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## **Cartel Enforcement in Canada**

**by D. Martin Low, QC and Casey W. Halladay**

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# **CARTEL ENFORCEMENT IN CANADA**

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## 1. INTRODUCTION

Canada has a well-developed system of investigation and prosecution of cartel offences, with a number of features that promote its ability to challenge anti-competitive conduct that targets the Canadian economy from abroad. The objective of this paper is to provide an assessment of Canada's law and enforcement practice from a pragmatic perspective. The aim is to identify a number of features of the present legislation, some recent developments, and some proposed changes to Canadian law that may be of comparative interest in other jurisdictions that face problems comparable to those of Canada in responding to increasing international, functionally global, economic and competitive influences.

## 2. CANADA'S CARTEL OFFENCES

Canada has one federal statute, the *Competition Act*,<sup>1</sup> which governs all aspects of competition law. The *Act* contains several specific criminal prohibitions against cartel behaviour. The best known is section 45, the general conspiracy offence. Described by the Supreme Court of Canada as the "core" of the *Act*,<sup>2</sup> section 45 is a provision which has been used to great effect by Canada's antitrust regulator, the Competition Bureau ("Bureau"), in recent years in contesting international cartels which were once beyond the effective reach of Canadian enforcement. Since 1995, the Bureau has obtained over 40 convictions in international cartel cases (mostly through plea agreements) 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. (emphasis added)

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<sup>1</sup> R.S.C. 1985, c. C-34 [hereinafter, the "*Act*"].

<sup>2</sup> See *R. v. Nova Scotia Pharmaceutical Society* (1992), 43 C.P.R. (3d) 1 at 32 [hereinafter "*PANS*"].

As this language demonstrates, cartel conduct is not *per se* illegal in Canada. Rather, section 45 prohibits only those conspiracies that have “undue” anti-competitive effects, as determined under a partial rule of reason analysis.<sup>3</sup> As with most other serious criminal offences, a conviction under section 45 requires the prosecution to prove beyond a reasonable doubt both the *actus reus* (illegal acts) and the *mens rea* (mental intent) of the offence. The *actus reus* is established by demonstrating that: (i) the accused was a party to a conspiracy, combination, agreement or arrangement, and (ii) the conspiracy, combination, agreement or arrangement, if implemented, would likely prevent or lessen competition unduly. In determining whether the agreement would or did cause an “undue” or significant lessening of competition, courts will consider the structure of the market (including the parties’ market shares) and the behaviour of the parties. Proof of the *mens rea* of the offence is also a two-part test. The prosecution must prove that: (i) the accused subjectively intended to enter into the agreement and had knowledge of its terms, and (ii) on an objective test, that a reasonable business person would or should have known that the likely effect of the agreement would be to cause an undue lessening of competition.

Prosecutions have proceeded on numerous occasions against international cartels, including cases where the co-conspirators were never present in Canada. In most of those cases, including the lysine and vitamins cases, there was a specific evidence to show that the parties had targeted specific Canadian customers and markets. A similar jurisdictional basis was shown in two prosecutions in the Thermal Fax Paper conspiracy — *R. v. Mitsubishi Paper Mills Ltd.*<sup>4</sup> and *R. v. New Oji Paper Co.*<sup>5</sup> In those cases, the manufacturers sold their product in Japan to Japanese trading houses, at prices established by agreement among the manufacturers. As the trading houses were party to the agreement, which was specifically directed to the Canadian market, the manufacturers were held liable even though the acts leading to the agreement took place wholly in Japan. However, Canada has never directly espoused the U.S. “effects based” jurisdictional test of *Alcoa*<sup>6</sup> and *Nippon Paper*<sup>7</sup> and thus there has never been a contested prosecution which sought to apply the leading Canadian decision of jurisdictional questions, *R. v. Libman*<sup>8</sup> to offshore cartels. In that case, the Supreme Court found Canadian criminal subject matters to exist where there was a “real and substantial connection” between the offence and Canada. This is a practical and flexible test that could be usefully considered in cases of international cartels.

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<sup>3</sup> However, as noted in Part 5 below, there are reform proposals under consideration which would transform section 45 into a *per se* offence against so-called (but vaguely defined) “hard core cartels”: see, e.g., 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>>.

<sup>4</sup> See Competition Bureau, News Release, “Mitsubishi Paper Mills Ltd. Pleads Guilty to Two Charges Under the *Competition Act*” (February 17, 1997).

<sup>5</sup> See Director of Investigation and Research, *Annual Report for the Year Ending March 31, 1997* (Ottawa: Industry Canada, 1997) at 13.

<sup>6</sup> *United States v. Aluminium Co. of America*, 148 F.2d 146 (2d Cir. 1945).

<sup>7</sup> *United States v. Nippon Paper Industries, Co.*, 944 F. Supp. 55 (D. Mass. 1996), rev’d 109 F.3d 1 (1<sup>st</sup> Cir. 1997).

<sup>8</sup> [1985] 2 S.C.R. 178.

