

The CBA 2004 Annual Fall Conference on Competition Law

**International Cartel Enforcement:
Issues of Canadian Jurisdiction**

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**September 23-24, 2004
Hilton Lac Leamy, Ottawa/Hull**

International Cartel Enforcement: Establishing Criminal Jurisdiction in Canada

1. Introduction

The successful detection, investigation and prosecution of international cartels have been among the most prominent achievements of competition enforcement agencies over the last decade. Coordinated investigations pursuant to mutual legal assistance treaties and competition law cooperation agreements have resulted in significant contributions to the successes of many enforcement agencies in bringing offshore cartel participants to justice.¹ However, the difficulty of asserting national jurisdiction over the cartel and its members is still a significant legal and operational concern for enforcement agencies and a critical element for lawyers assessing the defence of their clients. In order to prosecute participants in international cartels, both personal and subject-matter jurisdiction must be established,² and important policy and legal questions must be confronted, in the case of cartels that operate wholly outside of Canada, often without much consciousness of Canada, and frequently involving corporations with no presence or assets in Canada.

With respect to *subject-matter* jurisdiction over offshore cartels, representatives of the Competition Bureau and lawyers with its Competition Law Division have sometimes suggested that the parties to a global cartel could be liable to prosecution in Canada based on the fact that the cartelised product was sold in Canada. Subject-matter jurisdiction in Canada, or the authority of a Canadian court to try parties for a crime, is limited to offences committed within Canadian territory.³ For hard-core international cartels, including price fixing, bid rigging, and market or customer allocation agreements, it is evident in an economy served by global businesses that these anti-competitive offences will frequently involve different components, occurring in different jurisdictions around the world. The precise factual and legal underpinning that is required to substantiate the authority of Canadian courts to try such offences is a complex matter of real importance, and the purpose of this paper is to outline some of the key elements of debate.

¹ A notable example of extensive inter-agency coordination is the simultaneous searches in multiple countries by the U.S. Antitrust Division, the EC Directorate-General for Competition, the Canadian Competition Bureau, and the Japanese Fair Trade Commission in February 2003 in the plastic additives industry. See European Commission Press Release, “Statement on inspections at producers of heat stabilisers as well as impact modifiers and processing aids - International cooperation on inspections” (13 February 2003), online: <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/03/33|0|RAPID&lg=EN>; and R.H. Pate, “Anti-Cartel Enforcement: The Core Antitrust Mission” U.S. DOJ <https://http://www.usdoj.gov/atr/public/speeches/201199.htm#N_19_>.

² See Campbell and Rowley: “Jurisdiction and Litigation Developments in Canadian Competition Law”, 45th Annual Antitrust Law Institute, (May 2004) at 1-2.

³ *Criminal Code*, R.S.C. 1985, c. C-46, subsection 6(2).

In Canadian criminal law, *personal jurisdiction* can be established only where the person to be served is present within the territory of the court.⁴ It is commonplace that some cartel participants will have no presence in Canada, and personal service becomes a serious impediment to Canadian enforcement action. There have been recent efforts to overcome this territorial limitation on service of process, to extend the reach of Canadian courts to persons who are outside the jurisdiction. Canadian prosecutors have undertaken imaginative, but ultimately unsuccessful, measures to serve a corporate accused abroad by registered mail, and there have been musings about other procedurally aggressive tactics to reach parties who are outside Canada, using the Canada-U.S. Mutual Legal Assistance Treaty (MLAT).⁵

Numerous foreign corporations and individuals have agreed to come to Canada, submit to the personal jurisdiction of the Canadian courts and plead guilty to charges in Canada arising out of the activities of international cartels. There has not been a contested issue of service in any competition case that has emerged in the last decade. It is probable that if they addressed their minds to it, the parties simply chose not to test either the subject-matter or the personal jurisdictional issue, in a situation where they were resolving their antitrust liabilities on a global basis. However, this does not mean that the parties to the next international cartel will demonstrate similar cooperation and both aspects of jurisdiction remain an important issue for both sides to the cartel enforcement equation in Canada.

2. Canadian Subject-Matter Jurisdiction in International Cartel Cases

(a) *General*

Canada traditionally has had a strong presumption against the extraterritorial application of criminal laws. The principle of territoriality is paramount: a Court has authority to try an offence only if it was committed in Canada.⁶ While the facts that constitute the commission of an offence may range through different countries, and thus give rise to a dispute about the precise locus of the offence, the territorial restriction of Canadian law is clear. That position is subject to legislative modification, and the Supreme Court has confirmed Parliament's legislative authority to enact extraterritorial criminal laws.⁷ But it must do so expressly and clearly, and Parliament has created very few exceptions to the principle of territoriality. Exceptional cases of clear international concern, usually in conjunction with international agreements, like those that authorise or require Canada to take jurisdiction over certain acts of

⁴ The discussion which follows is focused on criminal liability. The *Competition Act* also contains a private right of action (in s. 36) that allows any person injured by a violation of any of the offences in the *Act*, including conspiracy, to bring a suit to recover their damages plus litigation and investigation costs. Such an action may proceed regardless of whether a prosecution has occurred in respect of the offence. The precise rules of service for civil claims depend upon the provincial or federal court in which the action is commenced. However, as long as subject-matter jurisdiction appears to exist, they generally contemplate that non-resident individuals and foreign corporations may be served outside of the jurisdiction by following the *Hague Convention on the Service of Process Abroad*.

