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**CARTELS / CRIMINAL ENFORCEMENT:
CANADIAN DEVELOPMENTS**

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I Introduction¹

International cartel enforcement has produced tremendous results in recent years. There has been a wave of significant prosecutions or administrative decisions, huge monetary penalties, and increasing numbers and duration of individual prison terms. Canada has been with the United States in the vanguard of these trends. Canada instituted an immunity policy at an early stage in the evolution of these now ubiquitous enforcement techniques and it has enjoyed great success, although some stress lines are beginning to emerge. Over the same period, Canada has made a gradual evolution towards US-style class and other private litigation as it applies to cartel cases; a development that is not yet widely appreciated at home or abroad. This paper outlines some recent enforcement trends and the significant increases in legal exposure for companies and individuals in Canada, the US and elsewhere resulting from these developments.

II Public Enforcement in Canada

The Canadian Competition Bureau, and its prosecutorial arm, the Competition Law Division of the Canadian Department of Justice, has 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, 15 corporations and two individuals have been convicted in cartel cases, resulting in fines of over C\$12 million. Nine of those more recent corporate convictions occurred as a result of investigations that had been initiated much earlier, in the Sorbates², Bulk Vitamins³, Choline Chloride⁴ and Graphite Electrodes Inquiries.

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, 23 of which originated with an immunity application under the Commissioner's Immunity Policy.⁵ Numerous other criminal cartel inquiries of great complexity, economic significance and international concern are under way.⁶ On the domestic front, an enormous

¹ The authors are members of McMillan Binch LLP of Toronto.

² "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>>.

³ "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>>.

⁴ "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>>.

⁵ Presentation by Colette Downie, Assistant Deputy Commissioner, Criminal Matters Branch, Competition Bureau, at the CBA National Competition Law Conference, September 23, 2004.

⁶ 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>> and the recent conviction of Morganite Canada and its parent, Morgan Crucible plc on cartel and obstruction charges, see "Morgan companies fined \$1 Million for Obstruction and Price-Fixing" (July 16, 2004), online: Competition Bureau <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02917e.html>>.

effort has been devoted since 2003 to an inquiry into the distribution of paper products in Canada, 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.⁷

Several new matters have also highlighted the extent to which Canadian enforcers are involved in cross-border investigations. In a major inquiry involving an alleged plastics additives cartel, Canadians participated in co-ordinated searches with American, European and Japanese enforcers.⁸ Last May, Canadian enforcers appear to have been involved in co-ordinated international enforcement action relating to investigations in the paper and forest products industry.⁹

Information Sharing

Barriers to international co-operation, particularly with the United States, have also lowered following a recent court of appeal decision that considered the thresholds for formal co-operation under the auspices of the *Canada-United States Mutual Legal Assistance Treaty*¹⁰ (“*Canada-US MLAT*”). In *Canada (Commissioner of Competition) v. Falconbridge*¹¹, 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 DOJ. A lower court issued the order; 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:

- 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

⁷ See e.g., *Canada (Commissioner of Competition) v. Cascades Fine Papers Group Inc.* (23 January 2004). Decision sealed.

⁸ 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>; 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>>.

⁹ “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” (26 May 2004) MEMO/04/123, online: <http://europa.eu.int/rapid/searchAction.do>.

¹⁰ *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-US MLAT*”).

¹¹ (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.

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 information 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 rejected 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.

III Immunity Considerations in Canada¹²

Canada was an early adherent to the amnesty concept that was developed by the US Department of Justice; but its first policy, adopted in 1994,¹³ was informal and unpublished, though highly successful. In the interests of certainty and predictability, the Bureau published its formal Information Bulletin, “Immunity Program Under the *Competition Act*” in September 2000.¹⁴ The Bulletin 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

¹² 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).

¹³ See H. Chandler, “Getting Down to Business: The Strategic Direction of Criminal Competition Law Enforcement in Canada”, March 10, 1994.

¹⁴ “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”).

investigation. The Bulletin (and its related FAQs)¹⁵ reflects the current practice of the Commissioner and, implicitly, the Attorney General. A majority of the current international cartel investigations appear to have originated in disclosures by immunity applicants. The Bureau's intake of immunity applications is difficult to assess, by comparison with the US, where Department of Justice officials regularly describe their intake data. General perceptions, and the only public Canadian statement on the programme, suggest that the intake level of both international and domestic cases was close to one application per month.¹⁶

As with comparable programmes in the US and elsewhere, 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. But some immunity issues are becoming slightly uncertain in light of recent developments, with the termination, instigation and co-operation aspects of the immunity requirements implicated in a number of emerging cases. So has 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 programme clearly reflects the "first-in" requirement 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 the first to apply in another jurisdiction will *not* result in any favourable treatment in Canada.¹⁷ There have been two cases in which the party that obtained amnesty as the first to apply in the US was not at the head of the queue in Canada; each corporation was required to plead guilty in Canada and subjected to significant fines.¹⁸ In cases where Canadian exposure is clear-cut, those examples should not recur, due to the specificity of the Immunity Bulletin on the point.

