on many of its initiatives is pending.

### 3. IMMUNITY CONSIDERATIONS IN CANADA<sup>9</sup>

The Commissioner's Information Bulletin, "Immunity Program Under the *Competition Act*",<sup>10</sup> sets out both the circumstances under which immunity from prosecution will be granted and the co-operation required to maintain immunity throughout the life of a cartel investigation. The Bulletin (and its related FAQs)<sup>11</sup> reflects the current practice of the Commissioner and, by extension, the Attorney General. Most of the current international cartel investigations appear to originate in disclosures by immunity applicants. The Bureau's intake of immunity applications is difficult to assess, by comparison with the U.S. where enforcement officials regularly emphasise such facts. General perceptions, and the only public Canadian statement on the program, suggest that the intake level of both international and domestic cases has been something close to one application per month.<sup>12</sup> However, it is relatively routine for applicants under the U.S. Corporate Leniency Policy to make parallel and contemporaneous applications in Canada, and U.S. officials have indicated they are receiving up to three applications per month.<sup>13</sup> One might therefore posit an application rate comparable to, or slightly lower than, that of the U.S. Department of Justice

As with comparable programmes, the Bureau offers the first party to come forward an unequivocal promise of immunity from prosecution, in exchange for co-operation with a Bureau investigation, subject to certain requirements. The formal conditions are:

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<sup>9</sup> This section is largely derived from a paper by D. Martin Low and Casey W. Halladay for the IBA/Global Competition Forum Conference: "Competition Law and Policy in a Global Context", Seoul, Korea, (23 April 2004).

<sup>10</sup> Competition Bureau, "Immunity Program Under the Competition Act" (21 September 2000), online: Strategis, Industry Canada <<http://strategis.ic.gc.ca/pics/ct/immunitye.pdf>> ("Immunity Bulletin"). See also Competition Bureau, Frequently Asked Questions "Immunity Programme under the Competition Act" (November 27, 2001), online: Strategis, Industry Canada <<http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02312e.html>> ("FAQ's").

<sup>11</sup> See D. Martin Low, "The Competition Bureau's Immunity Program: A View of Policy and Practice in Canada" (April 2001) *Antitrust Report* at 2.

<sup>12</sup> Notes for an Address by Konrad von Finckenstein QC, Commissioner of Competition, to the Canadian Bar Association Competition Law Section Annual Meeting (20 September 2001) at 5, online: Strategis, Industry Canada <<http://strategis.ic.gc.ca/pics/ct/kvf0901.pdf>>.

<sup>13</sup> See Pate, *supra*, note 6.

- (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 Bulletin's requirements for a recommendation for immunity are:

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

Some specific immunity issues are becoming slightly uncertain in light of recent developments, with the termination, instigation and cooperation aspects of the immunity requirements implicated in a number of emerging cases. So has the "first in" criterion, the fundamental commitment of the programme, which promises immunity to the party that is the first to arrive at the enforcer's door.

The Canadian program clearly reflects the "first-in" criterion that is now endemic internationally. It is therefore important to emphasise that this requires the applicant to be the first to approach the *Canadian* competition authorities. The Immunity Bulletin is clear that being first in another jurisdiction will *not* result in any favourable treatment in Canada.<sup>14</sup> There have been two cases in which the party that obtained amnesty as the first to apply in the U.S. was not at the head of the queue in Canada; each corporation was required to plead guilty in Canada and subjected to significant fines.<sup>15</sup> In cases where Canadian exposure is clear-cut, those examples should not recur, due to the specificity of the Canadian policy.

### ***Marker Practice***

Sometimes, though, a party's exposure to Canadian criminal liability is not factually or legally clear. In such cases, the development of a so-called "marker" practice may

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<sup>14</sup> Immunity Bulletin, *supra* note 10 at 5 (section G, item 31).

<sup>15</sup> See "Federal Court Imposes Fines Totalling \$88.4 Million for International Vitamin Conspiracies" (22 September 1999), online: Competition Bureau <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02712e.html>>; and see "Competition Bureau Investigation Nets \$600,000 Fine from Bioproducts Incorporated" (19 August 2003), online: Competition Bureau <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02712e.html>>.

still produce disparate immunity outcomes, from one jurisdiction to another. That possibility brings into focus some of the practical concerns that must be confronted by an amnesty applicant, when it tries to cover its global exposure for a global cartel.

A party that decides to withdraw from a cartel and cooperate with competition authorities is under significant pressure to be the first to apply, in every jurisdiction where it may have any penal exposure. Pragmatically, recognising reality in such cases, enforcement authorities in the United States and Canada have adopted the practice of accepting a “marker”. If a party is reasonably certain that an offence has been committed, but is not yet able (due to the state of its internal investigation) to substantiate the offence or to produce (or obtain) all relevant evidence, it may preserve its place as “first in” by requesting an immunity marker. Summarily, the party can approach the authorities informally to ascertain if immunity is available, and if so, to request a marker, or a period of time to meet the requirements for its immunity application, in order to preserve its place in the immunity queue. If it is the first to give notice of its intent to come in, it will be given a limited time to fulfill the application requirements of the Canadian (or U.S.) programmes. But no criteria have been published for this practice, and although some general principles may be evolving, the administration of the marker practice seems to depend on a case-by-case analysis. The formulation of policy in an area of practical uncertainty would be highly desirable.

Not unreasonably, the enforcement authorities will, if they are prepared to grant a marker at all, expect very expeditious action to perfect the full immunity application. By giving a marker, the enforcement agency has preserved the party’s status, but that excludes other potential applicants from applying, as long as the marker subsists. It is not clear whether, and if so, when and on what grounds, the marker holder could be displaced by another applicant, which may have better evidence or less culpability but was not the first to call. In addition, pending fulfillment of the marker and completion of the immunity application, the enforcement agency cannot effectively move forward. It has launched an enforcement procedure that may require immediate action to preserve evidence held by other parties or to investigate on-going anticompetitive activity, but is frozen while the marker holder is preparing its full immunity application. To avoid potential prejudice to the investigation, the marker holder will be under severe time constraints, in the jurisdiction that is holding its place in the race. Fairness to others, as well as the integrity of administration and effectiveness of an investigation, dictate that the party with the marker must move quickly. But is there a standard?