⁵ *Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters*, 1990, C.T.S. 1990/19 (Canada Gazette, Part 1, 1990, p. 953) (the "*Canada-U.S. MLAT*").

⁶ See *R. v. Finta*, [1994] 1 S.C.R. 701 at 805 (S.C.C.); and *Criminal Code*, R.S.C. 1985, c. C-46, s. 6(2).

⁷ *Terry v. The Queen*, [1996] 2 S.C.R. 207 at 215 (S.C.C.).

terrorism or aircraft offences, are some of the examples.⁸ But neither the *Criminal Code* nor the *Competition Act* specifically provide for the jurisdiction of the Canadian courts over foreign parties, engaged in global cartel activities outside Canada, that may have an economic impact in Canada.

The *Competition Act*⁹ is simply silent on the territorial reach of the Canadian courts in cartel cases. It says nothing about the authority to prosecute an international cartel under subsection 45(1) of the *Act*, where the participants were at all times outside Canada, undertook no concrete action in furtherance of the conspiracy within Canada, and where the only localising feature is that cartelised sales – the effects of the conspiracy – occurred in Canada. As globalization progresses, it is likely that large, international corporations are increasingly organising their affairs on a regional basis. It does not require much imagination to contemplate a member of an international cartel that has organised its business on a NAFTA basis, and manages its production and distribution activities as if the U.S. and Canada were a single market. In many cases, there may be no Canadian subsidiary of the foreign entity, and its directing minds may give no specific thought to Canada or Canadian customers. Unlike the Lysine or Vitamins cases, where specific Canadian objectives were important to the conspirators, the Canadian market may be purely incidental to American sales and production strategies. In such circumstances, whether Canadian courts have jurisdiction to try such cases is not free from doubt, on both legal and policy grounds. But the issues have not been articulated or analysed in any transparent fashion by the Competition Bureau or its lawyers, and the present paper aims to initiate a discussion.

(b) *The Common Law: R. v. Libman*¹⁰

In 1985, the Supreme Court of Canada in *R. v. Libman* rejected the artificial task of selecting one ingredient of an offence as its essential jurisdictional element and holding that the offence occurred in the place where that ingredient occurred.¹¹ Instead, the Court focused on the broader question of whether there was a real and substantial link between the offence and Canada. La Forest J. summarized the jurisdictional test in *Libman* as follows:

“All that is necessary to make an offence subject to the jurisdiction of our courts is that *a significant portion of the activities 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...”.¹² (emphasis added)

⁸ *Criminal Code*, s. 7.

⁹ *Competition Act*, R.S.C. 1985, c. C-34.

¹⁰ *R. v. Libman* (hereinafter, *Libman*), [1985] 2 S.C.R. 178.

¹¹ *Ibid.*, at p. 182, 207-208.

¹² *Ibid.*, at p. 213.

The Supreme Court of Canada held that this jurisdictional test does not require legislative support, since it is simply a matter of judicial interpretation of the meaning of the concept territoriality and “it was the courts after all that defined the manner in which the doctrine of territoriality applied”.¹³

The facts in *Libman* are as follows. Pursuant to the directions of the accused, telephone sales personnel called U.S. residents from Canada to induce them to buy shares in two Central American mining companies. Promotional material was then mailed to the victims from Central America. The sales personnel were directed to make and did make material misrepresentations with respect to the quality and value of the shares they were selling. As a result of these misrepresentations, a large number of U.S. residents were convinced to buy virtually worthless shares in the mining companies. The purchase money was sent to Central America, where the accused received a share to take back to Toronto.

The accused was charged with fraud, as well as with conspiracy to commit fraud under subsection 423(1)(c) of the *Criminal Code* (now section 465.) The Crown argued that the offences had been committed substantially in Canada. The accused claimed that clause 423(1)(c) applied only to conspiracies entered in Canada to commit a substantive offence in Canada, and that the essence of the offence of fraud had occurred in the United States. The Supreme Court considered the case on the basis of the common law principle of territoriality and subsection 5(2) (now subsection 6(2)) of the *Criminal Code*, which provides:

6(2) 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 Canada.

This is significant because in formulating the jurisdictional test, the Court placed no reliance on what is currently subsections 465(3) and (4) of the *Criminal Code*.

Even though the conspiracy involved several activities outside of Canada, the Supreme Court of Canada was not deterred from holding that the offence was committed within its territorial jurisdiction. An essential element of the fraud - the deprivation of the victim - occurred outside Canadian borders, but preparatory activities that were carried out in Canada were sufficient to constitute a real and substantial link to this country.

“[T]he preparatory activities to perpetrate the fraudulent scheme were in themselves sufficient to warrant a holding that the offence took place in Canada. The scheme was devised here, the whole operation that made it function, the directing minds, the boiler room -- all were situated in Toronto.”¹⁴

¹³ *Ibid.*

¹⁴ *Ibid.*, at p. 211.

