

**Jurisdictional Issues in International Cartel Cases:  
A Canadian Perspective**

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## **I. Introduction**

In most industries, competition is increasingly global in scope: no longer localized to one region, state, or country. Although borders have become increasingly irrelevant in business, they raise important jurisdictional issues in the enforcement of competition laws, both in criminal and civil proceedings. International cartel activity presents challenging issues for alleged cartel participants, enforcement authorities and plaintiffs suing to recover damages.

With respect to private actions in particular, jurisdictional issues raised by a claim for damages allegedly suffered as a result of international cartel activity may permeate every stage of an action, from service of the claim to enforcement of any judgment or award of costs. For defendants, jurisdictional challenges may be an important option to consider in a defence strategy. For plaintiffs, overcoming the challenges of bringing a claim to certification and trial and enforcing any judgment against a defendant with no ties to Canada can present a challenging prospect.

## **II. Jurisdiction of Canadian Courts over "Foreign" Conspiracies**

### **A. Civil Actions brought pursuant to Section 36 of the *Competition Act***

In Canada, private court actions brought by persons who have been harmed by the anti-competitive conduct of others are available as a means of private enforcement of competition laws. Section 36 of the *Competition Act*<sup>1</sup> (the "Act") grants a right of private action with respect to conduct that is contrary to the criminal provisions of the Act, allowing a plaintiff to sue to recover damages. Claims brought pursuant to section 36 must be issued within two years of the date of the completion of criminal proceedings or the last date on which the conduct was engaged in, whichever is later.

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<sup>1</sup> *Competition Act*, R.S.C. 1985, c. C-34.

For conspiracy claims, the most relevant criminal provisions of the Act are sections 45 and 46. Under section 45 of the Act, everyone "who conspires, combines, agrees or arranges with another person" to prevent or lessen competition "unduly" is guilty of an indictable offence and subject to criminal penalties. Under section 46 of the Act, a corporation carrying on business in Canada that implements a foreign conspiracy in Canada, regardless of whether it has knowledge of the foreign conspiracy, is guilty of an indictable offence and subject to criminal penalties. Section 36 allows persons who have suffered harm as a result of such conspiracies to bring civil damage claims in the courts.

Where one or more defendants in a section 36 action has pleaded guilty to an offence under the Act, the "record of proceedings" may be used in the subsequent civil suit against that defendant as proof that it engaged in conduct contrary to the criminal provisions of the Act.<sup>2</sup> In addition, any admissions made in the criminal proceedings are admissible as evidence in the subsequent civil proceedings.<sup>3</sup>

Unlike private antitrust claims in the United States, there is no provision for treble damages in Canada. In a section 36 action, the plaintiff must suffer quantifiable harm and must prove its actual loss at trial. The plaintiff may only recover the amount of its actual losses plus the costs of pursuing the legal action, including the costs of investigating the matter and the costs of court proceedings.<sup>4</sup> In addition, plaintiffs may (and generally do) allege common law tortious activity, such as civil conspiracy or intentional interference with economic relations. A plaintiff may also claim punitive damages, provided common law tortious activity is proven in addition to a section 36 claim. The threshold for an award of punitive damages is high. They may only be awarded where there is evidence of egregious, high-handed conduct on the part of the defendant(s).<sup>5</sup>

Many section 36 claims are brought as class proceedings and are usually issued after one or more of the defendants have pleaded guilty to, or have been proven guilty of, criminal anti-competitive conduct. In Canada, there is no national class proceedings legislation. Instead, many of Canada's provinces have their own regimes. Despite the lack of a national regime, courts in

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<sup>2</sup>*Competition Act, supra.* note 1, s.36(2).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Competition Act, supra.* note 1, s. 36(1).

<sup>5</sup> *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 (S.C.C.).

some provinces have certified national classes of plaintiffs.<sup>6</sup> In practice, competition law claims have usually been launched in one or more provinces, each of which may seek to certify a national class. Once a national class is certified in one province, proceedings in other provinces, while not technically precluded from continuing, may be stayed pending the outcome of the action in the first certifying province. It is important to note, however, that it is not yet clearly established in Canada that certification of a national class in one province precludes the continuation of class proceedings in a second province. In effect, this could mean that a defendant could settle or defend a class proceeding involving a certified national class, and still face continuing or new proceedings in other provinces.

## B. Criminal Jurisdiction under Sections 45 and 46

The focus of this paper is on civil claims. But civil claims under section 36 of the Act must be based on conduct contrary to the criminal provisions of the Act. As such, it is useful to consider some of the jurisdictional issues which may arise in criminal proceedings under the Act's conspiracy provisions.

### *i. Subject Matter Jurisdiction*

Section 45 of the Act, its main conspiracy provision, does not contain an express territorial limitation or extension. Section 46 of the Act purports to indirectly extend criminal jurisdiction over foreign cartels by rendering Canadian affiliates liable for implementing a conspiracy, whether or not the Canadian affiliate had knowledge of the foreign cartel.<sup>7</sup> Apart from section 46, the territorial reach of Canada's criminal anti-cartel laws is determined in accordance with Canada's common law regarding the assumption of criminal jurisdiction.

Canada's common law includes a presumption against the application of criminal law beyond Canada's borders. The Supreme Court of Canada has held "that a state has exclusive sovereignty

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<sup>6</sup> See for example *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (S.C.J.) and *Wilson v. Servier* (2000), 50 O.R. (3d) 219 (S.C.J.).

<sup>7</sup> The validity of section 46 has not been considered in a contested proceeding.

over all persons, citizens or aliens, and all property, real or personal, within its own territory."<sup>8</sup> The general rule, which has been codified in the *Criminal Code of Canada* (the "*Criminal Code*"), is that Canadian courts are only competent to enforce Canadian criminal laws within Canada.<sup>9</sup> This is not an absolute rule. A state may enact specific legislation providing for special circumstances, such as war crimes and crimes against humanity. A state may also enforce its laws where another state explicitly consents to for a limited purpose.<sup>10</sup>

The *Competition Act* does not expressly provide for extraterritorial application of its provisions, including its conspiracy provisions. Section 465 of the *Criminal Code* gives Canadian courts jurisdiction over foreign conspiracies to commit offences in Canada, but does not assist the Crown in a case under section 45 of the *Competition Act*, where the offence is the conspiracy itself. As a result, the conspiracy has to be considered to have been committed in Canada in order for a Canadian criminal court to assume jurisdiction. The question therefore becomes: when is a conspiracy to lessen competition considered to have been committed in Canada?

In *R. v. Libman*<sup>11</sup> ("*Libman*"), the Supreme Court of Canada articulated a broad test to determine whether a Canadian court ought to assume criminal jurisdiction where alleged criminal conduct originated in Canada but affected only individuals in the United States. The accused ran a telephone marketing scheme from Canada which used misrepresentations to induce U.S. residents to buy shares in mining companies located in Central America. Although the money for the mining shares was sent to Central America, the accused received a share of the proceeds and returned to Canada. The accused were charged with fraud and conspiracy to commit fraud. They argued that the *Criminal Code* provisions with respect to conspiracy to commit fraud applied only to conspiracies entered into in Canada to commit substantive offences in Canada. Since the essence of the offence of conspiracy to commit fraud had occurred in the U.S. where the victim had suffered the loss, the Canadian court could not exercise jurisdiction. In rejecting this argument, LaForest J. articulated the following test to determine when Canadian courts ought to assume jurisdiction over a criminal offence:

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<sup>8</sup> *R. v. Finta* [1994] 1 S.C.R. 701 at 806, per Cory J. (S.C.C.).

<sup>9</sup> *Criminal Code of Canada*, R.S.C. 1985 c. C-46, s. 6(2).

<sup>10</sup> *R. v. Terry* [1996] 2 S.C.R. 207 at paragraphs 14 to 16 (S.C.C.).

