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## **JURISDICTION ISSUES IN PROSECUTIONS UNDER SECTION 45 OF THE *COMPETITION ACT***

### **Introduction**<sup>1</sup>

International conspiracies involving foreign corporations, particularly those with no business presence in Canada, present both substantive and procedural jurisdictional challenges for competition authorities seeking to prosecute those corporations and their individual employees under section 45 of the *Competition Act*, R.S.C. 1985, c. C-34 (as amended) ("*Competition Act*"). These challenges stem from the fact that the criminal jurisdiction of the Canadian courts is grounded in a principle of territoriality which, as a general rule, limits their jurisdiction to offences that occur, and offenders who are found, within Canadian territory.

An allegation that an international conspiracy involving foreign corporations constitutes an offence on Canadian soil may be difficult to establish on the facts, particularly because conspiracy is an inchoate offence. There is, moreover, the problem of service upon an accused who is outside Canadian territory. The federal Crown has few legal mechanisms at its disposal to resolve this jurisdictional issue. The extradition process, while it may assist in bringing accused employees of foreign corporations into Canada for the purpose of a prosecution here, is of little use against an accused foreign corporation that does not carry on business here. Mutual legal assistance treaties may be relied upon to gain the assistance of a foreign corporation's own state authorities in the gathering of evidence to conduct a prosecution, but that evidence will be of little use if the Crown cannot establish that the Canadian courts have jurisdiction to try the case.

In spite of the challenges facing competition authorities, their ability to establish the jurisdiction to prosecute a foreign conspiracy is rarely put to the test. Foreign corporations often prefer to enter a quick and relatively quiet guilty plea and pay a negotiated fine, rather than to defend the charge in court and expose employees to a time consuming, public legal process, or to the risk of extradition. Typically, the parties settle the case on the basis of an agreed statement of facts which specifies that the accused submits to the court's jurisdiction for the purpose of the settlement only. The result is a paucity of judicial precedent on which competition counsel can rely in advising their foreign clients whether or not it is appropriate to enter a guilty plea to a charge of conspiracy under section 45.

This paper offers counsel defending foreign corporations with no business presence in Canada some thoughts on the substantive and procedural jurisdiction issues that arise in an international conspiracy case. It discusses: the territorial basis for criminal jurisdiction; the "substantial connection" test which can be applied to establish jurisdiction over an international conspiracy under section 45 of the *Competition Act*; restrictions on Canadian authorities seeking to serve criminal process on a foreign accused; and the limitations of the extradition process and mutual legal assistance treaties in resolving these jurisdiction issues.

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### The Meaning of "Jurisdiction"

Before discussing these issues, an introduction to the various ways in which the term "jurisdiction" is used in criminal and in international law is warranted.

In international law, "jurisdiction" in the criminal context refers to the power of one sovereign state *vis-a-vis* other sovereign states to make, apply and enforce its criminal law.<sup>2</sup>

In domestic criminal law, "jurisdiction" may refer to legislative jurisdiction - the legislative authority of a state to proscribe certain activity as an offence under its laws, or to judicial jurisdiction - the reach of the processes of that state's courts to try an accused.

Under international criminal law, judicial jurisdiction is subservient to legislative jurisdiction. For example, the first jurisdictional issue to consider is whether the acts alleged by the federal Crown against a foreign corporation or its employees constitute an offence under Canadian law, such as a breach of section 45 of the *Competition Act*. It is only if Canadian criminal law applies to the allegedly offensive acts (i.e. if Parliament's authority to proscribe those acts is recognized under international law) that Canadian courts will properly have jurisdiction over the offence.

The second jurisdictional issue to consider will then be whether the Canadian courts have jurisdiction to try the particular accused for the offence charged. While Parliament has authority to define the criminal character and consequences of conduct that takes place within Canadian territory, Canadian courts may not be able to enter a judgment against a person guilty of such conduct if he is physically outside of Canada and cannot properly be served. Thus although the courts may have jurisdiction over the offence with which an accused is charged, they will not necessarily have jurisdiction over the person of the accused.

The correlative principle is that while Canadian authorities may have power to arrest someone in Canada, such that the courts gain jurisdiction over him, for instance for the purposes of an extradition hearing, the Canadian courts will not necessarily have jurisdiction under international law to prosecute him under a Canadian statute if the illegal acts he is accused of committing were committed entirely in a foreign country. Both jurisdiction over the offence and jurisdiction over the person of the accused are necessary prerequisites to a criminal judgment being entered and enforced against that accused.

### Jurisdiction over International Conspiracies Pursuant to Section 45

Where the actions of two or more foreign corporations, without a Canadian business presence, are alleged to constitute a conspiracy under subsection 45(1) of the *Competition Act*, the first question that arises is whether the Canadian courts have jurisdiction over the offence.

Subsection 45(1) of the *Competition Act* states:

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<sup>2</sup> Law Reform Commission of Canada, Working Paper 37: *Extraterritorial Jurisdiction*, 1984 ("LRCC") at p. 4.

*s.45(1) CONSPIRACY – Everyone who conspires, combines, agrees or arranges with another person*

*(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,*

*(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,*

*(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or*

*(d) to otherwise restrain or injure competition unduly,*

*is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.*

Nowhere in the definition of this offence does Parliament make explicit reference to the locus of the elements of the offence. Must the "facilities" in clause (a) or the manufacturing in clause (b) be located within Canadian territory? Must the competition in clause (c) be between Canadian suppliers? What if the only competition affected under clause (d) is amongst foreign corporations, but restraint of that competition affects pricing and availability on the Canadian market? And must the agreement itself be reached in Canada?

Subsection 45(1) is not unlike most criminal provisions defining indictable offences; it is generally true that Parliament makes few references to territorial considerations in defining criminal offences under Canadian law. As a result, it has been up to the courts to interpret criminal legislation to determine where the elements of an offence must have occurred in order for the courts to have jurisdiction over it.<sup>3</sup> The courts have been guided in their interpretation of criminal legislation by the common law principle of territoriality, discussed below.