Subsection 45(1)(c) is the specific offence most frequently charged against defendants in conspiracy cases, as it is the most-broadly worded. It covers “hard core” aspects of cartel behaviour, including naked price fixing and customer and market allocation. While there is no formal basis for doing so, it is frequently the case that the Competition Bureau will recommend, and the Attorney-General of Canada (who has exclusive authority to prosecute offenders) will accept, that multiple charges be brought against defendants, relating to anti-competitive agreements affecting either different products, regions or duration of the conspiracy.<sup>9</sup> Among other things, this practice has the effect of dramatically increasing a defendant’s exposure to penalties (which are capped under section 45 at C\$10 million/5 years’ imprisonment *per count charged*) and hence the prosecutor’s leverage in securing a guilty plea.

In addition to section 45, the *Competition Act* includes several other prohibitions against specific forms of competitor interaction: bid-rigging (section 47), price maintenance (section 61) and implementing a foreign-directed conspiracy (section 46). As more fully described below, each offence has its own particular elements that must be met in order for the Attorney-General to obtain a conviction.

#### (a) Bid-rigging

Section 47 provides a *per se* criminal prohibition on bid-rigging. The offence is exhaustively defined<sup>10</sup> to mean: (i) the submission of bids, in response to a call for bids 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. The defined conduct will only constitute an offence where the parties to the agreement do not provide notice to the tendering authority, before the deadline for the submission of bids, of their agreement.<sup>11</sup> It is now clear, from *Welland Chemical*, that the illegal agreement must have been entered into prior to the submission or withholding of the bid, and that post-bid conduct is not caught by the *Act*.<sup>12</sup> On the other hand, agreements to withdraw a submitted bid for a federal or provincial government tender are prohibited by subsection 121(1)(f) of the *Criminal Code*. There is thus some dissonance between government and commercial tenders that the recent decision in *Welland Chemical* has brought into focus.

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<sup>9</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).

<sup>10</sup> See, e.g., *R. v. Welland Chemical et al.*, (December 29, 2003), Toronto M82-03 (S.C.J.), as yet unreported [hereinafter *Welland Chemical*]. The authors appeared as counsel in the *Welland Chemical* case, which involved a determination of whether or not an alleged agreement between two apparent competitors, by which one party agreed to withdraw a bid submitted to a municipality, constituted the offence of bid-rigging. The Ontario Superior Court accepted the authors’ submission that the offence in section 47 had been exhaustively defined by Parliament, and could therefore not extend to an agreement to withdraw a previously-submitted bid.

<sup>11</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.).

<sup>12</sup> *Welland Chemical*, *supra* note 10.

As noted, section 47 is a *per se* offence. The prosecutor need not prove that the parties held market power or that the illegal agreement had any harmful effect on competition, as the policy basis for the offence is to protect the competitive tendering process. Commission of the defined act alone is sufficient for a conviction, which carries penalties of a fine “in the court’s discretion” and/or five years’ imprisonment.<sup>13</sup>

### (b) Price Maintenance

Section 61 of the *Act* prohibits any attempt by “agreement, threat, promise or any like means” to “influence upward” or “otherwise discourage the reduction of” the price at which any other person sells, or advertises for sale, any product. Typically, it is used to prevent suppliers from controlling the prices at which distributors and retailers offer their goods. A companion offence prohibits refusals to supply a person due to the person’s low pricing policies.

While price maintenance has traditionally been seen as a means of protecting consumers, by minimizing the restrictions on a retailer’s ability to compete on prices, the offence is broadly-worded and, by the inclusion of the word “agreement”, would apply to horizontal agreements between competitors to raise or otherwise stabilize prices.<sup>14</sup> Like bid-rigging, price maintenance is *per se* illegal.<sup>15</sup> The offence lies in the attempt, and parties can be liable even where there has been no harm to competition or, worse, where the initial attempt to raise prices was unsuccessful. Penalties for price maintenance are the same as for bid-rigging: unlimited fines<sup>16</sup> and/or prison sentences for up to five years.

### (c) Foreign-directed Conspiracies

Section 46 is a unique provision of Canadian competition law which reflects the vulnerability of the Canadian economy to the influence of offshore corporate decision-making. The section literally provides that a Canadian corporation 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, under the language of the section, liability can attach even where the Canadian company had no knowledge of the foreign conspiracy:<sup>17</sup>

Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction,

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<sup>13</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 735.

<sup>14</sup> See generally, O.K. Wakil & C.W. Halladay, “Canada Again Considers Reform of Criminal Pricing Offences” *Antitrust Report* (July 2002) 2 at 4-6.

<sup>15</sup> Typically, price maintenance tends to be local in character, involving restraints on merchants in sales to consumers. However, in *R. v. Rittenhouse Ribbons & Rolls Ltd.* the accused was convicted under section 61 as an aspect of the international cartel arrangements in the thermal fax paper case: see Director of Investigation and Research, *Annual Report for the Year Ending March 31, 1996* (Ottawa: Industry Canada, 1996) at 18.

