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**DEVELOPMENTS IN CANADIAN CARTEL ENFORCEMENT**

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## 1. INTRODUCTION

Canada is known for its well-developed record of investigating and prosecuting cartel offences. With features providing for the challenge of anti-competitive behaviour originating from abroad, Canada is regarded as a jurisdiction that treats cartel conduct as serious criminal activity. In recent years, Canada has achieved an impressive record of convictions against both companies and individuals. The object of this paper is to provide an assessment of developments in Canada's most recent law and enforcement practice.<sup>1</sup>

## 2. DEVELOPMENTS IN CANADA'S CARTEL OFFENCES<sup>2</sup>

In Canada, the federal *Competition Act*<sup>3</sup> governs all aspects of competition law. Cartel behaviour is prohibited in several sections of the *Act*, including, in particular, a general conspiracy offence in section 45 of the *Act*, and a unique Canadian offence of implementing a foreign-directed cartel in section 46. Both sections have been used to great effect in recent years by Canada's anti-trust regulator, the Competition Bureau ("Bureau"), in challenging international cartels. Since 1995, the Bureau has obtained over 40 convictions in international cartel cases<sup>4</sup> with fines in excess of C\$150 million, and several convictions against individual executives.

Section 45 provides that:

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

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

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

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

(d) to otherwise restrain or injure competition unduly

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.<sup>5</sup>  
(emphasis added)

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<sup>1</sup> The author is a partner in the Competition Group at McMillan Binch LLP in Toronto. The research and analytical assistance of Melissa McBean, a summer law student at McMillan Binch LLP, is gratefully acknowledged.

<sup>2</sup> See D. Martin Low, Q.C. and Casey W. Halladay: "Competition Law and Policy in a Global Context," IBA/Global Competition Forum Conference: Seoul, Korea (23 April 2004).

<sup>3</sup> R.S.C. 1985, c. C-34 [hereinafter, the "*Act*"].

<sup>4</sup> Most have been through plea agreements.

<sup>5</sup> Note that section 45 of the *Competition Act* is a general conspiracy provision, like section 1 of the *Sherman Act*, but significantly unlike the complex provisions of sections 188 – 189 of the *U.K. Enterprise Act*, 2002.

Cartel conduct is not *per se* illegal in Canada. It is well settled in Canada that section 45 prohibits only cartel behaviour that has “undue” economic effects in a market, as determined under a partial rule of reason analysis.<sup>6</sup> In order to obtain a conviction under section 45, the prosecution must prove beyond a reasonable doubt both that: (i) the accused was a party to an anticompetitive conspiracy, and (ii) the conspiracy, if implemented, would likely prevent or lessen competition unduly. In determining if the Canadian requirement for “undueness” is met, courts consider the structure of the market (including the parties’ market shares) and the parties’ behaviour. The offence is punishable by a maximum fine of C\$10 million, for a corporation, or by up to five years in prison and/or a C\$10 million fine for individuals.

Because of its broad wording, defendants in cartel cases are often charged with subsection 45(1)(c) – it clearly covers the “hard core” aspects of cartel behaviour, including naked price fixing and customer and market allocation. Frequently, multiple counts will be brought against defendants, alleging multiple anti-competitive agreements affecting either different products, regions or duration of the conspiracy.<sup>7</sup> This practice multiplies defendants’ exposure to penalties, at C\$10 million per count, and consequently, prosecutors’ leverage in securing a guilty plea.

The *Act* also proscribes additional forms of illegal competitor interactions: bid-rigging (section 47), and as noted, implementing a foreign-directed conspiracy (section 46). Both offences are punishable, in the case of a corporation, by unlimited fines.

(a) Bid-Rigging

Unlike the general conspiracy offence, bid-rigging in Canada is a specific *per se* offence. It is defined as: (i) the submission of bids, in response to a call for bid or tenders that have been arrived at by agreement or arrangement between two or more parties; or (ii) an agreement or arrangement between two or more parties, in response to a call for bids or tenders, under which one or more parties agree not to submit a bid.<sup>8</sup> The offence is committed only where the parties fail to inform the tendering authority, prior to the deadline for submissions, of the agreement.<sup>9</sup> Unlike price fixing or market allocation conspiracies, if the constituent elements

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<sup>6</sup> *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 93 D.L.R. (4<sup>th</sup>) 36 [hereinafter “*PANS*”]. Note that there are reform proposals under consideration that would transform section 45 into a *per se* offence against so-called, though vaguely defined, “hard core cartels”: see Government of Canada, *Discussion Paper*, “Options for Amending the *Competition Act*: Fostering a Competitive Marketplace” (June 2003), available online at: <http://www.ppforum.ca/competitionact/dp2003.html>. To say the least, the proposed amendments are controversial in Canadian business and legal circles.

<sup>7</sup> For example, *F. Hoffman-LaRoche Ltd.* was convicted of eight counts of conspiracy and fined a total of \$50.9 million for its role in the bulk vitamins and citric acid cartels: see Competition Bureau, News Release, “Federal Court Imposes Fines Totalling \$88.4 Million For International Vitamin Conspiracies” (September 22, 1999), online: Competition Bureau <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02712e.html>>.

