

MCMILLAN BINCH LLP

**JURISDICTION AND LITIGATION DEVELOPMENTS
IN CANADIAN COMPETITION LAW**

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by A. Neil Campbell and J. William Rowley QC*

INTRODUCTION

While much has been written in the last decade about possible reforms to the core cartel (“conspiracy”) offence in Canadian competition law, including recent proposals to supplant the current “undue lessening of competition” test with a statutory “*per se*” regime,¹ less attention has been paid to jurisdictional issues which are of fundamental importance in cases with an international dimension. The competition authorities are also actively using unique evidence gathering and substantive provisions that allow Canadian subsidiaries to be targeted as an indirect substitute where it is difficult to obtain jurisdiction over their international parent companies. Similarly, Canada’s gradual evolution towards U.S.-style class and other private litigation is not yet widely enough appreciated. This paper outlines the significant increases in legal exposure for companies and individuals resulting from these developments.

JURISDICTION²

Coordinated investigations pursuant to mutual legal assistance treaties and competition law cooperation agreements have contributed significantly to the dramatic successes

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¹ See Canada, *A Plan to Modernize Canada’s Competition Policy: Report of the Standing Committee on Industry, Science and Technology* (April 2000); Canada, *Discussion Paper – Options for Amending the Competition Act: Fostering a Competitive Marketplace*, (June 2003) (the “2003 Discussion Paper”), available online at: Competition Bureau Website <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02584e.html>>; and the results of stakeholder consultations conducted by the Public Policy Forum which are summarized in *National Consultation on the Competition Act: Final Report* (8 April 2004) (the “PPF 2004 Report”), available online at: Public Policy Forum Website <http://www.ppforum.ca/competitionact/final_report.pdf>.

² This section of the paper is based on more detailed analysis in D. M. Low, Q.C., “International Cartel Enforcement: The Limits of Personal Jurisdiction” (February 2004), available online at: McMillan Binch LLP Website - Publications <<http://www.mcmillanbinch.com>> (the “Low Paper”).

of many enforcement agencies in bringing offshore cartel participants to justice.³ However, the difficulties involved in asserting national jurisdiction over the participants in an international cartel remains a significant legal and operational concern for enforcement agencies and a critical element for lawyers assessing the defence of an alleged participant. The jurisdiction of Canadian courts, as in other common law countries, has two components: subject-matter and personal jurisdiction.

Subject-Matter Jurisdiction

Canada traditionally has held a strong presumption against the extraterritorial application of criminal laws. At common law and under the *Criminal Code*, criminal jurisdiction is based on territoriality: a Court has authority to try an offence only if it is committed in Canada.⁴ That position is subject to legislative modification, and the Supreme Court has confirmed Parliament's legislative authority to enact extraterritorial criminal laws if it so chooses.⁵ To date, however, Parliament has created only a few exceptions to the presumption of territorial jurisdiction — one of which is a general provision that extends Canadian jurisdiction to cover foreign conspiracies to commit a criminal offence in Canada.⁶

The *Competition Act*⁷ is silent on the territorial reach of the Canadian courts in cartel cases. It says nothing about the authority to prosecute a case where the participants were not present in Canada and undertook no concrete action within Canadian territory. There has been no contested case in which the jurisdictional question has been confronted in an

³ A notable recent 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), available online at: European Commission – Press Releases <<http://europa.eu.int/rapid/start/cgi/guesten.ksh> >; and R.H. Pate, "Anti-Cartel Enforcement: The Core Antitrust Mission" (16 May 2003), available online at: U.S. Department of Justice Website <<http://www.usdoj.gov/atrp/public/speeches/201199.htm> >.

⁴ 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).

⁵ *Terry v. The Queen*, [1996] 2 S.C.R. 207 at 215 (S.C.C.).

⁶ *Criminal Code*, s. 465(4).

⁷ *Competition Act*, R.S.C. 1985, c. C-34, s. 45(1).

international cartel context. Nor has the application of section 465 of the *Criminal Code* (the general foreign conspiracy offence) to section 45 of the *Competition Act* (the offence of conspiring to restrain trade — the key cartel offence) been judicially determined.⁸ Nevertheless, numerous foreign parties (both corporations and individuals) have agreed to come to Canada, submit to the personal as well as subject-matter jurisdiction of the Canadian courts and plead guilty to cartel offences.

In *R. v. Libman*, the Supreme Court affirmed that conduct with extraterritorial elements that had a “real and substantial connection” with Canada was subject to trial in Canada.⁹ That adjustment of the territorial subject-matter jurisdiction of the Canadian courts seems reasonable and pragmatic in an age of easy travel and communication. However, it should be noted that *Libman* was a case where the activity took place in Canada and the victims (of fraudulent securities sales) were located abroad. The courts have not definitively determined whether subject-matter jurisdiction exists in the reverse scenario where foreign conduct affects Canadian victims.¹⁰ Nevertheless, the Competition Bureau and the lawyers who advise it at the Department of Justice take the view that price-fixing or market allocations that affect Canadian customers (including an agreement under which certain parties do not sell into Canada) have a real and substantial connection to Canada that brings such conduct within the jurisdiction of the *Competition Act*. In the context of international cartels, the practical result is therefore likely to be similar to the effects-based, extraterritorial jurisdiction of the U.S. courts in cases like *Nippon Paper*¹¹ and *Hartford Fire Insurance*.¹²

While not specifically relying on *Libman* for justification, the Canadian competition authorities have also been taking the position that export sales from Canada should

⁸ While the *Competition Act* offence is a criminal provision to which the general foreign conspiracy offence in the *Criminal Code* arguably might be applied, it is debatable whether foreign persons could “conspire to conspire”.

