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**International Cartel Enforcement:
The Limits of Personal Jurisdiction**

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INTERNATIONAL CARTEL ENFORCEMENT: THE LIMITS OF PERSONAL JURISDICTION

INTRODUCTION

The global economy has witnessed an explosion of international commercial activity, in response to diminishing trade barriers and the emergence of a global electronic infrastructure. Companies of greater and lesser stature are increasingly competing in global markets. But the rising level of international commercial activity has been accompanied either by an apparent escalation in anticompetitive business practices, or greater success in the detection of such practices. There have been dramatic successes by many enforcement agencies in bringing offshore cartel participants to justice, but the difficulty of asserting national jurisdiction over the participants in an international cartel remains a significant legal and operational concern for enforcement agencies and a critical element for lawyers assessing the defence of the participants.

Other issues have received more prominence, over the last two decades of antitrust enforcement. In the late 1970s and early 80's, the US assertion of extraterritorial jurisdiction over offshore cartel activity was challenged by countries like Canada, the UK, Japan and Australia, whose national economic policies of the day tended to support or at least condone cooperation among the producers of uranium and other industries. That issue has been superseded in practice, as a result of enhanced US enforcement sensitivity, but also as a consequence of imitation.¹ Access to offshore evidence was and continues to be a major issue for

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¹ An example of the emulation of US subject matter jurisdiction might be the prosecution by Canada of fax paper manufacturers, whose anticompetitive conduct occurred exclusively in Japan. Mitsubishi Paper Mills Ltd. of Japan pleaded guilty to price fixing in the thermal fax paper conspiracy. See Canadian Competition Bureau Press Release, "Mitsubishi Paper Mills Ltd. Pleads Guilty" (17 February 1997), online: <<http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct01041e.html>>. New Oji Paper Company Ltd. of Japan also pleaded guilty for its involvement in the same conspiracy. See F. Matte, Q.C. "Competition Law and Policy in Canada" (23rd Annual Conference on International Antitrust Law and Policy, New York US, October 1996), online: Canadian Competition Bureau <<http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct01456e.html>>.

Contrast the Canadian and Australian practice in the Vitamins cartel: Canada prosecuted companies whose wholly offshore conduct could be shown to have targeted Canada; whereas Australia penalised only companies with a local

enforcers. The risk of incoherent enforcement activities were an important issue, in cases where more than one agency was investigating the same cartel. For example, premature action by one agency could adversely affect the integrity of another's investigation. Some of these concerns have been moderated by instruments for international cooperation, such as Mutual Legal Assistance Treaties and Competition Cooperation Agreements, in which enforcers have committed to consultation and notification.² The development of the ICN may eventually lead to further streamlining, coordination and cooperation in cartel enforcement. But there remain jurisdictional obstacles to effective national enforcement. One of the most evident of these problems is the difficulty of establishing personal jurisdiction over the participants in a cartel, and that is the focus of this paper.

GAPS IN RECENT SUCCESS STORIES

Many of the prominent cartel enforcement achievements in North America have one or more matters outstanding. A look at the list of companies penalised by the European Commission in its Vitamins cartel decision³ includes some corporations that were not prosecuted by either the United States or Canada. There may have been a determination that the company concerned was not involved in aspects of the conspiracy that related to the North American market and that charges could not succeed. In the US, though not Canada, the limitation period may have expired. Or, non-prosecution of these parties may have been based a prosecutorial discretion not to proceed, due to considerations like a *de minimis* level of sales or limited access

presence, and which could be shown to have engaged in some cartel activity in Australia. A further cogent Canadian example is the adoption, in 1975, of what is now section 46 of the *Competition Act*. That provision enables Canada to prosecute a Canadian entity that, knowingly or not, implements a foreign directed cartel. Without explicitly adopting US jurisdictional claims, Canada has equipped itself to accomplish a suitable penal outcome, at least where an offshore participant has a Canadian affiliate or distributor.

² The most pronounced example of better inter-agency coordination is the example of simultaneous searches in multiple countries by the US 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 R.H. Pate, "Anti-Cartel Enforcement: The Core Antitrust Mission" US DOJ <https://http://www.usdoj.gov/atr/public/speeches/201199.htm#N_19_>. See also, European Commission Press Release, "Statement on inspections at producers of heat stabilisers as well as impact modifiers and processing aids - International cooperation on inspections" (13 February 2003), online: <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/03/33|0|RAPID&lg=EN>.

³ The companies fined by the European Commission were F. Hoffman-La Roche AG (Switzerland), BASF AG (Germany), Aventis SA (France), Solvay Pharmaceuticals BV (Netherlands), Merck KgaA (Germany), Daiichi Pharmaceutical Co. Ltd. (Japan), Eisai Co. Ltd. (Japan), and Takeda Chemical Industries Ltd. (Japan). Five companies, Lonza AG (Germany), Kongo Chemical Co. Ltd. (Japan), Sumitomo Chemical Co. Ltd. (Japan), Sumika Fine Chemicals Ltd. (Japan) and Tanabe Saiyaka Co. Ltd. (Japan) were not fined because limitation periods had expired before the Commission's investigations began. The US and Canada did not prosecute Solvay, Kongo, Sumitomo, Sumika or Tanabe.

to evidence relating to that party. But the lack of prosecution of penalties in these cases is just as likely to be the result of a simple inability to establish personal jurisdiction over non-resident defendants. That consideration does not affect the offshore party's culpability or liability to prosecution in Canada or the US, but a decision not to take action may sometimes just be the result of a pragmatic cost-benefit evaluation, that a prosecution cannot be effectively initiated.