Selecting the locale where the gist of the offence (which in the present case is the deprivation of the victim) occurred would “involve a large measure of unreality” and would permit “a too easy means of avoiding criminal sanctions”.¹⁵

The jurisdictional test formulated by Justice La Forest is broad. What may constitute a real and substantial link in a particular case is not specified. Only the following guidance is provided: in considering whether the transaction falls outside Canadian territory, the courts “must take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offence”.¹⁶ The “outer limits” of the test are coterminous with the requirements of international comity, where other states may have a strong interest in prosecuting.¹⁷ On the facts of *Libman*, the Supreme Court of Canada held that a failure to assume jurisdiction over the offence would be contrary to international comity as it would “permit criminals based in this country to prey on [the] citizens” of the United States.¹⁸

(c) ***The Reverse Scenario***

The test articulated in *Libman* confirmed the jurisdiction of Canadian courts over an “international” conspiracy, where some of the acts in furtherance of the conspiracy took place within Canada. Where, as in *Libman*, the participants were present and vital operations took place in Canada, but the victims of the cartel were abroad and subject-matter jurisdiction over the offence could readily be acknowledged. In fact, the Supreme Court found that on those facts, there was a real and substantial connection between the offence and Canada. However, since *Libman* was decided, the tactics and strategies of international cartel participants have adjusted to aggressive enforcement measures. It is increasingly common that international cartel participants are at all times outside Canada, undertake no concrete action in furtherance of the conspiracy within Canada, and that the only “Canadian” feature of the offence is that cartelised sales are made in Canada. Thus, only the effects of the conspiracy - increased prices for the cartelised product - are felt in Canada. If there are no other connecting links in the application of its territorial basis of criminal jurisdiction, do such sales suffice to constitute a “real and substantial connection” with Canada, to meet the test articulated in *Libman*?

Canadian courts have not assessed the scenario where nothing occurs in Canada except the consequence of the cartel. There is simply no Canadian case that clearly and consciously sanctioned the view that local effects are a sufficient foundation for subject-matter jurisdiction, as a matter of law. Canada has never overtly invoked the U.S. “effects based” jurisdictional test of *United States v Aluminum Co. of America* (hereinafter, *Alcoa*).¹⁹ And there has never been a contested prosecution which sought to apply *Libman* to wholly offshore

¹⁵ *Ibid.*, at p. 182, 207-208.

¹⁶ *Ibid.*, at p. 211.

¹⁷ *Ibid.*, at p. 213.

¹⁸ *Ibid.*, at p. 214.

¹⁹ *Alcoa*, 148 F. 2d 416 (2d Cir. 1945).

cartels.²⁰ Many foreign corporations and individuals have chosen to come forward, submit to the jurisdiction of a Canadian court and plead guilty to cartel offences.²¹ Entering a quick and relatively quiet guilty plea and paying a negotiated fine has been preferred to a time consuming, public legal process. Typically, the parties settle the case on the basis of an agreed statement of facts, which specifies that the accused submits to the jurisdiction for the purpose of the settlement only. That may solve an issue of personal jurisdiction over the accused, but it does little to clarify the question of subject-matter jurisdiction. And there certainly have been cases where subject-matter jurisdiction might have been a very live issue.

In *R. v. Mitsubishi Paper Mills Ltd.*²² and *R. v. New Oji Paper Co.*,²³ the parties were Japanese paper manufacturers who participated in the Thermal Fax Paper conspiracy. They sold the paper they produced to apparently unaffiliated Japanese trading companies, in transactions carried out in Japan. The trading houses then re-sold the paper in Canada either directly or through a subsidiary. The manufacturers and the trading houses were all party to a price fixing agreement that was entered into in Japan. The agreement specifically contemplated cartelised sales in the Canadian market, and to the knowledge of all parties, it was to be implemented in both the U.S. and Canada. The risk of arbitrage, or resale by Canadian buyers into the U.S. market, might have made control of the Canadian price a necessary component of the more important U.S. price fixing agreement. In these circumstances, one might argue that the *Libman* test was met because the connection was established through the trading houses, as direct parties to the illegal agreement, and actions by them to apply the agreement in Canada. But the issue of subject-matter jurisdiction was not tested.

In the Lysine conspiracy, Canadian convictions were obtained from ADM, Ajinomoto, and Sewon America, while a fourth participant, Kyowa Hakko, received immunity.²⁴ At least one meeting of the conspirators occurred in Canada and direct sales were made in Canada. The parties specifically targeted Canadian prices and Canadian customers, and ultimately entered into transactions with those customers for the delivery of the product, at fixed prices, in Canada. Once again, the case was one with several local Canadian events that could have provided a *Libman*-based jurisdiction.

²⁰ See Low and Halladay: “Cartel Enforcement in Canada”, The Global Competition Forum, Seoul, Korea (April 23, 2004) at 3.

²¹ See Low: “Cartel Enforcement, Immunity and Jurisdiction: Some Recent Canadian Developments”, International Bar Association Communications and Competition Law Conference, Rome, Italy (May 17-18, 2004) at 10.

²² See Competition Bureau, News Release, “Mitsubishi Paper Mills Ltd. Pleads Guilty to Two Charges Under the *Competition Act*” (February 17, 1997), online: <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct01041e.html>>.