Marker Practice

Sometimes, though, a party's exposure to Canadian criminal liability is not factually or legally clear. A party in the US or elsewhere that decides to withdraw from a cartel and co-operate with competition authorities is under significant pressure to be the first to apply, in every jurisdiction where it may have any penal exposure. Pragmatically, enforcement authorities in Canada, like the Department of Justice in the US, 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 or otherwise) to substantiate the offence

¹⁵ See D. Martin Low, "The Competition Bureau's Immunity Program: A View of Policy and Practice in Canada" (April 2001) *Antitrust Report* at 2.

¹⁶ Notes from 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>>.

¹⁷ Immunity Bulletin, *supra* note 14 at 5 (section G, item 31).

¹⁸ 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>>.

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. If it is the first to give notice of its intent to come in, it will be given a marker for limited time to fulfil the application requirements of the Canadian programs generally, by providing a proffer of relevant information that can be provided. But no criteria have been published for this practice, and the administration of the marker practice seems to depend on a case-by-case analysis. The Commissioner of Competition has recently announced that the Bureau has decided to undertake a review of the Immunity Bulletin, and this is a very welcome development.¹⁹

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 preserves the party’s status, but excludes other potential applicants from applying for as long as the marker subsists. An important issue relates to the length of time that the marker may be held. Pending perfection of the marker and completion of the immunity application, the Bureau cannot effectively move forward. It will have launched an enforcement procedure that may require immediate action to preserve evidence held by other parties or to investigate on-going anti-competitive activity, but the investigation 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 Canada. Secondly, there is an issue of fairness to others who may wish to come forward. If there is undue delay, will the second party to seek a marker have to tolerate a delay by the marker holder that might affect its position, relative to other cartel participants, or could it seek to bump the initial party out of the first chair? It is simply 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. Both considerations dictate that the party with the marker must move quickly. But is there a standard?

In a recent statement, a senior manager in the Bureau’s Criminal Matters Branch indicated that while there is no fixed period of time to perfect a marker, the Bureau considers that most applicants should be in a position to move forward within 10 days of receiving a marker. The other rule of thumb is that the proffers should not take more than 30 days, even in the most unusual circumstances.²⁰ The Bureau understands that there is some risk of delay, but expects the party to advise in advance and to provide a justification, with the clear implication that if notice of delay or the reasons for it are found unsatisfactory, another party could be considered for immunity. Given the considerable complexity and covert nature of most cartels, 10 days seems tight and 30 days is certainly not exorbitant.

In dealing with a typical international cartel, it is difficult to be clear-cut or even to provide any general timeline for fulfilment of a marker with a proffer. Frequently, counsel for

¹⁹ See “Speaking notes for Sheridan Scott, Commissioner of Competition, Competition in a Dynamic Marketplace”, Canadian Bar Association Annual Conference on Competition Law (September 23, 2004) at 10, online: <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02950e.html>>.

²⁰ Colette Downie, *supra* note 5.

an applicant will be dealing with multiple jurisdictions simultaneously, as well as trying to ascertain the true facts with a reasonable degree of confidence. 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 US or the EU. In these circumstances, there may be a significant potential for delay by the beneficiary of the marker. If that occurs, the Bureau (and other potential applicants) may argue that the marker holder is not meeting its obligations under the Immunity Bulletin,²¹ and that the protection of the marker should be withdrawn.

The Bureau is beginning to exhibit signs of impatience about delays, apparently as a result of recent experience with the programme, and in particular, where it appears that a marker holder or immunity recipient is giving priority to agencies in other jurisdictions. Because the grant of a marker blocks an immunity application by other parties, it is obviously unfair for a marker holder to delay voluntarily in advancing its application for immunity. Avoidable delay is equally unacceptable, because of the risks to the Bureau's investigation. On the other hand, it does not follow that the marker holder should be penalised for delay and lose its marker if it is squeezed because of different investigating agencies with competing agendas. The concern is one that should be manageable by good communication, not only between the Bureau and the marker holder, but also among interested enforcement agencies. It seems evident that the issue is one that will require some careful policy consideration, as the Bureau's review unfolds.

The Criteria for Revocation

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 programme: certainty and utmost good faith in decision-making. It appears that a marker granted by Canada has been revoked in one recent instance, where the party that was granted "first-in" status ultimately acknowledged that it was unable to establish the commission of the offence in Canada.²² The Bureau withdrew the marker, after discussion with the marker holder, and granted the marker to a different party, which eventually perfected its application and was granted a provisional guarantee of immunity. This situation cries out for careful co-ordination 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.

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.²³ It is unambiguous in both Canada and the United States that an applicant's

²¹ Immunity Bulletin, *supra* note 14 at ¶16 requires that "[t]hroughout the course of the Bureau's investigation...the party must provide complete and timely cooperation", and ¶25 confirms that failure to comply may result in revocation of immunity.

²² Colette Downie, *supra*, note 5.