<sup>16</sup> Note that, despite the lack of a cap on fines under sections 47 and 61, fines under these provisions typically do not exceed C\$200,000 per count charged.

<sup>17</sup> See D.W. Kent, R. Wisner and O.K. Wakil, “Record Fine in Canadian UCAR Case: Competition Bureau Continues to Target International Conspiracies” (Summer 1999) *International Antitrust Bulletin*.

intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court. (emphasis added)

To date, the section has only been used to reach the Canadian affiliate of a foreign corporate cartel participant. An arguable objective of imposing such a strict liability is to ensure that the economic penalties imposed on the Canadian affiliate will be felt by related parties abroad, where a multi-national entity is involved in an offshore cartel that is carried out in Canada. By facilitating the prosecution of their Canadian affiliates, this provision is aimed at deterring foreign corporations from carrying out international cartels in Canada. However, the language of the section read literally would apply to any Canadian corporation that is subject to foreign directives. It could clearly be argued that a Canadian arms' length, third-party distributor for an offshore supplier that is involved in a foreign cartel is liable under the statute. This interpretation has never been put before a Canadian court, but prosecutors have recently asserted that such a third party is liable to prosecution as the unwitting agent of a foreign manufacturer beyond Canadian jurisdiction. The policy basis for that approach, as opposed to treating related parties as components of a single economic undertaking, seems controversial. Unlike cases under the bid-rigging and price maintenance provisions, fines assessed under section 46 have been very substantial.<sup>18</sup> Due to the absence of any statutory cap, fines have on occasion exceeded the maximum fine that could have been levied against a member of the cartel under the general conspiracy offence.<sup>19</sup>

Notably, all of these companion provisions are *per se* offences, leading perhaps to the conclusion that where the Bureau can make a case against conspirators under one of these offences, it will do so in order to avoid having to prove market power and economic harm as required in a section 45 prosecution. No less an observer than the Industry Committee of the Canadian House of Commons has reached a similar conclusion — in commenting on proposals to abolish the price maintenance offence and treat cases of horizontal price maintenance under section 45, the Committee noted that the Bureau was the “lone dissenter” to this proposal, and that it could “only offer a higher success rate when prosecuting under a *per se* offence as its reason from departing from expert opinion”.<sup>20</sup> For the present, while it is true that the general

<sup>18</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>19</sup> See, e.g., *R v. SGL Carbon AG* (C\$12.5 million) (2000, graphite electrodes) and *R. v. UCAR Inc.* (C\$11 million) (1999, graphite electrodes), where fines exceeded the C\$10 million cap that would have applied had the defendants been charged under section 45. Other corporations that have been convicted and fined under this section include *Sumitomo Canada Limited* (C\$1.25 million) (1993, insecticides), *Chemagro Limited* (C\$1.25 million) (1993, insecticides), *Roussel Canada Inc.* (C\$370,000) (1999, bulk vitamins), *Tokai Carbon Co., Ltd.* (C\$250,000) (2001, graphite electrodes) and *Mitsubishi Canada Limited* (C\$250,000) (1994, thermal fax paper).

<sup>20</sup> House of Commons, Standing Committee on Industry, Science and Technology, “A Plan to Modernize Canada’s Competition Regime” (April, 2002) at 75.

conspiracy offence requires a “rule of reason” analysis, companies and their legal counsel should be aware of these instances where cartel behaviour could be prosecuted on a *per se* standard.

### **3. THE INVESTIGATIVE POWERS OF THE COMPETITION BUREAU**

The Bureau has extensive compulsory powers that may be invoked where the Commissioner of the Bureau commences a formal “inquiry”. An inquiry may be commenced where the Commissioner has “reason to believe” that there has been a violation of the criminal provisions of the *Act*, where he is directed to do so by the Minister of Industry, or an application to open an inquiry is made by six residents of Canada. The latter two criteria seek to ensure that there is scope for examinations of competitive situations where the Competition Bureau may have other priorities and, in that sense, they may operate as an outlet for broader public interest analyses. A directive from the Minister or a six-resident application cannot compel the Commissioner to take any particular enforcement proceedings, but the statutory requirement to submit a written report to the Minister upon the discontinuance of such an inquiry typically ensures that the Commissioner will closely examine the facts. The risk of such “public interest” inquiries is that the target(s) of the examination may have to incur the substantial costs and inconvenience that such an inquiry precipitates without any objective, prior reason to believe that anti-competitive conduct has occurred. The Commissioner has historically tended to approach such inquiries with considerable care to avoid the risk of frivolous, unsubstantiated or competitively motivated complaints. Ministerial directions for inquiries have been used very sparingly, out of concern that such initiatives may be perceived to flow from political, rather than competitive or economic, concerns.