<sup>8</sup> In *R. v. Rowe* (2003), 29 C.P.R. (4<sup>th</sup>) 525, (Ont. S. C. J.) [hereinafter “*Rowe*”], the author acted for defendants charged with bid-rigging in the supply of chlorine to the City of Toronto. The case involved an alleged agreement between two apparent competitors, by which one party agreed to withdraw a bid that had been submitted to a municipality. The Ontario Superior Court upheld the submission that the statutory definition of the offence in section 47 did not extend to an agreement to withdraw a previously-submitted bid.

<sup>9</sup> *R. v. Lorne Wilson Transportation Ltd. et. al.*, sub nom. *R. v. Charterways Transportation Ltd. et al.* (1982), 67 C.P.R. (2d) 188 (Ont. C.A.).

of the bid-rigging are proven, its economic significance (or lack thereof) is immaterial. Any collusive response to a formal request for bids is illegal, and punishable by an unlimited fine and/or, for individuals, up to five years in prison. The recent decision in *R. v. Rowe* has now clarified that the illegal agreement must have been made prior to submitting or withholding the bid, and that post-bid conduct is not caught by the *Act*.<sup>10</sup> However, to confuse matters, agreements to withdraw submitted bids for federal or provincial government tenders are specifically prohibited by subsection 121(1)(f) of the *Criminal Code*.<sup>11</sup> Thus, the *Rowe* decision has brought to light an unexplained (perhaps inexplicable, on policy grounds) discord between government and commercial tenders. Moreover, a clear discrepancy has emerged between the treatment of bid-rigging in Canada and the United States, Germany and many other jurisdictions which proscribe behaviour that undermines the competitive force of a public tendering process.

(b) Foreign-directed Conspiracies

Section 46 is a unique Canadian provision that is directed specifically at offshore cartels that target the Canadian market. It specifies that a Canadian corporation (but not an individual) may be convicted and fined in an unlimited amount for implementing any policy or directive of any foreign person that is in a position to influence the Canadian entity, where the policy or directive would give effect to a foreign cartel in Canada. Notably, liability can attach even where the Canadian company had no knowledge of the conspiracy.

To date, charges under section 46 have only been laid against a Canadian affiliate of a foreign corporate cartel participant. Arguably, the objective of such strict liability is to ensure that the penalties imposed on the Canadian affiliate will be felt by related corporate entities abroad. By facilitating the prosecution of a Canadian affiliate, the legislative policy objective aims to deter foreign corporations from carrying out international cartels in Canada. As such, it avoids concern about the assertion of an extra-territorial jurisdiction, by focussing on local entities, whose economic activity in Canada carries into effect a foreign cartel. It effectively pierces the corporate veil, to penalize the economic enterprise at the heart of multi-national corporate affiliations. However, read literally, the section would apply to any Canadian corporation that is subject to foreign directives of any party abroad. An arms' length, third-party Canadian distributor, acting without any knowledge of wrongdoing on behalf of an offshore manufacturer that is involved in a foreign cartel, could literally be liable to prosecution under the statute. Charges against unaffiliated corporations have never been laid before a Canadian court under section 46. But prosecutors have recently asserted that such a third party would be liable to prosecution, even as the unwitting agent of a foreign cartel participant, if that foreign entity remains outside Canada and is unwilling to accept responsibility for the offence in Canada.

The policy basis for that approach, as opposed to proceeding against related parties that are apparent components of a global economic enterprise, seems controversial. There is no prior reference to the prosecution of unaffiliated Canadian companies in the case law,

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<sup>10</sup> *Rowe*, *supra* note 7.

<sup>11</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 121(1)(f). Commission of bid-rigging under the *Competition Act* carries penalties of a fine "in the court's discretion" and/or five years' imprisonment. Despite the absence of a cap on fines under s. 47, fines under these provisions typically have not exceeded C\$200,000 per count charged. Under the *Criminal Code* offence, provision is made only for imprisonment, of up to 5 years in jail; no cases have been reported under subsection 121(1)(f).

legal commentary, or Parliamentary records. The objective seems to target the economic effect of foreign misconduct, without regard to the means of accomplishing that effect, or to the lack of moral culpability of the last party in a global distributive chain. Deterrence is an unlikely policy premise for section 46 in such a case, where the company to be charged is legally and economically unrelated to those responsible for the illegal conduct and is ignorant of their wrongdoing. By contrast to bid-rigging and price maintenance cases, fines assessed under section 46 have been substantial.<sup>12</sup> Recent practice indicates that the Bureau and the Attorney General may use section 46 to override territorial limitations on the jurisdiction of the Canadian courts over foreign corporations.<sup>13</sup> But it is important to note that there have been no litigated section 46 cases since the section was enacted: all have been the result of plea agreements, and the precise scope of the section, as well as its constitutional legitimacy, remain to be determined.

### 3. THE INVESTIGATIVE POWERS OF THE COMPETITION BUREAU<sup>14</sup>

In response to complaints by marketplace participants or on the basis of public information, the Bureau routinely commences informal investigations. Where the Commissioner has “reason to believe” that a criminal offence has been committed, she may launch a formal inquiry under section 10 of the *Act*. On commencement of an inquiry, the Commissioner may exercise compulsory powers of investigation, including orders for the production of records or warrants for search and seizure of evidence. Once evidence has been obtained, the Commissioner must decide either to refer the case to the Attorney General for prosecution or to discontinue the inquiry. If discontinued, the Commissioner must submit a written report to the Minister of Industry summarizing the information obtained and the reasons for discontinuing the inquiry.