²³ 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>, 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".

responsibilities do not end once its immunity application is granted.²⁴ 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 almost certainly in response to its announcement. 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”.²⁵ No further detail has been provided by the DOJ or Stolt-Neilsen, although a recent statement made by Scott Hammond, Director of Criminal Enforcement at the Antitrust Division, 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.²⁶ More recent disclosures in civil proceedings suggest that the revocation may have resulted from continuing anti-competitive conduct by the companies involved, subsequent to the grant of amnesty.²⁷

If that were so, the propriety of the revocation might be readily recognised. But until all the facts are known, there is a degree of continuing uncertainty for the advisors of companies or individuals who may be admitted to the US or Canadian programmes. It is not yet clear if revocation might have resulted from concerns about the timeliness or the quality of co-operation. The case exemplifies the lack of perfect clarity as to the precise implications of the cooperation requirements for an amnesty or immunity holder that are set out, in Canada’s case, of paragraph 16 of the Immunity Bulletin. While the ground rules seem conceptually comprehensible, there is room for dispute about criteria like “complete and timely” co-operation, disclosure of “any and all” offences in which it may have been involved,²⁸ or evidence that may be “available to or under the control” of the party with affiliates abroad.

The Bureau has recently re-confirmed that it does not have a “decisiveness” filter that it applies to the evidence that must be provided by an immunity applicant.²⁹ Unlike the initial 1996 version of the EU Leniency Policy, which required the provision of “decisive

²⁴ Immunity Bulletin, *supra* note 14 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).

²⁵ 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>.

²⁶ 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>>.

²⁷ See Wall Street Journal, “Stolt Continued Known Cartel”, October 6, 2004, p. A10.

²⁸ There has been long standing uncertainty about whether this applies to non-competition offences. See FAQ’s *supra* note 14, 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*.” [emphasis added] The FAQ’s go on to provide an example of the type of behaviour intended to be caught by this provision. But if undisclosed, anti-competitive conduct by an applicant for immunity related to a different product range, the FAQs virtually invite it to game the immunity system, by withholding evidence of other offences under the *Competition Act*.

²⁹ Colette Downie, *supra*, note 5.

evidence”, the Bureau apparently only requires that the party be willing and able to provide all the evidence that it has. A potential area of ambiguity, however, is that the party must disclose an offence under Canadian law. If there is no admission of an offence under the law in Canada, there can be no grant of immunity. Consequently, the party must not only be confident that it has committed an offence, but also, that it has some evidence to support that legal conclusion. The Bureau and the Attorney General will not give your client a pass “just in case”, in circumstances where there is clearly an offence in other jurisdictions, but Canadian misconduct, as defined by the Canadian legislation, may be equivocal.

A further important clarification has provided by the Bureau regarding the requisite content of the proffer. There is an onus on an immunity applicant’s legal advisors to be clear about the precise basis of all elements of criminal liability in Canada. The Assistant Deputy Commissioner has now clarified that a proffer in Canada must address all elements of the Canadian offence. That specifically includes a presentation on the economic effects of the anti-competitive conduct in Canada, to cover the “undueness” element of the Canadian offence. Situations appear to have arisen where an immunity applicant relied only on the proffer that it delivered to other authorities, clearly covering the fact of an anti-competitive agreement, but failing to address the economic effects of the conduct. With some justification, the Bureau believes that an applicant must proffer information about the specific application of the offence in Canada. If this position is rigorously applied, then a frequent form of proffer, covering the parties and the “*per se*” character of the agreements in question, will no longer suffice in Canada. That will add an informational and legal dimension to the case to be presented in Canada, and this may again inject an element of complexity and delay, both for the applicant in managing relationships with multiple enforcers and for the Canadian authorities, in evaluating the application.

Potential immunity applicants are invariably interested in clarity and predictability going in. In addition to the previous elements of uncertainty, 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 which is common to most amnesty programs. 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 the ground of leadership. 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 unequivocal advice to clients that may have concerns about cartel leadership. For these and other reasons, the Bureau initiative to review its policy, to clarify the ground rules and to respond to problems that have arisen in the administration of the Immunity Policy, is probably one of the most pragmatically useful steps in the current Commissioner’s policy inventory.

IV Recent Canadian Jurisdictional Gambits³⁰

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 Competition 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.³¹ 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.³² 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.³³

The *Competition Act*³⁴ 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. That might be an unexceptional and incontestable ground of subject-matter jurisdiction in the United States, but there has been no Canadian judicial decision in which that jurisdictional question has been confronted in an 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.³⁵ 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 all 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 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

³⁰ This section of the paper is derived from papers by the author, including "International Cartel Enforcement: The Limits of Personal Jurisdiction", (The ABA International Cartel Workshop, New York City, February 5 - 6, 2004), online: McMillan Binch LLP Website - Publications <<http://www.mcmillanbinch.com>>; and from A. Neil Campbell and J. William Rowley QC, "Jurisdiction and Litigation Developments in Canadian Competition Law", 45th Annual Practising Law Institute, May 2004.

³¹ 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).

³² *Terry v. The Queen*, [1996] 2 S.C.R. 207 at 215 (S.C.C.).

³³ *Criminal Code*, R.S.C. 1985, c. C-46, s. 465(4).

³⁴ *Competition Act*, R.S.C. 1985, c. C-34, s. 45(1).

³⁵ 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.

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.