²³ See Director of Investigation and Research, *Annual Report for the Year Ending March 31, 1997* (Ottawa: Industry Canada, 1997) at 13.

²⁴ See Competition Bureau, News Release, “\$3. 57 Million in Additional Fines Under the *Competition Act*” (July 23, 1998), online: <<http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct01295e.html>>, and Competition Bureau, News Release “\$16 Million in Fines Paid by Archer Daniels Midland for Violations of the *Competition Act* in the Food and Feed Additive Industries” (May 27, 1998), online: <<http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct01240e.html>>.

There was a fifth participant in the cartel: Cheil Jedang, a Korean corporation, as was evident from the proceedings against Cheil in the U.S. and the EU.²⁵ But Cheil did not ever sell its product in Canada, had no presence or assets in the jurisdiction, and there was no indication that it withheld its product from Canada as an agreed element of the cartel. No Canadian proceedings were taken against Cheil, even though its liability might have been clear, as a co-conspirator in an offence within Canadian jurisdiction. Cases comparable to that of Cheil could be multiplied in other cartels that have been prosecuted in Canada, including Vitamins, Citric Acid, and Graphite Electrodes, where no proceedings have been taken against known co-conspirators.

What is not clear is whether the lack of prosecution in these cases was a matter of practicality, based on an inability of the Canadian authorities to establish personal jurisdiction and an unwillingness of the party to attorn consensually to the jurisdiction of the Canadian courts. Alternatively, there might have been a sense that there could be serious difficulty in establishing subject-matter jurisdiction on a contested basis, because the facts might have shown that the Canadian ingredients of the cartel were simply irrelevant to a party which did not trade in Canada. Or it might have been a little of both.

The result is a dearth of judicial precedent on an important point of law. However, because subject-matter jurisdiction cannot be conferred by consent on a Canadian court in a criminal matter, it might be presumed that the judges that accepted the guilty pleas have tacitly found that they had subject-matter jurisdiction. But they did not rationalise or explain that putative, tacit finding. In some cases, the practical and legal result of these pleas might be difficult to distinguish from the effects-based, extraterritorial jurisdiction of the U.S. courts, classically expressed in *Alcoa*.²⁶ The test articulated in that decision requires the proof of direct, substantial, and reasonably foreseeable effects on U.S. commerce as a result of anti-competitive behaviour outside the U.S. The fact that the illegal agreement was made or criminal operations took place beyond American borders is irrelevant, if effects of that character are produced within the U.S.

(d) A Policy Approach to Canadian Jurisdiction

One might argue that the occurrence of significant effects in Canada should demonstrate a palpable Canadian interest in prosecuting cartel members that cause serious harm to the Canadian economy. Because of the increased international recognition of the importance of challenging and penalising international cartel activity, and of cooperating with other competition agencies to accomplish that objective, there might not appear to be any countervailing comity interests of other states that should inhibit the exercise of Canadian criminal jurisdiction over the foreign corporations concerned. And the large number of

²⁵ See EU Competition Commission, Press Release, “Commission fines Ajimoto, Cheil and Daesang in food flavour enhancers (nucleotides) cartel” (December 17, 2002), online: <<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/02/1907&format=HTML&aged=1&language=EN&guiLanguage=en>>, as well as U.S. Department of Justice, Press Release, “Three international companies to plead guilty in food flavouring cartel” (August 27, 2001), online: <<http://www.usdoj.gov/opa/pr/2001/August/435at.htm>>.

²⁶ See *Alcoa*, *supra* note 19 at 444.

convictions in the cases to date might now feed an argument of law and policy that minimal connecting factors are necessary to provide a jurisdictional foundation for a Canadian prosecution in such cases. How else could so many judges accept so many pleas, if there was any question of their authority to proceed? In a case where in fact, a cartel operated on an international basis and cartelised sales were made in Canada, even if the parties did not direct their minds to the Canadian implications of their conduct, direct, substantial and foreseeable Canadian effects might consequently be thought to suffice.

While that might be a plausible policy approach for the Competition Bureau and its lawyers in the Competition Law Division of the Department of Justice, that position has never been specifically promulgated or explained. Such an approach would be notable, in light of the history of Canadian resistance to the extraterritorial enforcement of the United States antitrust laws. Extraterritorial enforcement action by U.S. agencies and the U.S. courts, based on the jurisdictional test of *Alcoa*, have been strenuously criticized by Canadian commentators,²⁷ as well as by the Canadian and other governments in cases like *Westinghouse Electric Corporation v. Rio Algom Limited*²⁸ and *Hartford Fire Insurance Co. v. California*²⁹ (though not in *United States v. Nippon Paper Industries Co.*)³⁰ Resistance to U.S. extraterritorial jurisdiction in antitrust cases has led to the passage of “blocking” statutes, such as the *Foreign Extraterritorial Measures Act*,³¹ by Canada and other countries. That level of Canadian response signifies very serious intellectual and policy-based opposition to the assertion of American extraterritorial jurisdiction in antitrust cases, if only on comity grounds. Other efforts by Canada (and other enforcement authorities) have more recently been undertaken to resist the extraterritorial demands of civil litigants in the U.S. for records relating to dealings between the U.S. defendants and the Canadian, European and other competition agencies.³² Clearly, the Competition Bureau and the Government may have had a change of heart on extraterritorial subject-matter jurisdiction in international cartel cases, since Canada’s objections were advanced to comparable jurisdiction claims in the United States. But if so, the requisite legal and policy thinking has never been laid out. In the absence of jurisdictional facts that would supplement the mere combination of an international cartel and Canadian sales, it seems reasonable to suggest that the

²⁷ See J.G. Castel, *Extraterritoriality in International Trade: Canada and United States Practices Compared* (Butterworths: 1988) at 44-64.