Additionally, the Commissioner may be required to commence a formal inquiry in response to a directive from the Minister of Industry or an application from six Canadian residents. While neither a ministerial directive nor a six-resident application compels the Commissioner to undertake any particular form of enforcement proceeding, the obligation to open an inquiry and make a written report to the Minister upon its discontinuance implies a careful examination of the facts by the Commissioner. As a result, even though the target of the inquiry may not be ultimately charged with an offence, it may be required to incur the substantial costs and inconvenience that a criminal investigation invariably precipitates.

Throughout the course of an inquiry, the Commissioner possesses extensive investigative powers to obtain information not in the public domain via search warrants, wiretaps

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

<sup>13</sup> In fact, section 46 was adopted in the aftermath of international foment about the extraterritorial reach of the *Sherman Act*. Note that in the graphite electrodes cartel proceedings in Canada, charges were laid under section 46. SGL A.G. was fined C\$12.5 million and UCAR Inc. was fined C\$11 million, the highest fines ever imposed for a single count in a cartel case in Canada. See the Competition Bureau press releases, online: Competition Bureau <[http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/h\\_ct01256e.html](http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/h_ct01256e.html) >.

<sup>14</sup> This section updates an earlier paper by D. Martin Low, Q.C. and Casey W. Halladay: “Understanding Cartel Enforcement Conference,” British Chamber of Commerce in Belgium/Howrey Simon Europe: Brussels, Belgium (11 February 2003).

and orders for production (under section 11 of the *Act*). These statutory powers supplement information supplied voluntarily by marketplace participants, immunity applicants, or fellow enforcement agencies in other jurisdictions.

(a) Search Warrants

Search warrants may be obtained by way of an *ex parte* order under section 15 of the *Act*. The Commissioner may apply to a judge by showing reasonable grounds to believe that an offence has been committed and that relevant evidence is located on identified premises. Preventing access to premises or otherwise obstructing the execution of a search warrant is a criminal offence; the Commissioner may enlist the support of the police if entry is denied. In several instances, searches by the Bureau have been coordinated with “dawn raids” by the European Commission and searches, drop-in interviews and subpoenas by US anti-trust agencies.<sup>15</sup> The factual basis for a search warrant is set out in an “Information” sworn or attested to by an officer of the Bureau. The threshold for the warrant is not high, and the facts available to the Bureau are normally summarized in the information. Common practice of the Bureau has been to obtain a sealing order for the information in support of the application, but those orders have increasingly been challenged and set aside or modified.<sup>16</sup> The balance to be drawn is between the need for information, on the part of targets of a search, about the factual basis for the search, and the administrative and investigative integrity of an important law enforcement agency.

(b) Computer Searches

Section 16 of the *Act* authorizes the Bureau to search and seize computer records and permits the courts to set terms and conditions for the operation of a computer system during the search. The Bureau has invested heavily in this area over a long period, and has developed cutting-edge, internal expertise and technology for the conduct of electronic searches. The Bureau’s powers under section 16 are very broad, though there has been little judicial consideration of the section. One particular issue relates to the territorial scope of computer searches. Bureau investigators have downloaded data stored outside of Canada in the course of searches of computer terminals located in Canada. If the data stored abroad can be retrieved on a terminal in Canada, there is a strong textual argument that such data can be seized from that

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<sup>15</sup> 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\\_](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/03/33I0IRAPID&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/03/33I0IRAPID&lg=EN)>. See also Globe and Mail “Canada Confirms Forestry Probe,” (25 May 2004), for a summary of the paper and forest products industry price-fixing investigation, online: Globe and Mail <<http://www.theglobeandmail.com/servlet/story/RTGAM.20040525.wcomp0525/BNStory/Business/>>.

<sup>16</sup> A recent case dealing with sealing orders is *The Commissioner of Competition v. Cascades Fine Papers Group Inc., et al.*, [2004] F.C. 281; Court File No. T-139-03, (F.C.T.D.) (January 23, 2004), in which the Court ordered the provision of a redacted Information, in circumstances where the facts supporting the warrant derived from an immunity applicant. However, the proceedings to quash the warrant are still pending.

location.<sup>17</sup> But other provisions of the *Act* that grant explicit authority to deal with records physically located abroad might suggest that section 16 should be limited to data that is both stored and retrievable in Canada. In practice, the Bureau has exercised care where an information system in Canada is linked to other systems abroad, and has thus avoided any judicial consideration of the scope of the intrusive authority available under section 16. Suffice it to say that the section remains controversial, to the extent it might be construed to involve compulsory access by Canadian government officials to electronic records held outside Canada.