#### Common Law Principle of Territorial Jurisdiction

The common law rule of criminal jurisdiction is based on a principle of territoriality, such that a Canadian court generally has jurisdiction over an offence only if that offence was committed within the territory of Canada.<sup>4</sup> This territorial principle of criminal jurisdiction was developed by the courts to respond to two practical considerations: first, states ordinarily have little interest in prohibiting activities that occur abroad; and second, they are reluctant to incur the displeasure of other states by indiscriminate attempts to control activities that take place wholly within the boundaries of those other states.<sup>5</sup>

The territorial principle is recognized in international law as a reflection of the concept of sovereign independence in governing internal state affairs, or international comity.<sup>6</sup> It can be

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<sup>3</sup> *R. v. Libman*, [1985] 2 S.C.R. 178; [1985] S.C.J. No. 56 at para. 15.

<sup>4</sup> *R. v. Finta*, [1994] S.C.J. No. 26 at para. 170.

<sup>5</sup> *Libman*, *supra* at para. 11.

<sup>6</sup> *Finta*, *supra* at para. 170.

broken down into two parts, as follows: first, the criminal law applies to the conduct of everyone who is in Canada, whether he is a citizen, resident, alien or tourist; second, while Parliament has authority to make laws with extraterritorial application, Canadian criminal law does not generally apply to the conduct of people outside Canada.

Historically the Canadian courts tended to interpret the principle of territoriality so as to confine all the elements of a Canadian criminal offence to the realm of Canada. This was particularly the case when Canada was still dependent upon the United Kingdom. With independence as a sovereign nation, however, the attitude of the courts began to change, particularly where the impact of a crime was felt in Canada. In such cases the courts were reluctant to interpret the principle of territoriality rigidly, and thereby provide an easy escape for international criminals targeting Canada.<sup>7</sup> The courts' concern in this regard can only have increased in the last few decades, as the increase in international commerce has been paralleled by an increase in the opportunities for international commercial crime, including international conspiracies affecting commercial competition.

The principle of territoriality has always been subject to statutory exception. Historically the British Parliament exercised its authority to create statutory exceptions to the common law rule of criminal jurisdiction only as necessary to safeguard the security of the state, and to uphold international order. In such cases, the British Parliament passed specific statutes to empower its courts to exercise jurisdiction over British subjects who committed specified offences on foreign soil. By way of example, one of the statutory extensions to the common law rule limiting a court's jurisdiction by territory was with respect to murder. This extension was justified under international comity on the basis that murder was considered to be a crime against a universal code of morality accepted by all "civilized nations".<sup>8</sup> Another statutory exception was that made for the crime of treason committed extraterritorially.<sup>9</sup> This was justified in international law on the basis that all states have a right to protect themselves from an attack from abroad by extending their jurisdiction to acts of treason committed outside their territory.<sup>10</sup>

The Canadian Parliament has today legislated to assert criminal jurisdiction over a variety of extraterritorial criminal activities, some of which are noted below. In the absence of such an express statutory exception to the rule of territoriality though, there persists a strong presumption against the extraterritorial effect of legislation. Thus when one interprets criminal legislation, including the definition of indictable offences such as conspiracy under the *Competition Act*, one must do so from the presumption that Parliament does not intend to make a law with extraterritorial application unless it states so expressly.<sup>11</sup> As noted above, this has implications for the application of subsection 45(1) to an international conspiracy.

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<sup>7</sup> *Libman*, *supra* at paras. 59, 66.

<sup>8</sup> *Offences against the Person Act*, 1861 (U.K.) c. 100, ss. 9, 10.

<sup>9</sup> *Treason Act*, 1543, 35 Hen. VIII, c. 2.

<sup>10</sup> Salhany R.E., *Canadian Criminal Procedure*, 5<sup>th</sup> Ed. (Toronto: Canada Law Book, 1989) at p. 2-2 to 2-2.1. See LRCC, *supra* at p. 9-10 for a discussion of the bases on which an assertion of extraterritorial jurisdiction is justified in international law.

<sup>11</sup> LRCC, *supra* at p. 12.

### The Criminal Code

Today the presumption against the extraterritorial application of the criminal law is codified in subsection 6(2) of the *Criminal Code*, which sets out both the common law principle of territoriality and the statutory exception, as follows:

*6(2) Subject to this Act or any other act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada.*

Exceptions to the rule of territoriality are set out as express legislative exceptions to subsection 6(2) in the *Criminal Code*. For instance, section 7 (3.71-3.77) of the *Criminal Code* creates an exception for war crimes and crimes against humanity that are committed outside Canada. The language of these provisions deems the foreign acts constituting the crimes to be acts committed in Canada. The result is that Canadian courts may then acquire jurisdiction to prosecute the accused for such foreign acts under the applicable Canadian criminal law.<sup>12</sup>

As the Supreme Court of Canada has recently noted in *Terry v. The Queen*: "The principle that a state's law applies only within its boundaries is not absolute.... States may invoke a jurisdiction to prescribe offences committed elsewhere to deal with special problems, such as those provisions of the *Criminal Code* ... pertaining to offences on aircraft (s. 7(1), (2)) and war crimes and other crimes against humanity (s. 7(3.71)). A state may likewise formally consent to permit Canada and other states to enforce their laws within its territory for limited purposes."<sup>13</sup>

As with the old *Offences against the Person Act* and *Treason Act*, a legislated exception to the rule of territoriality such as that for war crimes is recognized and accepted under international law on the basis that it falls within broadly accepted principles that do not offend international comity. For instance, international war crimes are excepted as they offend fundamental, commonly shared principles of humanity and international order.

There are no legislated exceptions for extraterritorial offences under competition law involving foreign corporations with no business presence in Canada. Subsection 46(1), mentioned below, is specific to corporations with a Canadian presence. At the same time, the economic interests of Canada are vulnerable to harm by an international commercial conspiracy, even though that conspiracy may take place entirely outside the territory of Canada and be perpetrated by foreign parties. How then can Canadian courts acquire jurisdiction over an international conspiracy? In the absence of some formal arrangement between states, codified by a Canadian statute, as noted by the Supreme Court of Canada above, a conspiracy under section 45 must satisfy the principle of territoriality.

In applying that principle, the courts will, while seeking to discourage international criminals from targeting Canada, still endeavour not to extend Canadian jurisdiction to a degree that could offend international comity. As noted above, this can be a difficult balancing act, particularly since the overall purpose of the *Competition Act* is to protect the Canadian economy

<sup>12</sup> *Finta*, *supra* at paras. 172, 173, 180.

