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I. INTRODUCTION

The *Competition Act* ("the Act") governs all aspects of competition law in Canada.[2] Section 45 forms the core of Canadian cartel law, and once recent amendments to that section come into force in March 2010, section 45 will make it a *per se* offense for a person to conspire, agree, or arrange with a competitor to enter into certain types of agreements with respect to a "product." Generally, agreements to fix prices, allocate markets or customers, or restrict the supply of a product are caught under this section. Investigations and prosecutions (and guilty pleas) under section 45 in respect of international cartels have occurred often, including several in which some of the co-conspirators were never present in Canada. In most cases, however, there was specific evidence that the parties had targeted Canadian customers and markets as part of their cartel.

In general, Canadian courts and the Competition Bureau will not pierce the corporate veil to impose liability or find guilty foreign parents for the anticompetitive practices of their Canadian affiliates in the absence of evidence that the parent was also a cartel participant. However, the Act contains two sections that permit the Commissioner of Competition (the "Commissioner") to use Canadian companies to reach international cartels. Specifically, subsection 11(2) requires Canadian targets of an order for production of records to produce evidence in the hands of foreign affiliates and section 46 creates an offense for a Canadian corporation to implement a foreign-directed conspiracy.

II. SUBSECTION 11(2): GATHERING EVIDENCE FROM FOREIGN AFFILIATES

The Act gives the Commissioner broad powers to obtain court orders for the production of documents, responses to written interrogatories, and depositions of individuals under oath in its investigations. Under subsection 11(2), a court can also order a Canadian corporation to produce records in the possession of any of its affiliates, whether located inside or outside Canada. While this provision does not bring the foreign affiliate under Canadian jurisdiction, it exposes the Canadian affiliate to penalties if it does not comply with the court order for production.[3]

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[2] R.S.C. 1985, c. C-34.

[3] For a longer discussion of this subsection, *see* e.g. N. Campbell & W. Rowley, *Jurisdiction and Litigation Developments in Canadian Competition Law*, prepared for the 45th Annual Antitrust Institute of the Practicing Law

III. SECTION 46: FOREIGN-DIRECTED CONSPIRACIES

A. The Offense

Section 46 was added to Canada's competition laws in 1976. This section complements the conspiracy offense found in section 45, making it an indictable offense for any corporation carrying on business in Canada to implement a directive, instruction, intimation of policy, or other communication from a person outside Canada who is in a position to direct or influence the policies of the corporation, where the implementation takes place for the purpose of giving effect to a conspiracy, combination, agreement, or arrangement entered outside Canada that would have contravened section 45 if entered into Canada. In other words, section 46 prohibits corporations in Canada from implementing foreign directives for the purpose of giving effect to conspiracies entered into outside Canada.

The Competition Bureau's *Revised Draft Bulletin on Sentencing and Leniency in Cartel Cases* notes that section 46 is "targeted specifically at international cartel activity affecting Canada," and allows the application of the *Competition Act* in cases where the actual conspirators are not located or incorporated in Canada.[4] Although its reach is actually broader, section 46 is often regarded as a means for Canadian competition authorities to reach foreign parent companies by prosecuting their Canadian subsidiaries. In some ways, section 46 reflects the unique vulnerability that Canada faces with regards to foreign decision-making: An arguable objective of this section is to ensure that the foreign party involved in an international cartel will feel the weight of the economic penalties imposed on the Canadian affiliate.

Only a corporation can be indicted under section 46, and there is no requirement that any director or officer of the corporation in Canada have knowledge of the conspiracy or agreement. The penalty for conviction is a fine in the discretion of the court, but there is also potential liability from private action, including class actions, launched by parties seeking recovery for actual damages caused by the conspiracy.[5]

It should be noted that section 46 does not limit its scope to Canadian affiliates of foreign companies, but that it applies to any company in Canada implementing "conspiracy" directives from a person outside Canada in a position to direct or influence the policies of the corporation. Read literally, the language of the section could apply to any Canadian corporation subject to foreign directives, and it is open to argument whether a Canadian arms-length, third-party distributor for a foreign supplier involved in a foreign cartel should be liable under the statute. The policy basis for that approach seems controversial. This wording gives Canadian competition authorities a very broad scope for inquiry, especially when considering the fact that the directors and officers of the Canadian company need not have knowledge of the conspiracy. Indeed, in some cases third party Canadian distributors have been convicted under section 46 for importing and reselling goods that were price-fixed abroad.