²⁸ *Westinghouse Electric Corporation v. Rio Algom Limited* (hereinafter, *Westinghouse*), 617 F. 2d 1248; 1980 U.S. App. LEXIS 20437; 1980-1 Trade Cas. (CCH) P63,183; 28 Fed. R. Serv. 2d (Callaghan) 1263, September 20 and Nov. 9, 1979, Argued, February 15, 1980, Decided.

²⁹ *Hartford Fire Insurance Co. v. California* (hereinafter, *Harford Insurance*), 509 U.S. 764 (1993). Canada, along with other countries, submitted an amicus brief in the Supreme Court consideration of this and other effects-based cases in the U.S., to contest the assertion of extraterritorial jurisdiction under the *Sherman Act*.

³⁰ *United States v. Nippon Paper Industries Co., Ltd.* (hereinafter, *Nippon Paper*), 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998), a case arising out of the Thermal Fax Paper conspiracy. Only Japan, and not Canada, the UK or Australia, submitted an amicus brief to oppose the exercise of American criminal jurisdiction.

³¹ *Foreign Extraterritorial Measures Act* (hereinafter, “FEMA”), S.C. 1984, c. 49.

³² *In Re: Vitamins Antitrust Litigation: Re Bioproducts’ Rule 53 Objection*, 2002 U.S. Dist. LEXIS 25815.

case to support subject-matter jurisdiction in international cases should not be left to implication, if only because there may be other important interests at play.

*Hartford Insurance*³³ might suggest one such interest. In that case, one of the issues was whether the conduct of foreign corporations in a foreign jurisdiction, acting lawfully and maybe even with foreign encouragement (though without actual *compulsion* of foreign law), is subject to liability under the *Sherman Act*.³⁴ The Court held that where the requisite effect on U.S. commerce is shown, not even clear compatibility with the law of a foreign sovereign in its own territory can overcome the application of U.S. antitrust jurisdiction. Canada argued in its amicus brief that in such circumstances, even if the U.S. court had jurisdiction to hear the claims under its domestic law, comity and international law required that it refrain from doing so. That argument did not prevail. With other exercises of exorbitant jurisdiction in the American arsenal, including the *Helms-Burton Act*,³⁵ Canada might want to preserve its ability to resist the application of such foreign intrusions, as it did with *FEMA*. Even if an effects-based approach to criminal jurisdiction in cartel enforcement might seem like an unremarkable Canadian competition objective, it could hamstring the assertion of other important Canadian policy interests. The importation of an effects-based jurisdictional test for criminal proceedings under the *Competition Act*, without an analysis of the full implications of that policy shift for other Canadian interests, is founded on neither good policy nor good law.

(e) A Possible Statutory Basis for Extraterritorial Cartel Jurisdiction

Section 465 of the *Criminal Code* is sometimes argued to be relevant to international cartel enforcement, as a foundation for extraterritorial Canadian subject-matter jurisdiction. It specifically grants jurisdiction to a Canadian court in respect of foreign conspiracies to commit a criminal offence in Canada.³⁶ Subsection 465(1)(c) of the *Criminal Code* creates a general conspiracy offence: the offence of conspiring with any one to commit an indictable offence, which would ostensibly include the cartel offence under section 45(1)(c) of the *Competition Act*. Subsection 465(4) then creates a presumption of territoriality, in the case of a conspiracy outside Canada to commit an indictable offence in Canada. The provisions state:

Conspiracy – s. 465

465. (1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy:

...

³³ *Hartford Fire Insurance Co. v. California* (hereinafter, *Hartford Insurance*), 509 U.S. 764 (1993).

³⁴ *Sherman Antitrust Act*, 15 U.S.C. 1-7.

³⁵ *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, Pub. L. No. 104-114, 110 Stat. 785 (Mar. 12, 1996), aka the *Helms-Burton Act*.

³⁶ *Criminal Code*, s. 465(4).

(c) every one who conspires with any one to commit an indictable offence not provided for in paragraph (a) or (b) is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable.

Conspiracy to commit offences – s. 465(3)

(3) Every one who, while in Canada, conspires with any one to do anything referred to in subsection (1) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do that thing in Canada.

Idem – s.465(4)

(4) Every one who, while in a place outside Canada, conspires with any one to do anything referred to in subsection (1) in Canada shall be deemed to have conspired in Canada to do that thing.