<sup>13</sup> *Terry v. The Queen* (1996), 106 C.C.C. (3d) 508 at p. 515 *per* McLachlin J.

on the basis of certain fundamental principles which do not necessarily govern the economies, or the corporations, of other nations. Nevertheless, there is a general trend in international law whereby it is increasingly inclined to recognize jurisdiction by one state over criminal conduct in another state where that conduct has harmful consequences in the territory of the former state.<sup>14</sup> Certainly in relation to section 45, this trend broadens the scope for establishing jurisdiction in Canada where an international conspiracy targets the Canadian marketplace.

The federal Crown has occasionally suggested that section 465 of the *Criminal Code*, used in conjunction with subsection 45(1) of the *Competition Act*, may also expand Canadian jurisdiction over a competition law conspiracy with extraterritorial aspects. Clause 465(1)(c) of the *Criminal Code* makes it an offence for a person to conspire with any one to commit an "indictable offence". Subsections 465 (3) and (4) create a presumption of territoriality which may be applied to an offence under subsection 465(1). Those provisions state:

*Conspiracy -- s. 465*

*465. (1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy:*

...

*(c) every one who conspires with any one to commit an indictable offence not provided for in paragraph (a) or (b) is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable....*

*Conspiracy to commit offences -- s. 465(3)*

*(3) Every one who, while in Canada, conspires with any one to do anything referred to in subsection (1) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do that thing in Canada.*

*Idem -- s. 465(4)*

*(4) Every one who, while in a place outside Canada, conspires with any one to do anything referred to in subsection (1) in Canada shall be deemed to have conspired in Canada to do that thing.*

A number of arguments may be made against the assertion that section 465 expands the territorial reach of an offence under section 45, one of which is that the Crown would be required to prove a conspiracy to commit the indictable offence of conspiracy under section 45, or a conspiracy to conspire - an unlikely prospect.<sup>15</sup> The discussion in this paper assumes that

<sup>14</sup> *Libman*, *supra* at para. 11. See La Forest J.'s detailed review of the history of this case law in *Libman*.

<sup>15</sup> For a related argument, see *R. v. Dungey* (1979), 51 C.C.C. (2d) 86 (Ont. C.A.) in which the Court of Appeal rejected a charge by the Crown of attempt to conspire to defraud. Other noteworthy cases on subsections 465 (3) and (4) are *Bolduc v. Quebec (A.G.)*, [1982] 1 S.C.R. 573 and *R. v. Lai and Lau* (1985), 24 C.C.C. (3d) 237 (B.C.C.A.).

subsections 465(3) and (4) of the *Criminal Code* do not apply in conjunction with section 45, but argues that the Canadian courts may still have jurisdiction over an international competition conspiracy under the substantial connection test articulated in *R. v. Libman*, discussed below.

#### Offence of Conspiracy under Competition Law

As the offence of conspiracy in subsection 45(1) of the *Competition Act* makes no mention of the locus of the components of that offence, one must presume that the section is not intended to apply to conspiracies that are entirely extraterritorial. If it were intended to so apply, one would expect to see the kind of language that occurs in the express statutory exceptions to subsection 6(2) of the *Criminal Code*.

This presumption is supported also by the existence of subsection 46(1) of the *Competition Act*, in which Parliament has created a separate offence that applies to foreign corporations with a Canadian business presence. Section 46(1) states:

#### *Foreign directives*

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

When one reads subsection 45(1) in the larger context of the *Competition Act*, including subsection 46(1), it is difficult to avoid the conclusion that Parliament took into consideration the limitations of the territoriality principle in drafting subsection 45(1). Unlike subsection 46(1), which makes express reference to a conspiracy entered outside Canada that is then implemented in Canada through the directive of a foreign corporation made to its Canadian subsidiary, subsection 45(1) makes no express reference to territorial considerations.

The wording of subsection 45(1) of the *Competition Act* does not, though, necessarily preclude its application to a transnational conspiracy, where some elements of the offence occur in Canada, and some in other jurisdictions. In *Libman*, La Forest J. observed of subsection 6(2) that it "does not say that criminal law is confined to Canadian territory; it says rather that no person 'shall be convicted in Canada for an offence committed outside Canada'."<sup>16</sup> Whether the facts in any particular case establish enough of a connection with Canada to conclude that the conspiracy was not purely extraterritorial, and hence beyond the jurisdiction of Canadian courts pursuant to subsection 6(2) of the *Criminal Code*, is a matter of interpretation for the courts.

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<sup>16</sup> *Supra* at para. 66.

The caselaw in which Canadian courts have struggled to apply the restrictive common law principle of territoriality to international conspiracies deals largely with conspiracies to commit an indictable offence under the *Criminal Code*, rather than with competition law conspiracies under section 45. This then, is the primary source of judicial precedent to which competition counsel can turn in assessing the jurisdictional issues that may face their foreign clients.<sup>17</sup>

A review of the conspiracy case law under the *Criminal Code* shows that by the 1960's, the courts were finding jurisdiction in Canada when the agreement and preparation took place here, but also when the results contemplated by the conspiracy took place in Canada, even though the accused were not present here.<sup>18</sup> Alternatively, the courts analysed the territorial jurisdiction issue in conspiracy cases by first determining what was the gist of the offence and then considering where the gist of the offence took place. Yet another technique was to analyse the offence as being of a continuing character such that it could be deemed to have occurred in more than one jurisdiction.<sup>19</sup>

### *R. v. Libman*

In 1985, the Supreme Court of Canada in *R. v. Libman* rejected the difficult and artificial task of trying to determine in what particular locale an offence had taken place. Instead, the Court focused on the question of whether there was a real and substantial link between the offence and Canada. This approach left open the possibility that an offence could be considered to have occurred in more than one locale.