With regard to individual participants, many foreign residents have chosen to come forward, submit to the jurisdiction of both the US and Canadian courts and plead guilty to cartel offences. But there are other unresolved individual matters on both the United States and Canadian dockets. They involve people who, as non-resident employees of offshore companies, were demonstrably major players in the Vitamins, Sorbates, Lysine, Auctions and other cartels, but who have apparently chosen to leave their criminal exposure in North America outstanding. In some of these cases, indictments have issued and the individuals are formally treated as fugitives.⁴ 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.

In all international cartel investigations, the ability to get personal jurisdiction over a defendant has been a strategic element for both the prosecution and the defence, in assessing the prospects for satisfactory case resolution. The risk of establishing personal jurisdiction over a party is often a determining element in whether to engage in plea negotiations, the principal source of antitrust enforcement success in recent years.

Issues of personal jurisdiction may reduce prosecutorial options, and this has a number of invidious consequences for enforcers. The first is the unsatisfactory nature of having to lay charges, knowing there is little or no practical ability to bring the party before the court. Secondly, there may be a perception of potential prosecutorial disparity. A party that is outside the jurisdiction may be able to negotiate a sentence that is less onerous than one who is

⁴ Kazutoshi Yamada was indicted for participating in the Lysine cartel, but did not attorn to US 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", online: US DOJ <<http://www.usdoj.gov/atr/public/speeches/8280.htm>>. Sir Anthony Tennant, a citizen of the UK, has also refused to submit to US 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", US DOJ Website <<http://www.usdoj.gov/atr/public/speeches/10862.htm>>.

physically within the territory of the prosecuting authority. That was a concern in the early days of the Amnesty Program, where a succession of individuals agreed to plead guilty in the United States, but did not go to jail.⁵ It is now becoming clear that in the United States, though less so in Canada, a corporation that decides to plead guilty will have to plead guilty and be subject to a fine, and one or more of its culpable executives will also be required to serve a period in jail. That may produce a “sacrificial lamb” syndrome, where one of several culpable corporate executives agrees to go to jail, but his equally culpable co-workers go free. And a party outside the jurisdiction may have a greater prospect of negotiating a shorter term, a less onerous place of incarceration, or a lower fine, than a local resident. That may detract from the necessary perception of fairness and even-handedness in the administration of justice, but it may be a corollary of jurisdictional constraints on the enforcers.

From the perspective of the defence, a decision to stay outside of the US or Canada also has some difficult implications. That stance will be at the cost of their future inability to do business directly in North America, in the case of a corporation, or to travel to the US or Canada, in the case of an individual. For a corporations without significant business operations in the US or Canada, it may be possible to opt out of the North American economy. Conceivably such a company could deal through an arm’s length third party distributor, if it was determined not to submit to the penalties for cartel participation. But over the long term, those are decisions with strategic consequences, for a company with international operations. The calculus is less evident for individual business executives, and personal circumstances will drive different decisions, when the options are jail or isolation. In a global market, international executives need the freedom to travel and it is just bad for business and career development, if an executive is unable to conduct business abroad. There may be personal circumstances at play, such as family ties or property in the country seeking to prosecute. Age and stage in life may be relevant: an individual within sight of retirement may be less willing to come to the US or Canada to plead guilty to an offence and go to jail than a young high flyer whose future with the

⁵ Kazuhiko Watanabe, former president of Kanzaki Specialty Papers of Massachusetts paid \$165,000 in fines for his role in the thermal fax paper conspiracy. See US DOJ Press Release, “Justice Department’s Ongoing Probe into the Fax Paper Industry Yields More Indictments” (13 December 1995), online: <https://www.usdoj.gov/opa/pr/Pre_96/December95/627.txt.html>. Similarly, Masaru Yamamoto agreed to plead guilty and pay \$50,000 for participating in the lysine food additives conspiracy. See US DOJ Press Release, “Justice Department Takes First Action Against International Food and Feed Additive Price Fixers” (27 August 1996), online: <www.usdoj.gov/opa/pr/1996/August96/411at.htm>.

company might go on hold, due to unresolved criminal charges in a key market. Commenting on the psychological pressure point, Scott Hammond has said, with only slight rhetorical flourish:

While they may ultimately escape U.S. jurisdiction and the inside of a prison cell, they will forever be looking over their shoulders, unable to regain their lives as international businesspeople, and forever marked as international fugitives.⁶

The enforcement objective, of course, is to multiply both the pressures and the incentives for individuals as well as corporations to come forward. Most of these factors apply with full force in the practice of the United States, but the factors that bring parties in to plead guilty in the United States do not necessarily apply in other countries. Certainly the business imperatives that may dictate settlement in the United States do not apply to the same degree to Canada. Or Australia. Or to many other countries around the world where economic harm may have been done by an international cartel, but where the jurisdictional advantages of the culpable parties may stymie local enforcement, without a sweetheart deal. For these enforcers, and certainly for Canada, creativity is often necessary on the jurisdictional front and a closer look at recent Canadian efforts to establish personal jurisdiction over offenders seems warranted.

OBTAINING PERSONAL JURISDICTION

The jurisdiction of Canadian courts, as in other common law countries, has two components: personal and subject matter jurisdiction. While the focus here is on personal jurisdiction, an initial outline of Canadian subject matter jurisdiction may be helpful.