In the absence of formal guidance on markers, something in the order of 30 days to present the initial application might seem realistic for the applicant and tolerable for the enforcers. Given the considerable complexity and covert nature of most cartels, that does not seem exorbitant. But it is not at all clear, in practice, that many Canadian marker holders have been able to meet that timeline, a factor that has given rise to some signs of enforcement impatience. However, in dealing with a typical international cartel, it is difficult to be clear-cut or even to provide any general timeline for fulfillment of a marker.

In the nature of things, when a cartel comes to light and counsel for such a party is initially engaged, an intense and enormously urgent effort is necessarily devoted to an internal

investigation of considerable difficulty. The defence will naturally concentrate on getting prepared to proceed in the different places where the party's potential liabilities are greatest.<sup>16</sup> Not all the information that is necessary to support the application will be readily at hand, either because of the delay and difficulty of obtaining and communicating unequivocal instructions from corporate decision makers, the frailty of memory, the lack of cogent supporting documentation, or the quality of cooperation of key individuals. That is particularly so in Canada, where the offence demands not only proof of an agreement to engage in anti-competitive activity, but also an evaluation of the economic effects of the conduct. In practice, the party with the marker may simply be unable to meet the expectations of all enforcers in a tight time frame, in its need to move forward first, typically, in the U.S. or the EU. In multi-jurisdictional matters, the difficulty for the company and its lawyers is compounded by the indivisibility of the lawyers and other individuals who have the carriage of the matter, multiplied by the different degrees of exposure and the factual and legal ambiguities that they may face in the different places where the cartel operated. In these circumstances, where fairness, investigative efficiency and enforcement coordination intersect, the practice standard that might appear reasonable in isolation - or to meet the exigencies of a single enforcer - may be quite unrealistic in practice.

There is an enormous incentive for the Competition Bureau - like other enforcers - to encourage parties to take the initiative as early as possible, recognising that immunity applications are its primary source of new case intake. The marker practice facilitates that objective. While granting a marker is fair treatment for the first party to recognize and accept its responsibility in Canada, it is susceptible to strategic practice. Clearly, the invariable requirement that the applicant must terminate its participation in the cartel, if taken literally, may provide an important signal to others that the race for immunity - or the shredder - is on. The Canadian insistence that the immunity applicant must come forward first in Canada, without regard to its status in other jurisdictions is entirely reasonable, but it may lead to unnecessarily uncoordinated outcomes. If another party learns about initiatives taken by an amnesty applicant in other jurisdictions, it may apply for a marker in Canada, while the amnesty applicant abroad is perfecting its position with another enforcer and trying to ascertain whether, and if so, how the conduct applied to Canada.

Or, if a marker has been given in Canada and elsewhere, the exigencies of other enforcers may have the result that progress in Canada may be retarded. In these circumstances, there may be a significant potential for delay by the beneficiary of the marker. If that occurs, other parties may argue that the marker holder is not meeting its obligations under the Immunity Bulletin,<sup>17</sup> and that the protection of the marker should be withdrawn. Since the grant of a marker blocks an immunity application by others, it is unacceptable for the marker holder to delay in providing the requisite information and evidence to the Competition Bureau, if it has

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<sup>16</sup> D. Martin Low QC, Julian M. Joshua and Gary R. Spratling, "International Cartels, International Exposure: How to Contain the Pain", *Cartels 2001: Getting the Fine Down*, Global Competition Review (London: 2001).

<sup>17</sup> Paragraph 16 of the Immunity Bulletin requires that "[t]hroughout the course of the Bureau's investigation...the party must provide complete and timely cooperation", and paragraph 25 confirms that failure to comply may result in revocation of immunity. Immunity Bulletin, *supra* note 10.

any practical choice in the matter. Avoidable delay is equally unacceptable, because it may prejudice the Bureau's investigation. It does not follow that the marker holder should be penalised for delay and lose its marker, if it is squeezed between two agencies with competing agendas. There is a strong countervailing concern at the outset of an investigation that excessive pressure not be placed on the marker-holder, in order to avoid jeopardizing a proper internal investigation of the conduct. But the potential for competing demands by different enforcers may provide a plausible rationale for a party that may wish - or in the interests of factual or legal certainty, need - to go slowly. Ultimately, in such cases, one of the enforcers may become concerned about possible pretextual conduct, in the absence of clear rules and close coordination. The withdrawal or revocation of a marker, once granted, would be a controversial decision. It should only occur on clear and indisputable grounds, in the interests of two of the imperative requirements of the immunity program: certainty and utmost good faith in decision-making. This is a situation that cries out for careful coordination between enforcement agencies and the marker applicant, as well as the articulation of clear policy guidance by the agencies that have adopted the marker practice.

### ***The Criteria for Revocation***

A recent case in the United States has demonstrated the need for better guidance, not only in the area of markers, but also as to the consequences of non-compliance with the Immunity Program.<sup>18</sup> It is unambiguous in both Canada and the United States that an applicant's responsibilities do not end once its immunity application is granted.<sup>19</sup> Stolt-Neilsen announced on March 22, 2004 that its conditional amnesty for participation in the ocean tanker cartel had been revoked by the Department of Justice. The DOJ issued a press release the same day, which did not mention Stolt-Neilsen, though it was certainly in response. The government release simply reiterated that a party is required to "meet certain requirements and make accurate representations to the [Antitrust] Division" and that the Division "verifies the representations of the corporate leniency applicant".<sup>20</sup> No further detail has been provided, although a recent statement made by Scott Hammond, Director of Criminal Enforcement at the Antitrust Division of the U.S. Department of Justice, indicates that the decision was an objective application of the clear conditions of the DOJ's policy. He also stated that when the facts in that case become public, the conduct that led to the decision would be apparent to all observers.<sup>21</sup>

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<sup>18</sup> See, e.g., *Global Competition Review*, "DOJ in Leniency Shock" (26 March, 2004), online: [Global Competition Review Homepage <http://www.globalcompetitionreview.com/news/news\\_item.cfm?item\\_id=1665>](http://www.globalcompetitionreview.com/news/news_item.cfm?item_id=1665), which discusses the recent decision by the U.S. Department of Justice to terminate the immunity granted to Stolt-Nielsen, in the ocean tanker cartel investigation, for making "false representations".

<sup>19</sup> Immunity Bulletin, *supra* note 10 at 5 (section F, items 25-27). A provisional guarantee of immunity ("PGI") can be withdrawn where the applicant does not comply with all of its ongoing obligations (most notably, "complete and timely co-operation" and full, frank and truthful disclosure of *all* offences).