⁹ *R. v. Libman*, [1985] 2 S.C.R. 178 (S.C.C.), particularly at 212.

¹⁰ For further discussion, see D. Kent, R. Wisner and S. Walker, “Northern Exposure: Prosecution of Non-Residents for *Competition Act* Offences” (March 1999) *Competition Law* 293 at 294, available online at: McMillan Binch LLP Website – Publications <<https://www.mcmillanbinch.com>>.

¹¹ *United States v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998).

¹² *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993).

be included in determining the relevant volume of commerce for Canadian sentencing purposes in international cartel cases. As a practical matter, this is destined to lead to “double counting” — particularly where the sales are made to inter-company affiliates in jurisdictions with active cartel enforcement regimes such as the U.S. and the E.U. (Canada’s largest trading partners). From a policy perspective, this has the odd effect of Canadian authorities taking action against Canadian producers on behalf of foreign customers (whose interests can and often will be looked after by their own authorities).¹³ In addition, where the cartel participants have plants in multiple jurisdictions, this approach has the perverse result of penalizing Canadian manufacturers (and employers) much more harshly than co-conspirators that produced abroad and imported price-fixed products into Canada.

Personal Jurisdiction

At common law, there is a strong presumption that jurisdiction lies only over a person present within the jurisdiction of the court irrespective of whether subject-matter jurisdiction exists. While this has historically been established through personal service, other techniques are being explored by Canadian authorities in an effort to reach non-resident individuals and corporations.

(i) Personal Service

In Canada, a criminal prosecution is initiated by serving criminal process on a person within the territory of the court.¹⁴ Such a summons must be served personally on an individual accused. A corporation may be served by delivery of a summons to the “manager,

¹³ It seems clear from both the “purpose clause” in section 1.1 of the *Competition Act* and the “export cartel defence” (s. 45(5) and (6)) to the conspiracy offence that Parliament was concerned about protecting Canadian, not foreign, customers.

¹⁴ The discussion which follows is focused on criminal liability. The *Competition Act* also contains a private right of action (in s. 36) that allows any person injured by a violation of any of the offences in the *Act*, including conspiracy, to bring a suit to recover their damages plus litigation and investigation costs. Such an action may proceed regardless of whether a prosecution has occurred in respect of the offence. The precise rules of service depend upon the provincial or federal court in which the action is commenced. However, as long as subject-matter jurisdiction appears to exist, they generally contemplate that non-resident individuals and foreign corporations may be served outside of the jurisdiction by following the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 15 November 1965, 658 U.N.T.S. 163.

secretary or other executive of the corporation or a branch thereof”.¹⁵ In either case, the rules of personal jurisdiction in the *Criminal Code* do not speak to the possibility of service *ex juris* on a person who is outside Canada.

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

“... 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.”¹⁶

While some foreign executives have submitted to the jurisdiction of the U.S. and/or Canadian courts and pled guilty to cartel offences, there are many others who have chosen to leave their criminal exposure in North America outstanding. In a few of these cases, indictments have issued and the individuals are formally treated as fugitives.¹⁷ In others, the status of the matter is undisclosed, particularly in Canada, where the absence of a limitation period for hard core cartel conduct means that there is no time pressure on prosecutors to lay charges. Similarly, a number of corporations which remain of interest to competition authorities

¹⁵ *Criminal Code*, s. 703.2.

¹⁶ *Shulman v. The Queen* (1975), 58 D.L.R. (3d) 586 (B.C.C.A.) at 591, aff'g (1974) 52 D.L.R. (3d) 246 (B.C.S.C.). The accused in *Shulman* was personally served by a Royal Canadian Mountain Police officer in Australia for alleged Canadian income tax violations. Since the accused did not appear at his trial in Canada, the prosecution subsequently made a motion to proceed *ex parte*. The *ex parte* application was granted and the accused then applied for a writ of prohibition on the grounds that service was not properly effected. 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.

¹⁷ For example, Kazutoshi Yamada was indicted for participating in the Lysine cartel, but did not attorn to U.S. jurisdiction and remains an international fugitive. See S.D. Hammond, “The Fly on the Wall Has Been Bugged – Catching An International Cartel in the Act” (15 May 2001), available online at: U.S. Department of Justice Website <<http://www.usdoj.gov/atr/public/speeches/8280.htm>>. Sir Anthony Tennant, a citizen of the U.K., has also refused to submit to U.S. jurisdiction after being charged in the Christies and Sotheby's conspiracy: see S.D. Hammond, “A Review of the Recent Cases and Developments in the Antitrust Division's Criminal Enforcement Program” (7 March 2002), available online at: U.S. Department of Justice Website <<http://www.usdoj.gov/atr/public/speeches/10862.htm>>.

from a subject-matter perspective have not been prosecuted due to inability to obtain personal jurisdiction. There has, however, been recent consideration of alternatives to overcome this territorial limitation in situations where Canadian subject-matter jurisdiction extends to an offence with extraterritorial elements and parties.