(c) Privileged Records

Documents subject to solicitor-client privilege may not be seized under a search warrant but the *Act* contains a special procedure for determining the validity of privilege claims which balance the public interest with both solicitor-client privilege and judicially authorized intrusions into confidential records. Summarily, it entails a procedure for sealing the records concerned and depositing them with the Court under seal, for subsequent consideration of the claim of privilege. The *Act* also contains a provision requiring the Commissioner to report to the court to retain seized documents. Because the affected corporation can ultimately request a retention or privilege hearing, and evidence acquired through an illegal search may be excluded at trial, the courts have generally ruled that search warrant orders may not be appealed.<sup>18</sup> Nonetheless, a warrant may be set aside in specific circumstances (*e.g.* due to material non-disclosure or misrepresentation in the affidavit supporting the Commissioner's *ex parte* application) and proceedings to challenge such warrants are not uncommon.

(d) Wiretaps

By way of recent amendments to the *Criminal Code*,<sup>19</sup> the Commissioner has acquired the power to intercept private communications through electronic means, *i.e.* wiretapping. This power is reserved for investigations of conspiracy, bid-rigging and serious deceptive marketing cases. Judicial authorization is required prior to interception. Wiretapping has very significant resource and other implications, and its employment will likely imply that other investigative tools have produced sufficient information to satisfy the court that interception should be authorized. How often those circumstances will arise in cartel cases remains to be seen. While there are indications of increasingly frequent resort to wiretaps in the context of deceptive telemarketing scams, in virtually all of those cases, one of the parties to the communication participates from within Canada. In the case of a cartel wholly conceived and conducted abroad, domestic wiretap authority may be beside the investigative point.

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<sup>17</sup> It should be noted that this interpretation does have important and untested privacy and extraterritorial implications.

<sup>18</sup> *R. v. Hoffman-LaRoche Ltd.* (1981), 33 O.R. (2d) 694, 125 D.L.R. (3d) 607 (C.A.). However, see *Cascades*, supra, note 15, where the material seized by the Commissioner was challenged on the basis of an alleged breach of the constitutional protection of the privacy interests of the parties searched.

<sup>19</sup> S.C. 1999, c. 2, s. 47 (amending s. 183 of the *Criminal Code*).

(e) Section 11 Orders<sup>20</sup>

By way of an order under section 11 of the *Act*, the Commissioner may compel the production of pre-existing records and documents, as well as newly-created, written returns of information. Such orders require a person to produce records and written returns under oath or affirmation within a specified period of time. In an *ex parte* application, the Commissioner need only satisfy the court that an inquiry has been initiated and that a person is likely to have records that are relevant to the inquiry. Section 11 orders are normally very broadly drafted, and they may also be used in lieu of search warrants, because the threshold for obtaining a section 11 order is lower than that for obtaining a warrant. Most frequently, however, the Bureau will commence its public investigations with a search and then serve a broad section 11 order on the conclusion of the search, to compel production of other relevant records that may not have been seized during the search.

Section 11 may also be employed to compel witnesses who may possess relevant information to appear and answer questions under oath. A presiding officer oversees the examination and determines the propriety of questions asked. The inquiries are conducted in private, but any person who is a subject of the inquiry may attend the examination of a witness.<sup>21</sup> This may have significant implications, both for the investigators and for the party subject to the order, because if other subjects learn of the investigation, they may be present (though they have no right to participate) while corporate representatives are compelled to testify. However, the presiding officer has power to safeguard confidential information by excluding competitors' representatives in such circumstances.

A witness is not exempt from testifying on the ground that the testimony may incriminate the person; however, evidence obtained from a witness under a section 11 order may not be used against that person in any subsequent criminal proceedings.<sup>22</sup> This restriction is consistent with the Supreme Court of Canada's constitutional decisions that have established both use and derivative use protection for persons who may be compelled to give evidence under statutory powers of investigation.<sup>23</sup> The same does not hold true where an employee of a corporation is compelled to give evidence under section 11 – the evidence is admissible against the corporate accused or co-workers. Moreover, there is no protection against the use of documents obtained by way of a production order under section 11 or a search.

Subsection 11(2) provides for an important Canadian investigative tool. This provision focuses on records held by a foreign affiliate of a Canadian corporation. A court may order the Canadian corporation, usually a subsidiary, to obtain and produce relevant records that are in the possession or control of the foreign parent or affiliate. Numerous untested legal questions arise from this provision, which is a "long arm" public investigative tool that once again, formally operates on the susceptibility of local corporations to punishment, in the event of

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<sup>20</sup> This section is largely derived from a paper by D. Martin Low, QC and Casey W. Halladay: "Competition Law and Policy in a Global Context," IBA/Global Competition Forum Conference: Seoul, Korea (23 April 2004).

<sup>21</sup> This is in sharp contrast to the secrecy of United States' Grand Jury proceedings.

<sup>22</sup> *Act*, *supra* note 2, ss. 11(3).

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

non-compliance with a domestic court order. Such an order may require action that the Canadian entity has no legal capacity to carry out. The real target of the order may well be the foreign affiliate, which may control the Canadian entity. Nevertheless, the Canadian entity's exposure to compulsion, enforceable by the Canadian court's capacity to punish non-compliance with its orders, is a practical effort to secure evidence in Canadian competition investigations which have an international component. Despite having been on the statute books for an extended period of time, there have been no litigated challenges to an order under the provision. Once again, there are very significant and untested legal issues that cry out for judicial consideration, and while it is understood that a challenge has recently been initiated in a pending investigation, no outcome has emerged.