A Primer on Canadian Subject Matter Jurisdiction

Canada has had a strong presumption against the extra-territorial application of criminal laws. At common law, criminal jurisdiction was based on territoriality: a Court had

⁶ S.D. Hammond, "When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How do you put a Price Tag on an Individual's Freedom?", online: US DOJ < <http://www.usdoj.gov/atr/public/speeches/7647.htm>>.

authority to try an offence only if it was committed in Canada.⁷ Subsection 6(2) of Canada's *Criminal Code*⁸ provides:

Subject to this Act or any other act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside of Canada.

That point was reaffirmed by Canada's Supreme Court in *Terry v. The Queen*,⁹ as follows:

“This court has repeatedly affirmed the limitations imposed on Canadian law by the principles of state sovereignty and international comity ... The general rule that a State's criminal law applies only within its territory is particularly true of the legal procedures enacted to enforce it; the exercise of an enforcement jurisdiction is inherently territorial.”¹⁰

That traditional position of the common law is, however, subject to legislative change, and the Court went on to confirm Parliament's legislative authority to enact extraterritorial criminal laws:

“The principle that a state's law applies only within its boundaries is not absolute... states may invoke a jurisdiction to prescribe offences committed elsewhere to deal with special problems...”¹¹

Parliament has indeed created exceptions to the presumption of territorial jurisdiction, for offences like aircraft hijacking, war crimes and crimes against humanity, under section 7 of the *Criminal Code*. And in subsection 465(4) of the *Code*, Parliament confirmed Canadian jurisdiction over foreign conspiracies to commit an offence in Canada.

The *Competition Act*¹² is, however, silent on the territorial reach of the Canadian courts in cartel cases. It says nothing about the authority to prosecute a case – like Vitamins, for example – where the participants were not present in Canada and undertook no concrete action within Canadian territory. Nonetheless, numerous prosecutions have been registered in such

⁷ See *R. v. Finta*, [1994] 1 S.C.R. 701 at 805 (S.C.C.).

⁸ *Criminal Code*, R.S.C. 1985, c. C-46.

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

¹⁰ *Ibid.* at 215.

¹¹ *Ibid.*

¹² *Competition Act*, R.S.C. 1985, c. C-34.

circumstances. In all these cases, the foreign parties have agreed to come to Canada, submit to the personal and substantive jurisdiction of the Canadian courts and plead guilty. There has been no contested case in which the jurisdictional question has been confronted in a cartel case and the application of s 465 of the *Criminal Code* to section 45 of the *Competition Act*, the key cartel offence, has never been judicially determined. But because subject matter jurisdiction cannot be conferred by consent on a Canadian court in a criminal matter, it must be presumed that the convicting judges have tacitly found that they had jurisdiction over such offences.

International cartel offences are, of course, geographically non-specific. The parties may meet in one country, reach an illegal agreement on products or markets, and carry it into effect everywhere, as graphically demonstrated in the Lysine videotapes. In the cases prosecuted in Canada, there was evidence not only that the conspiracy had an effect on Canada, but that the parties specifically directed their minds to the Canadian market and Canadian customers. On those facts, the offence arguably has elements that occur in more than one jurisdiction and the Canadian courts have developed a test to reach such “transnational” offences: the “real and substantial connection” test.

In *R. v. Libman*,¹³ the Supreme Court of Canada affirmed that conduct with extraterritorial elements that had a “real and substantial connection” with Canada were subject to trial in Canada:

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

That adjustment of the strictly territorial jurisdiction of the Canadian courts seems reasonable and pragmatic, in an age of easy travel and communication. Its result, as applied in the cartel context, is only slightly different from the effects-based, extraterritorial jurisdiction of the US courts in cases like *U.S. v. Nippon Paper*¹⁵ and *Hartford Fire Insurance v. California*.¹⁶ This is

¹³ *R. v. Libman*, [1985] 2 S.C.R. 178 (S.C.C.) (emphasis added).

¹⁴ *Ibid.* at 212.

¹⁵ *United States v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1, 4 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998).

an over-simplification of a question of Canadian law that is much more complex and worth more detailed analysis. It is, however, simply the prelude to the question of personal jurisdiction.

Personal Jurisdiction: The Traditional Canadian Rule

At common law, there is a strong presumption that jurisdiction lies only over a person present within the jurisdiction of the court. In Canada, as in other countries with common law roots, a criminal prosecution is initiated by serving criminal process on a person within the territory of the Court. That is accomplished in Canada by service of a summons, formally in the name of the Queen, that commands a specific person to appear before the Court. That summons must be personally served on the accused. It is a key issue of international law and policy whether criminal process can be served on a person outside in the territory of the Court that issues the summons, without infringing the sovereignty of the state where the person is located.

In *Trower & Sons Ltd. v. Ripstein*,¹⁷ Lord Wright said:

“The question here is whether the Court has power to exercise jurisdiction over a person or corporation not personally served within it. If a person has been personally served within the jurisdiction, even though merely temporarily there, the jurisdiction of the Court is generally established. But a Court is not generally entitled to assume jurisdiction over a person who is outside the jurisdiction and has not been formally served within it and who does not submit to the jurisdiction. If that power is to be exercised it must be given to the Court by legislation.”¹⁸

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. That presents serious issues for both enforcers and defence lawyers as to whether the person will attorn to Canadian jurisdiction.

Pursuant to section 470 of the *Criminal Code*, every superior court of criminal jurisdiction is competent to try an accused person for an indictable offence if, in essence, the accused is within the territorial jurisdiction of the court. The case law, including *Trower*, ensures

¹⁶ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993)

¹⁷ *Trower & Sons Ltd. v. Ripstein*, [1944] 1 A.C. 254.