(ii) Efforts to Extend Jurisdiction Using Mail Service

In *R. v. R.J. Reynolds Tobacco (Delaware)*,¹⁸ the Crown sent a summons to corporate defendants in the U.S. from Ontario by registered mail. The accused were non-resident corporations with no office or place of business in Canada. The summons was addressed to them at their office outside Canada. The basis of the Crown's argument that this conferred personal jurisdiction was that the *Criminal Code* incorporates the service procedures of a province, for the purposes of *Criminal Code* offences.¹⁹ In the Province of Ontario, the *Provincial Offences Act* provides that service may be made on a corporation "... by mailing the summons by registered mail to the corporation at an address held out by the corporation to be its address...".²⁰ Neither provision says anything about whether or not the "address" of the corporation must be located inside Canada.²¹ Nevertheless, MacDonnell J. held — on a somewhat literal and formalistic analysis — that service on a corporation by registered mail did not involve serving the summons outside Ontario, despite the foreign address of the corporations concerned.²²

The decision was regarded as surprising and controversial for a number of reasons, including the lack of consideration of whether service of Canadian criminal process upon a person within the jurisdiction of a foreign country might intrude upon the sovereign prerogatives of that country. Moreover, if Parliament had intended to reverse centuries of law by

¹⁸ *R. v. R.J. Reynolds Tobacco (Delaware)*, MacDonnell J., Ontario Court of Justice, 17 October, 2003.

¹⁹ *Criminal Code*, s. 701.1.

²⁰ *Provincial Offences Act*, R.S.O. 1990, c. P-33, s. 26(4).

²¹ Section 26 of the *Provincial Offences Act* does provide expressly for service *ex juris* on individuals by registered mail.

²² He found that the act of service was accomplished by mailing the summons by registered mail, an act that was completed in Ontario. He specifically held that the foreign place of delivery was immaterial, because for service to be effective under Ontario law, there was no requirement to show actual delivery to the addressee.

extending the possibility of *ex juris* services for provincial summary conviction offences (misdemeanours, in U.S. parlance) to the most serious crimes known to Canadian criminal law, explicit language in the *Criminal Code* might have been expected. Thus, it was not surprising that the decision was overturned on judicial review.²³ However, the Crown has launched a further appeal, which if successful, would provide an aggressive tactic for Canadian prosecutors to pursue companies involved in offshore cartels.

(iii) Can Personal Jurisdiction Be Effected Through MLAT Service?

The Competition Bureau's lawyers have also been considering whether to request the co-operation of Canada's Mutual Legal Assistance Treaty ("MLAT") partners to carry out personal service on corporate cartel participants by serving a summons on the "manager, secretary or other executive officer of the corporation"²⁴ within the territory of the treaty partner. The theory is that the implementing legislation for Canada's mutual legal assistance arrangements may provide the requisite statutory authorization for service of a summons abroad.

For example, Article II of the *Canada-United States Mutual Legal Assistance Treaty*²⁵ ("Canada-U.S. MLAT") specifies that the assistance to be provided between the two countries extends to "serving documents". It is possible that this could include a summons to a corporation in the United States to compel its attendance in a Canadian court to stand trial for a criminal *Competition Act* offence. While, the *Canada-U.S. MLAT* has been interpreted liberally to facilitate mutual legal assistance in antitrust investigations,²⁶ it has never been used for service abroad of an originating process in a Canadian or American prosecution. In view of the traditional territorial limitations on service of criminal process in both countries, it is an open

²³ *R. v. R.J. Reynolds Tobacco Co. (Delaware)* (2004), 182 C.C.C. (3d) 126.

²⁴ *Criminal Code*, s. 703.2.

²⁵ *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, at 953) (the "Canada-U.S. MLAT").

²⁶ See *Canada (Commissioner of Competition) v. Falconbridge Ltd.* (2003), 24 C.P.R. (4th) 289; and the commentary thereon in O. Borgers & M. Renaud, "Mutual Legal Assistance in Criminal Antitrust Matters: A Canadian Perspective" presented at the 8th Annual Competition Conference Held September 17 – September 18, 2004 in Fiesole, Italy (London, England: International Bar Association, 2004).

question whether a court would uphold such an approach without much more explicit language in the Treaty — or in domestic implementing legislation.

The enabling legislation for Canadian MLATs is the *Mutual Legal Assistance in Criminal Matters Act*²⁷ (“*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 the relevant treaty. However, this does not necessarily imply, in the absence of specific language, that Canada’s domestic law has been changed to permit Canadian authorities to further advance their own domestic interests. The only *MLACMA* provision that addresses service abroad at all is section 39, which deals with how foreign service may be *proved* in a Canadian proceeding.²⁸ It does not mention the legal effect of “documents” (even if interpreted to include a “summons”) that have been served under Article 2, and would seem logical that the legal effect of serving documents has to be determined by local Canadian law. If *MLACMA* had been intended to enable service of the initiating documents in a criminal prosecution, and thereby establish personal jurisdiction over corporations outside Canada, it would have been appropriate to expect some greater specificity in the statute itself.