The Competition Bureau and the Competition Law Division 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*,³⁶ *Nippon Paper*³⁷ and *Hartford Fire Insurance*.³⁸ There has been no public 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. Nonetheless, there are indications that the issue may be litigated in pending proceedings.

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.³⁹ 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".⁴⁰ 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*

³⁶ *United States v. Aluminum Co.*, 148 F.2nd 416, (2d Cir. 1945).

³⁷ *United States v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998).

³⁸ *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.

³⁹ 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*.

⁴⁰ *Criminal Code*, R.S.C. 1985, c. C-46, s 703.2.

service cannot be used to establish personal jurisdiction in a criminal matter was confirmed in *Shulman v. The Queen*.⁴¹

While some foreign executives have submitted to the jurisdiction of the US 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, US indictments have been issued and the individuals are formally treated as fugitives.⁴² 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 formal 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 Co. (Delaware)*,⁴³ 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.⁴⁴ 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...".⁴⁵ Neither provision says anything about whether or not the

⁴¹ (1975), 58 D.L.R. (3d) 586 (B.C.C.A.), aff'g (1974) 52 D.L.R. (3d) 246 (B.C.S.C.). The accused in *Shulman* was personally served by a Royal Canadian Mountain Police officer in Australia for alleged Canadian income tax violations. Since the accused did not appear at his trial in Canada, the prosecution subsequently made a motion to proceed *ex parte*. The *ex parte* application was granted and the accused then applied for a writ of prohibition on the grounds that service was not properly 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.

⁴² 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 fine art auction 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>>. And in the electrical carbon case, the CEO of Morgan Crucible, was carved out of the corporate plea agreement with the DOJ and remains in the UK under US indictment.

⁴³ 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), 182 C.C.C. (3d) 126.

⁴⁴ *Criminal Code*, R.S.C. 1985, c. C-46, s 701.1.

⁴⁵ *Provincial Offences Act*, R.S.O. 1990, c. P-33, s. 26(4).

“address” of the corporation must be located inside Canada.⁴⁶ 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.⁴⁷

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 judicial consideration, in cross-border competition cases it seems plausible to say, as Gans, J. did,

“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.”⁴⁸

The outcome to date, then, is to leave the *status quo* intact. The current decision withdraws an 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. Time will tell whether the courts will condone the extension of personal jurisdiction by mail in a criminal case, without statutory amendment.

Personal Jurisdiction Through the MLAT

The Competition Bureau’s lawyers have also, apparently, been considering whether to request the co-operation of Canada’s partners in the Mutual Legal Assistance Treaty system for service of criminal process. The *Canada-US MLAT*⁴⁹ might be invoked to carry out personal service on corporate cartel participants, by asking the DOJ to serve a Canadian summons on the “manager, secretary or other executive officer of the corporation”⁵⁰ at US

⁴⁶ Section 26 of the *Provincial Offences Act* does provide expressly for service *ex juris* on individuals by registered mail.

⁴⁷ 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.

⁴⁸ *R. v. R.J. Reynolds Co.(Delaware)*, *supra* note 43.

⁴⁹ *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-US MLAT*”).

⁵⁰ *Criminal Code*, R.S.C. 1985, c. C-46, s. 703.2.

locations. The theory is that the implementing legislation for Canada's mutual legal assistance arrangements may provide the requisite statutory authorisation for service of a summons abroad.

Article II of the *Canada-US 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-US 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*⁵¹ ("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 authorise service abroad of Canadian criminal process by using the MLAT. The only MLACMA provision that refers to service is section 39, which deals with how foreign service of "documents" may be *proved* in a Canadian proceeding.⁵² It does not mention the legal *effect* of "documents" (even if interpreted to include a "summons") that have been served under Article 2 of the Treaty. It is therefore highly arguable, following the *R. J. Reynolds* distinction between procedure and effectiveness,⁵³ that the legal effect of serving a summons outside Canada has to be determined by other, more specific, Canadian law. Arguably, if MLACMA or the *Canada-US 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, legislative specificity would be required to effect such an important change in the law

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 US criminal proceedings on a Canadian company.⁵⁴ A request for assistance by Canada might be a suitable policy posture in competition cases, where the concept of the offences in question is comparable in both countries. But there are aspects of American law and policy, such as the *Helms-Burton Act* (penalising trade with Cuba) that could embarrass Canada, if it faced a reciprocal request for co-operation. Moreover, even if Canada did decide to ask the United States

⁵¹ *Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c. 30 (4th Supp.).

⁵² *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."

⁵³ *R. v. R.J. Reynolds Co. (Delaware)*, *supra* note 43.