¹⁸ *Ibid.* at 49. While *Trower* was a civil case emanating from Canada, the rule expressed by Lord Wright is clearly the same in criminal proceedings.

that such service is good, however transitory that presence may be. Under section 703.2 of the *Criminal Code*, a corporation may be served by delivery of a summons to the “manager, secretary or other executive of the corporation or a branch thereof.”

Both these provisions contemplate service within Canada because, as we have seen, a party may be served *ex juris* only by virtue of statutory authority. There have, however, been several creative efforts recently to overcome the hurdle to prosecution that this territorial limitation presents, in the case of an offence where Canadian subject matter jurisdiction extends to matters with extraterritorial elements.

In *Shulman v. The Queen*¹⁹, an R.C.M.P. officer personally served a Canadian summons on an individual in Australia. The person did not come to Canada to defend the case, but moved for a writ of prohibition. Robertson, J.A. held that

“...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.”²⁰

The court held that there was no such statutory authority for service *ex juris* of criminal process. There was no discussion of whether the authority to serve outside Canada had to be explicit, or whether, as in *Libman*, the courts could derive such authority as a matter of interpretation of equivocal legislation.

More recently, in *R. v. Smith*,²¹ the prosecution was more successful. The accused had been tried in British Columbia, but was acquitted at trial and left the country. The Crown appealed and sought to serve its notice of appeal in the United States. The Court upheld that

¹⁹ *Re Shulman and the Queen* (1975), 58 D.L.R. (3d) 586 (B.C.C.A.), aff'g (1974) 52 D.L.R. (3d) 246 (B.C.S.C.). The accused in *Shulman* was 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.

²⁰ *Ibid.* at 591.

²¹ *R. v. Smith* (1999), 141 C.C.C. (3d) 421 (B.C.C.A.).

service, on the basis that the document to be served was not an originating process, but simply the extension of personal jurisdiction that had previously been properly established. So the case does not determine that a summons to initiate a prosecution may be served abroad, but that once an accused has been properly served, subsequent service of documents to continue the proceedings may be served *ex juris*. In an observation relevant to the issue of initiating process, however, Southin, J.A., did say:

“...if a notice of appeal or application for leave is an originating instrument, then I would be reluctant to conclude that Parliament had authorized an intrusion into another sovereign state’s jurisdiction over those within its territory, *in the absence of express words to that effect.*”²²

Not only must there be statutory authority for service abroad, it seems correct to conclude from this observation in *Smith* that the legislation must be explicit, in order to achieve that result.

New Efforts to Extend Jurisdiction Abroad

1. Mail Service

Despite *Shulman* and *Smith*, there has very recently been a creative effort to extend Canadian jurisdiction over persons abroad, in reliance on section 701.1 of the *Criminal Code*. In *R. v. R.J. Reynolds Tobacco (Delaware)*,²³ service was carried out by registered mail. The accused are non-resident corporations with no office or place of business in Canada. The summons was sent to them from Ontario by the R.C.M.P., using registered mail, addressed to their office outside Canada, and it was received there. The corporate accused undoubtedly had notice of the proceedings; the question was whether service by mail was effective to provide personal jurisdiction over the company concerned. While section 701.1 of the *Criminal Code* does not itself authorise mail service of a summons, it does incorporate the service procedures of a Province, for the purposes of the *Criminal Code*. The section provides:

“...in any province service and proof of service of any subpoena, summons or other document may be made in accordance with the laws of the province relating to offences created by the laws of the province.”

²² *Ibid.* at 429 (emphasis added).

²³ MacDonnell J., Ontario Court of Justice, October 17, 2000. An application for certiorari, to quash the decision, and for prohibition was argued before Gans, J., of the Superior Court of Justice on December 15 – 16, 2003 and a decision is pending at the time of writing.

In the Province of Ontario, subsection 26(4) of the *Provincial Offences Act*²⁴ provides that service may be made, in the case of a corporation,

“...by mailing the summons by registered mail to the corporation at an address held out by the corporation to be its address...”

Neither subsection 26(4) nor section 701.1 of the *Criminal Code* say anything about whether or not the “address” must be located inside Canada. Clearly the incorporating provision, section 701.1 of the *Criminal Code*, makes no direct or indirect reference to service out of the jurisdiction. Nor is there any direct reference in section 26 of the *Provincial Offences Act* to service on a corporation that is outside Ontario, although the section does provide expressly for service *ex juris* on *natural* persons by registered mail.

MacDonnell, J. held that service on a corporation by registered mail did not involve serving the summons outside Ontario, despite the foreign address of the corporations concerned. 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 under Ontario law, there was no requirement to show actual delivery to the addressee, for service to be effective.

R.J. Reynolds did not deal with the implications of permitting service outside Canada by extending the provincial service arrangements to the *Criminal Code*. There was no consideration of whether a purportedly compulsory Canadian criminal process, served upon a person within the jurisdiction of a foreign country, might intrude upon the sovereign prerogatives of that country. The reasons do not allude to the issues of international law or comity that support a territorial limitation to the service of criminal process and the compulsion of persons abroad. Nor were the policy implications of permitting service by mail for the entire range of *Criminal Code* offences, from treason through to offences against the person, property and the like. For example, the charges in *R..J. Reynolds* were fraud and conspiracy to defraud, which in the circumstances of the case, may or may not have anything to do with provincial interests. There was no reference in the case to the risk of provincial heterogeneity or happenstance, which may follow from the fact that while Ontario may authorize service by mail, other provinces do

²⁴Ontario’s *Provincial Offences Act*, R.S.O. 1990, c. .P-33.

not. That may not be controversial in the usual cases under provincial law, where provincial Crown prosecutors initiate proceedings that originate in the province pursuant to provincial laws. But if this approach to personal jurisdiction were extended to prosecutions under the *Competition Act*, a statute administered by Federal Government prosecutors, prosecutorial determinations may become a tactical exercise in provincial forum shopping, oriented to the place with the most expansive jurisdiction, rather than the closest connection to the offence and its victims. That is because the Federal Crown prosecutors may initiate a prosecution anywhere in Canada.