On a policy level, it is possible that Canada would also be concerned about the longer term negative consequences of requesting MLAT service of a criminal summons — *ie* the prospect that, as a matter of reciprocity, it might in the future be required to serve “documents” initiating U.S. criminal proceedings on a Canadian company.²⁹ Moreover, even if Canada does decide to ask the United States to serve a corporation in the United States, it is by no means certain that the U.S. authorities would be receptive. It might invoke the escape hatch under the *Canada-U.S. MLAT* in respect of actions that would adversely affect the requested state’s

²⁷ *Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c. 30 (4th Supp.).

²⁸ *Ibid.*, 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.”

²⁹ 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 assertions of 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, including those that prohibit trade with countries like Cuba.

“important interests”³⁰ (as could Canada in a reciprocal scenario). As a result, it remains unclear whether MLAT service requests will be attempted and accepted, and if so, whether they would be vulnerable to legal challenge as exceeding the scope of the *Canada-U.S. MLAT* and the *MLACMA*.

(iv) Establishing Personal Jurisdiction Through Extradition

In addition to possible extraterritorial personal service via mail or MLATs, cartel participants now have to consider the risk that individuals and corporate representatives may be brought by compulsion within the territory of Canada or certain other jurisdictions through extradition. To date, extradition has rarely been invoked by Canada and the United States in competition cases.³¹ Although such matters have not proceeded to the stage of litigation or judicial decision in either country, there are many substantive and procedural issues that could be raised in respect of an extradition request derived from an international cartel investigation.³²

If extradition is successful, personal jurisdiction will be established over an individual. In addition, while a corporation is not directly amenable to extradition, the extradition of a corporate employee arguably might allow for service of criminal process if the individual is a senior executive (“manager, secretary or other executive officer”³³) through whom jurisdiction over a company can be established by service of a summons when they are present in Canada. However, there is case law in other contexts suggesting that, for corporate service to be effective, the officer who is in Canada must be shown to be present on the business of the

³⁰ *Canada-US MLAT*, *supra* note 25, Article V.

³¹ An example is the *Thomas Liquidation* case (see Competition Bureau, Press Release – “Thomas Liquidation Inc. Fined \$130,000 for One Count of Misleading Advertising Under the Competition Act” (7 February 1995), available online at: Competition Bureau Website <<http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct00119e.html>>. Charges of deceptive marketing practices under the *Competition Act* were laid against parties resident in the United States, as a result of exaggerated claims they made to Canadians. An extradition request was made on behalf of the Attorney General of Canada and an arrest warrant was issued in the United States, preparatory to the commencement of extradition proceedings. The individual waived his right to an extradition hearing, came to Canada and pleaded guilty to the offence. (The individual did not plead in his personal capacity, but on behalf of the corporate accused.)

³² For a more extensive overview, see Low Paper, *supra* note 2 at 17-21.

³³ See *Criminal Code*, s. 703.2, discussed *supra* note 24.

company.³⁴ It appears that premise would not be fulfilled in the case of an individual who has been extradited to Canada for the purpose of trial for a specific cartel offence.

The stakes for extradition in competition law investigations have recently increased. Until 2003, extradition was really only a plausible threat as between the U.S. and Canada. Individuals who were in a position to remain outside North America could avoid serious exposure, because few other countries had laws that established criminal penalties for cartel offences. Since the entry into force of the *Enterprise Act*³⁵ in the U.K., however, executives who are wanted in Canada and/or the U.S. have become liable to extradition from the U.K. for cartel activity engaged in after the entry into force of the British legislation. That exposure applies not only to British residents, but also to any person who may be physically present in the U.K., however briefly (*eg* transiting through London airports).³⁶ If the emerging international consensus on the harmful effects of cartels results in additional jurisdictions adding criminal penalties, extradition will become a more important component in the jurisdictional repertoire of competition law enforcers.

INDIRECT JURISDICTION VIA CANADIAN CORPORATIONS

The *Competition Act* contains two potentially powerful mechanisms by which Canadian companies can be used as evidence gathering conduits and/or prosecution targets in international cases. Each has been the focus of recent efforts to maximize the reach of the Canadian competition authorities.

³⁴ While there is no jurisprudence under the *Criminal Code* dealing with circumstances in which an executive officer is present in Canada, jurisprudence under Ontario's *Rules of Civil Procedure* suggest that a representative of a foreign corporation will not properly be served in Canada unless he or she is in the country to carry on the business of the corporation. See *Santa Marina Shipping Co. v. Lunham & Moore Ltd.* (1978), 18 O.R. (2d) 315 (Ont. H.C.J.).

³⁵ *Enterprise Act 2002*, U.K. 2002, c. 40, ss. 188-190.