The accused in *Libman* was charged with fraud and conspiracy to commit fraud under the *Criminal Code*. He was committed to trial under clause 423(1)(c), for conspiracy to commit an indictable offence, but not under subsection 423(3), which deals with conspiracies entered into in Canada to commit an indictable offence outside Canada. (Section 423 is the predecessor to section 465.) The Crown argued that the offences had been committed substantially in Canada. The accused argued that clause 423(1)(c) applied only to conspiracies entered in Canada to commit a substantive offence in Canada, and that the gravamen of the substantive offence of fraud had occurred in the United States. The Supreme Court considered the case on the basis of subsection 5(2) (now subsection 6(2)), and the common law principle of territoriality. Thus the test to establish Canadian jurisdiction as expressed in *Libman* is relevant to an examination of the circumstances in which the Crown, without relying on subsection 465(3) or (4), could establish Canadian jurisdiction over an international conspiracy under section 45 of the *Competition Act*.

The facts in *Libman* are as follows. The accused, while in Canada, had his Toronto salesmen make material misrepresentations over the telephone to residents of the United States for the purpose of inducing them to purchase shares in two central American mining companies. Promotional material was sent to the American residents from Central America and they were asked to send their money to offices operated by the accused in Costa Rica and Panama. The accused travelled to these South American offices and received his share of the proceeds there, which he then brought back to Canada and distributed amongst his salesmen.

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<sup>17</sup> There is, of course, also the case law respecting section 465 of the *Criminal Code*.

<sup>18</sup> *Libman*, *supra* at para. 50.

<sup>19</sup> Salhany, *supra* at p. 2-4.1.

The accused was, in the view of the Supreme Court of Canada, properly within the territorial jurisdiction of the Canadian courts to be tried for fraud and for conspiracy to commit fraud, even though some of the activities on which the charges were based occurred outside Canada. The Court rejected the accused's argument that because the essential element of the offence of fraud was deprivation of the victim, and that element occurred outside Canada, the offences could not be prosecuted in Canada. This approach to jurisdiction involves selecting one ingredient of an offence as its essential ingredient and holding that the offence occurs where that ingredient occurs. In the view of the Supreme Court of Canada in *Libman*, it is an overly restrictive approach that can provide an easy escape for international criminals.

The Court applied instead a broad two-part test to determine whether an offence is subject to the jurisdiction of the Canadian courts. First, one must determine whether a significant portion of the activities constituting the offence took place in Canada. The Court held that it is not only the specific elements of the offence that a court should consider, but all relevant facts that may give Canada a "legitimate interest" in prosecuting the offence. The words of La Forest J. articulating this part of the test are worth noting for their breadth:

*[T]he fruits of the transaction were obtained in Canada as contemplated by the scheme. Their delivery here was not accidental or irrelevant. It was an integral part of the scheme. While it may not in strictness constitute part of the offence, it is, I think, relevant in considering whether a transaction falls outside Canadian territory. For in considering that question we must, in my view, take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offence. One must then consider whether there is anything in those facts that offends international comity.<sup>20</sup>*

The second part of the test, reflected in the concluding sentence of the above quotation, requires a court to consider whether it would offend the principles of international comity for Canada to assume jurisdiction over the offence.

The Supreme Court held in *Libman* that the preparatory activities by the accused to perpetrate the fraudulent scheme (which occurred in Canada) were in themselves sufficient to warrant holding that the offences took place in Canada. The Supreme Court saw no conflict with international comity for Canada to assume jurisdiction in this case, but rather expressed the view that it would conflict with the notion of comity "to permit criminals based in this country to prey on [the] citizens" of the United States.<sup>21</sup>

The Supreme Court was content to leave open the possibility that its approach to jurisdiction could result in a person being prosecuted for the same offence in more than one country, since any injustice resulting from such a situation could be avoided by resort to the pleas of *autrefois acquit* or *autrefois convict*.<sup>22</sup>

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<sup>20</sup> *Libman*, *supra* at para. 71.

<sup>21</sup> *Libman*, *supra* at para. 77.

<sup>22</sup> *Libman*, *supra* at para. 73. Section 607 of the *Criminal Code* provides that an accused may make the special plea of *autrefois convict*. The validity of that plea is then to be dealt with by the judge without a jury before the accused is called on to plead further. Where it is determined that the accused is not entitled to plead *autrefois convict*, he may then plead guilty or not guilty. The plea of *autrefois convict* exists to prevent a person from being convicted a second time for the same offence. See also the

La Forest J. summarized the jurisdictional test in *Libman* as requiring that there be a "real and substantial link" between the offence and this country, or that "a significant portion of the activities constituting the offence took place in Canada". According to La Forest J., there is no need for legislation to extend jurisdiction to this extent; it is simply a matter of interpreting the principle of territoriality, which is a concept that has consistently been defined by the courts.<sup>23</sup>

Competition counsel advising their clients on jurisdictional issues must then consider what are the constituent elements of the offence of conspiracy under subsection 45(1) of the *Competition Act* and whether in their particular case there is a real and substantial connection between the facts establishing those elements and Canada. According to *Libman*, the elements of the offence should be construed broadly to include all relevant facts taking place in Canada that may give this country a legitimate interest in prosecuting the offence. Then one must consider whether there would be any offence to the principles of international comity if Canada were to prosecute a foreign corporation here for the offence.

#### Elements of a Conspiracy under Subsection 45(1) of the *Competition Act*

In *R. v. Nova Scotia Pharmaceutical Society*,<sup>24</sup> the Supreme Court of Canada identified three elements to the offence of conspiracy under subsection 45(1) (in that case clause (c) was in issue), as follows: 1) the agreement must have been entered by the accused; 2) there must be an undue lessening of competition flowing from the agreement; and 3) there must be proof of a mental element. With respect to the requirement that competition would be restrained "unduly" by the agreement, the Supreme Court explained that this fell somewhere between a "per se rule" and a "rule of reason". In other words, the reference to "unduly" permits some discussion of the anti-competitive effects of an agreement, but not a full discussion of the economic advantages and disadvantages of the agreement.<sup>25</sup>

With respect to the mental element, the Supreme Court clarified that the Crown must prove two fault elements, one subjective and one objective. With respect to the subjective element, the Crown must prove that the accused intended to enter the agreement and knew the terms of the agreement. With respect to the objective element, the Court explained that the Crown must prove, on an objective view of the evidence, that the accused intended to lessen competition unduly.<sup>26</sup> If, for instance, the accused, as a reasonable business person, can be shown to have been familiar with the business in which he engaged, then it can be presumed that he knew the likely effect of the agreement would be to lessen competition unduly. Thus, in proving the *actus reus* of the offence – that the agreement was likely to reduce competition unduly – the Crown may also establish thereby the objective fault element that the accused, as a reasonable business person, should have known this was likely the effect of the agreement.