It has been suggested that section 465 of the *Criminal Code*, when used in conjunction with section 45(1) of the *Competition Act*, would authorise a prosecution in Canada of an international cartel. The predicate is that the conspiratorial conduct outside Canada is completed by the undue prevention or lessening of competition in the Canadian market, and that the implementation of the conspiracy in Canada completes the offence in Canada. In *R. v. Ouellette*³⁷ the real and substantial link test of *Libman* was at play, in a case involving the infliction of physical injury outside Canada, followed by death of the victim within Canada. The Court in *R. v. Ouellette* appeared to be heavily influenced by the local consequences of the wrongful physical action abroad. The harm to the Canadian economy that is associated with foreign cartel activity, and the vulnerability of Canada to such cartels, might have a similar influence in assessing the argument that subsection 465(4) of the *Code* provides a legislative foundation for the assertion of Canadian jurisdiction over the offence.

However, the argument seems artificial, both substantively and textually. Subsection 465(4) is readily applicable in the case of an offshore conspiracy to commit an substantive offence against persons or property in Canada, such as fraud, trafficking in narcotics, extortion, or other criminal conduct that requires concrete action in Canada to complete the offence. But reliance on subsection 465(4) of the *Code* to provide jurisdiction over foreign cartel activity implies a conspiracy outside Canada to commit a conspiracy to lessen or prevent competition unduly in Canada, the offence that is proscribed by section 45 of the *Competition Act*. The implementation of the anticompetitive agreements that are proscribed by section 45 is not, of course, an element of the offence, which is complete on the formation of the illegal agreement, without any requirement for proof of action in furtherance of the agreement. And so,

³⁷ *R. v. Ouellette* (1998), 126 C.C.C. (3d) 219, p. 229 – “[T]he notion of a “real and substantial link” constitutes a test of varying content which is assessed in relation to the circumstances and , in particular, the importance of the elements of the offence linked to Canada, the relevant facts which arose in Canada and the harmful consequences which were caused, or which could have been caused, in Canada.”

reliance on subsection 465(4) would literally require the Crown to prove an offshore conspiracy to “conspire, combine, agree or arrange” in Canada. However sympathetic the result might be, in permitting Canadian prosecutions of global cartels that impact the Canadian economy, as a matter of statutory construction it is not at all clear that subsection 465(4) of the *Code* would provide, if tested, a reliable legislative basis for Canadian subject-matter jurisdiction in global cartel cases. It might be entirely suitable as a jurisdictional fig leaf for consensual plea agreements, and in conjunction with the common law approach of *Libman*, it might ultimately be found in a contested case to support the exercise of Canadian jurisdiction, subject to the facts of the particular case. But the better view of the provision is that in its present form, subsection 465(4) does not specifically or adequately extend Canadian jurisdiction to permit the prosecution of offshore cartels under section 45 of the *Competition Act*.

3. Recent Developments in Personal Jurisdiction in Canada³⁸

(a) Introduction

Even if the subject-matter connection between the offence and Canada can be made out, it is still necessary to establish jurisdiction over the person of the accused. In criminal proceedings in Canada, subject to express statutory exception, a person can only be served if the accused is physically or legally present within the jurisdiction of the court. A criminal prosecution is initiated by serving a summons, or criminal process, on a person who is within the territory of the court. The summons must be served personally on an individual accused.³⁹ A corporation may be served by physical delivery of a summons to the “manager, secretary or other executive of the corporation or a branch thereof”.⁴⁰ In either case, the *Criminal Code* does not speak to the possibility of service *ex juris* on a person who is outside Canada. In *Trower & Sons Ltd. v. Ripstein*,⁴¹ 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.”⁴²

³⁸ See Low: “Cartel Enforcement, Immunity and Jurisdiction: Some Recent Canadian Developments”, International Bar Association Communications and Competition Law Conference, Rome, Italy (May 17-18, 2004).

³⁹ *Criminal Code*, subsection 509(2).

⁴⁰ *Criminal Code*, subsection 703.2.

⁴¹ *Trower & Sons Ltd. v. Ripstein* (hereinafter, *Trower*), [1944] 1 A.C. 254.

⁴² *Ibid.* at 261-262.

While *Trower* was a civil case emanating from Canada, the rule expressed by Lord Wright is clearly the law in criminal proceedings and it presents serious issues for both enforcers and defence lawyers to consider, unless the accused is willing to attorn to Canadian jurisdiction.

The traditional rule that *ex juris* service cannot be used to establish personal jurisdiction in a criminal matter was confirmed in *Shulman v. The Queen*.⁴³

“... 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.”⁴⁴

Ex juris personal service seems the most critical issue, where a corporate participant in an offshore cartel does not conduct business in Canada and might be able to forego future direct involvement in Canadian commercial activity. Unless the company comes forward to plead, the capacity to bring proceedings against it may be stymied by the inability to serve it with the summons initiating the prosecution. The inability to establish personal jurisdiction over parties that are outside Canada may have had a bearing on the fact that some of the co-conspirators in cases like Lysine and Vitamins, for example, were not prosecuted in Canada. Hence the recent endeavours to overcome the territorial limitation on personal service take on considerable importance.