The judgment in *R.J.Reynolds* leaves many unanswered questions.²⁵ It comes as a major surprise to most practitioners who are aware of it. Predictably, prosecutors in the Competition Bureau are enthusiastic about their future prospects, if the decision is sustained. But on balance, the decision seems highly debatable. *R.J. Reynolds* could be the foundation for a radical initiative by Canadian prosecutors to break the impasse that is often presented by the territorial constraints of the requirement for effecting personal service on an accused within Canada. But the judgment turns on a literalist argument. It relies on an artificiality of provincial law, that service may be effected within the province by mail, ignoring the reality that the mail is received - and the service completed - within a foreign country.

The judgment might, perhaps, be a tenable reading of the statutory texts. But it seems an analytical stretch to think that the legislators knew they were cutting through centuries of law and extending rules for personal service for provincial, summary conviction offences (misdemeanours, in US parlance) to the most serious crimes known to Canadian criminal law. Explicit language in section 701.1 might have been expected, if Parliament had intended such a result. Whether a less revolutionary reading of the statutes is more correct remains a matter of judgment, but it appears that that definitive judgment will have to await appellate consideration. In the meantime, a jurisdictionally aggressive tactic has become available to Canadian prosecutors to capture the attention of offshore cartel participants, and perhaps, with other pressure points to influence them to decide to come in and settle their Canadian exposure.

²⁵ To exclude the risk of being held to have attorned to the jurisdiction, the accused did not appear. Its position was, quite exceptionally, set out in a letter from its US lawyer to the presiding judge in the case. The matter was accordingly not argued fully in the first instance. While the accused did argue the case on judicial review, the Crown has alleged that whatever the outcome on the law, their appearance implies that they have attorned for all purposes.

2. MLAT Service

If service of criminal process by mail seems like an extreme break with legal tradition, a variant is apparently under consideration among the Competition Bureau's lawyers. Canada has numerous mutual legal assistance treaties in force, with many others under negotiation. Perhaps the most significant is the Canada-US MLAT²⁶, which is normally the vehicle of choice for cooperation in investigative assistance in criminal cases with a cross-border dimension.²⁷ The idea being mooted is, apparently, to request the cooperation of Canada's treaty 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” within their territory. As the cases require statutory authorization for service of a summons abroad, an evolving theory is that the implementing legislation for Canada’s mutual legal assistance arrangements may suffice.

Article 2 of the Canada-US Mutual Legal Assistance Treaty specifies that the assistance to be provided between the two countries extends to "serving documents". Could that include a summons to a corporation in the United States to compel its attendance in a Canadian court to stand trial for an offence against the *Competition Act*?

The MLAT has never been used for service abroad of originating process in a Canadian or American prosecution. There may be very cogent reasons why the United States might be reluctant to give effect to a request to serve a criminal summons on a US corporation, and there are adequate grounds – including its own important interests in a case it might also be prosecuting – not to do so. Once again, because of the common territorial limitations on service in both countries, there might be some hesitation, especially in the United States, to accept such a request without much more explicit language in the Treaty. Legally, however, it seems like an analytical stretch to suggest that the Treaty, and the Canadian implementing statute, constitute “express words” to create an authority under domestic law to establish personal jurisdiction over an accused by serving Canadian criminal process *ex-juris*.

²⁶ *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) [US-Canada MLAT]

²⁷ For present purposes, the Canada-US Competition Cooperation Agreement does not appear to be specifically relevant. See *The Agreement between the Government of Canada and the Government of the United States of America Regarding*

The *Mutual Legal Assistance in Criminal Matters Act*²⁸ (“MLACMA”) was adopted to implement Canada’s MLATs. As a general implementing statute, it gives the treaties the force of law in Canada to the extent necessary to comply with Canada’s obligations under the relevant treaty. That principle of implementation suggests that the scope of the statutory authority is to permit Canada to comply with a request by its treaty partner. It does not necessarily imply, at least not without specific language, that the law was changed to permit Canada to adjust its domestic law for its own domestic Canadian interests.

This view is supported by *R. v. Filinov*²⁹, where Dilks, J. said:

“...the only provisions of the treaty which had to be addressed in new Canadian legislation were those that dealt with the procedure whereby assistance was to be given by Canadian authorities to their counterparts in the United States.”³⁰

MLACMA does, however, have an effect on domestic Canadian law where it is needed in order to utilise the product of foreign assistance in a Canadian criminal proceeding. Sections 36 to 39 of MLACMA address the admissibility in Canada of evidence obtained abroad pursuant to an MLAT. For example, *Filinov* concluded that evidence obtained from a foreign state in response to a Canadian request for assistance was admissible in evidence in Canadian proceedings. The only provision that addresses service abroad at all is section 39, which deals with how foreign service may be *proved* in a Canadian proceeding.³¹ But there is no mention of the legal effect of “documents” (even if interpreted to include a “summons”) that have been served under Article 2, and it is arguable that the legal effect of serving those documents has to be determined by local Canadian law. On the basis of *Smith*, the reference to serving “documents” in the MLAT, without further mention in the implementing legislation, would seem too indirect to modify the rules of the *Criminal Code* or the common law as to personal jurisdiction or service *ex juris*. The statutory silence of MLACMA as to the provisions of the

the Application of Their Competition and Deceptive Marketing Practices Laws, August 3, 1995: <<http://cb-bc.gc.ca/epic/internet/incbbc.nsf/vwGeneratedInterE/ct02007e.html>>.