<sup>11</sup> (1985), 21 D.L.R. (4<sup>th</sup>) 174 (S.C.C.).

"As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting the offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country..."<sup>12</sup>

The Court went on to say that in determining whether a real and substantial link to Canada exists, the courts "must take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offence", before considering whether there is anything in those facts that offends principles of international comity.<sup>13</sup> In *Libman*, the Supreme Court held that there were sufficient facts connecting the offence to Canada to allow Canadian courts to assume jurisdiction.

The test set out in *Libman* appears to permit a generous discretion to apply Canada's criminal laws to foreign entities, provided there is a factual link between the alleged crime and Canada, and provided that it would not offend the jurisdiction of other countries to apply Canada's criminal laws to their citizens. Remarkably, the test in *Libman* has never been considered in the context of a competition conspiracy prosecution under the Act. Whether or not potential anti-competitive effects in Canada are sufficient to found jurisdiction over a conspiracy entered into outside Canada remains an open question.

Most Canadian criminal proceedings against foreign entities for international cartel activity in Canada end with a guilty plea and a statement of admissions which explicitly states that the foreign entity is only submitting to Canada's jurisdiction in the interests of settling the investigation against them. For many accused, the certainty of a negotiated plea and statement of admissions (as compared to the uncertainty inherent in a contested proceeding) permits some measure of control and foreseeability regarding the potential business ramifications of a guilty plea. This may explain why the "real and substantial" connection test has never been tested in a Canadian court in a section 45 prosecution against a foreign national for alleged cartel activity which occurred wholly outside of Canada, but which had potential anti-competitive effects in a Canadian market.

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<sup>12</sup> *R. v. Libman*, *supra*. note 11 at 200.

<sup>13</sup> *R. v. Libman*, *supra*. note 11 at 198-199.

It is arguable that the assumption of criminal jurisdiction over a foreign defendant for an alleged conspiracy entered into outside Canada by an entity with no business presence in Canada is not supported by the provisions of the Act itself. Section 45 of the Act provides that it is an offence to enter into an agreement to unduly lessen competition. The offence is complete when the agreement is made. No further acts are required. Section 46 then provides that it is a criminal offence for an entity carrying on business in Canada to implement a directive from a person "in a country other than Canada...for the purpose of giving effect to a conspiracy entered into outside Canada that, if entered into in Canada..." would have been contrary to section 45. [emphasis added] The clear implication is that conspiracies entered into outside Canada by entities who do not carry on business in Canada are not contrary to section 45. Note, however, that this argument was rejected in *obiter dicta* in *Vitapharm*, a civil case, discussed below.

The fact that this is a live issue is substantiated by the form of indictment sometimes chosen by the Attorney General of Canada (the "Attorney General") with respect to foreign companies with no affiliates in Canada. In such cases, the Attorney General, in the context of negotiated pleas of guilty, has been inventive - charging foreign companies with *aiding and abetting* an offence under section 46, rather than seeking to indict those companies directly under section 45. In other words, it is alleged that the foreign company aided and abetted a foreign competitor in directing the competitor's Canadian affiliate to implement a conspiracy entered into outside Canada.<sup>14</sup> The jurisdictional validity of such an indictment has never been tested in a Canadian court. We question whether the twice removed jurisdictional nexus to section 46 in such a case is "real and substantial".

ii. *Personal Jurisdiction*

In criminal cases, in addition to subject matter jurisdiction, the Crown also has to establish personal jurisdiction over the accused. Unless there is a specific statutory exception, an accused can only be served with an originating summons if he/she/it is physically present in Canada and

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<sup>14</sup> See for example the indictment against Tokai Carbon Co., Ltd. dated February 1, 2001, Federal Court File number T-24-01. Available online at [www.strategis.ca](http://www.strategis.ca).

served personally.<sup>15</sup> For a corporate accused, section 703.2 of the *Criminal Code* provides that service must be effected by physical delivery to the "manager, secretary or other executive of the corporation or a branch thereof." Extradition may be available for individual accused, but only if the accused is located in a country which has an extradition treaty with Canada. Corporations cannot be extradited.

There is no express provision in the *Criminal Code* or the Act which permits service *ex juris* in criminal prosecutions, and attempts by the authorities to read provincial offence service procedures which permit service *ex juris* into the *Criminal Code* have so far failed. In *R. v. R.J. Reynolds Tobacco (Delaware)*<sup>16</sup>, the corporate accused (charged with corporate fraud) did not have a business presence in Canada. The Crown attempted to serve an originating summons by sending it by registered mail to the accused's address in the United States. Section 701.1 of the *Criminal Code* provides that the service procedures of a province may be adopted for the purposes of *Criminal Code* offences. The Crown argued that it had effected valid service on the corporate accused because it had served the summons in accordance with Ontario's *Provincial Offences Act*. In finding such service was not effective, Gans J. drew a distinction between the procedure permitted for service under the *Criminal Code* and the effectiveness of such service. The incorporation by reference of a province's service procedures did not constitute a statutory exception to the rule that service of a summons under the *Criminal Code* was only effective if served personally on an accused. The decision in *R.J. Reynolds* is under appeal.

The rule against *ex parte* service of criminal summons makes it difficult for Canadian prosecutors to exercise jurisdiction over foreign companies in the absence of voluntary attornment. As discussed below, this is not the case for civil plaintiffs seeking damages for cartel conduct.

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<sup>15</sup> *Shulman v. The Queen* (1975), 58 D.L.R. (3d) 586 at 591 (B.C.C.A.). Subsection 509(2) of the *Criminal Code* provides that a summons must be served personally on an accused.

<sup>16</sup> (2004), 182 C.C.C. (3d) 126 (Ont. Sup. Ct.).

### C. Jurisdiction over Civil Cartel Claims

In contrast to criminal prosecutions, Canadian courts have taken a less restrictive approach to their jurisdiction over civil claims brought pursuant to section 36 of the Act or the common law tort of conspiracy. The rules of civil procedure in all provinces provide for service *ex juris* in accordance with the *Hague Convention* (or otherwise), making the first step of serving a claim an easier hurdle to overcome than in criminal proceedings. However, for foreign defendants who have been served with a statement of claim for an alleged conspiracy under section 36 of the Act and/or for the common law tort of conspiracy, challenging the jurisdiction of the Canadian court may be their first response.

The Ontario *Rules of Civil Procedure* permit service *ex juris* without leave of the Court if a tort is committed in Ontario, damage is sustained in Ontario, a person outside Ontario is a necessary or proper party to the action, or where a defendant is carrying on business in Ontario.<sup>17</sup> The Rules and other legislation also provide that a foreign defendant served *ex juris* with a Canadian statement of claim (who has not otherwise attorned to the Canadian jurisdiction) may move to have that service set aside.<sup>18</sup> On such a motion, where the defendant adduces evidence that puts facts essential to jurisdiction in issue, the plaintiff may be required to demonstrate that there is a good arguable case established on the face of the pleading that the court has jurisdiction based on one of the factors which permit service *ex juris* without leave.<sup>19</sup>

In addition to moving to set aside service *ex juris*, a foreign defendant may seek to have the action stayed on the grounds that the Canadian jurisdiction is not a convenient forum (the doctrine of *forum non conveniens*), or that it lacks jurisdiction *simpliciter*.<sup>20</sup> In regard to

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<sup>17</sup> Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 17.02. Rule 17.02 also permits service *ex juris* without leave of the court where the subject matter of the action relates to property in Ontario, the administration of an estate or against a trustee with a connection to Ontario, contracts governed by Ontario law, taxes or where service *ex juris* is provided for by statute.

<sup>18</sup> See Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, Rule 17.06.