(b) Mail Service – *Ex juris*

In *R. v. R.J. Reynolds Tobacco (Delaware)*,⁴⁵ the Crown sent a summons from Ontario by registered mail to the corporate accused at their address in the United States. The accused were non-resident corporations with no office or place of business in Canada. The Crown’s argument that this constituted effective service on the accused corporations hinged on the fact that the *Criminal Code* incorporates the service procedures of a province, for the purposes of *Criminal Code* offences.⁴⁶ In Ontario, the *Provincial Offences Act* provides that service may be made on a corporation “...by mailing the summons by registered mail to the

⁴³ *Shulman v. The Queen* (1975), 58 D.L.R. (3d) 586 (B.C.C.A.), aff’d (1974) 52 D.L.R. (3d) 246 (B.C.S.C.). The accused in *Shulman* was personally served by a Royal Canadian Mountain Police officer in Australia for alleged Canadian income tax violations. Since the accused did not appear at his trial in Canada, the prosecution subsequently made a motion to proceed *ex parte*. The *ex parte* application was granted and the accused then applied for a writ of prohibition on the grounds that service was not properly affected. At trial, the accused’s application for prohibition was accepted. Writing for the British Columbia Court of Appeal, Robertson J.A. dismissed the Crown’s appeal. The judgment does not disclose the basis on which a Canadian police officer undertook to effect personal service in a foreign country.

⁴⁴ *Ibid.* at 591.

⁴⁵ MacDonnell J., Ontario Court of Justice, October 17, 2000. Note that the case did not involve proceedings under the *Competition Act*. An application for *certiorii*, to quash the decision, and for prohibition was granted by Gans, J., of the Superior Court of Justice: (2004) 182 C.C.C. (3d) 126, [2004] O.J. No. 548, February 9, 2004.

⁴⁶ *Criminal Code*, s. 701.1.

corporation at an address held out by the corporation to be its address...⁴⁷ Neither provision says anything about whether or not the “address” of a corporation must be located inside Canada.

MacDonnell J. held that the mailed summons was effective to establish personal jurisdiction over the corporate accused. Because section 701.1 incorporated reference to the service procedures of provincial laws, there was specific statutory authority for service by mail on the foreign corporations. He also held, however, that in any event, service was carried out when the summons was mailed, and the act of posting the summons took place in Ontario. On that analysis, he held that service on the accused by registered mail did not imply that service was effected outside Ontario, despite the foreign address of the corporations concerned, and that the Court could proceed with the prosecution.⁴⁸ On review, Gans J. decided that the mail service was not sufficient to establish personal jurisdiction over the corporations concerned. He expressly found that the *procedure* prescribed for service was distinguishable from its *effectiveness*, and that mere incorporation of provincial procedures for personal service under the *Criminal Code* did not determine the geographical extent of the service that is authorized. More importantly, he concluded, in essence, that the authorisation of mail service for provincial purposes under provincial legislation did not determine the *effectiveness* of that service upon a corporation outside Canada for the purpose of instituting a federal prosecution. In a view that is instructive for the effectiveness of other creative, jurisdictional gambits, he concluded that:

“If Parliament wished to provide for service of a summons *ex juris* beyond the borders of Canada, it should have done so in clear and unequivocal language.”⁴⁹

(c) *Personal Jurisdiction Through the MLAT*

Another theoretically possible approach to personal service abroad might be a request for the assistance of foreign authorities, under the MLAT, to effect personal service on corporate cartel participants at locations within the territory of the Treaty partner (especially, the U.S.). The premise would be that the implementing legislation for Canada’s mutual legal assistance arrangements provides the requisite statutory authorization for service of a summons abroad.

Article II of the *Canada-United States Mutual Legal Assistance Treaty*⁵⁰ (“*Canada-U.S. MLAT*”) specifies that the assistance to be provided between the two countries extends to “serving documents”. Literally, perhaps, this could include serving a summons on a corporation in the United States to compel its attendance in a Canadian court to stand trial for an

⁴⁷ *Provincial Offences Act*, R.S.O. 1990, c. P-33, s. 26(4).

⁴⁸ He found that the act of service was accomplished by mailing the summons by registered mail, an act that was completed in Ontario. He specifically held that the foreign place of delivery was immaterial, because for service to be effective under Ontario law, there was not requirement to show actual delivery to the addressee.

⁴⁹ *Supra* note 45 at para 55.

⁵⁰ *Supra* note 5.

offence under the *Competition Act*. However, the *Canada-U.S. MLAT* has never been used for service abroad of originating process in a Canadian or American prosecution. Because of the common territorial limitations on service of criminal process in both countries, it is an open question whether service of a summons is within the Treaty language, or whether a Canadian court would uphold such an approach without much more explicit language in the Treaty - or Canada's implementing legislation.

The enabling legislation for Canada's MLATs is the *Mutual Legal Assistance in Criminal Matters Act*⁵¹ ("MLACMA"). As a general implementing statute, it gives such treaties the force of law in Canada to the extent necessary to comply with Canada's obligations under a treaty. However, this does not necessarily imply, in the absence of specific language, that Canada's domestic law on service has been changed to by the statute to permit a form of service *ex juris*. This view is supported by *R. v. Filinov*,⁵² 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."⁵³

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.⁵⁴ But there is no mention of the legal effect of "documents" (even if interpreted to include a "summons") that may have been served under Article 2. It is arguable, following the *R. J. Reynolds* distinction between procedure and effectiveness,⁵⁵ that the legal effect of serving those documents has to be determined by other, specific provisions of Canadian law. Arguably, if *MLACMA* or the *Canada-U.S. MLAT* had been intended to authorise service of the initiating documents in a criminal prosecution, and thereby establish personal jurisdiction over corporations outside Canada, once again, much greater statutory specificity would have been expected. As a matter of statutory interpretation, the better view is that the MLAT and the *Act* did not indirectly insinuate such a significant change into the law relating to service, through the use of such general language.