Institute, May 2004. Available online: <http://www.mcmillan.ca/Upload/Publication/JuristicationalLitigationDevelopments.pdf>.

[4] Published March 25, 2009. Available online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03027.html>

[5] Under section 36 of the Act, persons who have suffered harm as a result of section 46 conspiracies may bring civil actions in the courts. The record of proceedings resulting in a guilty plea under section 46 is admissible evidence against the defendant.

Until recently, section 46 differed in a significant manner from section 45 in that section 46 makes it a *per se* offense to implement a foreign-directed conspiracy, whereas section 45 required the conspiracy to lessen competition substantially in Canada. Moreover, section 45 had a C$10 million cap on the fines that could be imposed, whereas section 46 leaves the fine amount to the discretion of the court. These factors led to the observation that the Competition Bureau would at times prefer to prosecute under section 46 where it wanted to impose fines larger than C$10 million, or where it might prefer to prosecute Canadian affiliates for a *per se* offense rather than an offense requiring a rule of reason approach.[6] Once the section 45 amendments come into force in March 2010, both section 45 and section 46 will provide for *per se* offenses, thus ending this particular difference, and the maximum fines that can be imposed under section 45 will be raised to C$25 million. It remains to be seen whether the Competition Bureau will continue to seek higher fines under section 46 than can be imposed under section 45.

B. Convictions and Guilty Pleas under Section 46

Although there are few contested cases under section 46, there have been several guilty pleas under this section. The most notable cases are summarized below, and are illustrative of the Competition Bureau's general use of section 45 pleas in conjunction with section 46 pleas to reach foreign parents engaged in international cartels and their Canadian affiliates implementing foreign-directed conspiracies:[7]

- In 1993, Chemagro Limited and Sumitomo Canada Limited pleaded guilty under section 46 for sharing the Canadian chemical insecticide market under a foreign-directed conspiracy from 1987 to 1988. Chemagro also pleaded guilty under section 45 for sharing the Canadian market with Abbott Laboratories. Fines totaling C$3.25 million were imposed in these two cases.
- In 1994 to 1997, Mitsubishi Corporation, Mitsubishi Paper Mills Ltd. of Japan, New Oji Paper Company of Japan, and Kanzaki Specialty Papers Inc. of the United States, pleaded guilty under section 45 for a conspiracy to fix thermal fax paper prices in 1991, and Mitsubishi Co., Mitsubishi Paper Mills Ltd., and Rittenhouse Ribbons & Rolls Ltd. pleaded guilty under section 61 for price maintenance. Mitsubishi Canada also pleaded guilty under section 46 for having implemented the foreign-directed conspiracy, as well as under section 61 for price maintenance. A total of C$3.45 million was fined in this case. It is noteworthy that Mitsubishi Co. was held liable even though the acts leading to the agreement took place wholly in Japan.
- In 1999-2000, seven companies and two individuals pleaded guilty under section 45 for fixing prices and allocating markets for bulk vitamins, and Roussel Canada Inc. pleaded guilty under section 46 for implementing the foreign-directive that gave effect to the

[6] For more discussion on this point, *see* M. Low & C. Halladay, *Cartel Enforcement in Canada*, Prepared for The Global Competition Forum "Competition Law and Policy in a Global Context" Seoul, Korea, April 23, 2004. Available online: <http://www.mcmillan.ca/Upload/Publication/Halladay_Low%20cartel%20paper%20for%20Seoul%20conference.pdf>.

[7] For a table of penalties imposed for international cartels, *see* the Competition Bureau's website at http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/01144.html.

conspiracy in Canada. Over C$91.5 million total fines were imposed in this case, of which C$370,000 were imposed under section 46.