<sup>20</sup> See "Justice Department Statement Regarding Antitrust Division's Corporate Leniency Program" (22 March 2004), online: U.S. Department of Justice <[http://www.usdoj.gov/opa/pr/2004/March/04\\_at\\_176.htm](http://www.usdoj.gov/opa/pr/2004/March/04_at_176.htm)>.

<sup>21</sup> Scott Hammond, the Director of Criminal Enforcement of the U.S. Department of Justice, "Roundtable Conference with Enforcement Officials" (ABA Antitrust Section Spring Meeting, Washington DC, 2 April 2004), online: U.S. Department of Justice <<http://www.usdoj.gov/atr/public/speeches/203088.htm>>.

However, until that time, there may be some uncertainty for the advisors of companies or individuals who may be admitted to the U.S. or Canadian programmes, if there are questions about the timeliness or quality of their cooperation. Nor does it provide clarity as to the precise implications of the requirements, in Canada's case, of paragraph 16 of the Immunity Bulletin to parties that may be considering an immunity application. While the ground rules seem conceptually comprehensible, there is some room for debate with criteria like "complete and timely" cooperation, disclosure of "any and all" offences in which it may have been involved,<sup>22</sup> or evidence that may be "available to or under the control" of the party with affiliates abroad. Imprecision is unhelpful, in a context where the Competition Bureau's otherwise reasonable demands may be in competition with the requirements of another enforcer and the exigencies that confront an applicant that is implementing a global immunity strategy. Undoubtedly, close communication with the Competition Bureau and the other enforcer may resolve uncertainty when it arises in any given case,<sup>23</sup> and in all probability, good faith efforts by the immunity applicant to meet broadly sensible duties of cooperation would not be repudiated without clear cause.

But potential applicants are invariably interested in clarity and predictability going in, and other criteria of disqualification may be very hard to assess in advance. An example might be the disqualification of the instigator or ringleader of a cartel. When a cartel involves more than one highly influential participant, the ringleader criterion may only be capable of evaluation subsequent to the provision of the applicant's self-incriminating evidence and the other material that comes to light in the course of the inquiry. As the immunity applicant has provided that evidence under an inducement - a provisional grant of immunity - there might be serious issues of voluntariness of a corporate or individual "confession", if immunity were revoked on this ground. To date, in North America, there has been no public case in which immunity was withheld or revoked on this ground, and it is predictable that any such decision would be made only in the most unequivocal of circumstances. Nonetheless, it is presently very difficult to give reliable advice to clients that may have concerns about cartel leadership. From the enforcement perspective, if it was ever in doubt, the Stolt-Neilsen decision makes it clear that participants in these immunity programmes will be held to strict compliance with their obligations. While that is essential to the integrity of the programmes, it puts an increasing premium on their clarity and predictability. Pending public clarification of the Stolt-Neilsen circumstances, there will be some uncertainty, both for parties that have already been admitted to the U.S. or Canadian program and those who may be considering an application.

But the stakes remain essentially the same. 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 to participate in the illegal venture - they face a pivotal decision.

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<sup>22</sup> There has been long standing uncertainty about whether this applies to non-competition offences. See FAQ's *supra* note 10, where it states that "[i]t is the Bureau's view that as a condition for obtaining immunity, paragraph 16(a) requires the immunity applicant to disclose all criminal anti-competitive behaviour contrary to the *Competition Act* relating to the product for which immunity is sought." The FAQ's go on to provide an example of the type of behaviour intended to be caught by this provision.

<sup>23</sup> Immunity applicants will normally be asked to provide a waiver of confidentiality to the enforcers, and this would normally permit the kind of communication that may be needed to sort out competing priorities.

Whether the corporation should contact authorities with an offer to cooperate 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 considerations that have been discussed here are no more than issues of law and practice that have arisen in the administration of a remarkably effective enforcement tool, the immunity or amnesty programs. But they are, again, issues of certainty on which the fairness, effectiveness and integrity of the programs depend.

#### 4. RECENT CANADIAN JURISDICTIONAL GAMBITS<sup>24</sup>

##### *Canadian Subject-Matter Jurisdiction*

Canada traditionally has had a strong presumption against the extraterritorial application of criminal laws, a policy approach that appears to be evolving quite significantly in the Competition Bureau's recent practice. At common law and under Canada's *Criminal Code*, criminal jurisdiction is based on the principle of territoriality: a Court has authority to try an offence only if it is committed in Canada.<sup>25</sup> 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.<sup>26</sup> But Parliament has created only 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 is relevant to cartel enforcement because it specifically grants jurisdiction to a Canadian court in respect of foreign conspiracies to commit a criminal offence in Canada.<sup>27</sup> Other examples of Canadian extraterritorial jurisdiction have been 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.<sup>28</sup>

The *Competition Act*<sup>29</sup> 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, where the 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. That might be an incontestable ground of subject-matter jurisdiction in the United States, but there has been no Canadian judicial decision in which this jurisdictional question has been confronted in an

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<sup>24</sup> This section of the paper is derived from papers by the author, "International Cartel Enforcement: The Limits of Personal Jurisdiction", (The ABA International Cartel Workshop, New York City, February 5 - 6, 2004), online: McMillan Binch <<http://www.mcmillanbinch.com/AboutUs.aspx?Section1=AboutUs&Section2=PublicationPopup&TypeID=1&ID=8dcbae89-1c30-4e61-9789-25de181c915f>>; and by A. Neil Campbell and J. William Rowley QC, "Jurisdiction and Litigation Developments in Canadian Competition Law," 45th Annual Practising Law Institute, May 2004.

<sup>25</sup> 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).

<sup>26</sup> *Terry v. The Queen*, [1996] 2 S.C.R. 207 at 215 (S.C.C.).

<sup>27</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 465(4).

<sup>28</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 7.

<sup>29</sup> *Competition Act*, R.S.C. 1985, c. C-34, s. 45(1).

international cartel context. Nor has the application of section 465 of the *Criminal Code* to section 45 of the *Competition Act* (the key cartel offence) ever been judicially determined in that context.<sup>30</sup> 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 most of those cases, however, there was specific evidence that the participants directed their minds and focussed their agreements on the Canadian market and Canadian customers, and then carried out the offence in Canada through affiliates or distributors. In those circumstances, it appears that the parties simply chose not to test the jurisdictional issue. But it must be assumed that the judges that accepted these 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.