⁵⁴ 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.

to serve criminal process on a party in the United States, it is by no means certain that the US authorities would be receptive, considering the potential precedential effect for other countries and other circumstances. It might invoke the escape hatch under the *Canada-US MLAT* in respect of actions that would adversely affect the requested state's "important interests"⁵⁵ (as could Canada in a reciprocal scenario). But those are tactics that undermine routine co-operation under the MLAT, the kind of co-operation that it was clearly designed to promote. As a result, it remains unclear whether MLAT service requests in competition cases would be attempted or accepted, and if so, whether they would be vulnerable to legal challenge as exceeding the scope of the *Canada-US 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.⁵⁶ Although such matters have not proceeded to the stage of litigation or adjudication in either country, there are a number of substantive and procedural issues that might arise in respect of an extradition request derived from an international cartel investigation.⁵⁷

Extradition can only apply to an individual. If a request for extradition were successful, personal jurisdiction would clearly be established over the individual sought. It might be thought that once the individual is present in Canada, he or she might be served on behalf of the corporation concerned, if the individual is a senior executive ("manager, secretary or other executive officer"⁵⁸) through whom jurisdiction over a company can be established. However, there is case law 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.⁵⁹ 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.

⁵⁵ *Canada-US MLAT*, *supra* note 10, Article V.

⁵⁶ 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.)

⁵⁷ For a more extensive overview, see the author's paper, *supra* note 30.

⁵⁸ See *Criminal Code*, R.S.C. 1985, c. C-46, s 703.2, discussed *supra*.

⁵⁹ 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.).

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 US. 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*⁶⁰ in the UK, however, executives who are wanted in Canada and/or the US have become liable to extradition from the UK 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 UK, however briefly.⁶¹ 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.

V 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.

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.⁶² With respect to documents located outside the jurisdiction, a court may also order a Canadian corporation to obtain and produce responsive records 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.⁶³

⁶⁰ *Enterprise Act 2002*, U.K. 2002, c. 40, ss. 188-190. It is likely, if extradition is sought in the electrical carbon investigation, that the charge would be obstruction and not price-fixing, as the cartel activity pre-dated the entry into force of the British legislation, and the *Pinochet* case indicates that extradition will not lie for offences under foreign law that were criminalised in Britain after the conduct terminated. *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Vgarte* (No. 3), [1999] 2 All E.R. 97.

⁶¹ As with Canada and the US, it is not just a matter of a decision not to go to the UK itself: a person wanted by the US 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.

⁶² *Competition Act*, s. 11.

⁶³ *Ibid.* s. 11(2).

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 and were enforced.⁶⁴ The section seems clearly focussed on the enterprise-wide interests of affiliated corporations, and to tie its investigative reach, at least facially, to local corporations in Canada.

The rationale for subsection 11(2) is clear, in 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 particular products of the foreign affiliate that are the subject of the alleged cartel that is under investigation.⁶⁵ Since section 11 does not specifically advert to this type of scenario, this broadened approach to extraterritorial evidence-gathering may well require litigation to resolve the scope of the section.

Foreign-Directed Conspiracies

The substantive criminal 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.⁶⁶

⁶⁴ 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 (s.65(4)). Where a corporation commits an offence under this section, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

⁶⁵ For example, a Canadian subsidiary which sells only “widget services” in Canada is served with a section 11 order seeking documents from a foreign affiliate that sells “gadget products” directly to third parties in Canada.

⁶⁶ 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. 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 - Options

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 constitutional 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 corporations.

Unlimited Fines under Section 46

The absence of an explicit fine limit in section 46 has led the Canadian competition authorities to invoke the section 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.⁶⁷ This regularly occurs in plea negotiations, and in two instances, parties have agreed to plea bargains of this sort.⁶⁸ However, that outcome remains, in 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, should not 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 for which it is a substitute. Finally, like section 45 itself, the circumstances might permit multiple counts to 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. This is one of the areas in Canadian law where the absence of prescribed sentencing guidelines, other than the application of the case law and the very broad *Criminal Code* principles of sentencing⁶⁹ might be argued to provide excessive prosecutorial discretion.

Liability for the Conduct of Unaffiliated Companies

Section 46 is conventionally regarded as a mechanism for reaching offshore corporations in international cartel cases, by prosecuting and fining their Canadian affiliates on an enterprise-wide approach to liability. However, the Canadian competition authorities have recently used the absence of limiting language in the provision (i.e., the failure to restrict liability to “affiliates”) to argue for a broader application to other, unrelated parties. In a number of recent investigations they have asserted that an independent, third-party, domestic distributor may be

for Amending the Competition Act: Fostering a Competitive Marketplace” (June 2003) (“2003 Discussion Paper”) at 13-16, online: Competition Bureau, <http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/h_ct02195e.html>. 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.

⁶⁷ *Competition Act*, s. 45(1).

⁶⁸ 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>.

⁶⁹ *Criminal Code* R.S.C.1985, c.C-46, as amended, sections 718 and 718.1.

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.

No such charges have been laid to date against unrelated Canadian companies. The broader interpretation of the reach of section 46 seems to be a harsh position in the case of a third party distributor 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, arm's length supplier constitutes the implementation of a foreign directive, within the meaning of section 46. And since resale price maintenance is an offence under section 61 of the *Competition Act*, it does not automatically follow that a supplier is necessarily "directing or influencing" the policies of the Canadian distributor merely by increasing the supplier's price. Of course, proceeding against the local distributor, where a foreign cartel participant declines to submit to Canadian jurisdiction, might be a way of seeking public satisfaction for the anti-competitive effects of the offshore conspiracy in Canada. But in such a case, any time a foreign supplier increased its prices to the distributor and thereby "influenced" the latter to pass on the increase in Canada, the possible application of section 46 would be an untenable risk for the distributor. The implications of this extended theory of the application of section 46 seem very far-reaching for Canadian distributors operating without knowledge of or affiliation with offshore anti-competitive activity of their foreign suppliers. 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.