During an inquiry, the Commissioner has extensive investigative powers to obtain information by means of search warrants, wiretaps and orders for production (under section 11 of the *Act*). These statutory powers supplement information supplied voluntarily by complainants, marketplace participants, immunity applicants<sup>21</sup> or fellow enforcement agencies in other jurisdictions. With co-operation between competition agencies on the rise,<sup>22</sup> it can be expected that this latter category will grow in importance as a source of information for the Bureau.

#### **(a) Search Warrants**

Search warrants may be obtained by means of an *ex parte* court order under section 15 of the *Act*. Under that section, the Commissioner must establish that there are reasonable grounds to believe that a criminal offence has been or is about to be committed, as

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<sup>21</sup> See Part 4, “Immunity Considerations in Canada”, below.

<sup>22</sup> A good example of this trend is to be found in the international investigation into price-fixing in the plastics industry, which featured an unprecedented level of inter-agency co-operation, including simultaneous raids by antitrust enforcers in Canada, the U.S., the E.U. and Japan. See, e.g., European Commission, News Release, “Statement on inspections at producers of heat stabilisers as well as impact modifiers and processing aids - International cooperation on inspections” (February 13, 2003), available online at: <[http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=MEMO/03/33|0|RAPID&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/03/33|0|RAPID&lg=EN)>.

well as reasonable grounds to believe that relevant evidence is located on the premises to be searched. Preventing access to premises or otherwise obstructing the execution of a search warrant is a criminal offence and the Commissioner may enlist the support of the police if access is denied. It is an almost universal practice in Canada for search warrants to be used in Bureau investigations of cartel activity.

Section 16 of the *Act* expressly provides for the search and seizure of computer records and permits court applications to set the terms and conditions for the operation of a computer system during the search. The Bureau has developed cutting-edge, internal expertise and technology for the conduct of electronic searches, and has shared this expertise with fellow competition agencies. Its powers under section 16 are very broad, though there has been little judicial consideration of these powers. One particular issue relates to the territorial scope of computer searches. In past investigations, Bureau officers have downloaded data stored outside Canada in the course of searching computer systems 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 location. (It should be noted that this interpretation does have important privacy and extraterritorial implications that are untested.) But there continues to be controversy as to the precise limits of the authority granted by a warrant authorising a search of computer systems. Other provisions in the *Act* conferring explicit investigative authority to deal with records physically located abroad could suggest that the scope of section 16 should be limited to data stored and retrievable in Canada. The Bureau has exercised care, in practice, where an information system in Canada is linked to other systems abroad. There are practical measures, such as the establishment of inter-office firewalls, that private parties might take to inhibit access by Canadian searchers to foreign-located data. However, to avoid any risk of perceived obstruction or interference with an investigation, such steps should only be undertaken as part of a corporate data management policy, and not as an *ad hoc* response to the execution of a warrant under section 16.

Documents that are subject to solicitor-client privilege may not be seized under a search warrant, and the *Act* contains a specific rules for determining the validity of privilege claims, as well as provisions requiring the Commissioner to make a report to the court in order to retain seized documents. Since the affected corporation can ultimately request a retention or privilege hearing, and because evidence procured through an illegal search may be excluded at trial, the courts have generally ruled that search warrant orders may not be appealed.<sup>23</sup> However, 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 unusual.

Amendments to the *Criminal Code* in 1999 gave the Commissioner the additional power to intercept private communications through electronic means, *i.e.* wiretapping.<sup>24</sup> This power is restricted to investigations of conspiracy, bid-rigging and serious deceptive marketing cases. It requires prior judicial authorisation. Wiretapping has very significant resource and other implications and its use therefore will likely imply that other investigative tools have

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<sup>23</sup> *R. v. Hoffman-La Roche Ltd.* (1981), 33 O.R. (2d) 694, 125 D.L.R. (3d) 607 (C.A.).

<sup>24</sup> S.C. 1999, c. 2, s. 47 (amending s. 183 of the *Criminal Code*).

produced sufficient probative information to satisfy a judge that the intercept should be authorized. How often those circumstances will arise in cartel cases remains to be seen, although there are indications of increasingly frequent resort to wiretaps in the context of deceptive telemarketing scams.

**(b) Section 11 Orders**

By means 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. These orders require a person to produce records and written returns under oath or affirmation within a certain period of time. In the application for a section 11 order, which is *ex parte*, the Commissioner need only satisfy the court that an inquiry has been initiated (see Part 3(a) above) and that a person is likely to have relevant documents in his possession or control. Section 11 orders are often used as a follow-up to the execution of search powers under section 15. But they may also be used in lieu of search warrants, because the threshold test for obtaining a section 11 order is lower than that for obtaining a warrant.<sup>25</sup> However, as noted, the Bureau is prone to start its investigations with a search.

Section 11 may also be used to compel witnesses who may have relevant information to appear and answer questions related to the inquiry under oath. The examination takes place before a presiding officer who can determine the propriety of questions asked and the conduct of the examination. Although inquiries must be conducted in private, any person who is the subject of an inquiry is entitled to attend the examination of a witness, unlike the U.S. tradition of Grand Jury secrecy. This may have significant implications, both for the investigation and for the party whose employee is being examined, particularly if other subjects of the inquiry become aware of the examinations. However, the presiding officer has the power to safeguard confidential information by excluding representatives of competitors from commercially sensitive aspects of the examination.