- Since 2000, several companies have pleaded guilty to conspiring to fix the prices of graphic electrodes in Canada. Among these is UCAR Inc., which pleaded guilty under section 46 for implementing a foreign-directed conspiracy; UCAR Inc. was fined C$11 million and agreed to pay more than C$19 million in restitution. In addition, the German corporation SGL Carbon Aktiengesellschaft ("SGL AG") pleaded guilty to fixing prices in Canada and was fined C$12.5 million. This fine exceeded the C$10 million cap that would have applied had SGL AG been charged under section 45. In 2005, the Ontario Superior Court noted that although Mitsubishi Co. was not a principal party to the foreign conspiracy, it held a 50 percent interest in UCAR and Mitsubishi Co. was accordingly fined C$1 million. In 2006, Nippon Carbon Co. Ltd. was fined C$100,000 under section 46.
- In 2000, a Japanese company and one of its senior executives were convicted of an international price-fixing and market-sharing conspiracy involving sorbates. Daicel Chemical Industries, Ltd. pleaded guilty and was fined C$2.46 million. The court also imposed an order prohibiting the company from committing or repeating the offense in Canada. The Deputy Commission of Competition issued a statement that the Competition Bureau would "not permit these international cartels to harm Canadian competition and [it would] continue to stamp out this type of behaviour…The conviction of the individual in this case sends a strong warning to executives everywhere; individuals involved in these kinds of cartels face serious risk of prosecution in Canada."[8]
- In 2004, The Morgan Crucible Company was fined C$550,000 for obstructing a Bureau investigation into price-fixing of carbon brushes and current collectors used in public transit vehicles. Its Canadian affiliate, Morganite Canada, pleaded guilty under section 46 for implementing the foreign-directed conspiracy and was fined C$450,000. Between 1995 and 1998, Morganite Canada had received and unknowingly implemented pricing directives from its foreign affiliate that were reached unlawfully by agreement with competitors.
- In 2006, the Competition Bureau obtained a prohibition order against the international auction house, Sotheby's, and its Canadian subsidiary, Sotheby's (Canada) Inc. prohibiting both the New York-based parent company and the Canadian subsidiary from committing any offense contrary to the conspiracy and foreign directives provisions of the Act. It further directed them to maintain and implement compliance measures to prevent any such future illegal activities, which included a posting of the Order on Sotheby's Canadian Web page, notifying Canadian auction sellers in writing about the court order, paying investigative costs—calculated at just under C$800,000—instituting compliance programs, and providing written proof to the Commissioner of compliance with the order for five years. The Competition Bureau had determined there was an international conspiracy to fix auction commission rates, and that Sotheby's and

[8] Competition Bureau, *Fines totalling $2.71 million imposed for international conspiracy under the Competition Act*, September 19, 2000. Available online: <http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/00574.html>.

Sotheby's Canada may have induced Canadians to consign their property to auctions in the United States and elsewhere for sales subject to the fixed commission rates.

IV. OTHER PROVISIONS MAY BE USED AGAINST INTERNATIONAL CARTEL PARTICIPANTS

In some cases the Competition Bureau has used other provisions of the Act to reach international cartel participants, such as the price maintenance provision. For example, in the thermal fax paper case, the price maintenance provision was used to convict cartel participants where the offense was an aspect of international cartel arrangements.[9] It is therefore worth noting that the Competition Bureau may, from time to time, employ provisions of the Act other than sections 45 and 46 to reach international cartel participants where applicable.

V. CONCLUSION

The Act provides Canadian competition authorities with a few powerful tools to use Canadian companies to reach international cartel participants. In particular, section 11(2) enables the Competition Bureau to require Canadian parent companies to produce evidence in the hands of foreign affiliates, section 46 allows the Competition Bureau to prosecute Canadian subsidiaries implementing foreign-directed international conspiracies, and other provisions of the Act may from time to time be relevant in assisting the Competition Bureau's prosecution of international cartel activities.

[9] Prior to the 2009 amendments to the Act, subsection 61 made price maintenance a *per se* criminal offense. Price maintenance is now a reviewable practice under the civil provisions of the Act.