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Supreme Court of Canada's decision in: *R. v. Van Rassel* (1990), 53 C.C.C. (3d) 353 where it considered whether the plea of *autrefois convict* could be based on a foreign conviction and Salhany, R.E., *Canadian Criminal Procedure*, 6th ed. at para. 6.

<sup>23</sup> *Libman*, *supra* at para. 74.

<sup>24</sup> [1992] 2 S.C.R. 606; [1992] S.C.J. No. 67.

<sup>25</sup> *Supra* at p. 319.

<sup>26</sup> *Supra* at p. 326.

### Part 1 of the Test: Real and Substantial Connection to Canada

The bases on which the federal Crown might argue that a real and substantial connection exists between Canada and those acts of foreign corporations impugned as a conspiracy under section 45 are as varied as the facts could be in any particular case. This paper mentions two bases on which the federal Crown might in fact be successful in establishing such a connection.

One allegation on which the Crown might rely to establish a real and substantial connection to Canada is that the conspiracy targeted the Canadian market. The Supreme Court of Canada has stated in *Nova Scotia Pharmaceutical* that the *Competition Act* is central to Canadian public policy in the economic sector and specifically, is a central feature of Canadian economic policy.<sup>27</sup> Thus if the Canadian market was targeted and the Canadian economy was likely to be affected unduly, the very purpose of our *Competition Act* would be triggered, giving a Canadian court a "legitimate interest" in prosecuting the offence. By the same token, given the purpose of the *Competition Act*, it is difficult to conceive how Canada could claim jurisdiction over a conspiracy under section 45 if that conspiracy would not have impacted the Canadian economy. Thus, whether the Crown could establish jurisdiction may turn in large part on whether it can prove that the conspirators did intend to target Canada or at least ought to have known that an undue impact on the Canadian market would be a likely effect of the conspiracy.

Another allegation on which the federal Crown might rely to show a real and substantial connection between foreign conspiratorial activity and Canada would be an allegation that participants in the conspiracy met and plotted the conspiracy in Canada. This is not unlike the situation in *Libman*, and in that case, La Forest J. suggested that Canada has some obligation in international law not to reject jurisdiction over criminal activity here that aims to harm the citizens or interests of foreign states.

On the other hand, section 45 is aimed specifically at protecting the Canadian economy. It is arguably inappropriate to apply that provision with the aim of protecting the economy of another sovereign state. This would be especially true where the foreign conspirators reside in a state in which competition laws do not criminalize conspiracies as does Canadian law.

Finally, the fact that the same world-wide conspiracy could, because of its international scope, be prosecuted in other jurisdictions besides Canada would not necessarily be a sufficient basis for a Canadian court to reject jurisdiction. Pleas of *autrefois convict* or *autrefois acquit* could well be available to prevent any prejudice to an accused.

### Part 2 of the Test: International Comity

Generally international comity does not preclude a state protecting its own interests from the impact of foreign activity, whether that activity would be considered criminal in the foreign state or not. But at the conclusion of *Libman*, La Forest J. states: "There may be a danger, particularly in relation to common law conspiracy, for this country in essence to engage in punishing acts that take place wholly in another country that are not criminal there." La Forest J.'s comment serves as a reminder that the territoriality principle requires a connection between Canada and the offence.

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<sup>27</sup> *Supra* at p. 317-318.

In summary, even where subsection 465(3) or (4) is not applicable, Canadian courts have assumed jurisdiction over the *Criminal Code* offence of conspiracy when either the agreement was made in Canada, though it targeted a foreign jurisdiction, or when an agreement reached in a foreign jurisdiction targets Canada. Where the charge is conspiracy under section 45 of the *Competition Act*, the same jurisdictional bases may apply. If, for instance, the Canadian market was a target of, or affected by, an international conspiracy, this may be sufficient to establish jurisdiction. Alternatively, if the conspiracy itself occurred in Canada because the conspirators met here to arrange and plot the wrongful acts, this may also be sufficient to establish jurisdiction, though arguably the intent of the *Competition Act* to protect the Canadian economy is not triggered in such a case. In any case, the facts must show a connection between the alleged illegality and Canadian territory which justifies, on an international scale, Canada assuming jurisdiction. This leaves the problem of gaining jurisdiction over the person of an accused foreign corporation with no business presence in Canada.

### **Procedural Issues – Service on a Foreign Corporation**

A particular challenge for the Crown in commencing a prosecution against a foreign corporation is effecting valid service. Assuming the corporation does not carry on business in Canada, the Crown would have to effect service *ex juris*. However, the general rule is that service *ex juris* is valid only where authorized expressly by legislation.

As discussed below, there is no authorizing legislation that would apply in the case of a charge under section 45. Service *ex juris* of criminal process (i.e. a warrant for arrest or summons) on a foreign corporation or its employees would not be valid and a Canadian court would not thereby acquire jurisdiction over them. It could not proceed in their absence to make an order against them pursuant to the *Competition Act*.

This is illustrated, though not in an international context, by *Re Kenny*<sup>28</sup>. In that case (decided before reciprocal enforcement legislation was passed) a British Columbia court purported to serve a summons upon a resident of Ontario in connection with an application brought against the defendant for maintenance as a result of his having deserted his wife in British Columbia. The Ontario Court of Appeal held that an order of the British Columbia court for maintenance could not be enforced in Ontario because the British Columbia court had no jurisdiction in the first place to issue a summons directed to the defendant in Ontario or to serve it upon him there. Not having any jurisdiction to issue and serve a summons outside the limits of the province, the British Columbia court had no jurisdiction to proceed to make an order on the substance of the case before it.

The need for a statutory grant of jurisdiction derives from the courts' lack of extraterritorial jurisdiction at common law. Again, the common law rule is that the courts have no jurisdiction over persons beyond the realm of the state, unless by domestic law (i.e. by statute) such jurisdiction is conferred upon them.<sup>29</sup> In penal proceedings in particular, the common law rule is that a summons (or other form of criminal process) cannot be served on a person outside

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<sup>28</sup> [1951] O.R. 153-166 (C.A.).