#### 4. IMMUNITY CONSIDERATIONS IN CANADA<sup>24</sup>

The Commissioner's Information Bulletin, "Immunity Program Under the *Competition Act*,"<sup>25</sup> outlines both the circumstances under which immunity from prosecution will be granted and the co-operation required to maintain immunity throughout the life of an investigation. The Bulletin and its related FAQs<sup>26</sup> reflect the current practice of the Commissioner and, implicitly, the Attorney General.<sup>27</sup> Since publication of the Immunity Bulletin in September 2000, there has been a significant increase in the number of immunity requests, and in the early stages, the Bureau received approximately one request per month.<sup>28</sup> It is also notable that the Immunity Program applies both to cartels and other forms of criminal misconduct under the *Act*, and the Program has very recently and quite remarkably been invoked for the first time in a criminal prosecution for misleading advertising.<sup>29</sup>

In exchange for cooperation with the Bureau's investigation, subject to certain minimal requirements, the Bureau's programme offers immunity or leniency on terms that are comparable to those offered by other competition enforcement agencies. The authority to grant immunity from prosecution lies exclusively with the Attorney General. The Commissioner will recommend to the Attorney General that immunity be granted to a party that is the first to disclose the offence, provided the applicant has taken steps to terminate its involvement and is

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<sup>24</sup> This section is based on a paper written by D. Martin Low, Q.C. and Casey W. Halladay for the IBA/Global Competition Forum Conference: "Competition Law and Policy in a Global Context", Seoul, Korea (23 April 2004), and a paper written by D. Martin Low, Q.C. for the IBA Communications and Competition Law Conference: "Cartel Enforcement, Immunity and Jurisdiction: Some Recent Canadian Developments", Rome, Italy (17 May 2004).

<sup>25</sup> Competition Bureau, "Immunity Program Under the Competition Act" (21 September 2000), online: Strategis, Industry Canada <<http://strategis.ic.gc.ca/pics/ct/immunitye.pdf>> ("Immunity Bulletin"). See also Competition Bureau, Frequently Asked Questions "Immunity Programme under the Competition Act" (November 27, 2001), online: Strategis, Industry Canada <<http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02312e.html>> [hereinafter "FAQ's"].

<sup>26</sup> See D. Martin Low Q.C., "The Competition Bureau's Immunity Program: A View of Policy and Practice in Canada" (April 2001) *Antitrust Report* at 2.

<sup>27</sup> The Attorney General's prosecutorial policy is laid down in the Federal Prosecutions Service Desk Book. A draft chapter on immunity has been under development for some time; the current text specifically refers to the immunity practice of the Commissioner of Competition. See the Department of Justice online: <<http://canada.justice.gc.ca/en/>>.

<sup>28</sup> Notes for an Address by Konrad von Finckenstein Q.C., Commissioner of Competition, to the Canadian Bar Association Competition Law Section Annual Meeting (September 20, 2001) at 5, available online at: <<http://strategis.ic.gc.ca/pics/ct/kvf0901.pdf>>.

<sup>29</sup> See Competition Bureau, News Release, "PetNet Pleads Guilty and Pays \$150,000 Fine for Misleading Mailings," (July 28, 2004) online: Competition Bureau <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02920e.html>>.

not the instigator or (exceptionally in international immunity practice) the sole beneficiary of the offence in Canada. The party must provide complete and timely co-operation throughout the course of the Bureau's investigation. It must make restitution to the victims of the illegal activity, although this requirement is generally left to the self-help of the victims, seeking redress under the civil cause of action created by section 36 of the *Act*.

The Bureau has also adopted the so-called "immunity plus" codicil that is applied under U.S. Amnesty practice: party that is not first in may nonetheless qualify for a reduced fine of the original offence, by disclosing a second competition offence. Some specific immunity issues are becoming slightly uncertain in light of recent developments, with the termination, instigation and cooperation aspects of the immunity requirements having been implicated in several emerging cases.

The Canadian program clearly reflects the "first-in" criterion that is now commonplace internationally. This requires the applicant to be the first to approach the *Canadian* competition authorities. Being the first to approach the authorities in another jurisdiction will not result in any favourable treatment in Canada, if another party is the first to offer its cooperation in Canada.<sup>30</sup> Two cases illustrate the reality of this policy: in the Vitamins investigations, parties that obtained amnesty in the U.S. were slow to come forward in Canada. As a result, each corporation was required to plead guilty in Canada and received heavy fines.<sup>31</sup>

Because of the pressure to be the first to apply, the Bureau has adopted the U.S. Department of Justice's practice of accepting a "marker" although the mechanism has not been the subject of a public articulation of policy. If a party is certain that an offence has been or continues to be committed, but is unable to substantiate the application of the offence in Canada, it may preserve its place as "first-in" by communicating to the Bureau a request for a marker. The marker practice facilitates the Bureau's objective of learning about anti-competitive behaviour sooner rather than later, and it also affords would-be cooperating parties protection while their internal investigation is not finally completed. However, it appears that the expectations have been occasionally unmet, on both sides of the line of enforcement.