In *R. v. Libman*, the Supreme Court affirmed that illegal activity with extraterritorial elements that had a “real and substantial connection” with Canada is subject to trial in Canada.<sup>31</sup> That adjustment of the common law rules on the territorial subject-matter jurisdiction of the Canadian courts seems reasonable and pragmatic, in an age of easy travel and global commerce. However, it should be noted that *Libman* was a case where part of the activity took place within Canadian territory and the victims (of fraudulent securities sales) were located abroad. The courts have not assessed the reverse scenario, of finding Canadian subject-matter jurisdiction where foreign conduct affects Canadian victims, but without any other local activity in furtherance of the conspiracy.<sup>32</sup> However, the Competition Bureau and the Competition Law Division appear to have moved to the view that a global conspiracy to fix prices or allocate markets 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 court. 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 U.S. courts, in cases like *Nippon Paper*<sup>33</sup> and *Hartford Fire Insurance*.<sup>34</sup> There has been no public articulation of the precise grounds of the Bureau’s legal position on this point. 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. 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.

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<sup>30</sup> 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.

<sup>31</sup> *R. v. Libman*, [1985] 2 S.C.R. 178 (S.C.C.), particularly at 212. *Libman* might, though it is by no means clear, be a legal basis for the assumption of jurisdiction in the cases mentioned above: whether the mere fact that sales of the cartelised product were made in Canada remains an open point in Canadian law.

<sup>32</sup> For further discussion, see David Kent, Robert Wisner and Sandra Walker, “Northern Exposure: Prosecution of Non-Residents for *Competition Act* Offences”, (March 1999) *Competition Law* 293 at 294.

<sup>33</sup> *United States v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998).

<sup>34</sup> *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.

### *Personal Jurisdiction*

At common law, there is a strong presumption that jurisdiction lies only over a person present within the jurisdiction of the court. In Canada, a criminal prosecution is initiated by serving criminal process on a person within the territory of the court.<sup>35</sup> Such a summons must be served personally on an individual accused. A corporation may be served by delivery of a summons to the “manager, secretary or other executive of the corporation or a branch thereof”.<sup>36</sup> In either case, the rules of personal jurisdiction in the *Criminal Code* do not speak to the possibility of service *ex juris* on a person who is outside Canada.

The traditional rule that *ex juris* service cannot be used to establish personal jurisdiction in a criminal matter was confirmed in *Shulman v. The Queen*:<sup>37</sup>

“... 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.”<sup>38</sup>

While some foreign executives have submitted to the jurisdiction of the U.S. and/or Canadian courts and pled guilty to cartel offences, there are many others who have apparently chosen to leave their criminal exposure in North America outstanding. In a few of these cases, indictments have been issued and the individuals are formally treated as fugitives.<sup>39</sup>

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<sup>35</sup> 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 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 of Process Abroad*.

<sup>36</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s 703.2.

<sup>37</sup> (1975), 58 D.L.R. (3d) 586 (B.C.C.A.), aff’d (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 affected. At trial, the accused’s application for prohibition was accepted. Writing for the British Columbia Court of Appeal, Robertson J.A. dismissed the Crown’s appeal. The judgment does not disclose the basis on which a Canadian police officer undertook to effect personal service in a foreign country.

<sup>38</sup> *Ibid.* at 591.

<sup>39</sup> For example, Kazutoshi Yamada was indicted for participating in the Lysine cartel, but did not attorn to U.S. jurisdiction and remains an international fugitive. See S.D. Hammond, “The Fly on the Wall Has Been Bugged-Catching An International Cartel in the Act” (International Law Congress 2001, EU Competition Law, Dublin, Ireland, 15 May 2001), online: U.S. Department of Justice <<http://www.usdoj.gov/atr/public/speeches/8280.htm>>. Sir Anthony Tennant, a citizen of the U.K., has also refused to submit to U.S. jurisdiction after being charged in the Christies and Sotheby’s conspiracy. See S.D. Hammond, “A Review of the Recent Cases and Developments in the Antitrust Division’s Criminal Enforcement Program” (The 2002 Antitrust Conference: Antitrust Issues In Today’s Economy, New York 7 March 2002), online: U.S. Department of Justice <<http://www.usdoj.gov/atr/public/speeches/10862.htm>>.

In others, the status of the matter is undisclosed, particularly in Canada, where the absence of a limitation period for hard-core cartel conduct means that there is no pressure on a prosecutor to lay the charges. Similarly, a number of corporations, which remain of interest to the competition authorities from a subject-matter perspective, have not been prosecuted due to the inability to establish personal jurisdiction. There has, however, been recent consideration of alternatives to overcome this territorial limitation, in situations where Canadian subject-matter jurisdiction would arguably extend to an offence with extraterritorial elements and parties.

### *Service of Process through the Mail*

In *R. v. R.J. Reynolds Tobacco (Delaware)*,<sup>40</sup> the Crown prosecutors sent a summons from Ontario by registered mail to corporate defendants in the United States. The accused were non-resident corporations with no office or place of business in Canada. The summons was addressed to them at their office in the United States. The Crown argued that this was effective service on the accused corporation, because the *Criminal Code* incorporates the service procedures of a province, for the purposes of *Criminal Code* offences.<sup>41</sup> In the Province of Ontario, the *Provincial Offences Act* provides that service may be made on a corporation "... by mailing the summons by registered mail to the corporation at an address held out by the corporation to be its address...".<sup>42</sup> Neither provision says anything about whether or not the "address" of the corporation must be located inside Canada.<sup>43</sup> The argument was initially upheld - on a somewhat literal and formalistic analysis - that service on a corporation by registered mail did not involve serving the summons outside Ontario, despite the foreign address of the corporations concerned.<sup>44</sup>

On review, Gans J. decided that the mail service did not establish personal jurisdiction over the corporations concerned. He held that the procedure prescribed for service was distinguishable from its effectiveness, and that the mere incorporation of provincial procedures for personal service into the *Criminal Code* did not determine the geographical extent of the service that is authorised. He also concluded, in effect, that the authorisation of mail service for provincial purposes under provincial legislation did not determine the *effectiveness* of that service upon a corporation outside Canada for the purpose of a federal prosecution.