<sup>29</sup> *R v. Smith*, [1999] B.C.J. No. 2847 (B.C.C.A.) at para. 15; *McGuire v. McGuire and Desordi*, [1953] O.R. 328 (C.A.) at p. 5. See also: *United Services Funds (Trustees of) v. Richardson Greenshields of Canada Ltd.* (1987), 24 C.P.C. (2d) 84 (B.C.S.C.) at p. 90, *aff'd* (1988), 25 C.P.C. (2d) 136 (B.C.C.A.).

Canada unless such service is authorized by statute.<sup>30</sup> Furthermore, a court cannot rely on its inherent powers to extend its jurisdiction to persons over whom neither the *Criminal Code* nor related criminal legislation gives it jurisdiction.<sup>31</sup> This common law rule reflects the principle of state sovereignty and international relations between sovereign states.

The Supreme Court of Canada explained in *Terry v. The Queen* that the primary basis of criminal law is territorial and states are expected, in keeping with the principles of international comity, to respect the sovereignty of one another within their respective territorial boundaries:

*This court has repeatedly affirmed the territorial limitations imposed on Canadian law by the principles of state sovereignty and international comity.... [It is a] settled rule that a state is only competent to enforce its laws within its own territorial boundaries.... The general rule that a state's criminal law applies only within its territory is particularly true of the legal procedures enacted to enforce it; the exercise of an enforcement jurisdiction is "inherently territorial".<sup>32</sup>*

Service of criminal process is a procedural step that commences the enforcement process. Service *ex juris* is considered to be, *prima facie*, an offence to the principles of international comity because it involves one sovereign state purporting to usurp another sovereign state's powers by exercising jurisdiction over and attempting to compel compliance to its laws by persons subject to that other state's territorial jurisdiction.<sup>33</sup> Thus, the courts look for an express legislative authorization to serve a party *ex juris* before they will find that there is jurisdiction to do so. They are unlikely to infer that Parliament intended such an intrusion into a foreign jurisdiction's authority over its subjects in the absence of express words to that effect.<sup>34</sup>

There are no provisions in the *Criminal Code* which expressly authorize service *ex juris* of criminal process. Rather, section 703.1 provides that a summons may be served anywhere in Canada and section 470 of the *Criminal Code* makes it clear that a Canadian court has jurisdiction over the person of an accused when he is within the territory of the court. Section 470 states:

#### *JURISDICTION OVER PERSON*

470. *Subject to this Act, every superior court of criminal jurisdiction and every court of criminal jurisdiction that has power to try an indictable offence is competent to try an accused for that offence*

(a) *if the accused is found, is arrested or is in custody within the territorial jurisdiction of the court; or*

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<sup>30</sup> *Re Shulman v. The Queen* (1975), 58 D.L.R. (3d) 586 (B.C.C.A.) at pp. 590-591.

<sup>31</sup> *Re Shulman, supra* at p. 592.

<sup>32</sup> *Terry v. The Queen, supra* at 515-516.

<sup>33</sup> *United Services Funds (Trustees of) v. Richardson Greenshields of Canada Ltd.* (1987), 24 C.P.C. (2d) 84 (B.C.S.C.) at p. 91, *aff'd* (1988), 25 C.P.C. (2d) 136 (B.C.C.A.); *R. v. Smith, supra* at para. 20.

<sup>34</sup> *R. v. Smith, supra* at paras. 17, 18.

- (b) *if the accused has been ordered to be tried by*
- (i) *that court, or*
  - (ii) *any other court, the jurisdiction of which has by lawful authority been transferred to that court.*

It was argued in *Re Shulman* that an inference could be drawn, from section 470 of the *Criminal Code*, that service *ex juris* was valid. [student could insert description of the facts in this case] The B.C. Court of Appeal rejected this argument and explained that paragraph (a) of section 470 limits the court's jurisdiction to situations where the accused is physically present in the jurisdiction, and paragraph (b) applies only where the court committing or ordering the accused already has jurisdiction over the person of the accused.<sup>35</sup>

In *R. v. Smith*, the B.C. Court of Appeal noted that the power of the courts in criminal matters is derived, and can only be derived, from the *Criminal Code* and from the rules lawfully promulgated thereunder, which may import by reference the provisions of other enactments.<sup>36</sup> Given the lack of legislative authorization for service *ex juris* in the *Competition Act* itself, the only other source to consider in the context of a competition offence would be the *Criminal Code* itself, rules of practice made pursuant to section 482 of the *Criminal Code*, or perhaps, the Federal Court Act or Rules.

As the B.C. Court of Appeal observed, "There are no express provisions in the *Criminal Code* ... relating to service out of the jurisdiction".<sup>37</sup> The B.C. Court of Appeal also noted that there were no express provisions for service out of the jurisdiction in its rules of court, either. The rules to which the B.C. Court of Appeal was referring are rules authorized under section 482 of the *Criminal Code*. Section 482 gives power to the criminal courts to make rules of court to apply to any "prosecution, proceeding, action or appeal" within the jurisdiction of those courts, so long as those rules are not inconsistent with the *Criminal Code* or any other federal statute.

In Ontario, the *Criminal Proceedings Rules* made pursuant to section 482 of the *Criminal Code* are applicable to criminal proceedings in Ontario courts. The *Criminal Proceedings Rules* were proclaimed in force on May 11, 1992. There is no provision for service *ex juris* under those *Rules*.

The introduction to the *Criminal Proceedings Rules* states that prior to their enactment, criminal lawyers looked to the civil rules for procedural guidance. The Ontario *Rules of Civil Practice* do provide in R. 17 for service outside Ontario. However, the *Criminal Proceedings Rules* state that they are a complete code and that where a rule does not exist, one is to act by analogy to the existing (criminal) rules. Thus, there is no basis to assert that service *ex juris* would be authorized or even appropriate by analogy to the *Rules of Civil Procedure*.