A witness is not excused from testifying on the ground that the testimony may incriminate the person, although section 11(3) provides that no evidence obtained from a witness under a section 11 order may be used against that person in any subsequent criminal proceedings. This limitation is consistent with decisions of the Supreme Court of Canada establishing use and derivative use immunity for persons compelled to give evidence under statutory powers of investigation.<sup>26</sup> But where an individual employee of a corporation has been compelled to give evidence under section 11, the evidence is admissible against the corporate accused or co-workers. Furthermore, there is no protection against the subsequent use of documents obtained under a section 11 production order.

A significant Canadian investigative innovation is found in subsection 11(2) of the *Act*. That provision is directed against the foreign affiliate of a Canadian corporation, and

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<sup>25</sup> There is some uncertainty about this statutory standard for compelling production of documents: *R. v. Jarvis* [2002] 3 S.C.R. 73.

<sup>26</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.

permits a court to order the Canadian entity to obtain and produce to the Bureau relevant records that are in the possession or control of an affiliated corporation outside Canada. There are numerous untested legal questions that arise from this provision, which is a “long arm” investigative tool not unlike those available to U.S. litigants. It may require action which the Canadian entity has no legal capacity to carry out; for example, the Canadian corporation may have no legal right to require compliance by its foreign parent or a sister company. Notwithstanding this potential limitation, the exposure of the Canadian entity to compulsion in Canada, enforceable by the Canadian court’s power to punish non-compliance with its orders, is a practical effort to secure evidence in matters affecting Canadian commerce. Current litigation may test some of these issues.

#### 4. IMMUNITY CONSIDERATIONS IN CANADA

##### (a) Immunity Applications

The Commissioner’s *Information Bulletin*, “Immunity Program Under the *Competition Act*”,<sup>27</sup> sets out the circumstances under which immunity can be obtained and the level of co-operation required to maintain immunity throughout the life of an investigation. The Bulletin (and its related FAQs)<sup>28</sup> reflects the current practice of the Commissioner and, by extension, the Attorney General. Since its publication in September 2000, there has been a significant increase in the number of immunity requests and, in the early going, the Bureau received about one per month.<sup>29</sup> The authors understand that many applications under the new policy involve purely domestic cases whereas, under the previous program, only one or two exclusively domestic cartels were uncovered by the availability of immunity.

The Bureau’s programme offers immunity or leniency in exchange for co-operation with a Bureau investigation, subject to certain minimal requirements. The Commissioner will recommend to the Attorney General that immunity be granted to a party in the following situations:

- (i) the Bureau is unaware of an offence, and the party is the first to disclose it; or
- (ii) the Bureau is aware of an offence, and the party is the first to come forward before there is sufficient evidence to warrant a referral of the matter to the Attorney General.

The requirements for a grant of immunity are as follows:

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<sup>27</sup> Competition Bureau, “Immunity Program Under the Competition Act” (September 21, 2000), online: <<http://strategis.ic.gc.ca/pics/ct/immunitye.pdf>>. See also Competition Bureau, Frequently Asked Questions “Immunity Programme under the Competition Act” (November 27, 2001), available online at: <<http://strategis.ic.gc.ca/SSG/ct02312e.html>>.

<sup>28</sup> See D. M. Low, Q.C., “The Competition Bureau’s Immunity Program: A View of Policy and Practice in Canada” (April 2001) *Antitrust Report* at 2.

<sup>29</sup> Notes for an Address by Konrad von Finckenstein QC, 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>>.

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

While the Commissioner's policy does not legally bind the Attorney General, who has the exclusive authority to grant immunity in competition cases, there is a high degree of probability that a recommendation by the Commissioner will be followed (the Attorney General's policy directives to federal prosecutors now make specific reference to the Commissioner's Program, and the Commissioner's legal advisors conduct the prosecutions under the *Act* and advise on the conduct of an investigation). We are not aware of any case in which a recommendation for immunity has been rejected and the Canadian approach seems a practical way of marrying the interests of an investigative body with the requirements for an independent exercise of prosecutorial discretion.