<sup>19</sup> *Garipey v. Shell Oil Co.* (2000), 51 O.R. (3d) 181 at 190-191 (Ont. Sup. Ct.); *Nutrico Canada Inc. v. F. Hoffman-La Roche Ltd.* [2001] B.C.J. No. 1581 at paragraph 21 (B.C.S.C.); *Ecolab Ltd. v. Greenspace Services Ltd.* (1998), 38 O.R. (3d) 145 at 148 (Div. Ct.); *Furlan v. Shell Oil Co.* [1999] B.C.J. No. 1905 at paragraphs 42,43 (B.C.S.C.) aff'd [2000] B.C.J. No. 1334 (B.C.C.A.); *Ontario New Home Warranty Program v. General Electric* (1988), 36 O.R. (3d) 787 at 799 (Ont. Gen. Div.)

<sup>20</sup> Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 106.

jurisdiction *simpliciter*, the Supreme Court of Canada has held that a Canadian court may assume jurisdiction over foreign parties in civil proceedings where there is a "real and substantial connection" between the Canadian jurisdiction and the subject matter of the litigation, and where the assumption of jurisdiction would not offend the principles of international comity.<sup>21</sup> Absent a "real and substantial connection", a Canadian court should not take jurisdiction even if the rules for service *ex juris* have been complied with. Motions to set aside service *ex juris* or for a stay on the basis of *forum non conveniens*, or to challenge jurisdiction *simpliciter*, are often brought together.

The leading case in Ontario on a foreign defendant's motion to have service set aside or the action stayed is the pharmaceutical product liability class action *Wilson v. Servier*.<sup>22</sup> The French parent company of a Canadian affiliate (which had also been sued) had been served *ex juris*. The French parent company brought a motion to set aside service of the claim on the grounds that service had not been effective under the terms of the *Hague Convention* and sought a stay of the Ontario action on the grounds that Ontario was not the most convenient forum for the action.

The Court held that the essence of the claim against the French parent was that it had committed a tort against class members both directly and through the Canadian affiliate acting as its agent.<sup>23</sup> As such, the claim asserted that both defendants committed torts in Ontario. Further, because the drug was marketed in Canada, the Representative Plaintiff was from Ontario, and the Plaintiff purchased and ingested the drug in Ontario, there was a real and substantial connection between the subject matter of the action and Ontario. This was despite the fact that the only connection that the parent company had to Canada was as the sole shareholder of the Canadian subsidiary, and despite the existence of an article of the French *Code Civil* which had been interpreted by French courts to provide French corporations with the right to have claims adjudicated as against them by a French court. In regard to the validity of service *ex juris*, the Court held that by delivering a Notice of Intent to Defend and waiting approximately eight months to bring its motion to set aside service, the French parent had attorned to the jurisdiction of the Ontario court.

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<sup>21</sup> *Morguard Investments Limited v. DeSavoye* [1990] 3 S.C.R. 1077 at 1109 (S.C.C.).

<sup>22</sup> (2000), 50 O.R. (3d) 219 (Ont. Sup. Ct.), leave to appeal denied (2000), 52 O.R. (3d) 20 (Ont. Sup. Ct.)

<sup>23</sup> *Ibid* at 226.

A civil claim alleging a foreign conspiracy contrary to section 45 of the Act may raise significant jurisdictional issues. The only civil conspiracy case to date in which proceedings against foreign defendants in Canada have been challenged is *Vitapharm v. F. Hoffman-La Roche Ltd.*<sup>24</sup> ("*Vitapharm*"). In *Vitapharm*, the plaintiffs in five proposed Ontario class proceedings served claims *ex juris* alleging price fixing and market allocation conspiracies against the multinational producers of several vitamin products. The plaintiffs relied on section 36 of the Act but also alleged common law conspiracies and other torts. Some of the foreign defendants brought motions to set aside *ex juris* service of the claim. They also argued that Ontario was not a convenient forum, and that it lacked jurisdiction *simpliciter*.

In *Vitapharm*, there were some Canadian defendants in each action, some of the foreign defendants had affiliates in Canada, and some foreign defendants had pleaded guilty in prior criminal prosecutions under section 45 of the Act. As such, Cumming J. held that none of the moving party foreign defendants had adduced sufficient evidence to put jurisdiction at issue and that the pleading established a good arguable case that the prerequisites for service *ex juris* were met. In doing so, Cumming J. referred to U.S. case law which held that there is a presumption that a price fixing scheme will cause damage to the purchasers of the price-fixed product<sup>25</sup>. In addition, Cumming J. dismissed the notion that a foreign corporation cannot be responsible for the alleged unlawful conduct of its affiliates or subsidiaries:

If the conspiracies are proven, it is arguable that a price-fixing scheme concocted outside Canada, but then implemented inside Canada through subsidiaries or affiliates, constitutes carrying on business in Canada on the part of the co-conspirators. It is arguable that the corporate veil of a domestic subsidiary or affiliate may be pierced in such a situation and that the principal (parent or affiliated corporation) involved in the conspiracy is itself carrying on business in Ontario. In such instance, it is arguable that the subsidiaries or affiliates are in reality mere agents of the principals for the purposes of the conspiracy....

...Foreign corporations may be regarded as "carrying on business" for the purposes of special or assumed jurisdiction when the business they conduct through an agent in Ontario involved the commission of intentional wrong by the foreign corporation.<sup>26</sup>

Cumming J. (in *obiter*) also rejected the argument that such a conspiracy entered into outside Canada could not be actionable in Canada:

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<sup>24</sup> (2002), 20 C.P.C. (5<sup>th</sup>) 351 (Ont. Sup. Ct.)

<sup>25</sup> Cumming J., at paragraph 73 of *Vitapharm* referred to *In re Alcoholic Beverages Litigation*, 95 F.R.D. 321 at 327 (E.D.N.Y.).

<sup>26</sup> *Vitapharm* . *supra*. note 24 at paragraphs 81 and 83.

In my view, there is a good arguable case that any conspiracy entered into abroad that fixes prices or allocates markets in Canada so as to create losses through artificially higher prices in Canada, gives rise to the tort of civil conspiracy in Canada. It is arguable that a conspiracy that injures Canadians gives rise to liability in Canada, even if the conspiracy was formed abroad.

The moving defendants argue that ss. 45 and 46 of the Competition Act render a conspiracy to fix prices a criminal offence only when the agreement is made within Canada. Again, I disagree. The language of s. 45 is not directed to only those conspiracies entered into within Canada.

The moving defendants submit that s. 46 is to be properly interpreted as imposing limiting language in respect of offences under s. 45. I disagree. Section 46 creates an offence for persons beyond those who are not co-conspirators but knowingly implement in whole or in part in Canada any directive for the purpose of giving effect to a conspiracy.<sup>27</sup>

Cumming J. also dismissed the defendants' motion for a stay based on the application of the doctrine of *forum non conveniens*. The fact that all of the defendants' witnesses and evidence were located in a different jurisdiction did not displace the loss of juridical advantage that the Court held the plaintiff would suffer if the actions proceeded in other jurisdictions.

In *Vitapharm*, as noted above, there were numerous factual connections with Canada, including Canadian guilty pleas by a number of foreign defendants. In our view, the *Vitapharm* decision should not close the door to jurisdictional challenges in future cases where these connections do not exist. In an alleged market allocation conspiracy, for example, there may be alleged participants who do not have any business presence in Canada, did not have any sales into Canada and who have not pleaded to an offence in Canada. Or, there may be an allegation that foreign defendants conspired outside Canada to fix prices in North America without specific reference to Canada. In such cases, it is arguable that the required "real and substantial connection" with Canada does not exist.