Though granting a marker is fair treatment for the first party to accept responsibility in Canada, the practice is susceptible to strategic conduct. Where an involved party has applied for amnesty abroad, other parties may learn of the applications and rush to the door of the Bureau. At the other end of the spectrum, there is potential for delay by the marker holder. Once a marker has been granted, the party may see little urgency in fulfilling its application with any alacrity. The marker party may be facing penalties abroad, and may be distracted by or focussed primarily on that exposure. Or it may not wish to amass or produce self-incriminating evidence for Canadian authorities which may be sought by civil litigants in other jurisdictions (principally, the United States). It may focus excessively, and to the perceived detriment of Canadian enforcement interests, on satisfying its obligations to other

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<sup>30</sup> Immunity Bulletin, *supra* note 26 at 5 (section G, item 31).

<sup>31</sup> See Competition Bureau, News Release, "Federal Court Imposes Fines Totalling \$88.4 Million for International Vitamin Conspiracies," (22 September 1999) in regards to Rhône Poulenc S.A., 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>>.

enforcers. While there are no specific deadlines regarding the submission of evidence pursuant to a marker, it is evident that the Bureau recognizes the potential for marker parties to stall its investigation while preventing other parties from applying for marker status. While it is a distinct possibility that a marker holder in Canada could be displaced as a result of an inability or an unwillingness to perfect its application, there have been no public announcements of such outcome in Canada (unlike the *Stolt-Nielsen* example in the U.S.).<sup>32</sup> At the same time, there is a concern that excessive pressure not be placed on the marker party so that a proper internal investigation is not jeopardized. There are risks in proceeding too quickly. An interview with individuals who have not been fully prepared may produce an incomplete or erroneous recollection. Forcing the pace while, for example, corroboration of information is pending, may produce misunderstandings, a risk of jeopardy to the witness and inappropriate investigative records that may eventually have to be disclosed, with potential detriment to downstream trials in Canada or in other countries. In the circumstances, there is a need for both administrative care and further clarification of the ground rules applicable to the marker initiative.

If a party is not the first to approach the Bureau, there remain important reasons to consider cooperating with Canadian authorities. The second party to cooperate may be afforded lenient or favourable treatment, in the form of lower fines, protection of individuals, reduced numbers of charges, or other forms of leniency. Alternatively, if the first party fails to meet the requirements to maintain immunity, the second party may be able to supplant it, although such an outcome would likely be controversial, at the very least. As a rule of thumb, the second party to apply will usually qualify for a reduced fine, depending on the value of its cooperation and any aggravating factors. The “discount” is liable to be greater if the Bureau does not yet have sufficient evidence to refer the case for prosecution, a common situation where an immunity applicant’s evidence does not meet the requirement for proof of the offence beyond a reasonable doubt. Parties who offer to cooperate at a later stage in the investigation are likely to be offered higher fine settlements as a proportion of the relevant volume of commerce, depending upon their position in the queue as well as other aggravating or mitigating factors.<sup>33</sup> Parties seeking to resolve their exposure later in the investigation will have limited opportunities to negotiate favourable terms for both fine levels and exposure of implicated executives or employees.<sup>34</sup> Summarily, as each cooperating party strengthens the prosecution’s case by reducing the evidentiary and litigation risks, those who delay have less to offer.

## **5. THE FUTURE FOR PENALIZING ANTI-COMPETITIVE CONDUCT**

Given their status as the most serious offences under the *Act*, cartel prosecutions attract very significant individual and corporate fines and imprisonment, together with prohibition orders made after a conviction. Courts have emphasized that, in a competition law context, fines must be large enough to deter powerful companies and must not become simply a

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<sup>32</sup> See “Justice Department Statement Regarding Antitrust Division’s Corporate Leniency Program” (22 March 2004), online: U.S. Department of Justice <[http://www.usdoj.gov/opa/pr/2004/March/04\\_at\\_176.htm](http://www.usdoj.gov/opa/pr/2004/March/04_at_176.htm)>.

<sup>33</sup> See *R. v. Ueno Fine Chemicals Industry Ltd.* [2001] J.Q. no 3424 (Que. Sup. Ct.), where the court generally adopted a hierarchy of fines.

<sup>34</sup> See Competition Bureau, News Release, “Morgan Companies Fined \$1 Million for Obstruction and Price-Fixing” (16 July 2004), online: Competition Bureau <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02917e.html>>.

cost of doing business.<sup>35</sup> As a result, the Commissioner has recently obtained multi-million dollar fines following guilty pleas in a number of conspiracy cases. These have included the highest fines in the history of Canadian criminal law.<sup>36</sup> But despite the very considerable recent record of effectiveness, there have been significant proposals for legislative change.