²⁸ *Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c.30 (4th Supp.). [MLACMA]

²⁹ *R. v. Filinov* (1993), 82 C.C.C. (3d) 516 (Ont. Ct. (Gen. Div.)).

³⁰ *Ibid.* at 526.

³¹ *MLACMA*, supra note 28 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.”

Criminal Code on personal service, after the service of “documents” by the US authorities, seems meaningful. If the Act or the Treaty had been directed to assistance in serving the initiating documents in a criminal prosecution, and thereby establish personal jurisdiction over a person outside Canada, some greater specificity would have been required. An unstrained reading of *Smith* and *Shulman* suggests that more explicit language would be required to authorise service *ex juris* of a Canadian summons. As a matter of statutory interpretation, the better view would be that the treaty and the Act did not indirectly insinuate such a significant change into the law of jurisdiction, through the use of such general language. And yet, a Canadian request for service is a course that may still be attempted.

On the policy level, it is possible that Canada would be unconcerned about the longer term consequences of such a request: the prospect that as a matter of reciprocity, it might be required, in future, to serve "documents" initiating criminal proceedings in the US. However, there are implications that need real care and that could leave this putative service initiative stillborn.

For one thing, the Canada-US MLAT is not predicated on double criminality.³² If the MLAT can be used by Canada to effect service in the United States, surely Canada could be asked to assist in serving a Canadian for a matter that involves an offence under a US law that might have no counterpart in Canada. For the extraterritorial enforcement of the Sherman Act, that thought would have been exceedingly controversial, a few years ago when legislation was adopted by Canada specifically to block such US jurisdiction. It might continue to startle Canadian policy makers with respect to other US offences, including those that prohibit trade with countries like Cuba. Of course, Canada might refuse to comply with a US request in such a case, by invoking the escape hatch under the Treaty, for action that would adversely affect Canada's "important interests". But that is a step that encourages unilateralism, in a treaty relationship that is contingent on mutuality of cooperation.

And even if Canada did have the hardihood to ask the US to serve an individual or corporation in the United States, it is by no means certain that the US Government would be

³² *US-Canada MLAT*, supra note 26, Article 3: “Assistance shall be provided without regard to whether the conduct under investigation or prosecution in the Requesting State constitutes an offence or may be prosecuted by the Requested State”.

receptive. Several American concerns might be foreseeable. If service of criminal process on a US corporation is to be effected at the request of Canada to initiate a criminal proceeding, other states with less comparable laws, or less predictable legal systems, might expect compliance with the same request under other treaties. There might well be a view that the United States has more to lose than to gain, in precedential terms, by acceding to such a putative Canadian request. Moreover, depriving American residents of the shelter from foreign criminal process comes with their physical presence inside the United States might be a matter of American political focus. There has been strong opposition in the US to the possibility that US military personnel might be subjected to the extraterritorial jurisdiction of the international criminal court, for war crimes or crimes against humanity. Some might see an analogy, if a US corporation can be served in the United States with a Canadian summons. Once again, the exception for US important interests might squelch such an initiative. The better view would seem to be that there is no indication that either the negotiators or the legislators ever contemplated service of the initiating process for a foreign criminal prosecution, and it is implausible to believe that it was intended.

Compulsion and Service: Extradition

In addition to any prospective risk of extraterritorial personal service, cartel participants now have to consider the risk that they, or their representatives, may be brought by compulsion within the territory of Canada, or the United States, through extradition. Obviously, personal jurisdiction will be established, if extradition is successful. Much has been said about extradition, in recent years, by enforcement agencies in both Canada and the United States.

It is very likely that the current Canada-US Extradition Treaty applies to cartel offences. Article 2 of the Treaty provides:

Extradition shall be granted for conduct which constitutes an offence punishable by the laws of both Contracting parties by imprisonment or other form of detention for a term exceeding one year or greater punishment.

This rule of double criminality, together with the minimum penalty of at least one year's imprisonment would appear to be met for hard-core cartel offences under both the Sherman Act and the *Competition Act* and extradition would presumably be available, as between Canada and the United States.

But there may be some important qualifications to that assessment, in the case of an international cartel. Article 1 of the treaty allows extradition for offences committed within the “territory” of the requesting state. If the US were seeking extradition of an individual involved in an international cartel from Canada, Canadian law would determine whether the conspiracy took place within the territory – not “jurisdiction” – of the United States. And an American Court, seized with a Canadian request for extradition in such a case, would have to determine whether there is a territorial basis for Canadian jurisdiction, in the absence of any local conduct by the participants in Canada. Complicating the analysis, however, Article 3(2) the Treaty indicates that extradition shall be granted for an offence committed *outside* the territory of the requesting State, if the laws of the requested state would provide jurisdiction in similar circumstances.³³ That might be particularly pertinent to an American request for extradition in an international cartel case. But while there is undoubtedly jurisdiction in the United States in the case of such a cartel, as a result of *Nippon Paper*, the issue has never been judicially determined in Canada. And indeed, the Canadian Government has frequently appeared in US Courts to contest the assertion of US extraterritorial jurisdiction. So that might provide some litigation room for a defendant.

But there is an escape hatch for the enforcers, although it has never been used.