It appears that further appellate proceedings may be contemplated. Pending further review, it seems plausible to say, as Gans, J. did,

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<sup>40</sup> MacDonnell J., Ontario Court of Justice, October 17, 2000. An application for *certiorari*, to quash the decision, and for prohibition was granted by Gans, J., of the Superior Court of Justice: [2004] O.J. No. 548, February 9, 2004.

<sup>41</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 701.1.

<sup>42</sup> *Provincial Offences Act*, R.S.O. 1990, c. P-33, s. 26(4).

<sup>43</sup> Section 26 of the *Provincial Offences Act* does provide expressly for service *ex juris* on individuals by registered mail.

<sup>44</sup> He found that the act of service was accomplished by mailing the summons by registered mail, an act that was completed in Ontario. He specifically held that the foreign place of delivery was immaterial, because for service to be effective under Ontario law, there was no requirement to show actual delivery to the addressee.

“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.”<sup>45</sup>

Otherwise, however, the decision is relatively mundane, for a procedural point of such legal and policy significance in cross-border cases. The outcome to date then is to leave the status quo intact. The current decision withdraws a jurisdictionally aggressive tactic that might have been available to Canadian prosecutors to enable them to overcome the ability of foreign corporations to avoid Canadian jurisdiction and a risk of prosecution in Canada. Extended personal service seems most pertinent where a corporate participant in an offshore cartel does not do business in Canada, and in commercial terms is able to forego future involvement in Canadian activity. It seems that this was of particular interest to the Competition Bureau and the Competition Law Division, because of the high incidence of such parties in international cartel cases. Time will tell whether the courts will condone the extension of personal jurisdiction by mail in a criminal case.

### ***Personal Jurisdiction Through the MLAT***

The Competition Bureau’s lawyers have also, apparently, been considering whether to request the cooperation of Canada’s Mutual Legal Assistance Treaty (“MLAT”) partners to carry out personal service on corporate cartel participants, by serving a summons on the “manager, secretary or other executive officer of the corporation”<sup>46</sup> at locations within their territory. The theory is that the implementing legislation for Canada’s mutual legal assistance arrangements may provide the requisite statutory authorization for service of a summons abroad.

For example, Article II of the *Canada-United States Mutual Legal Assistance Treaty*<sup>47</sup> (“*Canada-U.S. MLAT*”) 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 a criminal *Competition Act* offence. 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 a court would uphold such an approach without much more explicit language in the Treaty - or in domestic implementing legislation.

The enabling legislation for Canada’s MLATs is the *Mutual Legal Assistance in Criminal Matters Act*<sup>48</sup> (“*MLACMA*”). 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 has been changed to permit Canadian authorities to further advance their own domestic Canadian interests. The only *MLACMA* provision that addresses service abroad at

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<sup>45</sup> *R. v. R.J. Reynolds Co (Delaware)*, *supra* note 40.

<sup>46</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 703.2.

<sup>47</sup> *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, p. 953) (the “*Canada-U.S. MLAT*”).

<sup>48</sup> *Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c. 30 (4th Supp.).

all is section 39, which deals with how foreign service may be *proved* in a Canadian proceeding.<sup>49</sup> It does not mention the legal effect of “documents” (even if interpreted to include a “summons”) that have been served under Article 2, and it is arguable, following the *R. J. Reynolds* distinction between procedure and effectiveness,<sup>50</sup> that the legal effect of serving those documents has to be determined by other Canadian law. Arguably, 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, once again, much greater specificity would have been expected.

Canada should be concerned, on a broader policy level, about the longer term consequences of requesting MLAT service of a criminal summons - *i.e.* the prospect that, as a matter of reciprocity, it might in the future be required to serve “documents” initiating U.S. criminal proceedings on a Canadian company.<sup>51</sup> Moreover, even if Canada does decide to ask the United States to serve a corporation in the United States, it is by no means certain that the U.S. authorities would be receptive, considering the potential precedential effect for other countries and other circumstances. It might invoke the escape hatch under the *Canada-U.S. MLAT* in respect of actions that would adversely affect the requested state’s “important interests”<sup>52</sup> (as could Canada in a reciprocal scenario). As a result, it remains unclear whether MLAT service requests will be attempted and accepted, and if so, whether they would be vulnerable to legal challenge as exceeding the scope of the *Canada-U.S. MLAT* and the *MLACMA*.

### ***Personal Jurisdiction via Extradition***

In addition to possible extraterritorial personal service via mail or the MLAT, cartel participants now have to consider the risk that individuals and corporate representatives may be brought by compulsion within the territory of Canada or certain other jurisdictions through extradition. To date, extradition has only occasionally been invoked by Canada and the United States in competition cases.<sup>53</sup> Although such matters have not proceeded to the stage of

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<sup>49</sup> *Ibid.* at 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.”

<sup>50</sup> *R. v. R.J. Reynolds Co. (Delaware)*, *supra* note 40.

<sup>51</sup> While the extraterritorial enforcement of the *Sherman Act* appears less controversial than in the mid-1980s when legislation was adopted by Canada specifically to allow such U.S. jurisdiction to be blocked (*Foreign Extraterritorial Measures Act*, R.S.C. 1985, c. F-19), it might continue to be a concern in certain circumstances. More importantly, the Canadian Departments of Justice and Foreign Affairs may have significant concerns with respect to other U.S. offences, such as prohibition of trade with countries like Cuba.

<sup>52</sup> *Canada-US MLAT*, *supra* note 47, Article V.

<sup>53</sup> An example is the *Thomas Liquidation* case (see Canadian Competition Bureau Press Release, “Thomas Liquidation Inc. Fined \$130,000 for One Count of Misleading Advertising Under the Competition Act” (7 February 1995), online: Competition Bureau <<http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct00119e.html>>). 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. 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. The individual waived his right to an extradition hearing, came to Canada and pleaded guilty to the offence. (The individual did not plead in his personal capacity, but on behalf of the corporate accused.)

litigation or judicial decision in either country, there are many a number of substantive and procedural issues that might arise in respect of an extradition request derived from an international cartel investigation.<sup>54</sup>

If extradition is successful, personal jurisdiction will be established over the individual who is extradited to Canada. While a corporation is not directly amenable to extradition, the extradition of a corporate employee might indirectly allow for service of criminal process if the individual is a senior executive (“manager, secretary or other executive officer”<sup>55</sup>) through whom jurisdiction over a company can be established by service of a summons when they are present in Canada. However, there is case law in other contexts that concludes that the officer who is in Canada must be shown to be present on the business of the company, for corporate service to be effective.<sup>56</sup> That premise would appear not to be fulfilled in the case of a person who has been extradited to Canada for the purpose of trial for a specific cartel offence.