(a) Proposed Amendments to the *Act*

Debate about reforming section 45 of the *Act*, the general conspiracy prohibition, has continued more or less in earnest for more than a decade. Proposals to amend section 45 and introduce a “dual-track approach” were included in the Canadian Government’s Discussion Paper entitled *Options for Amending the Competition Act: Fostering a Competitive Marketplace*, released in June 2003.<sup>37</sup> A specific proposal by the Government was to facilitate prosecutions in cartel cases by scaling down the requirement in section 45 for proof of economic significance – or undueness – as an element of the offence. The proposed policy approach would make section 45 into a *per se* offence, but applicable only to so-called “hard core” cartel behaviour (i.e. agreements to fix prices, allocate customers or markets, or limit output). For non-hard core conduct, the proposals contemplate a scheme of non-criminal penalties (administrative monetary penalties), coupled with an arrangement for binding opinions as to the legality of various forms of competitor interaction, such as joint ventures, licensing agreements and other benign competitive relationships. The main arguments in support of reform are that section 45 has a chilling effect on legitimate strategic alliances, that it is too difficult to enforce (despite a brilliant record of success in criminal matters over the last decade) and an inflated bit of sloganeering, that Canada lags behind international norms because it lacks a *per se* cartel offence.<sup>38</sup> On the other side of the debate has been concern about the ability to redefine hard core cartel conduct in a precise and meaningful manner that catches neither too much nor too little. Canada, like the UK, does not have the benefit of the jurisprudential gloss that the US courts have given the general language of section 1 of the *Sherman Act*. While the 1998 OECD description of hard core cartel behaviour is instructive and indicative, it is hardly precise or exhaustive.<sup>39</sup> But the current Canadian formulation, shorn of any economic criterion, casts far too wide a net, leaving those who may be close to the line subject to the vagaries of prosecutorial discretion.<sup>40</sup>

The government sought comments on the Discussion Paper proposals and as of November 13, 2003, 92 submissions had been made to the Public Policy Forum (“PPF”).<sup>41</sup> The PPF released a report summarizing the views expressed regarding section 45 and other

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<sup>35</sup> *R. v. Armco Canada Ltd. (No. 2)* (1975), 24 C.C.C. (2d) 147 at 149.

<sup>36</sup> See Competition Bureau, News Release, “Federal Court Imposes Fines Totalling \$88.4 Million for International Vitamin Conspiracies,” (September 22, 1999), online: Competition Bureau <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct01581e.html>>.

<sup>37</sup> Available online at <<http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02584e.html>>.

<sup>38</sup> Additional proposals set out in the Discussion Paper are to transform reviewable practices such as abuse of dominance into civil offences (through the introduction of potentially substantial “administrative monetary penalties”) and/or competition torts (by the introduction of private rights to recover damages).

<sup>39</sup> OECD: Recommendation Concerning Effective Action Against Hard Core Cartels, May 13, 1998.

<sup>40</sup> See Julian Joshua: “The UK’s New Cartel Offence and its Implications for EC Competition Law: A Tangled Web”, (2003), 5 E.L.R. 620.

<sup>41</sup> All submissions are available on the PPF’s website at <[http://www.ppforum.com/competitionact/submissions\\_e.htm](http://www.ppforum.com/competitionact/submissions_e.htm)>.

amendment proposals.<sup>42</sup> Few respondents offered much support for a modification of section 45 and there has been widespread and trenchant criticism of both the rationale given for changing the section and the specific changes that are proposed.<sup>43</sup> There has been no public indication of the attitude of the new government to the policy proposals that were floated prior to its election. It therefore remains to be seen when and in what form any changes will be brought forward in legislative amendments.

(b) Administrative Monetary Penalties

Administrative Monetary Penalties (AMPs) were added to the *Act* in 1999 to enable the Competition Tribunal to address non-criminal misleading advertising and deceptive marketing practices. Three years later, AMPs were added under subsection 79(3.1), in order to penalise instances of abuse of dominant position by an airline. Since their inception, AMPs have increasingly been imposed by the Bureau by consent agreements, in competition cases that have been diverted to a “non-criminal” track by the exercise of a sort of triage, in the discretion of the Bureau. Within the last year, several AMPs in amounts upwards of \$500,000 have been imposed by consent agreements against offending companies. In response to allegations of deceptive marketing practices under Part VIII.1 of the *Act*, the Bureau negotiated settlements with Suzy Shier, The Forzani Group Ltd. and Teleresolve Inc. These parties were respectively ordered to pay C\$1 million, C\$1.7 million and C\$750,000 in AMPs, by way of consent orders that were filed with the Competition Tribunal and therefore automatically enforceable, without judicial consideration.<sup>44</sup> Moreover, in 2003, a price maintenance and misleading advertising claim against Toyota Canada was resolved without any penal proceedings whatever, on payment of a C\$2.3 million donation by Toyota Canada to private groups that promote automotive safety.<sup>45</sup>

The articulated purpose of AMPs is to encourage businesses to comply with the regulatory scheme and to diminish recourse to formal criminal prosecution. While these financial penalties may indeed promote compliance, they are certainly penal in nature, and the practice to date raises important questions of law and policy. For instance, when the penalty is imposed, there is no accompanying commentary or explanation by the Bureau and no public disclosure of the specific facts that led to the penalty. The means by which a penalty is calculated are not divulged to the Tribunal, the public or the profession. The penalties are adopted in a process of negotiations, with very extensive discretion left to the Competition Bureau, with agreed resolutions leading to consent orders which are effective when filed with the Competition Tribunal, without judicial evaluation or victim or public input. The magnitude of the penalties are particularly difficult to understand, having regard to the limits set out in subsection 74.1(1)(c)(ii), which provides:

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<sup>42</sup> *National Consultation on the Competition Act: Summary Report on the Submissions by Intervenors*. Available online at <[http://www.ppforum.ca/competitionact/Comp\\_Bureau\\_submission\\_report.pdf](http://www.ppforum.ca/competitionact/Comp_Bureau_submission_report.pdf)>.