Article 3(2) provides that:

...the executive or other appropriate authority of the requested State shall grant extradition if the laws of the requested State provide for jurisdiction over such an offence committed in similar circumstances. If the laws in the requested State do not so provide, the executive authority in the requested State may, in its discretion, grant extradition.

A discretionary grant of extradition may therefore be literally possible, but it would certainly be a controversial and probably litigable matter.

There are many other, more or less substantive issues that might arise in responding to an extradition request derived from an international cartel. For example, if an American prosecution has been undertaken against the members of an international cartel, an argument of double jeopardy, under Article 4 of the Treaty, might be advanced. Nevertheless,

³³ Article 3(2) to extradite despite the lack of similar laws.

assuming there is subject matter jurisdiction, extradition is a clear means of establishing personal jurisdiction, at least for an individual.

And extradition has been invoked on occasion in competition cases, by both Canada and the United States, although matters have never proceeded to the stage of litigation or judicial decision in either country. An example is the *Thomas Liquidation* case.³⁴ 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 plead guilty to the offence. The individual did not plead in his personal capacity, but on behalf of the corporate accused.

That outcome highlights several points. The first, of course, is that a corporation is not directly amenable to extradition. Despite the outcome in *Thomas Liquidation*, the extradition of a corporate employee does not automatically entail jurisdiction over the corporation, because of its separate legal personality. However, where key individuals are exposed to a risk of extradition, it certainly increases the pressure to resolve both individual and corporate criminal liability. *Thomas Liquidation* demonstrates that compelling the attendance of a corporate representative by extradition may, in some situations, be all that is really required to reach the company. But that is not the inevitable result, if a company or a targeted individual is determined to resist.

The individuals who are liable to extradition may not be senior executives (“manager, secretary or other executive officer”) through whom jurisdiction over a company can be established automatically when they are present in Canada. Lower level employees may not be shown to represent the company in a role or capacity that they could be served on behalf of corporate entity. They may be formally employed by a subsidiary of the primary corporate accused. Or the individual’s employment may be terminated, prior to execution of a warrant for

³⁴ 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 < <http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct00119e.html>>.

their extradition, if they were sufficiently senior. There is also case law indicating that, for corporate service to be effective, the officer or employee who is in Canada must be shown to be present on the business of the company.³⁵ That representative premise seems unlikely, in the case of a person who has been extradited to Canada, exclusively for the purpose of his or her trial, or the execution of a sentence, for a specific cartel offence.

Despite these and other difficulties, the risk of extradition for a cartel offence will generate huge pressures on both the company and on its individuals. It may be tactically important, as the *Thomas Liquidation* case shows, for the enforcement agencies to initiate extradition just because of that pressure. For the individual, of course, arrest on an extradition warrant in one's own place of residence is only different in degree from serving a sentence in a foreign country. The very extended proceedings involving General Pinochet in the United Kingdom³⁶ may substantiate that view, even though the eventual result in that case was rejection of the extradition proceedings.

The stakes for extradition have been recently increased. Until 2003, extradition was really only a plausible threat as between Canada and the US. Individuals who were determined not to submit to jail in the US, and who were in a position to remain outside North America, might be able to avoid serious exposure, because few other countries had laws that establish criminal penalties for cartel offences. Since the entry into force of the *Enterprise Act*³⁷ in the UK, however, executives who are wanted in Canada and the US have become liable to extradition from the UK for cartel activity engaged in after the entry into force of the British legislation. Section 190 of the *Enterprise Act* exposes cartel participants to potential imprisonment for a term of up to five years. The newly adopted extradition treaty between the US and U.K. authorises extradition for conduct that is punishable under the laws of both states

³⁵ While there does not appear to be any 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 (Ont. H.C.J.).

³⁶ *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [1999] 2 All E.R. 97.

³⁷ *Enterprise Act* 2002 (c.40), ss. 188 – 190.

“by deprivation of liberty for a period of one year or more...”.³⁸ So the criteria of double criminality is now met in the UK, Canada and the US.

That exposure applies not just to British residents, but also to any person who may be physically present, however briefly, in the UK. Pinochet, for example, had come to England for medical attention, but was restrained, pending resolution of the request for his extradition, for upwards of two years. And 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 London's airport, without risk of being arrested, even if their presence is the inadvertent result of a diverted aircraft. Once again, this is a matter of upping the ante, of intensifying the pressure on implicated individuals to come forward to settle their criminal liability by increasing their geographical isolation. The pressure on individuals to settle increases the tension for their corporate employer and its lawyers. But without an actual application for extradition from one of the countries where it is legally feasible, the immediacy of the perception of risk may diminish. And so it is foreseeable that an effort to obtain jurisdiction in a cartel case is probable, sometime soon.

Innovations in Moral Suasion

The United States does not have extradition treaties that would reach anti-trust offences in numerous countries, including France, Germany and Switzerland. Nevertheless, this has not deterred American authorities from pursuing individuals who are resident in those countries. A well-known example is the case of the six high-level executives of BASF and Hoffmann-LaRoche who participated in the international vitamins cartel. These executives resided in Germany and Switzerland, and were not exposed to extradition; yet they travelled to the United States, plead guilty and served time in US prison.³⁹ Generally speaking, that is the effect of a combination of incentives and pressure points. Not only is it a question of whether compulsory jurisdiction can be established, for example, by extradition, but a whole range of psychological, personal and business issues are at play in individual discussions to submit to the

³⁸ Article 2(1) of the *Extradition Treaty Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America*, signed March 31 2003, online: <<http://www.fco.gov.uk/Files/kfile/CM%20582%2002.03.pdf>>.