However, as a recent case in the United States has demonstrated,<sup>30</sup> an applicant's responsibilities do not end once a provisional guarantee of immunity ("PGI") has been granted. A PGI can be withdrawn where the applicant does not comply with all of its ongoing obligations (most notably, "complete and timely co-operation" and full, frank and truthful disclosure of *all* offences<sup>31</sup>). There are other, potentially debatable aspects of disqualification; for example, where the instigator or ringleader of a cartel is disqualified. That is a criterion that may be only capable of evaluation subsequent to the provision of the applicant's self-incriminating evidence and other material that comes to light in the course of the inquiry. As the immunity applicant will provide its evidence under the scope of an inducement — a provisional grant of immunity — there might be serious issues of voluntariness of a corporate or individual "confession", if the immunity were revoked on this ground. At present, all that can be said is that, pending clarification of the *Stolt-Neilsen* decision, there will be some uncertainty for parties that have been admitted to the U.S. or Canadian programmes.<sup>32</sup>

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<sup>30</sup> See, e.g., *Global Competition Review*, "DOJ in Leniency Shock" (26 March, 2004), available online at: <[http://www.globalcompetitionreview.com/news/news\\_item.cfm?item\\_id=1665](http://www.globalcompetitionreview.com/news/news_item.cfm?item_id=1665)>, which discusses the recent decision by the U.S. Department of Justice to terminate the immunity granted to Stolt-Nielsen, in the ocean tanker cartel investigation, for making "false representations".

<sup>31</sup> Immunity Program, *supra* note 27 at 5 (section F, items 27-28).

<sup>32</sup> Scott Hammond, the Director of Criminal Enforcement of the U.S. Department of Justice, recently indicated at the ABA Antitrust Section's Spring Meeting that the decision was an objective application of the clear conditions of the DOJ's policy. He also stated that when the facts in that case become public, the conduct that led to the decision will be apparent to all observers. However, this does not assist the advisors of companies or individuals who may be considering an immunity application in the interim.

The Canadian program reflects the “first-in” amnesty regime employed in the United States. It is therefore important to stress the advantage of being the first party to approach the Canadian competition authorities. Firms that are “first in” with evidence of a conspiracy where the Bureau does not have a provable case can expect a free pass for both the corporation and all implicated officers and employees. However, the party must be “first in” *in Canada*. The Immunity Bulletin is clear that being first in another jurisdiction will *not* result in any favourable treatment in Canada.<sup>33</sup> There have been two cases in which the party that obtained amnesty as the first to apply in the U.S. was slow to come forward in Canada; each corporation was required to plead guilty in Canada and subjected to significant fines.<sup>34</sup> In this sense, timing is everything. The timing of a telephone call may mean the difference between complete immunity and a corporate fine of millions of dollars.

Because of the acknowledged pressure to be the first to apply, the Competition Bureau has adopted the U.S. Department of Justice’s practice of accepting a “marker”. If a party is certain that an offence has been committed, but is not yet able (due to the state of its internal investigation) to substantiate the matter, it may preserve its place as “first in” by requesting a marker, often by means of a telephone application to reserve its status. There is a clear incentive for the Bureau to encourage parties to take the initiative as early as possible, and the marker practice facilitates that objective. While granting a marker is fair treatment for the first party to recognize and accept its responsibility in Canada, it is susceptible to strategic practice where a party learns about the problem from initiatives taken by an amnesty applicant in other jurisdictions and applies for a marker in Canada, while the amnesty applicant abroad is trying to ascertain whether the conduct applied to Canada. Related to this concern is the potential for delay by the beneficiary of the marker. Having blocked applications by others to qualify as “first in”, it is unacceptable for the marker holder to stall in providing the requisite evidence to the Competition Bureau. Although there are no specific standards or timetables laid down by the Bureau on this issue, it is evident that they are aware of the problem. It is probable that marker holders in Canada have been displaced due to their inability or unwillingness to move forward with providing cooperation, but so far (unlike the *Stolt-Neilsen* example in the U.S.) there have been no public pronouncements to this effect. There is, however, a countervailing concern that excessive pressure not be placed on the marker-holder, in order to avoid jeopardizing proper investigation of the conduct and interviews of the key individuals. There is a need for both administrative care and further clarification of the ground rules applicable to the marker initiative, but it is clearly necessary to achieve fairness, when the race is to the swift.

If it is not possible to be “first in”, there are important reasons to consider being the second party to co-operate. A party will not be eligible for immunity if the Bureau has been made aware of the offence by another, earlier, immunity applicant, but the second party to offer co-operation will, as a practical matter, be considered for favourable treatment. (It may also qualify for immunity where the first party fails to meet of the requirements under the Immunity Program.) Typically, a secondary applicant will qualify for a reduced penalty, perhaps as low as

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<sup>33</sup> Immunity Program, *supra* note 27 at 5 (section G, item 31).

<sup>34</sup> See Competition Bureau, News Release, “Federal Court Imposes Fines Totalling \$88.4 Million for International Vitamin Conspiracies” (September 22, 1999); and Competition Bureau, News Release, “Competition Bureau Probe Nets 2.9 Million in Fines and Guilty Plea from Akzo Nobel Chemicals BV” (August 19, 2003).

12% of affected commerce depending on the value of co-operation (and any aggravating factors), especially if the Bureau does not yet have sufficient evidence to recommend that charges be brought against the applicant. Subsequent applicants are likely to be offered fine settlements of 20% and then 30-40% of the relevant volume of commerce, depending upon their position in the queue as well as other aggravating or mitigating factors.<sup>35</sup> Conspirators who seek to resolve their exposure later in the investigation will have very limited opportunity to negotiate favourable terms regarding both fine levels and the exposure of culpable individuals. In short, those who wait inevitably have less to offer, as each co-operating party strengthens the prosecution's case by reducing the evidentiary and litigation risks for the prosecution, and thus its incentive to accept lower fines.