It is also arguable that such allegations, if true, would not constitute an offence in Canada contrary to sections 45 or 46 of the Act, and therefore cannot be the basis for a claim under section 36 of the Act. There is no express language in section 45 to extend its reach to alleged conspiracies committed outside Canada. As mentioned above, section 46 limits liability to corporations "carrying on business in Canada" which implement a directive from a participant in a conspiracy entered into outside Canada, that "if entered into in Canada" would have violated

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<sup>27</sup> *Vitapharm . supra.* note 24 at paragraphs 58-60.

section 45. Alleged conspiracies entered into outside Canada by persons who do not carry on business in Canada are arguably outside the provisions of section 45.<sup>28</sup>

A final note on this subject: Before challenging the jurisdiction of a Canadian court in a civil international cartel case, defendants must carefully consider all of the consequences of success. If the effect of successfully challenging jurisdiction in Canada is that the defendant is then sued for treble damages in the U.S., it will not have been a good choice for the defendant. The willingness of the U.S. courts to entertain such claims is discussed next.

### **III. Canadian Plaintiffs seeking to Recover for International Cartel Activity in the U.S. - The Effects of *Empagran* in Canada**

In *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*<sup>29</sup> ("*Empagran*"), the U.S. Supreme Court considered the jurisdiction of U.S. courts to entertain treble damage claims by foreign purchasers of products allegedly the subject of price fixing. In the U.S., plaintiffs who suffer loss or damage as a result of conduct that is contrary to the *Sherman Act*<sup>30</sup> are entitled to collect treble damages - a prospect that is very attractive to Canadian plaintiffs and those in other parts of the world.

In *Empagran*, foreign purchasers of vitamins brought claims in the U.S. alleging that they suffered damages as a result of an international conspiracy to fix the price of vitamins. The lower courts were divided on whether a U.S. court could assume jurisdiction and apply U.S. antitrust law when the alleged conduct has direct, substantial and reasonably foreseeable effects in the U.S., but the foreign plaintiff's injury is independent of the U.S. effects.

In the U.S., the Foreign Trade Antitrust Improvement Act (the "FTAIA") generally precludes the application of the *Sherman Act* to "conduct involving trade or commerce (other than import trade and commerce) with foreign nations...". However, there is an exception to this rule where two prerequisites are met:

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<sup>28</sup> For further elaboration, see section II(B)(i) above.

<sup>29</sup> 124 S. Ct. 2359 (2004).

<sup>30</sup> 15 U.S.C. §1.

1. the conduct has "a direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce; and
2. the direct, substantial and reasonably foreseeable effect gives rise to a claim under the *Sherman Act*.

In *Empagran*, the federal District Court judge interpreted the FTAIA to require a direct effect within the United States stemming from the foreign conduct.<sup>31</sup> Because the foreign plaintiffs in *Empagran* had not alleged precise injuries stemming from the direct U.S. domestic effects, their claims lacked the required connection under the FTAIA and were dismissed. The U.S. Court of Appeals for the District of Columbia reversed, holding that the FTAIA permits foreign plaintiffs who suffer loss as a result of the foreign effects of the international cartel conduct to sue in the U.S. as long as the conduct gives rise to "a" private claim by a U.S. plaintiff under the *Sherman Act*.<sup>32</sup>

The U.S. Supreme Court reversed, holding that foreign purchasers cannot use the U.S. courts to pursue damages for price fixing conspiracies where their damages are "independent" of those suffered by purchasers in the U.S.. In so holding, the *Empagran* decision put to rest the contention that an exception enumerated under the FTAIA could apply to provide foreign purchasers with treble damage claims in U.S. courts against foreign companies where they could demonstrate simply that there was "an" effect of the international conspiracy on U.S. commerce.

The U.S. Supreme Court held that the FTAIA ought to be interpreted to avoid unreasonable interference with the sovereign authority of other nations. As a result, in order to bring themselves within the jurisdiction of the U.S. courts, foreign plaintiffs must demonstrate that the effect on foreign plaintiffs of the anticompetitive conduct is not independent of the adverse domestic effect on U.S. commerce. The U.S. Supreme Court did not specify when an effect is considered to be independent of the effect on U.S. domestic commerce and remanded the question of whether such an effect existed on the facts pleaded in *Empagran* back to the Court of Appeals.

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<sup>31</sup> *Empagran v. F. Hoffman-LaRoche Ltd.*, No. CIV 001686 TFH, 2001 WL 761360 (June 7, 2001), rev'd 315 F. 3d 338 (D.C. Cir. 2003), vacated, 124 S.Ct. 2359 (2004).

<sup>32</sup> *Ibid.*, 315 F. 3d 338 (D.C. Cir. 2003).

On remand, the Court of Appeals held that the foreign plaintiffs' claim was properly pleaded, and ordered the parties to submit full merits briefs and further oral argument regarding the issue of whether the nature of the alleged link between foreign injury and domestic effect is legally sufficient to come within the FTAIA exception.<sup>33</sup> The oral hearing is scheduled for April 20, 2005.

The foreign plaintiffs in *Empagran* argue that because the subject vitamins are commodities that are traded on a global market, the defendants' alleged fixing of prices in the U.S. and limiting of trade between the U.S. and other countries permitted the defendants to extract profits from plaintiffs abroad. As a result, they argue that the foreign plaintiffs' injuries arose from the U.S. effects of the defendants' conduct, and thereby satisfy the requirements of the FTAIA exception.<sup>34</sup>

Canada, along with several other countries<sup>35</sup> has filed a brief as *amicus curiae* in support of the defendants. The Canadian brief submits that if the foreign plaintiffs are successful, it will render Canada's immunity program ineffective and will permit Canadians to bypass Canada's sovereign decision to permit only single damage recovery in civil actions - "...even for sales within Canada between Canadian nationals".<sup>36</sup> Further, it submits that the link which the foreign plaintiffs allege in *Empagran* is a link that could be found to exist for all conspiracies which operate across national boundaries, and which has been recognized by the U.S. courts in the past as insufficient to found the extraterritorial application of U.S. laws. In other words, they argue that if the Court of Appeals finds the necessary link in *Empagran*, it will open the door for the application of U.S. laws to every conspiracy with an international aspect. Canadian plaintiffs will be anxiously awaiting the Court of Appeals decision this spring.

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<sup>33</sup> *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.* 388 F. 3d 337 (D.C. Cir. 2004).

<sup>34</sup> Brief of the Appellants filed January 10, 2005, *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, U.S. Court of Appeals for the District of Columbia, File No. 01-7115 at 15-16.

<sup>35</sup> An *amicus curiae* brief has also been filed on behalf of Germany, the United Kingdom, Japan, Switzerland and the Netherlands.

<sup>36</sup> Brief of the Government of Canada as *amicus curiae* filed February 16, 2005, *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, U.S. Court of Appeals for the District of Columbia, File No. 01-7115.

Since the release of the U.S. Supreme Court's decision in *Empagran*, many foreign purchaser cases have been remanded to lower courts for consideration of possible domestic effects linked to foreign harm.<sup>37</sup> In other cases, it has been held that the requisite domestic effect had not been sufficiently pleaded to bring the plaintiffs within the FTAIA exception.<sup>38</sup>

In another recent case, it was held that an adequate connection to the U.S. had been pleaded to permit a claim of a foreign plaintiff to proceed under the exception in the FTAIA. In *MM Global Services, Inc. v. The Dow Chemical Company*<sup>39</sup>, the plaintiff ("MM") acted as the non-exclusive distributor for Union Carbide products in India, purchasing Union Carbide products in the United States and reselling them in India. When Union Carbide merged with Dow Chemical, the distributorship was terminated. MM sued both Dow and Union Carbide, alleging that those two defendants had compelled MM to engage in a price maintenance conspiracy with respect to the resale of the products in India. The District Court dismissed the defendants' motion, holding that the defendants' alleged fixing of minimum resale prices had an effect on competition in both the sale and resale of the products in the United States and that as a result of that effect, MM could sue in the U.S..

The decision of the Court of Appeals in *Empagran* is much anticipated. We think, however, that is unlikely to put significant constraints on Canadian purchasers who wish to bring their claims in the U.S.. In most international cartel cases which involve Canada, the allegation is a North American conspiracy - not separate conspiracies relating to Canada and the U.S.. In those cases, it should be relatively straightforward for Canadian purchasers to assert that their claims are not "independent" of the effect of the conspiracy on U.S. prices. Hence, Canadian plaintiffs who want to advance their claims in the U.S., and to sue for treble damages, are not likely to be turned away by U.S. courts.