³⁶ The United States has recently initiated proceedings to extradite Ian P. Norris, the former CEO of Morgan Crucible from the U.K., although the basis of this request is an obstruction of justice charge rather than the individual's role in the cartel. See James Kanter, "US Trying to Extradite Ex-Morgan Crucible CEO" (22 September 2004), available online at: International Competition Policy System Website <http://icps.ftc.gov/data/master/2004/09/000235/000235_01.doc>. Morgan Crucible has also pleaded guilty to obstruction of justice in Canada and its Canadian subsidiary has pleaded guilty to implementing a foreign-directed conspiracy in Canada. See Competition Bureau, Press Release – "Morgan companies fined \$1 million for Obstruction and Price-Fixing" (July 16, 2004), available online at: Competition Bureau Website <<http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02917e.html>>. It is unclear whether the Canadian authorities will also seek to extradite U.K.-based executives in this case.

Evidence Gathering From Foreign Affiliates

The *Competition Act* contains a broad subpoena power under which the Commissioner of Competition may obtain court orders for production of documents, responses to written interrogatories, and depositions of individuals under oath.³⁷ With respect to documents located outside the jurisdiction, a court may also order a Canadian corporation to obtain and produce responsive items from its foreign affiliates:

11(2). Where the person against whom an order is sought under paragraph (1)(b) [the document subpoena power] in relation to an inquiry is a corporation and the judge to whom the application is made under subsection (1) is satisfied by information on oath or solemn affirmation that an affiliate of the corporation, whether the affiliate is located in Canada or outside Canada, has records that are relevant to the inquiry, the judge may order the corporation to produce the records.³⁸

This provision does not directly compel the foreign affiliate to subject itself to Canadian jurisdiction. However, the Canadian company will be exposed to potentially significant penalties for contempt if it does not obtain and produce the documents required under such a court order. It remains to be seen how a court would adjudicate liability and sanctions in a contempt proceeding where the Canadian corporation is a subsidiary with no practical or legal leverage to force an unwilling foreign parent or sister company to turn over required documents.

The rationale for section 11(2) can be appreciated in the context of international cases where the Canadian company will often be the importer and distributor of products manufactured by foreign affiliates that may have been subject to an international conspiracy. However, in some recent cases (not yet publicly reported), the Competition Bureau has obtained such orders against Canadian companies which are not involved in the distribution of the

³⁷ *Competition Act*, s. 11(1).

³⁸ *Ibid.* s. 11(2).

products of the foreign affiliate that are the subject of the investigation (eg a Canadian subsidiary which sells “widget services” is served with a section 11 order seeking documents from a foreign sister company that sells “gadget products” directly to third parties in Canada). Since section 11 does not specifically advert to this type of scenario, it can be expected that respondents may attempt to challenge the validity of this broadened approach to extraterritorial evidence gathering.

Foreign-Directed Conspiracy Offence

The substantive analogue to section 11(2) is section 46 of the *Competition Act*, which makes it an offence for a Canadian corporation to implement a foreign-directed conspiracy:

46(1). Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45 [the general conspiracy offence], is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.³⁹

³⁹ *Competition Act*, s. 46(1). The conspiracy offence currently requires that an agreement or arrangement be “likely to lessen competition unduly”: *ibid.*, s. 45(1). (The participants must also have subjective knowledge/intent regarding the agreement, but an objective “reasonable business person” test is applied for the portion of the knowledge/intent element relating to the likelihood of such an undue lessening of competition: see *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 660). The Government is proposing amendments that would replace the competitive effects test with a

One of the controversial features of this provision is that it purports not to require any knowledge of, or intention to participate in, the conspiracy on the part of the corporation carrying on business in Canada. It remains an open question whether this departure from the fundamental principle that *mens rea* is needed for criminal offences may at some point be challenged.

Recent attempts to maximize the power of section 46 have focused on avoidance of the fine cap for the principal conspiracy offence and the potential application of section 46 to unaffiliated companies.

(i) Fines

The absence of an explicit fine cap in section 46 has led the Canadian competition authorities to seek to invoke it when they perceive that the volume of affected commerce and other relevant factors would justify a fine in excess of the C\$10 million maximum applicable to the main conspiracy offence.⁴⁰ This regularly occurs in fine negotiations, and in two instances parties have agreed to plea bargains of this sort.⁴¹ However, such an approach remains questionable. As a matter of legal interpretation, it is arguable that the penalty on an ancillary anti-avoidance provision which does not specify a knowledge/intent requirement cannot exceed the maximum fine which could be imposed on a domestic or foreign company on the main *mens rea* offence. Moreover, even if this provision was not interpreted as having an implied cap on the penalty that could be imposed as a matter of law, it is difficult to envision how a court

per se prohibition of a defined list of “hard-core cartel” activities: see *2003 Discussion Paper*, *supra* note 1 at 13-16. This proposal has generated significant opposition from the business and legal communities on the basis that the proposed attempts to define cartel conduct overreach and would criminalize substantial amounts of non-anti-competitive activity: see *PPF 2004 Report*, *supra* note 1 at 16-18.

⁴⁰ *Competition Act*, s. 45(1).