Although the Federal Court of Canada has jurisdiction, under subsection 73(1) of the *Competition Act*, to sit as a superior court of criminal jurisdiction and try an offence under section 45 of the *Competition Act*, it has not made any rules of criminal practice pursuant to

<sup>35</sup> *Re Shulman, supra* at 591.

<sup>36</sup> *R. v. Smith, supra* at para. 12.

<sup>37</sup> *R. v. Smith, supra* at para. 13.

section 482 of the *Criminal Code*. (It may not, in any event, be authorized to do so by the particular language of section 482.) It is perhaps arguable that the federal court sitting under subsection 73(1) as a superior court of criminal jurisdiction could, if sitting in Ontario, apply the Ontario *Criminal Proceedings Rules*, but since those rules lack a provision for service *ex juris*, the federal court would have no greater jurisdiction in this regard than an Ontario superior court of criminal jurisdiction.

The *Civil Rules of Practice* for the Federal Court of Canada do provide in R. 307 that "a party to a proceeding may, without a court order, be served outside Canada with a certified copy of the Statement of Claim". However, there is no apparent basis for these civil rules to apply when the Federal Court is sitting as a superior court of criminal jurisdiction to hear a charge of an indictable offence. As the Supreme Court of Canada stated in *R. v. Libman*, "[t]he primary basis of criminal jurisdiction is territorial"<sup>38</sup> and in this respect criminal law cannot be compared with civil law.

In summary, it is a fundamental principle that no court can proceed in the absence of a party to a proceeding unless that party has been given valid notice of the proceeding (or, by an enactment, there is power to dispense with notice). This is the foundation of the common law tradition not to try persons *in absentia*.<sup>39</sup> It is also clear that service *ex juris* of criminal process is not valid unless authorized by statute. No such authorizing statutory provision exists in the *Criminal Code* (or, for that matter, in the *Competition Act*) or in the rules of practice that would apply to the prosecution of a conspiracy under section 45 of the *Competition Act*.

Unless a foreign corporation and its employees were validly served, a Canadian court would have no jurisdiction to proceed in their absence, even though it may have jurisdiction over the subject matter of the complaint (i.e. a conspiracy under section 45 of the *Competition Act*).<sup>40</sup> In the circumstances, they could only be validly served with Canadian criminal process in Canada, pursuant to section 470 of the *Criminal Code*. Where a foreign corporation does not carry on business in Canada, there is little prospect of valid service on that corporation under existing law. While Parliament could legislate to permit service *ex juris*, a formal arrangement would presumably be required between Canada and the country where service was to be effected, in order not to offend the principle of international comity. In other words, service *ex juris* would require both legislative change and political goodwill, neither of which is easy to secure quickly.

The federal Crown has managed to avoid the jurisdictional problems raised by service of criminal process in a number of section 45 conspiracy cases that have been settled on the basis of an agreed statement of facts. The accused foreign corporations entering these settlements effectively concede that they have attorned to the jurisdiction of the Canadian courts on the charge of conspiracy under the *Competition Act*. Examples of the wording used in an agreed statement of facts can be found in settlement documents filed with the court in the food and feed additives inquiry. Typically, the parties will agree that: "[The accused foreign corporation] has appeared and submitted to the jurisdiction of the Canadian Courts solely for the purposes of pleading guilty herein. This has saved considerable costs of further

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<sup>38</sup> *Libman*, *supra* at para. 11.

<sup>39</sup> *R v. Smith*, *supra* at para. 15.

<sup>40</sup> *Re Shulman*, *supra* at p. 591.

investigation and trial which would otherwise have been incurred by the Government of Canada.”

In the absence of the voluntary submission by a foreign corporation with no business presence in Canada, to the jurisdiction of the Canadian courts, the federal Crown might well find its hands tied early in a prosecution under section 45. Certainly the Crown appears to concede the magnitude of its jurisdictional problems when it encourages the court to approve a settlement, in part on the basis that the attainment to Canadian jurisdiction of the foreign corporation has saved the federal government considerable costs - costs that might otherwise be spent litigating jurisdictional issues.

### **Mutual Legal Assistance Treaties**

Mutual legal assistance treaties often contain provisions whereby each signatory agrees to serve legal documents for the other in its own sovereign territory. Could such provisions in a treaty assist the federal Crown in overcoming the restrictions on service *ex juris* and effecting valid service of criminal process on a foreign accused for the purpose of giving a Canadian court jurisdiction to proceed against that accused?

The short answer is no. A mutual legal assistance treaty would not override the Canadian common law respecting service *ex juris* unless such a change in the law was enacted by statute in Canada. An international treaty is a contract between sovereign states that is administered by the executive branch of government and its officials.<sup>41</sup> To be enforceable as part of the domestic law, a treaty must be implemented by legislation. Thus, the common law, which is part of the domestic law, would prevail over a treaty to the extent that the two were inconsistent and the inconsistent treaty provisions had not been implemented by legislation.

The Canadian statute that implements mutual legal assistance treaties once they come into force is the *Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c. 30 (4<sup>th</sup> Supp.) (“*Mutual Legal Assistance Act*”). The *Mutual Legal Assistance Act*, came into force in 1988 and was amended substantially in 1999 by the new *Extradition Act*, S.C. 1999, c. 18 (“*Extradition Act*”).

The purpose of the *Mutual Legal Assistance Act* is to facilitate the battle against international crime by enabling Canada and the foreign states with which it has mutual legal assistance treaties to obtain evidence from one another’s respective jurisdictions, for use in criminal investigations and prosecutions within each country’s own territory.<sup>42</sup> It does not contain any provision indicating that it has changed the law regarding the territorial limits of jurisdiction and the invalidity of service *ex juris* in criminal matters by Canadian authorities. In fact, the *Mutual Legal Assistance Act* does not contemplate service of criminal process on an accused at all. Even if one were to argue that it does, the problem of Canadian courts acquiring jurisdiction over the person of a foreign accused would not be solved.

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<sup>41</sup> *McVey (Re); McVey v. United States of America*, [1992] 3 S.C.R. 475; [1992] S.C.J. No. 95.

<sup>42</sup> *Canada (A.G.) v. China (Republic)* (1996), 113 C.C.C. (3d) 470 (N.S.C.A.) at 471; *Russian Federation v. Pokidyshev* (1999), 138 C.C.C. (3d) 321 (Ont. C.A.) at 327-328.