However, and perhaps fortunately for Canadian defendants, there is an active class plaintiffs' bar in Canada which continues to bring these claims in Canada, rather than pursuing them in the U.S..

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<sup>37</sup> See for example *BHP New Zealand Ltd. v. UCAR International, Inc.*, 2004 U.S. App. LEXIS 16347 (3<sup>rd</sup> Circ.).

<sup>38</sup> See for example, *Sniado v. Bank of Austria*, 378 F. 3d 210 (2004).

<sup>39</sup> 329 F. Supp. 2d 337 (U.S. Dist. Ct.).

#### IV. Canadian Court Recognition of Foreign Judgments

Two recent Canadian cases have expanded the test for recognition and enforcement of foreign judgments by Canadian courts. While neither of these decisions are competition law cases, they have important ramifications for civil proceedings arising out of alleged international cartel activity. These cases suggest that plaintiffs who may have been eligible to participate in settlements or judgments in foreign class proceedings, may be barred from bringing subsequent proceedings in Canadian courts. They also make it easier for plaintiffs to enforce their foreign judgments in Canada.

In *Beals v. Saldanha*<sup>40</sup> ("*Beals*"), the Supreme Court of Canada held that a Florida Court judgment was enforceable in Ontario. The claim involved a real estate transaction in Florida. The defendants had filed a defence to the original Florida claims, but did not defend subsequent amendments to the claim. Pursuant to Florida rules, the plaintiffs obtained a default judgment against the defendants, which they then sought to enforce in Ontario.

In holding that the Florida judgment was enforceable in Ontario, the Supreme Court of Canada held that Canadian courts should recognize and enforce a judgment of a foreign court where the foreign court had a "real and substantial connection" with either the subject matter of the action or the defendant. It thereby applied the test that the Supreme Court had articulated in *Morguard Investments Ltd. v. De Savoye*<sup>41</sup> for judgments from other provinces, to judgments from other countries.

In *Parsons v. McDonald's Restaurants of Canada Ltd.*<sup>42</sup> ("*Parsons*"), Cullity J. of the Ontario Superior Court applied the *Beals* test in the context of a class proceeding. In *Parsons*, the defendants applied to stay two Ontario class proceedings on the basis of *res judicata* and abuse of process. The basis for the application was a prior Illinois judgment approving a settlement of a similar class action in Illinois.

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<sup>40</sup> [2003] 3 S.C.R. 416 (S.C.C.).

<sup>41</sup> [1990] 3 S.C.R. 1077. (S.C.C.).

<sup>42</sup> [2004] O.J. No. 83 (S.C.J.), additional reasons at (2004) 70 O.R. (3d) 53, affirmed [2005] O.J. No. 506 (C.A.).

*Parsons* involved promotional contests run by McDonald's in the U.S. and Canada. An employee of the marketing company hired by McDonald's to run the promotions pleaded guilty in the U.S. to stealing the prizes. A class action was then commenced in Illinois on behalf of all customers of McDonald's (in the U.S. and Canada) who had bought McDonald's food products in order to get a prize. The Illinois class action was settled, and that settlement was approved by the Illinois Court, whose order specifically provided for notice of the settlement to be provided to Canadian customers through advertisements in MacLean's magazine and two French language newspapers in Québec.

One of the subsequent Canadian plaintiffs (*Parsons*), appeared in Illinois to challenge the jurisdiction of the Illinois Court over Canadian customers, and to object to the sufficiency of notice to Canadian customers. Those arguments were rejected by the Illinois Court. The Illinois judgment gave class members a set time to opt out of the settlement, failing which their claims would be barred.

After the Illinois judgement had been issued, two proposed class actions were commenced in Ontario, advancing essentially the same claims as those made in Illinois, but on behalf of Canadian customers only. One of the actions was commenced by *Parsons*, who had appeared in Illinois to contest jurisdiction, and the other was commenced by *Currie*, who had not appeared in Illinois.

McDonald's then applied to stay the proposed Ontario class proceedings on the basis of abuse of process and *res judicata*. Cullity J. applied the *Beals* test, holding that the Illinois Court had a "real and substantial connection" with the subject matter of the action. He found that *Parsons* had attorned to the jurisdiction of the Illinois Court, so that his claim was barred, but that *Parsons'* attornment did not bind other members of the proposed class. With respect to the other class members, Cullity J. held that they were not bound by the Illinois judgement because the notice they received of the Illinois settlement was not sufficient.

It seems clear, however, that if the notice had been sufficient, the Illinois judgments would have barred subsequent Canadian claims. Subsequent to the decision in *Parsons*, the defendants in the remaining proposed Ontario class proceeding sought to limit the Canadian class to those plaintiffs who opted out of the Illinois settlement, after adequate notice of the Illinois settlement

was provided. Cullity J. dismissed the motion, holding that the relief sought by the defendants would require a potential Ontario class member who wished to participate in the Ontario proceeding to take the positive step of opting out of the Illinois settlement.<sup>43</sup> This would be tantamount to requiring the plaintiffs to opt in to the Ontario proceedings. On appeal, the Ontario Court of Appeal affirmed the decision of Cullity J., stating as follows:

In my view, provided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out. In those circumstances, failure to opt out may be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court....

...I consider the motion judge's ruling on the adequacy of notice below and conclude that there is no basis upon which I would interfere with that ruling. I would apply it to the question of jurisdiction and hold that as the unnamed plaintiffs were not afforded adequate notice of the Boland proceedings, the Ontario courts should not recognize and enforce the Boland judgment against Currie and the non-attorning Canadian class members he seeks to represent.<sup>44</sup>

The *Parsons* and *Beals* decisions are important for civil proceedings in competition law matters (especially class proceedings) which involve alleged international cartels. Where there have been prior proceedings and/or settlements in the U.S. or elsewhere, they can significantly impact, or even bar, subsequent Canadian proceedings. These cases also suggest that Canadian defendants who may be successfully sued elsewhere for their part in cartel activity, such as in the U.S. for treble damages, will be subject to having those foreign judgments enforced against them in Canada.

Canadian defendants in these cases may face the "double whammy" of U.S. courts taking an expansive view of their jurisdiction over the treble damage claims of foreign (including Canadian) plaintiffs, combined with a greater willingness of Canadian courts to enforce foreign (including U.S.) judgments in Canada. Canadian defendants seeking to resist enforcement of U.S. judgments in Canada would have to show that the U.S. court did not have a real and substantial connection with the subject matter of the action. That raises issues similar to those that might arise on an anti-suit injunction, which is discussed next.

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<sup>43</sup> *Currie v. McDonald's Restaurants of Canada Limited* (2004) 70 O.R. (3d) 53, affirmed [2005] O.J. No. 506 (C.A.)

<sup>44</sup> *Currie v. McDonald's Restaurants of Canada Limited*, [2005] O.J. No. 506 at paragraphs 30-31 (C.A.).

## V. Anti-Suit Injunctions

The effects of the *Empagran* decision on Canadian plaintiffs seeking to collect treble damages in U.S. courts for international cartel activity have yet to be definitively determined by U.S. courts. As noted above, we do not expect the U.S. Courts to significantly constrain claims by Canadian purchasers in cases involving alleged North American conspiracies. For defendants in those actions, the difference between exposure to treble damages under U.S. law, and single damages in Canada, raises the prospect of anti-suit injunctions brought in Canada to restrain Canadian plaintiffs from pursuing their claim in the U.S..