<sup>43</sup> For a summary of the responses, see John F. Clifford and Todd Prendergast: “Competition Reform – Again: The Discussion Paper and Bill C-249,” 2003 Competition Invitational Forum (17 November 2003).

<sup>44</sup> See <<http://www.ct-tc.gc.ca/english/cases/ct-2003-006/Suzy.html>>, <<http://www.ct-tc.gc.ca/english/cases/ct-2004-001/teleresolve.html>>, <<http://www.ct-tc.gc.ca/english/cases/ct-2004-010/forzani.html>> for copies of the consent agreements.

<sup>45</sup> See Competition Bureau, News Release, “Competition Bureau Settles Price Maintenance and Misleading Advertising Case Regarding the Access Toyota Program,” (28 March 2003), online: Competition Bureau <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02539e.html>>.

74.1(1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Act, the court may order the person

...

(c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding ...

(ii) in the case of a corporation, one hundred thousand dollars and, for each subsequent order, two hundred thousand dollars. (emphasis added)

How the AMPs in the Suzy Shier, Teleresolve Inc. and Forzani Group Ltd. cases reached such high levels is simply unknown in the face of the statutory cap. Perhaps of even greater interest is the Toyota outcome. Stripped to its essence, the case involved apparently problematic advertisements which were finally diverted completely outside the *Act's* scheme of enforcement. No criminal proceedings were taken, no civil administrative proceedings occurred, but a large amount of money changed hands, with the benefits flowing not to the putative victims who may have been misled, but to third party organizations whose selection and interest in the case is utterly opaque as a matter of penal policy. If there was a case of public concern, it may be legitimate to inquire how a payment to private parties, unrelated to the victims, contributes to deterrence, compliance or any other public purpose of the *Act*.

In addition, some recent consent orders under the new procedures for AMPs have included the payment of some or all of the costs of the investigation. No specific provisions of the statute authorize an award of costs for a public investigation or public penal proceedings. Costs are not liable to be awarded to a prosecutor in a criminal case in Canada (other than on appeal), without specific statutory provision. The Canadian policy is rooted in a concern to maintain both the fact and the perception of complete objectivity and impartiality in the prosecutorial function. It has historically been considered that the availability of costs in the event of success in a penal matter might appear to give a prosecutorial agency an institutional interest in a positive outcome. Against that philosophical backdrop, the negotiation of cost payments to the government, in consent orders that are not subject to judicial consideration, raises additional questions about the appropriate administration of administrative penalties under the *Act*. This opacity in administration is of questionable propriety, for the prosecution of cartel offences, the core provisions of the *Competition Act*, and it should be a factor in any debate of the proposals to amend the criminal conspiracy provisions of the statute.

Related to this uncertainty is the Bureau's discretion to pursue either a criminal or administrative process under the proposed amendments. Proceeding by way of AMPs means diversion of the matter out of the criminal process. While that is important public policy interest, the fact remains that an ostensibly culpable party will not be charged criminally. One is left to wonder, in the absence of objective review, whether the recent large AMPs were negotiated with the offending party, giving way to exorbitant penalties to avoid the stigma and other negative consequences of criminal charges. The pressure that would likely take place throughout a negotiated settlement might involve threats of criminal charges, if a settlement is not reached. Avoiding criminal prosecution would be important leverage for most corporations, especially those that are publicly traded. The potential for such pressure is regarded, by lawyers, as a matter of professional ethics. The Rules of Professional Conduct of the Law Society of Upper

Canada, for example, generally prohibit the threat of criminal proceedings to promote a civil settlement,<sup>46</sup> as the new AMP procedures are asserted by the Bureau to be.

It is not clear whether an explicit threat of moving a case to the criminal track would be made expressly by the Bureau, when considering the new resolution models that would arise with an administrative penalty procedure. However, the choice of administrative or criminal proceedings is at the sole option of the Bureau, and in the absence of public information about the process, there is at least the potential for administrative abuse. As the Bureau and the Government consider the application of a dual track approach to what is currently *criminal* cartel activity, many important and practical questions of policy and procedure call for clarification.

## **6. CONCLUSION**

This survey of Canadian investigative authority, practice and recent developments has emphasized several Canadian procedures that may be of interest in international efforts to both deter and punish cartels. Tremendous achievements in cartel enforcement have made significant contributions to the restoration of competitive markets in Canada, but very important questions of practice and procedure, law and policy are outstanding, and they deserve pressing and detailed consideration.

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<sup>46</sup> Law Society of Upper Canada: Rules of Professional Conduct online: <[http://www.lsuc.on.ca/services/services\\_profconduct\\_en.jsp](http://www.lsuc.on.ca/services/services_profconduct_en.jsp)>. 2.02 (4) A lawyer shall not advise, threaten, or bring a criminal or quasi-criminal prosecution in order to secure a civil advantage for the client.