VI Private Enforcement in Canada⁷⁰

Unlike the United States, Canada has historically relied primarily on government rather than private enforcement of competition laws. Among other things, Canada's legislatures and courts:

- only recently established well-functioning class action regimes;
- rarely utilise jury trials in complex civil cases;
- allow for finite and limited punitive damage awards, only in the most exceptional cases;
- restrict the availability of open-ended contingency fees in various ways;
- make private actions available only in respect of certain *Competition Act* offences and remedies; and

⁷⁰ This section of the paper is based on A. Neil Campbell and J. William Rowley, Q.C., "Jurisdiction and litigation developments in Canadian Competition Law" (October 2004), available online: [McMillan Binch LLP Website – Publications <http://www.mcmillanbinch.com>](http://www.mcmillanbinch.com).

- provide only single, not treble, damages for competition law offences.

Many of these features of the Canadian legal framework for civil recovery in antitrust cases have been changing significantly. The development of effective class action regimes in numerous provinces and before the Federal Court, along with opportunities for above-hourly-rate compensation for successful class counsel, are now well known.⁷¹ Of particular note in the competition law area are recent (and proposed further) expansions of private rights of action and the beginnings of meaningful jurisprudence regarding the certification of direct and indirect purchaser claims.

New Private Rights of Action

In 2002, after prolonged and controversial debates on the proposed reforms,⁷² the *Competition Act* was amended to allow private parties to pursue their own actions for relief from anti-competitive exclusive dealing, tied selling, market restrictions (e.g., exclusive territories) and refusals to deal.⁷³ Various safeguards were included to address concerns in the business and legal community regarding “strategic litigation”,⁷⁴ including a requirement to obtain leave to bring a proceeding (based on a very modest threshold standard)⁷⁵ and the limitation of remedies to the prohibition or other remedial orders currently available to the Commissioner of Competition. After a slow start, a total of nine refusal to deal cases have been filed.⁷⁶

The *Competition Act* contains a remedially-focused regime for these vertical non-price restraints as well as other more general monopolisation (“abuse of dominant position”) issues.⁷⁷ This legal framework was developed in response to the modern economic learning that most commonplace commercial distribution practices are efficient and pro-competitive, or at least benign. It has been considered that the Commissioner of Competition

⁷¹ See D. M. Low, Q.C., “Basic Concepts of Class Litigation in Canada” (September 2001), online: McMillan Binch LLP Website – Publications <<http://www.mcmillanbinch.com>>.

⁷² For a summary of the stakeholder consultations, see Public Policy Forum, *Amendments to the Competition Act and the Competition Tribunal Act: A Report on Consultations* (20 December 2000) at 18-21, online: Public Policy Forum Website <http://www.ppforum.ca/ow/ow_p_12_2000.PDF>.

⁷³ See Bill C-23, *An Act to Amend the Competition Act and the Competition Tribunal Act*, 1st Sess., 37th Parl., 2001- 2002, adding s. 103.1 to the *Competition Act*.

⁷⁴ See N. Campbell and J.W. Rowley QC, *Should Reviewable Practices Be Turned Into Competition Torts?* (October 2001) (Report Prepared for the Competition Policy Group), executive summary online: McMillan Binch LLP Website – Publications <<http://www.mcmillanbinch.com>>.

⁷⁵ See *Competition Act*, s. 103.1(7), which empowers the Tribunal to grant leave when it “has reason to believe that the applicant is directly and substantially affected... by any practice... that could be subject to an order under [the refusal to supply, tied selling, exclusive dealing or market restriction provisions].” This test has been interpreted as not requiring evidence of anti-competitive effects at the leave stage: see *Barcode Systems Inc. v. Symbol Technologies Canada UCC*, 2004 Comp. Trib. 1 (File no.: CT2003008); and *Allan Morgan & Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4 (File no.: CT2003009). Both decisions are under appeal.

⁷⁶ See the cases listed on the Competition Tribunal website – Cases, online: <<http://www.ct-tc.gc.ca/english/view.asp?x=64>>.

⁷⁷ See *Competition Act*, Part VIII.

has ample enforcement powers to address the rare cases where such practices are anti-competitive. However, a new round of proposed amendments is exploring the possibility of adding authority to impose “administrative monetary penalties” for these practices. A similar authority is under consideration for the general reviewable practice of abuse of dominance.⁷⁸ In addition, proposals have been advanced to add a follow-on right to recover damages in actions based on these vertical and other practices. There is a risk that these proposals will raise the potential exposure for companies significantly. They are also likely to induce more strategic private litigation, in circumstances that have not, to date, been considered anti-competitive in the abstract, but only after evaluation by the Competition Tribunal of the specific issues at play in the individual case.