Earlier in this paper, we discussed the factors that a Canadian court considers when faced with a request to stay its own process on the basis that it is not the most appropriate forum for the action. In an anti-suit injunction, instead of a defendant in a Canadian lawsuit seeking a stay from a Canadian court with respect to Canadian litigation, a defendant in foreign litigation seeks an order from a Canadian court enjoining a Canadian plaintiff from launching or continuing an action in a jurisdiction outside Canada. In either case, the Canadian court considers the doctrine of *forum non conveniens* and examines the connections between the subject matter of and parties to the litigation.

The leading Canadian case on anti-suit injunctions is *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*<sup>45</sup> ("*Amchem*"). In that case, individuals who had worked in the manufacture of asbestos products by various companies in several provinces in Canada and Washington state sued in Texas, alleging that several asbestos manufacturers had failed to provide adequate warnings regarding the dangers of exposure to asbestos. Most of the claimants resided in British Columbia and the British Columbia Workers' Compensation Board was a subrogated claimant with respect to most of the individuals. Most of the 33 corporate defendants in the Texas action did not have a significant business presence in Canada. After the action was commenced in Texas, most of the 33 defendants brought a motion in the Texas court challenging jurisdiction and seeking a stay on the grounds that Texas was *forum non conveniens*. The Texas Court dismissed the motion without reasons. After many attempts to reverse this decision,

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<sup>45</sup> (1993), 102 D.L.R. (4<sup>th</sup>) 96 (S.C.C.).

several of the defendants brought applications in British Columbia, seeking anti-suit injunctions against the claimants in the Texas action. The British Columbia Supreme Court issued an *ex parte* injunction, following which the non-British Columbia claimants in the Texas action sought an "anti-anti-suit" injunction from the Texas court to prevent the defendants from obtaining similar injunctions against them in Canada.

The Supreme Court of Canada held that the B.C. Court should not have granted an anti-suit injunction. Sopinka J. drew the following distinction between seeking a stay and an anti-suit injunction:

Although both the remedy of a stay and an injunction have as their main objectives the selection of an appropriate forum for the trial of the action, there is a fundamental difference between them which is crucial to the development of the principles which should govern each. In the case of the stay the domestic court determines for itself whether in the circumstances it should take jurisdiction whereas, in the case of the injunction, it in effect determines the matter for the foreign court.<sup>46</sup>

The threshold to meet to convince a Canadian court to prevent a plaintiff from continuing with an action in a jurisdiction where a foreign court has assumed jurisdiction is higher than for a motion to stay a proceeding in a Canadian court: "In some cases a serious injustice will be occasioned as a result of a foreign court's refusal to decline jurisdiction. It is only in such circumstances that a court should entertain an application for an anti-suit injunction."<sup>47</sup> However, the Supreme Court was also clear that "forum shopping" ought not to be encouraged:

...The choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants at the expense of another in a jurisdiction that is otherwise inappropriate.<sup>48</sup>

In considering whether to grant an anti-suit injunction, a domestic court should first determine whether the domestic forum is the natural forum with the closest connection with the action and the parties, or if there is another forum that is clearly more appropriate. If the foreign court, applying the principles of the doctrine of *forum non conveniens*, could reasonably have concluded that there was no other forum that is clearly more appropriate, the domestic court should not displace the foreign court's assumption of jurisdiction. Further, even where the

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<sup>46</sup> *Ibid.* at 105.

<sup>47</sup> *Ibid.* at 106.

<sup>48</sup> *Ibid.* at 104.

domestic court finds that there was a clearly more appropriate forum, it ought not to interfere with the plaintiff's choice of forum if the plaintiff would be unjustly deprived of an advantage in the foreign jurisdiction that is not available in the domestic jurisdiction.

Where Canadian plaintiffs seek the advantage of treble damages by bringing suits in the U.S. under the exception to the FTAIA and the U.S. Supreme Court's decision in *Empagran*, an anti-suit injunction may be the defendant's next step if and when those Canadian plaintiffs are permitted by a U.S. court to proceed. Presumably, the U.S. court would have found a nexus between the effect on Canadian commerce and U.S. domestic commerce. In doing so, would the U.S. court's decision foreclose the willingness of the Canadian courts to restrain the Canadian plaintiffs' ability to continue with the U.S. action under the *Amchem* test?

The *Amchem* test provides that where a U.S. court, in applying the factors of *forum non conveniens*, could have reasonably concluded that no other forum is clearly more appropriate, the Canadian court should not interfere. The *Empagran* test provides that foreign plaintiffs must demonstrate some nexus between their adverse effect and an adverse effect on U.S. domestic commerce. The U.S. Supreme Court also held that the exception in the FTAIA ought to be interpreted to avoid unreasonable interference with the sovereign authority of other nations. The burden on a defendant seeking an anti-suit injunction from a Canadian court will be to demonstrate that the U.S. court erred in its consideration of the unreasonableness of the interference with the sovereign authority of Canada, and that the U.S. court did not, in its analysis, give adequate thought as to whether Canada was clearly a more appropriate forum. This will be a difficult burden to overcome.

However, a finding that there is a nexus to a direct effect on U.S. commerce under the test in *Empagran* is not the same as concluding that there is a "real and substantial connection" to the U.S.. In effect, the *Empagran* test only considers half of the *forum non conveniens* test. It only considers whether there is a connection to the U.S.. It does not consider whether there are closer connections to another jurisdiction.

Treble damages are the single most important reason why a Canadian plaintiff would seek to sue in the U.S. for competitive injury suffered in Canada. Another reason is that under U.S. antitrust laws, unlike in Canada, plaintiffs alleging price fixing or market allocation need not prove that the defendants' conduct led to an "undue" lessening of competition, since such conduct is *per se* illegal under the *Sherman Act*. These factors become relevant under the third portion of the *Amchem* test which provides that even where a Canadian court finds that Canada is clearly the more appropriate forum, it ought not to interfere with the plaintiff's choice of forum if the plaintiff would be unjustly deprived of an advantage in the United States that is not available in Canada.

In *Amchem*, the Supreme Court held that a juridical advantage to the plaintiff is just one of the factors to be considered in the analysis of connecting factors:

If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.<sup>49</sup>

Based upon this test, the defendants would have to demonstrate not only that Canada is the clearly more appropriate jurisdiction based on connecting factors, but also that the reason the Canadian plaintiffs chose the U.S. was for the advantages provided by the *per se* rule and the prospect of treble damages. Further, the defendants would have to demonstrate that it would not be unjust to deprive the plaintiff of these advantages.

Canada's *Competition Act*, through section 36, (along with the common law tort of conspiracy) provides Canadian plaintiffs with a cause of action for losses actually suffered as a result of an anti-competitive conspiracy. Consequently, plaintiffs in Canada have a mechanism in Canada by which to recover their actual losses. They would not be deprived of their cause of action if an anti-suit injunction was granted in these circumstances. They would only be deprived of the ability to treble their damages, and to establish liability without proving the competitive effects required by Canadian law. From a public policy standpoint, those who do business in Canada legitimately expect that their conduct will be judged by Canadian law. Canadian plaintiffs

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<sup>49</sup> *Ibid.* at 110-111.

precluded from bringing their claims in the U.S. under U.S. laws would not be unjustly deprived of an advantage. They would only be deprived of an advantage that Canadian lawmakers do not consider appropriate for Canada. Therefore, there should be at least some cases in which Canadian courts would restrain Canadian plaintiffs from pursuing treble damage claims in the U.S.

Consider, for example, an industry based largely in Canada, but with some sales into the United States. If Canadian plaintiffs alleged a conspiracy to fix North American prices and sought to bring their claims in the U.S., it would appear, under *Empagran*, that a U.S. court may take jurisdiction. A Canadian defendant in that situation should have a credible argument to claim, in a Canadian court, that it should not face treble damages or *per se* liability merely because of the Canadian plaintiffs' decision to sue in the U.S.. We are not aware of any case in which this argument has been advanced to date.