The stakes for extradition in competition law investigations have recently increased. Until 2003, extradition was really only a plausible threat as between Canada and the U.S. Individuals who were in a position to remain outside North America could avoid serious exposure, because few other countries had laws that established criminal penalties for cartel offences. Since the entry into force of the *Enterprise Act*<sup>57</sup> in the U.K., however, executives who are wanted in Canada and/or the U.S. have become liable to extradition from the U.K. for cartel activity engaged in after the entry into force of the British legislation. That exposure applies not just to British residents, but also to any person who may be physically present in the U.K., however briefly.<sup>58</sup> If the emerging international consensus on the harmful effects of cartels results in additional jurisdictions adding criminal penalties, extradition will become a more important component of jurisdictional repertoire of competition law enforcers.

### ***Indirect Jurisdiction over Canadian Corporations***

The *Competition Act* contains two potentially powerful mechanisms by which Canadian affiliates of foreign companies can be used as evidence-gathering conduits and prosecution targets in international cases. Each has been the focus of recent efforts to enhance the reach of the Canadian competition authorities.

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<sup>54</sup> For a more extensive overview, see the author’s paper, *supra* note 24.

<sup>55</sup> See *Criminal Code*, R.S.C. 1985, c. C-46, s 703.2, discussed *supra*.

<sup>56</sup> While there is no jurisprudence under the *Criminal Code* dealing with circumstances in which an executive officer is present in Canada, jurisprudence 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.).

<sup>57</sup> *Enterprise Act 2002*, U.K. 2002, c. 40, ss. 188-190.

<sup>58</sup> As with Canada and the U.S., it is not just a matter of a decision not to go to the U.K. itself: a person wanted by the U.S. or Canada will not be able to transit at London airports without risk of being arrested, even if their presence is the inadvertent result of a diverted aircraft.

## *Evidence Gathering*

The *Competition Act* contains a broad authority to obtain court orders for production of documents, responses to written interrogatories, and depositions of individuals under oath.<sup>59</sup> With respect to documents located outside the jurisdiction, a court may also order a corporation to obtain and produce responsive items from its foreign affiliates:

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 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.<sup>60</sup>

This provision does not directly compel the foreign affiliate to subject itself to Canadian jurisdiction. However, the Canadian company will be exposed to potentially significant penalties for breach of the order if it does not obtain and produce the documents required. It remains to be seen how a court would adjudicate liability and sanctions in a contempt proceeding where the Canadian corporation is a subsidiary with no practical or legal leverage to force an unwilling affiliate to turn over required documents. But compliance with an order is a matter of strict liability, and one should not assume that penalties would be light, if breach of such an order occurred.<sup>61</sup>

The rationale for subsection 11(2) is clear, in the context of international cases where the Canadian company will often simply import and distribute products manufactured (and priced) by a foreign affiliate that may have been party to an international cartel. That clearly contemplates enterprise-wide exposure, without much regard for the separate legal personality of related entities. However, in some recent cases (not yet publicly reported), the Competition Bureau has applied subsection 11(2) against Canadian companies which are not involved in the distribution of the products of the foreign affiliate that are the subject of the investigation.<sup>62</sup> Since section 11 does not specifically advert to this type of scenario, a challenge to this broadened approach to extraterritorial evidence gathering may well be forthcoming.

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<sup>59</sup> *Competition Act*, s. 11.

<sup>60</sup> *Ibid.* s. 11(2).

<sup>61</sup> Section 65(1) of the *Competition Act* sets out the penalties for contravention of a section 11 order: a fine not exceeding \$5,000 or to imprisonment for up to two years. Even where the corporation is not convicted, the directors may be individually liable: 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.

<sup>62</sup> 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.

### ***Foreign-Directed Conspiracies***

The substantive analogue to subsection 11(2) is section 46 of the *Competition Act*, which 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.<sup>63</sup>

One of the controversial features of this provision is that it is 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. It remains an undecided question whether this departure from the fundamental requirement of *mens rea* as an essential element of criminal liability would withstand a challenge. Other issues of interest under section 46 relate to guilty pleas that have ignored the fine cap for the principal conspiracy offence in section 45 of the Act, and the potential application of section 46 to unaffiliated companies.

### ***Unlimited Fines under Section 46?***

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.<sup>64</sup> This regularly occurs in plea negotiations, and in two instances, parties have agreed to plea bargains of this sort.<sup>65</sup> However, that outcome remains, in

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<sup>63</sup> *Competition Act*, s. 46(1). 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 is proposing amendments that would replace this competitive effects test with a *per se* prohibition of a defined list of “hard-core cartel” activities: see *2003 Discussion Paper* at 13-16. 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.

<sup>64</sup> *Competition Act*, s. 45(1).

<sup>65</sup> See *R. v. UCAR Inc.* and *R. v. SGL Carbon AG*, summarized on the Competition Bureau’s chart of Penalties Imposed by the Courts, online: Competition Bureau <[http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/h\\_ct01709e.html](http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/h_ct01709e.html)>.

essence, an open judicial question. 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, cannot exceed the maximum fine that could be imposed on a domestic or foreign company on the *mens rea* offence. Moreover, even in the absence of an implied legal restriction on the penalty that could be imposed under section 46, it is difficult to rationalise the imposition of a fine under section 46 that exceeds the C\$10 million cap for the substantive offence which it is designed to replace. Finally, like section 45 itself, multiple counts might be laid under section 46, in any case where the prosecution might believe that proper sentencing considerations would justify a fine over the C\$10 million limit of section 45.