*Direct and Indirect Purchaser Class Actions*⁷⁹

While it is still “early days” in the development of class action regimes in Canada, competition law has already emerged as one of the most active subject areas. Last year the Ontario Court of Appeal in *Chadha v. Bayer Inc.*⁸⁰ rejected the first attempt to certify a class of indirect purchasers that had reached an appellate court in Canada. However, it did so without embracing the black and white approach of the “*Illinois Brick*”⁸¹ decision in the United States.

The Test for Certification

The test for class certification in Ontario is essentially the same as in all other Canadian jurisdictions with modern class action rules. It contains five requirements that differ slightly from the well-known US framework:

- the pleadings must disclose a cause of action;
- there must be an identifiable class;
- the claims of the class must raise common issues;
- a class proceeding must be the preferable procedure; and

⁷⁸ 2003 Discussion Paper, *supra* note 66 at 5–12. AMPs are a euphemism for potentially significant fines: the current proposals would give the Competition Tribunal discretion to impose unlimited fines with no maximum cap.

⁷⁹ This section of the paper draws from D. W. Kent, “Indirect Purchaser Claims – A Canadian Approach”, *The ABA Canadian Law Newsletter*, Vol. XXXIX, No. 2 (Fall 2003).

⁸⁰ *Chadha v. Bayer Inc.* (2003) 63 O.R. (3d) 22 (C.A.) (“*Chadha (Court of Appeal)*”). The plaintiffs’ Statement of Claim alleged a conspiracy by defendants who were manufacturers and distributors of iron oxide pigments used in making bricks, paving stones and other building materials. The conspiracy was said to have been in operation between 1985 and 1991, a period during which the defendants generally held more than 90% of the Canadian market for iron oxide. Expert evidence filed on the certification motion indicated that, if entirely passed through to end consumers, the cartel-related increase in the price of iron oxide pigments could have raised the cost of a \$150,000 home by between \$70 and \$112.

⁸¹ *Illinois Brick v. State of Illinois*, 431 U.S. 720 (1977).

- there must be an appropriate representative plaintiff.⁸²

The *Chadha* case focused on the critical third and fourth elements of the certification test – commonality and preferability. It was acknowledged that the question of whether there had been an agreement to fix prices was a common issue. The dispute centred on whether liability could also be a common issue and, in particular, whether harm (as distinct from the quantum of damage), a prerequisite for liability,⁸³ could be determined on a common basis for a class of indirect purchasers. The analysis of preferability — a Canadian variation on the US “predominance” test — was then driven by the conclusions as to commonality.

Commonality of Issues

The motions judge had expressly declined to follow *Illinois Brick* or to bar actions by indirect purchasers. The Court of Appeal did not disagree with this refusal to set general rules or to impose an *Illinois Brick* structure on price-fixing litigation. However, it did criticise the plaintiffs’ failure to take into account the complexities (discussed in *Illinois Brick*) involved in determining which participants in the various distribution chains actually bore the brunt of the alleged price-fixing harm.⁸⁴ In particular, the Court of Appeal noted that the economic evidence filed by the plaintiffs on the certification motion assumed, without supporting evidence or analysis, that harm had been passed through to the end consumers.⁸⁵ The absence of any evidence or plan as to how the existence of harm might be proven on a common basis for all members of the class was fatal to the plaintiffs’ attempt to have liability defined as a common issue.

The Court of Appeal was careful to note, however, that indirect purchaser classes were not inevitably barred for lack of commonality and might, with appropriate analysis and evidence, be certified. It compared the *Chadha* plaintiffs’ evidence unfavourably to that of the plaintiffs in the recent US decision, *In Re: Linerboard Antitrust Litigation*.⁸⁶ The Court of Appeal remarked that the expert evidence in the *Linerboard* case addressed the concept of “presumed impact”, as well as the extensive empirical investigations that had already been undertaken and the advanced economic modelling which could be undertaken to establish class-wide impact.⁸⁷ However, it is worth noting that *Linerboard* involved a direct purchaser class entitled to recover all of the alleged overcharge under US law. It will be more difficult to adduce sufficiently compelling economic evidence in a Canadian context where both direct and indirect classes may have claims and a pass-on defence may be available.

⁸² *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1).

⁸³ See *Competition Act*, s. 36(1), which provides that: “Any person who has suffered loss or damage as a result of (a) conduct that is contrary to any provision of Part VI, ... may, sue for and recover from the person who engaged in the conduct ... an amount equal to the loss or damage proved to have been suffered ...”.

⁸⁴ *Chadha (Court of Appeal)*, *supra* note 80 at 38-39.

⁸⁵ *Ibid.* at 33-34, 41 and 45.

⁸⁶ *In Re: Linerboard Antitrust Litigation*, 305 F.3d 145 (2002).

⁸⁷ *Chadha (Court of Appeal)*, *supra* note 80 at 36.