## **VI. Access by Canadian Plaintiffs and Courts to Evidence in Foreign Proceedings**

If and when a Canadian court assumes jurisdiction over a civil proceeding alleging illegal international cartel activity, other jurisdictional issues may arise at the discovery and production stages of the proceeding. Plaintiffs in several countries may bring actions against the same alleged cartel participants in several jurisdictions. For example, a consumer may sue a European-based corporate defendant in the United States, alleging the same conduct as a different consumer suing the same defendant in Canada. The same defendant may have been subject to investigations by competition authorities in Europe, the U.S. and Canada.

Plaintiffs or prospective plaintiffs will be keenly interested in monitoring the progress of proceedings in other jurisdictions, and in getting access to any information produced in those proceedings to further their own case. Canadian plaintiffs may bring motions in other jurisdictions for access to material that they may not have access to in Canada. Two recent cases, each decided on opposite sides of the Canada/U.S. border, will likely encourage further attempts by Canadian plaintiffs to gain access to information that is not available to them under the relevant Canadian procedural rules.

In *Ford v. F. Hoffman-LaRoche Ltd.*<sup>50</sup> ("*Ford*"), the plaintiffs in a series of proposed class proceedings brought motions in a U.S. court seeking access to the fruits of discovery in parallel U.S. actions - information that was subject to a protective order in the U.S. litigation. If successful on their U.S. motion, the Ontario plaintiffs would be permitted to obtain discovery evidence to investigate and support their class proceedings pending in Ontario, before the class proceeding had been certified in Ontario, and before their discovery rights in the Ontario class proceeding were operative. As such, the Canadian defendants brought motions in Ontario to prohibit the plaintiffs from proceeding with their motions in the U.S. Pending the outcome of those motions in Ontario, the U.S. Court deferred its decision on whether to give the plaintiffs access. However, the Canadian Courts declined to intervene. The Ontario Courts, and ultimately the Supreme Court of Canada, rejected the defendants' attempts to prohibit the U.S. motions from proceeding. In doing so, they held, *inter alia*, that because the Ontario Court retains jurisdiction regarding the admissibility of any information obtained from the U.S. proceeding, it was unnecessary for the Ontario Court to interfere with the U.S. courts' jurisdiction over the motions before it.

In their motion in the U.S., the *Ford* plaintiffs relied on U.S. Federal Rule of Civil Procedure 24(b) which provides that "upon timely intervention anyone may be permitted to intervene in an action...when an applicant's claim or defence and the main action have a question of law or fact in common." U.S. courts have held that the requirements for permissive intervention under 24(b) are:

- (1) an independent basis of subject matter jurisdiction;
- (2) a timely motion to intervene; and
- (3) a claim or defence that has a question of law or fact in common with the main action.<sup>51</sup>

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<sup>50</sup>[2003] O.J. No. 868 (Ont. C.A.) affirming [2002] O.J. No. 1400 (Div. Ct.), leave to appeal to the Supreme Court of Canada denied [2003] S.C.C.A. No. 245 (S.C.C.).

<sup>51</sup>*EEOC v. National Children's Ctr.*, 146 F. 3d 1042 (D.C. Cir. 1998).

All three of these requirements have been interpreted broadly to apply to parties who raise a common question in a suit in another jurisdiction and who seek to modify a confidentiality order in U.S. litigation, even after the U.S. proceedings have been completed.<sup>52</sup> In *Ford*<sup>53</sup>, the U.S. District Court found the criteria to be met, but deferred modification of the protection order until the Ontario Court had made its decision.

In addition to *Ford*, Canadian plaintiffs were granted intervener status under Rule 24(b) and protective orders were modified permitting them access to confidential discovery in *In re Baycol Products Litigation*<sup>54</sup> and, most recently *In re Linerboard Antitrust Litigation*<sup>55</sup> ("*Linerboard*"), discussed below.

In addition to Rule 24(b), Canadian (or other foreign) plaintiffs can seek access to discovery materials in the U.S. pursuant to 28 U.S.C. §1782(a) ("§1782(a)"), the utility of which has recently been affirmed by the U.S. Supreme Court. In *Intel Corp. v. Advanced Micro Devices, Inc.*<sup>56</sup> ("*Intel*") the U.S. Supreme Court laid out rules for foreign parties seeking access to U.S. production for use in foreign proceedings, expanding the rights of foreign complainants and plaintiffs to seek access to information produced in law suits in the United States, regardless of whether the same information would be discoverable in the foreign proceedings.

In *Intel*, Advanced Micro Devices ("*AMD*") filed an antitrust complaint against Intel Corp. with the Directorate-General for Competition (the "*DG*") of the Commission of the European Communities (the "*Commission*"), alleging that Intel had abused its dominant position in the European market through loyalty rebates, exclusive purchasing agreements, price discrimination and standard-setting cartels. Although AMD had recommended to the DG that it seek documents produced or filed by Intel in a private antitrust suit filed in Alabama, the DG decided not to seek such production. AMD then applied to the District Court for an order directing Intel to produce the documents, relying on a statutory provision enacted in 1964 to encourage U.S. judicial assistance for foreign proceedings.

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<sup>52</sup> *In re Linerboard*, *infra.* note 55 at 339.

<sup>53</sup> *In re Vitamins Antitrust Litigation*, 2001 U.S. Dist. LEXIS 25068.

<sup>54</sup> MDL No. 1431, Pretrial Order No. 77 (D.Minn. May 6, 2003).

<sup>55</sup> 333 F. Supp. 2d 333 (U.S. Dist. Ct).

<sup>56</sup> 124 S. Ct. 2466 (2004).

§1782(a) provides that a federal district court "may order" a person residing or found in a district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal" upon the application of "any interested person." Intel's appeal to the U.S. Supreme Court of the Ninth Circuit's decision permitting production was supported by an *amicus* brief from the Commission. The Commission stated that it did not want or need the assistance of the District Court. Further, it characterized its own function as being more in the nature of a prosecuting authority than a Tribunal within the meaning of §1782(a), and that the granting of the relief sought could lead to the disclosure of confidential information, encourage fishing expeditions and undermine the Commission's Leniency Program.

Despite these concerns, the U.S. Supreme Court affirmed the decision of the Ninth Circuit, holding that:

- (1) a complainant before the European Commission qualifies as an "interested person" within the meaning of §1782(a);
- (2) the Commission is a "tribunal" within the meaning of §1782(a) when it acts as a decision-maker at first instance;
- (3) the "proceeding" for which discovery is sought under §1782(a) must be in reasonable contemplation, but need not be "pending" or "imminent"; and
- (4) §1782(a) contains no threshold requirement that evidence sought from a federal district court would be discoverable under the law governing the foreign proceeding.

The U.S. Supreme Court rejected the argument that §1782(a) was intended to restrict assistance to *litigants* in foreign proceedings to seek information that would be discoverable in the litigant's home jurisdiction. In the *Intel* case, this would have meant that only the DG could seek the assistance of the U.S. courts for information that would also be compellable in the Commission's investigation. In rejecting the foreign-discoverability threshold, the Court noted that the domestic tribunal would retain jurisdiction to determine the use to be made of any information produced from the U.S. proceeding in accordance with its own domestic laws.