⁴¹ See *R. v. UCAR Inc.* and *R. v. SGL Carbon AG*, summarized on the Competition Bureau’s chart of Penalties Imposed by the Courts, available online at: Competition Bureau Website <http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/h_ct01709e.html>.

could justify imposing a section 46 fine in excess of the C\$10 million cap for the conspiracy offence as a fair and rational exercise of judicial sentencing discretion.⁴²

(ii) Unaffiliated Companies

Section 46 is conventionally regarded as a mechanism for reaching offshore corporations by prosecuting and fining their Canadian subsidiaries. This represents a rational legal and economic response to jurisdictional challenges relating to multinational enterprises. However, the Canadian competition authorities here again have latched onto the absence of formal restrictive wording (*ie* a reference to “affiliates”) in the provision to argue for a more expansive scope. Indeed, they are taking the position in a number of investigations that third party domestic distributors that have no equity linkage to a supplier involved in a foreign conspiracy are nevertheless liable under section 46 for importing and reselling products that were price-fixed abroad.

The proposed application of section 46 to unaffiliated distributors is harsh if they had no knowledge, or reason to suspect, that they were purchasing price-fixed goods. From a legal perspective, it depends upon interpreting both the phrase “directive, instruction, intimation of policy or other communication” and the phrase “in a position to direct or influence the policies of the corporation” very broadly. It is not at all clear that simply paying the price established by a price-fixing supplier constitutes the implementation of a directive or that the supplier is in a position to direct or influence the Canadian company by setting such a price (particularly when Canada’s *per se* prohibition against “price maintenance” requires that resellers be given autonomy in setting their own prices⁴³). Nevertheless, pending clarification of this issue, Canadian distributors would be well advised to try to obtain indemnification clauses in their supply contracts for any Canadian liability arising from a supplier’s offshore competition law violations.

⁴² *Criminal Code*, s. 718.1, requires that a sentence be proportionate to the gravity of the offence and degree of responsibility of the offender. See generally B.P. Archibald, “Fault, Penalty and Proportionality: Connecting Sentencing to Subjective and Objective Standards of Criminal Liability (with Ruminations on Restorative Justice)” (1998) 40 *Criminal Law Quarterly* 263.

⁴³ See *Competition Act*, s. 61.

PRIVATE COMPETITION LITIGATION

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

- only recently established well-functioning class action regimes;
- rarely utilizes jury trials in civil cases;
- allows for only modest punitive damage awards;
- has restricted the availability of open-ended contingency fees in various ways;
- has made private actions available only in respect of certain *Competition Act* offences and remedies; and
- has never employed treble damages for competition law offences.

Many of these features of the Canadian legal framework have been changing significantly. The development of effective class action regimes in numerous provinces and before the Federal Court, along with opportunities for above-hourly-rate compensation for successful class counsel, are now well known.⁴⁴ Of particular note in the competition law area are recent (and proposed further) expansions of private rights of action and the beginnings of meaningful jurisprudence regarding the certification of direct and indirect purchaser claims.

New Private Rights of Action

In 2002, after prolonged and controversial debates on the proposed reforms,⁴⁵ the *Competition Act* was amended to allow private parties to pursue their own actions for relief

⁴⁴ See D. M. Low, Q.C., “Basic Concepts of Class Litigation in Canada” (September 2001), available online at: McMillan Binch LLP Website – Publications <<http://www.mcmillanbinch.com>>.

⁴⁵ For a summary of the stakeholder consultations, see Public Policy Forum, *Amendments to the Competition Act and the Competition Tribunal Act: A Report on Consultations* (20 December 2000) at 18-21, available online at: Public Policy Forum Website <http://www.ppforum.ca/ow/ow_p_12_2000.PDF>.

from anti-competitive exclusive dealing, tied selling, market restrictions (*eg* exclusive territories) and refusals to deal.⁴⁶ Various safeguards were included to address concerns in the business and legal community regarding “strategic litigation”,⁴⁷ including a requirement to obtain leave to bring a proceeding (based on a very modest threshold standard)⁴⁸ and the limitation of remedies to the prohibition or other remedial orders currently available to the Commissioner of Competition. After a slow start, a total of nine refusal to deal cases have been filed.⁴⁹

The Canadian *Competition Act* contains a remedially-focused regime for these vertical non-price restraints as well as other more general monopolization (“abuse of dominant position”) issues.⁵⁰ This legal framework was developed in response to the modern economic learning that most commonplace commercial distribution practices are efficient and pro-competitive, or at least benign. While the Commissioner of Competition has ample enforcement powers to address the rare cases where such practices are anti-competitive, a new round of proposed amendments is exploring the possibility of adding “administrative monetary penalties”⁵¹ as well as follow-on damage recovery actions for the foregoing vertical distribution practices and the general reviewable practice of abuse of dominance.⁵² This will raise the

⁴⁶ See Bill C-23, *An Act to Amend the Competition Act and the Competition Tribunal Act*, 1st Sess., 37th Parl., 2001- 2002, adding s. 103.1 to the *Competition Act*.

⁴⁷ See N. Campbell and J.W. Rowley QC, *Should Reviewable Practices Be Turned Into Competition Torts?* (October 2001) (Report Prepared for the Competition Policy Group), executive summary available online at: McMillan Binch LLP Website – Publications <<http://www.mcmillanbinch.com>>.