Preferability of Class Process

Recent Supreme Court of Canada jurisprudence has established that preferability must be examined with respect to the resolution of the action as a whole and not just of the common issues.⁸⁸ While neither Ontario nor any other Canadian jurisdiction has a US-style predominance requirement, the preferability test⁸⁹ does assess whether or not the resolution of the truly common issues will move a case forward significantly or whether it would represent only the commencement of a large and unmanageable series of individual inquiries. In *Chadha*, the Court of Appeal concluded that the complex individual inquiries required to determine whether any class member had suffered harm (all apart from the degree of harm suffered) meant that the action would be unmanageable even though the issues relating to the existence of a conspiracy might be determined on a common basis.⁹⁰

Implications for Future Cases

While the *Chadha* decision turned in large part on the paucity of the plaintiffs' evidence, the court's analytical approach establishes three key general propositions for antitrust class action litigation in Canada. First, indirect purchasers are as entitled as direct purchasers to bring suit to recover damages from cartel activities. Second, the necessary implication of the status of indirect purchasers to bring suit is that price-fixing harm can (and ultimately must) be traced to its resting place through the channels of distribution. This, in turn, should logically mean that the "pass-on" defence is alive and well in cartel-based class actions in Canada.⁹¹ Finally, whether harm is capable of being analysed and proved on a common basis requires some economic evidence and/or analysis at the certification stage. The existence of a viable approach to a common assessment of harm (though obviously not necessarily proof of the outcome of that approach) must be demonstrated. This requirement presumably attaches not only to proposed indirect classes but to direct classes as well. Thus, a class of direct purchasers which assumes without explicit evidence that its members did not pass on *any* of the price-fixing harm may be as doomed to failure as an indirect class which assumes that all or much of the harm was passed on.

Developments in the vitamins price-fixing litigation may further refine the *Chadha* analysis. In the vitamins cases,⁹² the plaintiffs have proposed a universal class

⁸⁸ *Hollick v. City of Toronto*, [2001] 3 S.C.R. 158 at 177-179.

⁸⁹ See *Class Proceedings Act*, 1992, *supra* note 82, s. 5(1)(d).

⁹⁰ *Chadha (Court of Appeal)*, *supra* note 80 at 42.

⁹¹ The Supreme Court of Canada commented inconclusively on pass-on defences generally in *British Columbia v. Canadian Forest Products Ltd.* (2004), 240 D.L.R. (4th) 1. The majority opinion found that a pass-on defence did not need to be considered because the Crown had not proven any of its claimed loss of stumpage fees, but noted in *obiter* that "it is not generally open to a wrongdoer to dispute the existence of a loss on the basis it has been 'passed on' by the plaintiff" (¶111). The minority opinion was even more categorical that "passing on is not a defence known to law" (¶210). However, the case involved the application of tort law principles in the context of environmental damage. It may have little or no influence in the context of the statutory private damage recovery regime in the *Competition Act*.

⁹² There are approximately 12 co-ordinated class actions proposed in three jurisdictions. Five proposed class actions, each covering a different collection of vitamins, are moving forward as a package first in Ontario.

consisting of all direct and indirect purchasers and consumers of relevant vitamins during the relevant time periods. They propose first to put forward a settlement with defendants that establishes liability and a global amount of damages on behalf of the class generally (which presumably contains everyone who suffered harm no matter what the results of any pass-on analysis are). They then propose to conduct a second stage of proceedings to allocate the pool of damages among the class members.⁹³ Whether this universal class approach will solve the certification problem suffered by the partial class in *Chadha* remains to be seen.

There are several other important areas of difference between Canadian and US class action practice that tend to affect the relative balance of risks between plaintiffs and defendants. The most obvious is the absence of treble damages, or other punitive or exemplary damages in competition cases. Secondly, in Canada, a judge alone, without a jury, tries these kinds of complex claims. In addition to the potential availability of the pass-on defence, Canadian recovery in such cases is predicated on a theory of joint and several liability. Though it has not been specifically determined as yet, the better view is that a defendant will have a right to contribution and indemnity from their co-defendants. Furthermore, it is now clear that the representative plaintiff (or, more realistically, the plaintiffs' class counsel) is exposed to a risk of cost awards.⁹⁴ The overall point, in cases that have cross-border implications, is that there are features of Canadian class action practice that bring into balance the extreme risks that are perceived to operate in the corresponding US procedure.

VII Conclusion

Numerous issues of Canadian cartel enforcement law and policy are in a state of flux, at the present time. Few of them are of simple application. Some may have an unforeseeable effect on the administration of the Immunity Policy, that 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 even-handed practice in Canada's handling of international cartel matters. The openness of the Bureau to a review of its policy is to be welcomed. More broadly, though, there are particular features of Canadian law and policy that the Competition Bureau is increasingly insistent and concerned about, that require a "made in Canada" approach to immunity practice and the defence of cartel cases in Canada. It is similarly the case that new and evolving aspects of private litigation in Canada require specifically Canadian consideration by any party that may be exposed to damages claims arising out of an international conspiracy. While individually litigated skirmishes may periodically have positive or negative impacts on the

⁹³ In an interesting recent development, Nordheimer J. approved the sharing of fees in a class action settlement with the US counsel who collaborated with local counsel for the plaintiff class. See: *Gariepy v. Shell Oil Co.*, unreported endorsement dated September 16, 2004.

⁹⁴ *Gariepy v. Shell Canada* (2002), 23 C.P.C. (5th) 360.

extent of private litigation in Canada, it is clear that other forces will continue to drive increases in private competition litigation.