**(b) The Application Process**

The immunity application process typically involves the following steps:

(i) Initial Contact: Anyone may initiate a request for immunity in a cartel case by communicating with the Deputy Commissioner of Competition, Criminal Matters. Some information will need to be provided to determine whether the party qualifies for immunity and, as noted above, a “marker” may be granted.

(ii) Provisional Guarantee of Immunity: If the party decides to proceed with the immunity application, there will need to be a description of the illegal activity, usually in hypothetical terms. The Bureau will then present all the relevant information to the Attorney General, who has independent discretion in these matters and who will, if satisfied, issue a written provisional guarantee of immunity.

(iii) Full Disclosure: Following the provisional guarantee of immunity, the party must make full disclosure to the Bureau. The disclosure will be on the basis that the Bureau will not use the information against the party, unless there is a failure to comply with the party's continuing obligations under the immunity agreement.

(b) Immunity Agreement: If the Attorney General accepts the Bureau's recommendation after full disclosure, the Attorney General will execute an immunity agreement that will include all of the party's continuing obligations.

The moment that corporate managers become aware that their enterprise is implicated in an international cartel — or conclude that they do not want to continue participating in such a venture — they face a pivotal decision. Whether the corporation should contact authorities with an offer to co-operate or hope that none of its co-conspirators initiate such contact (and take the attendant risk of discovery, prosecution and conviction) becomes the key question. The latter course is a high-risk strategy, especially in light of the existence of amnesty programs. There may be enormous consequences associated with a litigated loss and,

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<sup>35</sup> See *R. c. Ueno Fine Chemicals Industry Ltd.* [2001] J.Q. no 3424 (Que. Sup. Ct.), where the court generally adopted this hierarchy of fines.

therefore, tempting reasons to co-operate.

## 5. WHAT DOES THE FUTURE HOLD FOR CANADA'S CARTEL REGIME?

In June of 2003, Canada's federal government released a discussion paper entitled *Options for Amending Competition Act: Fostering a Competitive Marketplace*.<sup>36</sup> The *Discussion Paper* contains numerous (and controversial) proposals for reforming the *Act*, and is the subject of an ongoing public consultation process. The place of these proposals in the new government agenda is difficult to predict at present.<sup>37</sup> The most controversial proposal<sup>38</sup> would replace the current "rule of reason" conspiracy offence in section 45 with a *per se* criminal offence aimed at "hard-core cartels" (and a companion civil provision for pre-notifying and reviewing non-criminal alliances among competitors). Among other things, proponents of reform have argued that, by requiring proof of market power and harmful effects on competition, section 45 is too difficult to enforce. The Bureau's poor record in litigating contested cartel cases is typically cited in support of this assertion.

While effective cartel enforcement is obviously a necessary and desirable element in any competitive economy, it is extremely misleading to suggest that simply making an offence easier to prove would result in a more competitive economy. The Bureau's impressive enforcement record over the last twelve years, since the watershed decision of the Supreme Court of Canada in the *PANS*<sup>39</sup> case clarified the application of section 45, suggests that Canada's cartel law *is* effective: the Bureau has obtained convictions in 25 of 28 conspiracy cases, an 89% success rate.<sup>40</sup> Fines have exceeded C\$150 million, including several convictions against individual corporate executives. As one commentator has noted, "if defendants thought they had a chance at acquittal, because of a weak law, one would not expect to see firms consistently entering guilty pleas".<sup>41</sup>

It is equally notable that, in each of the three acquittals under section 45, the prosecution's case contained serious flaws — in one case, the Crown was unable to prove the illegal agreement and, in another, was unable to prove intent. A *per se* offence would not have

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<sup>36</sup> *Supra* note 3 [hereinafter, the "*Discussion Paper*"].

<sup>37</sup> The reform proposals were perceived to have been spearheaded by the former Commissioner of Competition; it remains to be seen what level of priority the new Commissioner (and new Minister of Industry) assign to the reforms.

<sup>38</sup> See, e.g., the opposition to this proposal expressed by the Task Force of Canadian Bar Association's Competition Law Section, "CBA Competition Law Section – Section 45 Amendments Task Force Report", 21 Can. Compet. Rec. 3 (Summer 2003) at 26ff, and by numerous (in fact, a majority) of the written submissions from stakeholders in the government's consultation process, available online at: <[http://www.pforum.ca/competitionact/submissions\\_e.htm](http://www.pforum.ca/competitionact/submissions_e.htm)>.

<sup>39</sup> *Supra* note 2.

<sup>40</sup> See H. Chandler and R. Jackson, "Beyond Merriment and Diversion: The Treatment of Conspiracies Under Canada's Competition Act", Roundtable on *Competition Act* Amendments, May 2000.