⁴⁸ See *Competition Act*, s. 103.1(7), which empowers the Tribunal to grant leave when it “has reason to believe that the applicant is directly and substantially affected... by any practice... that could be subject to an order under [the refusal to supply, tied selling, exclusive dealing or market restriction provisions].” This test has been interpreted as not requiring evidence of anti-competitive effects at the leave stage: see *Barcode Systems Inc. v. Symbol Technologies Canada UCC*, 2004 Comp. Trib. 1 (File no.: CT2003008); and *Allan Morgan & Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4 (File no.: CT2003009). Both decisions are under appeal.

⁴⁹ See the cases cited in note 48 *supra*, as well as other cases listed on the Competition Tribunal website – Cases <<http://www.ct-tc.gc.ca/english/view.asp?x=64>>

⁵⁰ See *Competition Act*, Part VIII.

⁵¹ AMPs are a euphemism for potentially significant fines – the current proposals would give the Competition Tribunal discretion to impose unlimited fines with no maximum cap.

⁵² 2003 *Discussion Paper*, *supra* note 1 at 5–12.

potential exposures for companies significantly and is also likely to induce more strategic private litigation.

Direct And Indirect Purchaser Class Actions⁵³

While it is still “early days” in the development of class action regimes in Canada, competition law has already emerged as one of the most active subject areas. Last year the Ontario Court of Appeal in *Chadha v. Bayer Inc.*⁵⁴ rejected the first attempt to certify a class of indirect purchasers that had reached an appellate court in Canada. However, it did so without embracing the black and white approach of the “*Illinois Brick*”⁵⁵ decision in the United States.

(i) The Test for Certification

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

- the pleadings must disclose a cause of action;
- there must be an identifiable class;
- the claims of the class must raise common issues;
- a class proceeding must be the preferable procedure; and
- there must be an appropriate representative plaintiff.⁵⁶

⁵³ This section of the paper draws from D. W. Kent, “Indirect Purchaser Claims – A Canadian Approach”, *The ABA Canadian Law Newsletter*, Vol. XXXIX, No. 2 (Fall 2003).

⁵⁴ *Chadha v. Bayer Inc.* (2003) 63 O.R. (3d) 22 (C.A.) (“*Chadha (Court of Appeal)*”). The plaintiffs’ Statement of Claim alleged a conspiracy by defendants who were manufacturers and distributors of iron oxide pigments used in making bricks, paving stones and other building materials. The conspiracy was said to have been in operation between 1985 and 1991, a period during which the defendants generally held more than 90% of the Canadian market for iron oxide. Expert evidence filed on the certification motion indicated that, if entirely passed through to end consumers, the cartel-related increase in the price of iron oxide pigments could have raised the cost of a \$150,000 home by between \$70 and \$112.

⁵⁵ *Illinois Brick v. State of Illinois*, 431 U.S. 720 (1977).

⁵⁶ *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1).

The *Chadha* case focused on the critical third and fourth elements of the certification test – commonality and preferability. It was acknowledged that the question of whether there had been an agreement to fix prices was a common issue. The dispute centred on whether liability could also be a common issue and, in particular, whether harm (as distinct from the quantum of damage), a prerequisite for liability,⁵⁷ could be determined on a common basis for a class of indirect purchasers. The analysis of preferability — a Canadian variation on the U.S. “predominance” test — was then driven by the conclusions as to commonality.

(ii) Commonality of Issues

The motions judge had expressly declined to follow *Illinois Brick* or to bar actions by indirect purchasers. The Court of Appeal did not disagree with this refusal to set general rules or to impose an *Illinois Brick* structure on price-fixing litigation. However, it did criticize the failure to take into account the complexities (discussed in *Illinois Brick*) involved in determining which participants in the various distribution chains actually bore the brunt of the alleged price-fixing harm.⁵⁸ In particular, the Court of Appeal noted that the economic evidence filed by the plaintiffs on the certification motion assumed, without supporting evidence or analysis, that harm had been passed through to the end consumers.⁵⁹ The absence of any evidence or plan as to how the existence of harm might be proven on a common basis for all members of the class was fatal to the plaintiffs’ attempt to have liability defined as a common issue.

The Court of Appeal was careful to note, however, that indirect purchaser classes were not inevitably barred for lack of commonality and might, with appropriate analysis and evidence, be certified. It compared the *Chadha* plaintiffs’ evidence unfavourably to that of the plaintiffs in the recent U.S. decision, *In Re: Linerboard Antitrust Litigation*.⁶⁰ The Court of

⁵⁷ See *Competition Act*, s. 36(1), which provides that: “Any person who has suffered loss or damage as a result of (a) conduct that is contrary to any provision of Part VI, ... may, sue for and recover from the person who engaged in the conduct ... an amount equal to the loss or damage proved to have been suffered ...”.

⁵⁸ *Chadha (Court of Appeal)*, *supra* note 54 at 38-39.

⁵⁹ *Ibid.* at 33-34, 41 and 45.

⁶⁰ *In Re: Linerboard Antitrust Litigation*, 305 F.3d 145 (2002).

Appeal remarked that the expert evidence in that case addressed the concept of “presumed impact”, as well as the extensive empirical investigations that had already been undertaken and the advanced economic modelling which could be undertaken to establish class-wide impact.⁶¹ However, it is worth noting that *Linerboard* involved a direct purchaser class entitled to recover all of the alleged overcharge under U.S. law. It will be more difficult to adduce sufficiently compelling economic evidence in a Canadian context where both direct and indirect classes may have claims and a pass-on defence may be available.

