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***Minn-Chem Incorporated et al. v.
Agrium Incorporated et al.:*
A Canadian Perspective on the
Extraterritorial Application of U.S.
Antitrust Law**

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I. INTRODUCTION

This article provides a Canadian perspective on the recent decision of the U.S. Seventh Circuit Court of Appeals (the “Seventh Circuit”) in *Minn-Chem Incorporated et al. v. Agrium Incorporated et al.* (“*Minn-Chem*”).² *Minn-Chem* considered the application of the *Foreign Trade Antitrust Improvements Act* (“FTAIA”) to a class action by U.S. direct and indirect purchasers of potash against seven major international potash mining companies. The issue raised by the case is of keen concern to Canadian (and other non-U.S. entities), namely when will U.S. antitrust law apply to foreign conduct? In our view, the Seventh Circuit came out on the right side of the issue, adopting a suitably restrained approach to the extraterritorial application of U.S. antitrust law.

II. THE MINN-CHEM DECISION

In *Minn-Chem*, the plaintiffs alleged a conspiracy to restrict output and fix prices of potash in violation of Section 1 of the *Sherman Act*. The defendants were seven major international potash mining companies, all of whose mining operations are located outside of the United States (in Canada, Belarus, and Russia).

The alleged anticompetitive conduct involved coordination at industry meetings and the exchange of production information. There were also allegations of parallel business conduct, such as mine closures and temporary shutdowns by two of the defendant companies. All of this conduct occurred outside of the United States. The only link to the United States argued by the plaintiffs was that the alleged anticompetitive conduct had inflated the price of potash sold in the United States. (Potash prices in the United States rose by approximately 600 percent in the five years during which the conspiracy had allegedly operated.)

Complicating matters further was that three of the defendant potash companies were equal shareholders in Canpotex Ltd., a Canadian corporation that co-ordinates the joint export marketing, distribution, and sale of potash outside of Canada and the United States. Subject to certain exceptions, subsection 45(5) of the Canadian *Competition Act* permits companies to coordinate on prices, etc. when the agreement relates only to the export of products from Canada. The objective is to enhance Canadian export trade by facilitating coordination between Canadian exporters, even if the same conduct would be prohibited if it related to domestic Canadian markets. Thus, as the Seventh Circuit noted in its decision, “[e]xport marketing through Canpotex is explicitly authorized and encouraged by Canadian law. In other words,

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² *Minn-Chem Incorporated et al. v. Agrium Incorporated et al.*, 2011 U.S. App. LEXIS 19433 (7th Circ. 2011).

Canpotex's coordination of Canadian potash exports is lawful under the domestic law of that country.”

The defendants in *Minn-Chem* moved to dismiss the plaintiffs' claim on two grounds: a lack of jurisdiction, since the price-fixing conspiracy occurred outside of the United States and, in the alternative, a failure to satisfy the pleading requirements for an antitrust claim because the allegations constituted, at most, parallel business conduct. The Seventh Circuit did not consider the latter argument, given its conclusions on the jurisdictional question.

On that issue, the Seventh Circuit was called upon to interpret the application of the FTAIA to the case. The FTAIA establishes the general rule that U.S. antitrust law does *not* apply to foreign anticompetitive conduct. It then carves out exceptions to bring certain conduct back within the reach of U.S. antitrust law. Two of these exceptions were relevant in *Minn-Chem*: (i) if the foreign conduct has a “direct, substantial, and reasonably foreseeable effect” on U.S. domestic or import commerce (the “direct effects” exception) or (ii) if the foreign conduct “involv[es]” U.S. import trade or import commerce (the “import commerce” exception).

In considering the “import commerce” exception, the Seventh Circuit concluded that the district court below had erred in finding that the combination of the import of potash into the United States and the alleged conspiracy to fix prices of potash globally created a sufficiently “tight nexus” to “involve” U.S. import trade or commerce. Under the district court's approach, the Seventh Circuit explained, a foreign company with *any* import business in the United States would violate U.S. antitrust laws “whenever it entered into a joint selling arrangement overseas regardless of its impact on the American market. This would produce the very interference with foreign economic activity that the FTAIA seeks to prevent.” The Court observed further that it was not sufficient for the purposes of the FTAIA that the defendants were somehow engaged in the U.S. import market (although this could be relevant to the analysis); rather, the plaintiffs were required to demonstrate that the foreign conduct had targeted U.S. import goods or services.

The Seventh Circuit also held that the FTAIA's “direct effects” exception did not apply. The Court interpreted “direct” in this context to mean “follow[ing] as an immediate consequence of the defendant's activity,” noting that “[a]n effect cannot be ‘direct’ where it depends on uncertain intervening developments.” The Court concluded that the plaintiffs had failed to provide evidence of a direct impact on sales of potash in the United States. The Court observed that there was no evidence that any prices or supply quotas had been imposed with respect to the U.S. market, only general allegations of “benchmarking” of U.S. prices to international prices. Ultimately, the Court held that the connection between international and U.S. potash prices was “too speculative and indirect” to be actionable under the “direct effects” exception. The Court left open the possibility that it might have found a direct effect on U.S. commerce if the plaintiffs had offered enough factual evidence to demonstrate that the prices in foreign countries had indeed served as a benchmark for U.S. potash prices.

III. THE VIEW FROM CANADA

Canada has historically been concerned with what is sometimes referred to as “the long arm” approach of U.S. antitrust enforcement, regarding it as a potential infringement of Canadian sovereignty. One of the most notable flashpoints between Canada and the United States on this issue arose in the context of an alleged uranium cartel in which a Canadian government-owned corporation (known in Canada as a “Crown corporation”) was implicated.