### ***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. Once again, the Canadian competition authorities have used the absence of specific language (*i.e.* reference to “affiliates”) in the provision to argue for a broader application to other, unrelated parties. In a number of recent investigations they have asserted that a 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 from the foreign party and had no equity or other corporate connection to the offshore supplier. This seems to be a harsh position in the case of distributors that had no knowledge, or reason to suspect, that they were purchasing price-fixed goods. However, the suggested outcome is the result of interpreting the language of the section very literally and very broadly and not, as is the general rule of interpretation of criminal law, most favourably to the accused. It is not at all clear that simply passing on the price established by a price-fixing supplier constitutes the implementation of a directive or that the supplier is necessarily in a position to direct or influence the Canadian company by setting such a price. One might also argue that, where the distributor is a separate legal entity operating at arm’s length from the supplier, the theory that section 46 applies would suggest that the parties to a distribution relationship are necessarily engaged in price maintenance, itself an offence under section 61 of the *Competition Act*, any time a foreign supplier increases its prices to the distributor, where the latter passes on the increase. Representatives of the Bureau are not convinced by these objections, from all appearances, and so this is another issue that might require a litigated determination.

## **5. PENALTIES: EXPORTS AND THE EFFECT OF PRIOR CONVICTIONS**

### ***The Calculation of Penalties: Do Exports Count?***

Canada has no specific formulation of the manner of calculating the fine to be imposed on a party that is convicted of a hard-core cartel offence. There is nothing comparable to the U.S. Sentencing Guidelines, which at least give the appearance of a relatively precise and standardised formula for fine calculation. Canadian criminal courts depend on a “fundamental principle” of proportionality in sentencing<sup>66</sup> and on the guidance offered by sentencing decisions

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<sup>66</sup> See section 718.1 of the *Criminal Code*.

in comparable cases.<sup>67</sup> The gist of the most recent (though uncontested) cases has been recognition that the volume of affected commerce is a very significant factor in levying penalties for cartels and other economic offences. Using a proportion of sales to measure the fine seeks (1) to ensure that the penalty will be more than a licence to offend, by taking away potential profits, and (2) to generate some confidence that the penalty is commensurate with the economic harm caused by cartels. Successive Courts have adopted the premise that a starting point for the imposition of fines in cartel cases, in the absence of any particular aggravating or mitigating factors, has been a fine level of around 20% of sales in Canada during the entire duration of the cartel. There has not been any economic or judicial analysis of the assumptions behind the proxy for harm that this represents, and fines of that magnitude or greater have been routine, despite the invariable Canadian judicial repudiation of fine calculation as a “mathematical formula.”<sup>68</sup>

Canadian enforcers have recently taken the position, in cartel matters as yet unresolved, that export sales from Canada should be included in determining the relevant volume of commerce for Canadian sentencing purposes in international cartel cases. While their approach does not specifically rely on *Libman*<sup>69</sup> for justification, it can only derive from an assertion that the Canadian courts have subject-matter jurisdiction over the export aspects of an offence. That seems intellectually at odds with the policy underlying subsections 45(5) and (6) of the *Competition Act*, the “export cartel” shelter from prosecution. Moreover, that posture seems inevitably destined to result in “double counting,” (or double jeopardy) in cases where the party is exposed to the imposition of penalties by other enforcement agencies, based on cartel activity and sales including imports, within their territory. That might seem self-evident, where the Canadian export sales are made to inter-company affiliates that are located in jurisdictions with active cartel enforcement regimes, such as Canada’s largest trading partners, the U.S. and the E.U. From a policy perspective, this approach would have the effect of Canadian authorities taking action against Canadian producers based on harm to foreign customers (whose interests can and generally will be looked after by their own authorities).<sup>70</sup> In addition, where cartel participants all participate in the Canadian market, some from plants outside Canada, this approach has the perverse result of penalizing the Canadian suppliers more harshly than co-conspirators that produced abroad and exported price-fixed products to Canada, if the enforcement agencies in other jurisdictions would not count exports in assessing penalties. A fuller analysis of the Bureau’s approach to the calculation of penalties in such cases would make a beneficial contribution to clarity and predictability, two essential components of negotiated, rather than litigated dispositions in cartel cases.

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<sup>67</sup> See, for example *R. v. Canadian General Electric Company Ltd. et al.* (1976), 15 O.R. (2d) 360 (H.C.); *Albany Felt Co. of Canada Ltd. et al. v. The Queen* (1982), 70 C.P.R. (2d) 36 (Que. C.A.), aff’d re sentence, 52 C.P.R. (2d) 204; *Canada v. Canada Pipe Ltd.* (1995), 64 C.P.R. (3d) 182 (F.C.T.D.).

<sup>68</sup> See *Canada v. Canada Pipe*, *ibid.*; *R. v. Canadian General Electric Co.* [1977] O.J. No. 509 (“I am far from implying that an appropriate sentence can be reduced to an arithmetic problem.”).

<sup>69</sup> *R. v. Libman*, *supra* note 31.

<sup>70</sup> It seems clear from both the “purpose clause” in section 1.1 of the *Competition Act* and the “export cartel defence” (s. 45(5) and (6)) to the conspiracy offence that Parliament was concerned about protecting Canadian, not foreign, customers. One might also ask if the approach being taken is consistent with the general theme of the Canadian position in its amicus brief in the U.S. Supreme Court’s consideration of *F. Hoffman-La Roche Ltd. v. Empagran SA*, Docket No. 03-724, Canadian brief filed February 3, 2004.

### *Does Recidivism Count?*

Two of the dispositions involving participants in the most recent cartel cases might have been affected by prior Canadian convictions, either directly or in a related company. Akzo Nobel Chemicals, B.V. (“Akzo”) was convicted in 1999 for its role in the international sodium gluconate conspiracy.<sup>71</sup> Rhône-Poulenc S.A. was convicted in Canada, also in 1999, for its leading role in the Vitamins cartel.<sup>72</sup> In 2003, Akzo and Rhône-Poulenc Biochimie SA (“Biochimie”) were convicted for cartel behaviour involving other products that had been ongoing at the time of the prior conviction.<sup>73</sup> The record in these cases has left the implications of prior convictions in the sentencing process somewhat opaque.

Under Canadian procedures, an Agreed Statement of Facts (“ASOF”) is filed with the Court prior to a guilty plea, to set out the factual admissions and other relevant issues on which the proposed conviction and sentence will be based. A prior conviction for a competition offence would presumably have been a highly relevant sentencing element, and a serious aggravating factor, and therefore something to be disclosed to the sentencing court. In the second *Akzo* case, the prior conviction was not mentioned in the ASOF or any other written record, although it is possible that it might have been disclosed to the Court in unrecorded oral statements in sentencing submissions. In the *Biochimie* matter, the ASOF did make an oblique reference to the point. But the ASOF stated only that Rhône-Poulenc SA, the former parent of Biochimie, had been convicted in the Vitamins case.<sup>74</sup> It is not clear if that allusion was meant to suggest that Rhône-Poulenc was legally responsible for the conduct of Biochimie at the time. But as apparently separate legal entities, it is not evident as a matter of law that Biochimie would necessarily bear the legal consequences of its *former* parent’s offence.