<sup>41</sup> B.A. Facey & D.H. Asaf, "Innovation, Growth and Prosperity: A Framework for Amending Canada's Conspiracy Laws" 20 Can. Compet. Rec. 4 (Winter 2001-2002) 61 at 63.

changed either of these outcomes. Thus, only one case since 1992 has been lost due to the prosecutor's inability to prove sufficient economic harm, and in that case the court expressly found that the Crown's evidence was "unreliable and inconclusive" (in part due to the credibility of the Crown's expert witness).<sup>42</sup> In its country report for Canada, the OECD has noted that

[s]ome of the problems in enforcement — notably the record of success in contested conspiracy cases — are explained by inexperience, both of the Bureau's litigators and of the court [...] the Bureau staff too has reportedly 'overtried' cases, failing to focus the analysis and delaying the process.<sup>43</sup>

Obviously, there are other factors that must be considered when evaluating the Bureau's record in contested conspiracy cases: the uncertainties of litigation, defendants' retention of specialized antitrust counsel to defend the case, the presumption of innocence and all of the other general rights and protections that an accused person or corporation enjoys when facing criminal charges. Perhaps the more natural expectation is that the Bureau should *not* win all, or even most, of its contested cases.

Other issues that require careful consideration at the level of policy development in considering "*per se*" liability are the definitional and administrative difficulties with such a development. The OECD's *Recommendation on Hard Core Cartels*<sup>44</sup> took years of debate to develop a description of "hard-core cartels" that is by not sufficiently precise to provide a standard for national criminal legislation. Nor is it apparent that the OECD definition is broader or more tailored to the economic harm associated with cartels than is the current law. In fact, the economic focus of section 45 might be more properly self-defining than a *per se* standard, by concentrating enforcement efforts on those offences that are economically "undue". The development of U.S. jurisprudence over an extended period provides guideposts for legitimate and illegal conduct. Those standards neither inhibit appropriate self-determination by businesses, in the conduct of their affairs within the law, nor do they risk allocating scarce regulatory resources to trivial, but facially anti-competitive agreements that may have no economic impact in any relevant market. But at a time when even the U.S. is debating the *per se*

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<sup>42</sup> *R. v. Clarke Transport Canada Inc.* (1995), 64 C.P.R. (3d) 290 (Ont. Ct. Gen. Div.) at 325.

<sup>43</sup> Organization for Economic Co-operation and Development, "Regulatory Reform in Canada — The Role of Competition Policy in Regulatory Reform in Canada" (September, 2002) at 42, available online at: <[http://www.oecd.org/infobycountry/0,2646,en\\_2649\\_33759\\_1\\_70315\\_119663\\_1\\_37463,00.html](http://www.oecd.org/infobycountry/0,2646,en_2649_33759_1_70315_119663_1_37463,00.html)>.

<sup>44</sup> Organisation for Economic Co-operation and Development, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels* (March 25, 1998) at recommendation A.2, available online at: <<http://webdomino1.oecd.org/horizontal/oecdacts.nsf/Display/7328AA9E04799859C1256DAA00643D29?OpenDocument>>. The OECD defines "hard core cartel" conduct as "an *anticompetitive* agreement, *anticompetitive* concerted practice, or *anticompetitive* arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce." By very use of the term "anticompetitive" in its definition, the OECD *Recommendation* would require a competitive effects test in determining whether or not an agreement among competitors was a "hard-core cartel" — Canada's current conspiracy offence already meets this description.

rule of liability,<sup>45</sup> it is not obvious that the adoption of the *per se* standard by itself, without concentrating on improved measures of detection, broader international cooperation and more efficient and effective prosecution, is likely to produce greater success or more desirable regulatory intervention in a sensitive area of economic activity.

## 6. CONCLUSION

The purpose of this survey of Canadian investigative authority, practice and recent developments has been to highlight a number of Canadian procedures that may be of interest to international efforts to deter and punish cartels. Tremendous achievements in cartel enforcement have been recorded in recent years, which have made significant contributions to the restoration of competitive markets. Other initiatives are awaiting development in Canada and abroad. For example, the extension of extradition treaties to hard core cartel participants has been projected for several years by enforcement officials. Extradition has been available in Canada/U.S. relations, and has recently become available to U.K./North American cases (and may become a possibility for Japan, if pending proposals are enacted). As this example shows, the efforts of enforcers to pursue cartel misconduct are always evolving. These initiatives (and the potential flaws in them, outlined above) may be of value as Asian countries, and others, are increasingly sensitized to the harm done by international cartels.

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<sup>45</sup> See, e.g., *In the Matter of Polygram Holdings Inc. et al.*, Docket No. 9298 (July 28, 2003) and *California Dental Association v. F.T.C.* 526 U.S. 756 (1999), and a spirited debate during the Chair's Showcase Program, "The Challenge of Counselling and Litigating in the Shadow of the *Per Se* Rule" at the recent ABA Antitrust Section Spring Meeting, April 1, 2004.