The issue arose initially when Westinghouse, a U.S.-based company, was sued by sixteen plaintiffs who alleged that Westinghouse had failed to fulfill its obligations under certain uranium supply contracts. Westinghouse pleaded in defence that it would have been commercially unreasonable to fulfill its obligations under these contracts because a cartel of foreign government and uranium producers (including in Canada) had conspired to artificially inflate uranium prices. Westinghouse then secured letters rogatory from the U.S. court to obtain evidence from various Canadian entities (including the Canadian government and its Crown corporation). When Westinghouse (and another party in the action, Gulf Oil) applied to have these letters rogatory enforced by the courts in Canada, the Canadian government intervened to oppose the application on the grounds that to enforce the letters rogatory would be contrary to public policy. The Canadian government also enacted regulations to prohibit the production of documents and the giving of testimony relating to any aspect of the uranium business unless required to do so under Canadian federal law.

Ultimately, the Canadian courts refused Westinghouse's application on several grounds, including that letters rogatory could not be enforced where this would violate the public policy of the country to which an appeal for assistance has been made. The courts held that to enforce the letters rogatory in these circumstances would be contrary to the principles of international comity.³

The Canadian government also intervened in subsequent civil litigation in the United States brought by plaintiffs alleging that they had been harmed by the uranium cartel.⁴ In an *amicus curiae* brief, the Canadian government argued that the impugned uranium marketing arrangements were in the Canadian national interest and that the application of U.S. antitrust law would be contrary to Canadian sovereignty. In the end, the Seventh Circuit concluded that U.S. courts had jurisdiction based on the “intended effects test,” which provided that U.S. courts should have jurisdiction over anticompetitive activity outside of the United States so long as there is an intended effect on U.S. commerce.

The Canadian government filed another *amicus* brief on the extraterritorial enforcement of U.S. antitrust law in the *Hartford Fire Insurance Co.* case.⁵ In that case, 19 states and a number of private plaintiffs alleged that certain domestic insurers and domestic and foreign reinsurers of general commercial liability insurance had conspired to limit the general commercial insurance coverage available in the United States. The foreign defendants brought a motion to have the case against them dismissed on the grounds of international comity.

In its *amicus* brief in support of the foreign defendants' position, the Canadian government argued that international law prohibits the United States from applying its antitrust laws to persons located outside of the United States when to do so “directly conflicts with and undermines the law of the foreign territorial sovereign.” However, the Canadian government did not object to the extraterritorial enforcement of U.S. laws that are compatible with those of the foreign country. The United States Supreme Court ultimately upheld U.S. jurisdiction in the case, concluding that there was no conflict between the requirements of U.S. antitrust law and the applicable foreign laws.

³ See *Re Westinghouse Electric Corp. Uranium Contract Litigation* (1977), 16 O.R. (2d) 273 (Ont. S.C.) and *Gulf Oil Corporation v. Gulf Canada Limited et al.*, [1980] 2 S.C.R. 39.

⁴ *In Re Uranium Antitrust Litigation*, 617 F. 2d 1248 (7th Cir. 1980).

⁵ *Hartford Fire Insurance Co. v. California*, 509 U.S. 754 (1993).

In the almost 20 years since the *Hartford Fire Insurance* case, there has been a great deal of convergence between Canadian and U.S. antitrust enforcement, both substantively and in terms of inter-agency cooperation. From an enforcement perspective, the Canadian Competition Bureau now cooperates closely with its U.S. counterparts on a wide variety of matters, ranging from mergers to cartels to deceptive marketing practices. This cooperation is carried out pursuant to both formal instruments (such as various cooperation agreements, memoranda of understanding, and mutual legal assistance treaties) as well as on an informal basis. Substantively, as a result of amendments to Canada's *Competition Act* in 2009, there is now even greater similarity between U.S. and Canadian antitrust law, particularly in key areas such as cartels and merger review.

Convergence and cooperation means that points of friction between Canada and the United States are now less likely to occur than ever before. Still, as the *Minn-Chem* case demonstrates, the possibility of the “long arm” of U.S. antitrust law encroaching into Canada persists, albeit largely in the context of private litigation.

From a Canadian perspective, then, it is reassuring to see the Seventh Circuit adopt a reasonable interpretation of the jurisdictional limits imposed by the FTAIA. Enforcement restraint is particularly appropriate in circumstances where the conduct at issue, insofar as Canada is concerned, was not illegal at all.⁶

Unfortunately, not all recent U.S. cases have imposed limits on potential actions under the FTAIA. *Animal Science Products, Inc. v. China Minmetals Corp.*, a recent decision of the Third Circuit Court of Appeals (“Third Circuit”), hints at a more liberal approach to permitting FTAIA law suits, although the case is procedural rather than substantive in its holding.⁷ The Third Circuit held in *Animal Science Products* that the FTAIA establishes a required element for an antitrust claim involving foreign trade, rather than imposing a jurisdictional limit on such claims. The practical impact is to shift the burden for dismissal of an FTAIA case from plaintiffs to defendants, who will have to prove a failure by the plaintiffs to state an FTAIA claim. Again, from a Canadian perspective, any tipping of the scales in favor of plaintiffs under the FTAIA, whether from a procedural or substantive perspective, is not a welcome development.

⁶ It is, of course, another question entirely whether Canadian competition law **should** incorporate an exemption for export cartels.

⁷ (3d Cir. August 2011).