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

⁵² *R. v. Filinov* (1993), 82 C.C.C. (3d) 516 (Ont. Ct. (Gen. Div.)).

⁵³ *Ibid.* at 526.

⁵⁴ *Supra* note 51, 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."

⁵⁵ *R. v. R.J. Reynolds Co. (Delaware)*, *supra* note 45.

Canada might also be concerned, on a broader policy level, about the longer term consequences of requesting MLAT service of a criminal summons - *i.e.* the prospect that, as a matter of reciprocity, it might in the future be required to serve comparable “documents” initiating U.S. criminal proceedings against a Canadian company.⁵⁶ For one thing, the *Canada-U.S. MLAT* is not predicated on double criminality.⁵⁷ If the MLAT can be used by Canada to effect service in the United States, surely Canada could be asked to assist by serving a Canadian to initiate a U.S. prosecution for a U.S. offence that has no counterpart in Canada. For the extraterritorial enforcement of the *Sherman Act*, such a thought would have been exceedingly controversial. It might continue to startle Canadian policy makers with respect to other U.S. offences, including the U.S. prohibition on trade with Cuba under *Helms-Burton Act*.⁵⁸ Of course, Canada might refuse to comply with a U.S. 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.

As a result, it remains unclear whether the hypothesis of MLAT service requests in competition cases would be attempted or accepted, or whether the idea is a matter of mere speculation. Suffice it to say that there appear to be cogent grounds for a legal challenge if the attempt were made, because 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 to be a specific element of general implementing legislation.

(d) *Personal Jurisdiction via Extradition*

In addition to any prospective risk of extraterritorial personal service, cartel participants now have to consider the risk that they, or corporate representatives, may be brought by compulsion within Canadian territory through extradition. If an extradition request is successful, personal jurisdiction would be established over the individual who is extradited to, and thus physically within, Canada. The extradition of a corporate employee might also be argued to permit service of a summons on the corporation, if the individual is a senior executive (“manager, secretary or other executive officer”).⁵⁹

⁵⁶ While the extraterritorial enforcement of the *Sherman Act* appears less controversial than in the mid-1980s when legislation was adopted by Canada specifically to allow such U.S. jurisdiction to be blocked (*Foreign Extraterritorial Measures Act*, R.S.C. 1985, c. F-19), it might continue to be a concern in certain circumstances. More importantly, the Canadian Departments of Justice and Foreign Affairs may have significant concerns with respect to other U.S. offences, such as prohibition of trade with countries like Cuba.

⁵⁷ *U.S.-Canada MLAT*, *supra* note 5, 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”.

⁵⁸ *Supra* note 35.

⁵⁹ *Supra* note 40.

Nevertheless, the *Thomas Liquidation* case shows the importance of extradition, in such circumstances.⁶⁰ 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. It might be significant that the individual did not plead in his personal capacity, but on behalf of the corporate accused as a corporate representative.

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 an extradition order. And finally, there is case law to suggest that for effective service on a corporation, the corporate officer who is in Canada must be shown to be present on the business of the company.⁶¹ That seems an implausible factual premise, in the case of a person who has been extradited to Canada for the purpose of trial in his or her personal capacity. 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 and may be an aspect of the moral suasion that helps persuade the company to seek a consensual resolution of its exposure.

4. Conclusion

Canadian cartel enforcers might have a strong interest in emulating the effects-based extraterritorial jurisdiction of the American courts. They face serious difficulties, in the case of a party that is determined to resist Canadian enforcement action, due to the limitations of

⁶⁰ 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>>.

⁶¹ While there is no jurisprudence under the *Criminal Code* dealing with circumstances in which an executive officer is present in Canada, decisions under Ontario’s *Rules of Civil Procedure* suggest that a representative of a foreign corporation will not properly be served in Canada unless he or she is in the country to carry on the business of the corporation. See *Santa Marina Shipping Co. v. Lunham & Moore Ltd.* (1978), 18 O.R. (2d) 315 (H.C.J.).

both subject-matter and personal jurisdictional rules in Canada. It is not obvious that the general test of subject-matter jurisdiction that was laid down in *Libman* would suffice to establish Canadian jurisdiction over an international cartel that did not involve specific factual elements that occurred within or were demonstrably directed to Canadian actors. The status quo on service of criminal process continues to apply. While there has been much government creativity, initiative and imagination in recent efforts to surmount the jurisdictional impediments to prosecution, it is not clear that much “progress” has been made. What has been missing is policy formulation and evaluation, and to the extent that the traditional rules of jurisdiction might be felt to jeopardise future success in proceedings against offshore cartels, the grounds for change have not been explicitly articulated. The stakes are high, and there is certainly a need for careful analysis, or contested criminal proceedings on the right factual basis.