³⁹ S. D. Hammond, “Detecting and Deterring Cartel Activity Through an Effective Leniency Program” (November 21-22, 2000), online: US DOJ <www.usdoj.gov/atr/public/speeches/9928.pdf>.

jurisdiction of a foreign cartel enforcer and to serious penalties. Some of the considerations that tend to persuade a “fugitive” to surrender have been mentioned earlier in this paper, and many are well known.

These tactics no doubt create a chilling effect on the willingness of foreign executives to travel beyond their “safe harbours”. This might best be illustrated by the Canadian convictions of Messrs Hauri and Myasaki in the Vitamins and Sorbates cartels. In those cases, Canadian authorities obtained the guilty pleas of a Swiss and a Japanese national, through the video-conferencing authority of s 650(1.1) of the *Criminal Code*. The foreign executives were quite willing to plead guilty in Canada, on the condition that he would not have to come to North America and thereby be exposed to the risk of extradition to the United States.⁴⁰

INTERPOL Red Notices

There has also been some recent fanfare about the invocation of INTERPOL for assistance in cartel cases.⁴¹ National police authorities that are members of INTERPOL may initiate a “red notice” by that organisation. The red notice is a sort of international “wanted” poster, which is circulated to all national police forces. They, in turn, are expected to look out for the individual concerned and to cooperate with the initiating police authority. The essence of the INTERPOL notification process is not just that a particular person is sought for a serious offence, but also a confirmation that extradition will be requested if the person is located.

In 2001, the Antitrust Division began placing indicted cartel participants on the “Red Notice List”. People sought are placed on look-out lists, which are provided by INTERPOL to foreign enforcement authorities throughout the world. If a foreign police authority identifies the listed individuals, INTERPOL then notifies the seeking country. The seeking country then has the option of either requesting a provisional arrest in a matter of urgency or making a formal extradition request. According to Deputy Assistant General James

⁴⁰ K. von Finckenstein, “Cross-border Canada/U.S. Cooperation in Investigations and Enforcement Actions vis à vis private parties” (2000) 26 Can.-U.S.L.J. 285 at 286. Hauri subsequently plead guilty and served time in the United States.

⁴¹ J.M. Griffin, “The Modern Leniency Program After Ten Years – A Summary Overview of the Antitrust Division’s Criminal Enforcement Program” (Presented at The American Bar Association Section of Antitrust Law Annual Meeting, San Francisco US, August 2003), online: US DOJ website <<http://www.usdoj.gov/atr/public/speeches/201477.htm>>.

Griffin of the US Department of Justice Antitrust Division, Red Notices have already led to the arrest of many foreign fugitives.⁴²

In 2001, the Division adopted a policy of placing indicted fugitives on a "Red Notice" list maintained by INTERPOL. A red notice watch is essentially an international "wanted" notice that, in many INTERPOL member nations, serves as a request that the subject be arrested, with a view toward extradition. Multiple fugitive defendants have already been apprehended through a Division INTERPOL red notice."

But the weak link of the red notice system is that the ability to secure the transfer of the individual to the country that wants him or her is co-extensive with the scope of applicable extradition arrangements. It might be tempting, therefore, to treat the red notice system as an idle threat in many cases. And so it has been, for notorious fugitives like Ronald Biggs, who lived so long in Brazil, or Robert Vasco, in Panama. A person who is willing and able to remain within a single country, from which extradition is not possible, may encounter little or no effects from an INTERPOL communication that a foreign cartel enforcer wants to prosecute.

But as with so many enforcement efforts, the red notice initiative is an investment in psychology. It seems most focussed on individuals who may be able to stay away from North America and the UK, but continue to travel elsewhere. Advances in information technology mean that immigration databases in most countries can integrate the INTERPOL notices into their "watch lists". Even if extradition may not actually be available, delays at immigration while a "hit" is investigated is, at the very least, disquieting, for executives travelling on business or pleasure. The mere knowledge that one is a "person of interest" to police is liable to heighten personal anxiety. Together with other elements of moral suasion, then, the red notice is, for most practical terms, simply another element for offshore executives to consider, in deciding whether they should face the music in the US. If one is actually present in a "safe harbour", with no risk of extradition and no need to travel, an indicted individual may have little to fear from being in multiple databases. Careful counsel must now advise of this tactic, as one of the many considerations that will go into an individual client's decision. But as

⁴² J.M. Griffin, "The Modern Leniency Program After Ten Years – A Summary Overview of the Antitrust Division's Criminal Enforcement Program".

additional countries consider criminalisation and extradition, the red notice system may become an increasingly significant issue.

CONCLUSION

The result of this survey of personal jurisdiction is that in Canada, at least, there is a lot of legal churn. Not much has changed, in black letter terms, though the cases are evolving with some potential for surprising developments in the ability of Canadian authorities to establish jurisdiction over offshore defendants. If so, of course, the next level of analysis would be whether a local decision, predicated on service *ex-juris*, would be enforceable, if the person concerned remained intractable.

Otherwise, the leverage (both pro and con) that enforcement officials and offshore cartel defendants exercise in seeking a penal outcome continues to wax and wane. The issues may seem relatively evident, based on the traditional, territorial basis of jurisdiction, but there are subtleties that deserve the care and attention of capable lawyers on both sides of cartel resolution negotiations. Jurisdictional bluster does not serve either interest well, as efforts go on to reach out to those who may think they have geographical impunity. For we can be sure, these days, that enforcement officials are doing what they can to help each other overcome territorial impediments to effective enforcement.