(iii) Preferability of Class Process

Recent Supreme Court of Canada jurisprudence has established that preferability must be examined with respect to the resolution of the action as a whole and not just of the common issues.⁶² While neither Ontario nor any other Canadian jurisdiction has a U.S.-style predominance requirement, the preferability test⁶³ does assess whether or not the resolution of the truly common issues will move a case forward significantly or whether it would represent only the commencement of a large and unmanageable series of individual inquiries. In *Chadha*, the Court of Appeal concluded that the complex individual inquiries required to determine whether any class member had suffered harm (all apart from the degree of harm suffered) meant that the action would be unmanageable even though the issues relating to the existence of a conspiracy might be determined on a common basis.⁶⁴

(iv) Implications for Future Cases

While the *Chadha* decision turned in large part on the paucity of the plaintiffs’ evidence, the court’s analytical approach establishes three key general propositions for antitrust class action litigation in Canada:

⁶¹ *Chadha (Court of Appeal)*, *supra* note 54 at 36.

⁶² *Hollick v. City of Toronto*, [2001] 3 S.C.R. 158 at 177-179.

⁶³ See *Class Proceedings Act*, 1992, *supra* note 56, s. 5(1)(d).

⁶⁴ *Chadha (Court of Appeal)*, *supra* note 54 at 42.

- Indirect purchasers are as entitled as direct purchasers to bring suit to recover damages from cartel activities.
- The necessary implication of the status of indirect purchasers to bring suit is that price-fixing harm can (and ultimately must) be traced to its resting place through the channels of distribution. This, in turn, means that the “pass-on” defence is alive and well in Canada.⁶⁵
- Whether harm is capable of being analyzed and proved on a common basis requires some economic evidence and/or analysis at the certification stage. The existence of a viable approach to a common assessment of harm (though obviously not necessarily proof of the outcome of that approach) must be demonstrated. This requirement presumably attaches not only to proposed indirect classes but to direct classes as well – a class of direct purchasers which assumes that its members did not pass on the price-fixing harm may be as doomed to failure as an indirect class which assumes that the harm was passed on.

Developments in the vitamins price-fixing litigation may further refine the *Chadha* analysis. In the vitamins cases,⁶⁶ the plaintiffs have proposed a universal class consisting of all direct and indirect purchasers and consumers of relevant vitamins during the relevant time periods. They propose first to put forward a settlement with defendants that establishes liability and a global amount of damages on behalf of the class generally (which presumably contains everyone who suffered harm no matter what the results of any pass-on

⁶⁵ The Supreme Court of Canada commented inconclusively on pass-on defences generally in *British Columbia v. Canadian Forest Products Ltd.* (2004), 240 D.L.R. (4th) 1. The majority opinion found that a pass-on defence did not need to be considered because the Crown had not proven any of its claimed loss of stumpage fees, but noted in obiter that “it is not generally open to a wrongdoer to dispute the existence of a loss on the basis it has been ‘passed on’ by the plaintiff” (¶111). The minority opinion was even more categorical that “passing on is not a defence known to law” (¶210). However, the case involved the application of tort law principles in the context of environmental damage, and may not be determinative in the context of the statutory private damage recovery regime in the *Competition Act*.

⁶⁶ There are approximately 12 co-ordinated class actions proposed in three jurisdictions. Five proposed class actions, each covering a different collection of vitamins, are moving forward as a package first in Ontario.

analysis are). They then propose to conduct a second stage of proceedings to allocate the pool of damages among the class members.⁶⁷ Whether this universal class approach will solve the certification problem suffered by the partial class in *Chadha* remains to be seen.

CONCLUDING OBSERVATIONS

We expect Canadian prosecutors will continue to attempt to advance the boundaries of subject-matter and personal jurisdiction for *Competition Act* offences. They will also make increasingly aggressive use of the provisions which allow Canadian corporations to be targeted for evidence gathering and/or as prosecution targets when foreign companies cannot be reached directly. As they do so, it is likely that various companies and individuals will bring legal challenges which will generate much needed clarifications of Canada's jurisdictional reach. While such skirmishes may also have positive or negative impacts on the extent of private litigation in Canada,⁶⁸ other forces are driving increases in private competition litigation that are likely to continue irrespective of these jurisdictional factors.

⁶⁷ In an interesting recent development, Nordheimer J. approved the sharing of fees in a class action settlement with the U.S. counsel who collaborated with local counsel for the plaintiff class. See: *Gariepy v. Shell Oil Co.*, unreported endorsement dated September 16, 2004.

⁶⁸ The scope of subject-matter jurisdiction directly affects civil suits as well as criminal prosecutions. While personal jurisdiction is treated differently in the two contexts (see *supra* note 14), the provision for reading in a conviction or guilty plea and supporting evidence as a presumption of liability in a follow-on damages action (see *Competition Act*, s. 36(2)) means that expansions or restrictions of criminal personal jurisdiction will have an effect on the time, cost and risk of civil suits.