In *Biochimie*, an agreed fine of C\$500,000 was imposed, which informally appears to amount to about 29% of its stated Canadian sales over the nine-year conspiracy. In *Akzo* the accused was sentenced to a fine of C\$1.9 million, again by agreement, in respect of its Canadian sales of MCAA, and \$1 million in respect of choline chloride. That amounts to about

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<sup>71</sup> See “\$700,000 in Fines Paid by Akzo Nobel and Glucona for Price-fixing under the Competition Act” (23 July 1999), online: Competition Bureau <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct01556e.html>>.

<sup>72</sup> See “Federal Court Imposes Fines Totalling \$88.4 Million For International Vitamin Conspiracies” (22 September 1999), online: Competition Bureau <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct01581e.html>>. It is notable that Rhône-Poulenc was required to plead guilty in Canada despite having been the beneficiary of amnesty in the United States.

<sup>73</sup> See “Competition Bureau Probe Nets \$2.9 Million in Fines and Guilty Plea from Akzo Nobel Chemicals BV” (19 August 2003), online: Competition Bureau <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02711e.html>>; and “Rhône-Poulenc Biochimie S.A. Sentenced To \$500,000 Fine Following Competition Bureau Price Fixing Investigation” (27 February 2003), online: Competition Bureau <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02507e.html>>.

<sup>74</sup> The ASOF for Biochimie is accessible through a link in the Bureau’s Press Release, *ibid*. Biochimie was also convicted in the United States. There is, of course, no mention in the U.S. press release of the relationship between Biochimie and the former Rhône-Poulenc, which as noted obtained amnesty for its Vitamins cartel participation, online: U.S. Department of Justice <[http://www.usdoj.gov/atr/public/press\\_releases/2003/201284.htm](http://www.usdoj.gov/atr/public/press_releases/2003/201284.htm)>.

45% of its MCAA sales in Canada.<sup>75</sup> As a proportion of the relevant volume of commerce, neither the *Akzo* nor the *Biochimie* fine level is startlingly high, having regard to other penalties in the Bureau's enforcement record. Those fine levels do not obviously typify the kind of stingingly punitive and deterrent monetary penalty that might be expected in cases involving prior convictions.<sup>76</sup>

Clearly, other considerations may have been at play in the plea negotiation that led to these outcomes. There may have been cooperation by the parties with investigations into other, previously undisclosed offences, and credit for cooperation might have outweighed the sentencing implications of the prior convictions. *Biochimie* may have convinced the prosecutors that it should not be penalised for the prior conviction of its former parent, though if that were so, one might ask why the ASOF spelled it out. While recidivism is an obvious aggravating factor in sentencing, neither the available record nor the fine levels that were imposed suggest that the prior convictions increased these penalties to a significant degree. The silence or indirection of the materials filed, and the absence of any public representations on the issue, leave the impact of prior convictions a matter of ambiguity for future sentencing considerations.

It seems surprising, to say the least, that when dealing with their liability in 1999, neither Akzo nor Rhône-Poulenc apparently offered to cooperate with the Bureau (or, from what the public record discloses, the United States DOJ) in return for immunity on these subsequently prosecuted cartels. The cases both appear to demonstrate a failed opportunity to seek "immunity plus", under the Commissioner's policy on immunity. The circumstances seem analogous to the decision of Hoffman- La Roche, which apparently chose not to seek amnesty plus for its vitamins exposure when negotiating its liability for the citric acid cartel with the U.S. DOJ. There may have been many reasons for this, when Akzo and Rhône-Poulenc were resolving their outstanding cartel matters in 1999.

The Bureau's policy on immunity plus had not been explicitly and formally promulgated at that time; conceivably, the parties may not have been aware of the chance to resolve these other matters on very favourable terms. However, by 1999, the availability of amnesty plus (which would have exonerated these companies for liability for the second offence and provided a reduced penalty for the first) had certainly been made known in the United States, where the parties were involved in plea negotiations, and it was a common practice in Canada and widely known to Canadian practitioners at the time. Alternatively, the company and its advisors may not have known about the other cartel activity when settling the original offences. If they knew or suspected, they might not have been able to elicit the necessary evidence or cooperation from relevant individuals to substantiate a disclosure or clear admission of a serious criminal offence. Or, less charitably, they might erroneously have thought the other conduct would not come to light. Whatever may have happened, these cases, like that of *Hoffman-La*

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<sup>75</sup> Akzo had no Canadian sales of choline chloride. That offence included a market allocation agreement, which reserved the Canadian market to North American producers, and Akzo did not sell the product in Canada. It paid the same fine amount as BASF, another European party to the choline chloride agreement.

<sup>76</sup> See *R. v. Armco Canada Ltd.*, (1976), 13 O.R.(2d) 32, in which fines were imposed on parties with prior convictions that were dramatically higher than those for other members of the conspiracy.

*Roche*, suggests that a careful sweep of all possible areas of exposure for a company is a critical responsibility for the company's advisors, when a cartel is first uncovered. But the force of that view is diminished, if a prior conviction and the failure to disclose outstanding offences do not invariably lead to significantly aggravated penalties. The posture of the Bureau and the Canadian Department of Justice on this issue would benefit from clarity in their message.

## 6. CONCLUSION

Numerous issues of Canadian cartel enforcement law and policy are in play, at the present time. Few of them are of simple application. Some, in particular important aspects of immunity administration, may have an unpredictable effect on the most important generator of cases, and of consensual case resolutions, in the history of the *Competition Act*. The analytical grounds for emerging enforcement approaches are unarticulated, except in the discussion of specific cases, in negotiating ad hoc solutions to those cases. That might maximise the flexibility and leverage of the Bureau, in such cases, but it also engenders potential policy incoherence and it tends to diminish the willingness of parties to resolve matters without recourse to the courts, with the inevitable delays, risks and costs of contested proceedings. A systematic and conscientious effort to explain the posture of Canadian and other enforcers would be conducive to a more transparent and potentially even handed practice in Canada's handling of international cartel matters.