The U.S. Supreme Court stopped short of granting the order for production, cautioning that §1782(a) authorizes, but does not require, the federal district court to provide judicial assistance to foreign or international tribunals or to "interested persons" abroad. The merits of AMD's application was remanded to the District Court for determination and the District Court ultimately declined to order production on the facts presented.<sup>57</sup>

Since *Intel*, U.S. district courts have exercised their discretion under §1782(a) in favour of granting access to discovery in U.S. proceedings by foreign litigants. In *Proctor & Gamble v. Kimberly-Clark Corporation*<sup>58</sup>, the U.S. District Court for the Eastern District of Wisconsin permitted Proctor & Gamble ("P&G") access to discovery evidence in U.S. proceedings for use in foreign patent infringement proceedings pending in several countries in Europe and Japan. P&G was the defendant in all of the actions and sought access to discovery from the U.S. action from the parties who were the Plaintiff in all of the foreign actions. The plaintiff resisted the motion for production on the basis that both it and P&G were participants in the foreign proceedings and as such, P&G could obtain discovery in those proceedings and should not receive assistance under §1782(a) until it had exhausted its discovery opportunities in the pending foreign proceedings. The District Court rejected this argument, stating that such a proposal "is inefficient and possibly ineffective":

It is more efficient for a court located in the Eastern District of Wisconsin to order discovery from persons located in such district than to force P&G to seek the same discovery in as many as five foreign actions and return to this court if its efforts fail.<sup>59</sup>

Access to production was also granted under §1782(a) in *In re Application of Jonathan Guy Phillips*<sup>60</sup> and *In re Servicio Pan Americano de Proteccion*<sup>61</sup>.

Aside from the remanded decision in *Intel*, the only case to date to deny access to U.S. production under §1782(a) is *Schmitz v. Bernstein, Liebhard & Lifshitz, LLP*<sup>62</sup>. The Second

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<sup>57</sup> 2004 U.S. Dist. LEXIS 21437 (N.D. Cal.).

<sup>58</sup> 334 F. Supp. 2d 1112 (U.S. Dist. Ct.).

<sup>59</sup> *Ibid* at 1115.

<sup>60</sup> 2004 U.S. Dist. LEXIS 16426 (S.D.N.Y.). This is an estates case where the administrators of a British estate sought discovery against U.S. citizens who were not parties to the U.K. proceedings.

<sup>61</sup> 2004 U.S. Dist. LEXIS 24430 (S.D.N.Y.). A Venezuelan security firm was granted access to documents held by HSBC Bank USA that were relevant to a law suit brought by HSBC against the security firm in Venezuela for damages suffered when an employee of the security firm absconded with \$5.6 million.

<sup>62</sup> 376 F. 3d 79 (2d Cir. 2004).

Circuit applied the *Intel* factors to a securities fraud action against a German corporation in Germany for allegedly misleading investors by overstating the value of its real estate assets. The plaintiffs sought access to documents produced in a private action against the same defendants based on the same facts that had been commenced in the U.S.. In particular, the documents sought had been produced in the U.S. action by a German prosecutor and consisted of documents from the German criminal investigation of the same defendants based on the same facts alleged in both the U.S. and Germany. However, the German prosecutor had produced those documents on the condition that they were to be used exclusively in the U.S. action. The U.S. Court denied access to production under §1782(a) because the German government was of the view that it would jeopardize the ongoing criminal investigation and German sovereign rights and because the evidence sought was from a participant in the German action.<sup>63</sup>

In conspiracy cases, the U.S. courts have not drawn a significant distinction between a Canadian plaintiff's standing under Rule 24(b) and §1782(a). In *Linerboard*<sup>64</sup>, a Canadian company sought to intervene under Rule 24(b) in pending U.S. antitrust litigation alleging conspiracy among linerboard manufacturers for the limited purpose of obtaining access to discovery material in the U.S. case that was subject to a confidentiality order. As mentioned above, in *Linerboard*, the U.S. court held that the Canadian plaintiff met all three requirements of Rule 24(b), thereby granting intervener status and permitting them access to production material subject to a U.S. protective order.

The plaintiffs in *Linerboard* did not seek access based on §1782(a). The defendants argued that the plaintiffs ought to have sought production by relying on the more direct route of §1782(a) and that the plaintiffs had not met the requirements set out by the U.S. Supreme Court in *Intel*. In particular, the defendants argued that the plaintiffs were seeking to circumvent the proof-gathering restrictions of Canada in two ways:

- (1) under the Ontario *Rules of Civil Procedure*, the plaintiffs were not yet entitled to discovery (since certification had not yet been granted); and

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<sup>63</sup> *Ibid* at 84.

<sup>64</sup> *Supra*. note 55.

- (2) under the Ontario *Rules of Civil Procedure*, the plaintiffs would not be entitled to the breadth of discovery that was available in the U.S. proceedings.

In dismissing this argument, the U.S. District Court referred to the Ontario Court's decision in *Ford* and affirmed the distinction drawn by the Ontario Court between seeking discovery in a U.S. action and seeking access to the discovery of the litigants in the U.S. litigation. In the absence of the confidentiality order, the plaintiffs in the U.S. action could have disclosed the fruits of its discovery to the Canadian plaintiffs. It was therefore simply more efficient to grant the Canadian plaintiffs access to the U.S. productions.

So far, U.S. Courts have been receptive to requests from Canadian plaintiffs seeking access to discovery in the U.S.. While this approach may be practical and efficient for plaintiffs, it may overlook several substantive issues. As discussed earlier, most Canadian conspiracy class proceedings are commenced in the wake of guilty pleas by some or all of the defendants. Those guilty pleas, in turn, are largely the result of Canada's immunity program which encourages early disclosure of conduct that is contrary to the criminal provisions of the Act and which, in the absence of the immunity program, would be difficult to detect and prosecute. Enforcement authorities, as reflected in the *amicus* brief file by the European Commission in *Intel*, worry that the broadening of rights under §1782(a) could undermine the effectiveness of immunity programs. Potential immunity applicants may be less likely to come forward to disclose anti-competitive conduct if the protection from disclosure afforded under the rules of the investigating jurisdiction could be undermined by the production rules of another jurisdiction.

In addition, different approaches to privilege in different jurisdictions could lead to the disclosure of privileged information or information protected from disclosure by statute. For example, the documents produced by a litigant in the U.S. proceedings could include a complaint by a party to the Competition Bureau or documents produced to the Competition Bureau during an investigation. Under Canada's law of public interest privilege, complaints or confidential information provided to the Bureau during an investigation would be protected from disclosure. Section 29 of the Act also provides some protection of confidentiality. In addition, plea

negotiations with the Government are protected by settlement privilege in Canada. Those same protections may not apply to the very same documents under U.S. law.<sup>65</sup>

Consequently, if a Canadian plaintiff is granted access to such material by a U.S. court, the protection afforded by Canadian law (and its courts) becomes meaningless. A Canadian plaintiff will have access to privileged material. Further, it is uncertain whether a Canadian court would view the production of a document under U.S. rules of court as a waiver of privilege for the purposes of Canadian litigation.

The decisions in *Ford* and *Intel* encourage Canadian plaintiffs to seek discovery in other jurisdictions to support their cases in Canada. In effect, this permits plaintiffs to circumvent the rules of civil procedure which permit rights of discovery and production only after a claim has been certified. Given this potential result, the following comments of Matlow J. of the Ontario Divisional Court in *Ford* are somewhat surprising:

"It would be beyond belief that a foreign court would purport to assume jurisdiction over an action pending in Ontario and even contemplate granting interlocutory relief for discovery. It is trite to assert that only this Court has jurisdiction to control its own process."<sup>66</sup>

A potential glimmer of hope for those seeking to preserve some control by Canadian courts over their own process flows from the judgment of Farley J. in the Divisional Court decision in *Ford*. He drew a distinction between "passive discovery", which he felt to be acceptable, and "active discovery", which he viewed to be more problematic. This will not assist defendants in opposing plaintiffs' applications for access to U.S. discovery, but it may give them an argument to oppose future requests to actually conduct discovery in the U.S. for the purposes of the Canadian proceedings.

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<sup>65</sup> See for example *In re: Vitamins Antitrust Litigation* 2002 U.S. Dist. LEXIS 25815 where the U.S. District Court for the District of Columbia ordered production of, among other things, letters between Bioproducts legal counsel and the Competition Bureau with respect to Bioproducts request for, and information to support it request for immunity.

<sup>66</sup> [2002] O.J. No. 1400 (Ont. Div. Ct.) at paragraph 8 aff'd [2003] O.J. No. 868 (Ont. C.A.).