### Relationship between Mutual Legal Assistance Treaties and Canadian Common Law

International treaties typically contemplate that one state will serve documents within its own territorial jurisdiction on behalf of the other state. This is because, absent a specific formal arrangement between the two, one sovereign state has no legal authority within the sovereign territory of another state. In *Terry v. The Queen*, McLachlin J. stressed that,

*The practice of co-operation between police of different countries does not make the law of one country applicable in the other country. Bilateral Mutual Legal Assistance Treaties negotiated under the authority of the Mutual Legal Assistance in Criminal Matters Act stipulate that the actions requested of the assisting state shall be undertaken in accordance with its own laws, not those of the requesting state....*

*The gathering of evidence by these foreign officers or agency is subject to the rules of that country and no other. Consequently, a co-operative investigation involving law enforcement agencies of Canada and the United States will be governed by the laws of the jurisdiction in which the activity is undertaken.*

*The sovereign authority of Canada ends with the sending of the request for assistance.*<sup>43</sup>

Service of documents, whether they are criminal process served upon an accused, or notice to a potential witness, would be a matter of foreign jurisdiction, and the fact that foreign authorities had served a document in accordance with their own jurisdictional authority would not, in spite of a treaty, somehow effect a transfer of jurisdiction over the result of the service of process to Canadian authorities. That would be a matter requiring legislative change in Canada, as explained above. The *Mutual Legal Assistance Act* would not support Canadian jurisdiction over an accused served with criminal process in a foreign jurisdiction by authorities there.

### **Extradition**

Extradition involves the surrender by one state, at the request of another, of a person within its jurisdiction who is accused or has been convicted of a crime committed within the jurisdiction of another state. Under international law, states have no obligation to give up fugitives unless bound to do so by treaty obligations.<sup>44</sup>

Extradition to and from Canada is governed by the *Extradition Act*. The *Extradition Act* provides, *inter alia*, for extradition from Canada to its extradition partners and for the provisional arrest of persons in Canada at the request of extradition partners.

Extradition of a foreign corporation is not contemplated by this legislation and it is difficult to conceive how it could be possible in any event. There is, however, a risk that employees of a foreign corporation could be extradited to face charges in Canada of conspiracy under section 45. This would depend on the nature of any existing extradition agreements between Canada and a foreign country where the employees were found. For the purposes of discussion, the following paragraphs assume that foreign country is the United States.

<sup>43</sup> *Terry v. The Queen*, *supra* at p. 516.

<sup>44</sup> La Forest, A.W., *Extradition To and From Canada*, 3<sup>rd</sup> Ed. (Toronto: Canada Law Book, 1991) at pp. 15-16.

Canada and the United States are parties to an extradition treaty. It is the "*Treaty on Extradition Between the Government of Canada and the Government of the United States of America*", as amended by Protocol on January 11, 1988 (the "Treaty").

The Treaty is part of the law of Canada pursuant to the *Extradition Act*. However, the *Extradition Act* provides principally for the surrender, to countries with which Canada has an extradition treaty, of fugitives in Canada who have been accused or convicted of crimes within the scope of the treaty. The *Extradition Act* contains only a few provisions in Part 3 - which are more procedural than substantive - respecting extradition to Canada. Whether the United States would extradite accused persons to Canada would be principally a matter of American law, and the terms of the Treaty itself. However, a few arguments might be made against extradition based on the terms of the extradition treaty which exists between Canada and the United States, principally those respecting the jurisdiction in which the alleged offence occurred. These would likely be the same kind of arguments that one would make to dispute Canada's jurisdiction over the offence.

#### Relevant Provisions of the Treaty

Article 1 of the Treaty provides:

*Each Contracting Party agrees to extradite to the other, in the circumstances and subject to the conditions described in this Treaty, persons found in its territory who have been charged with, or convicted of, any of the offenses covered by Article 2 of this Treaty committed within the territory of the other, or outside thereof under the conditions specified in Article 3(3) of this Treaty.*

There are several points to consider in respect of Article 1. First, it applies to "persons found in [the requested state's] territory."<sup>45</sup>

Second, it applies to persons charged with offences covered by Article 2. Article 2(1) provides (Article 2(2 and 3) not being relevant for the purposes of this discussion):

*(1) Extradition shall be granted for conduct which constitutes an offense punishable by the laws of both Contracting Parties by imprisonment or other form of detention for a term exceeding one year or any greater punishment.*

Thus for extradition from the United States to Canada pursuant to the Treaty, the conduct which constitutes in Canada a conspiracy under section 45 of the *Competition Act* must also constitute an offence under American law (regardless of whether the two offences are called by the same name in both countries). Moreover, it must be an offence in both Canada and the United States that is punishable by imprisonment or other form of detention exceeding one year - or any greater punishment.

Whether facts that establish a Canadian conspiracy would also constitute an offence in the United States is a matter of American law. With respect to punishment in Canada, an offence under section 45 is punishable by imprisonment for up to 5 years, or a fine of up to \$10 million.

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<sup>45</sup> Also see Article 12 which contemplates extradition to a "third state", in addition to the requested and requesting states. This also supports the conclusion that extradition is not restricted to U.S. citizens or residents, but applies to anyone found within the territory of the U.S.

While a sentence of less than one year could conceivably be imposed under section 45, thereby falling outside the terms of Article 2(1), Canadian authorities seeking extradition for conspiracy would likely have to assert, with an extradition request, that punishment would exceed one year's imprisonment in the circumstances. It is certainly possible that a request for extradition from the United States could founder under the terms of Article 2(1) on the basis of an argument that the punishment for a competition/anti-trust conspiracy in the two countries does not meet the requirements of that provision.

Assuming Article 2 were satisfied, then under Article 1, an American court would also have to conclude at an extradition hearing that the conspiracy was "committed within the territory" of Canada or outside thereof under the conditions specified in Article 3(3) (now Article 3(2), following amendment by the Protocol).

Article 3(1) provides that "territory" includes "all territory under the jurisdiction of the [requesting party]". Whether an American court would consider that a world-wide conspiracy alleged against a group of foreign corporations falls within the scope of Canadian jurisdiction by virtue of having been committed within Canadian territory would be a matter of American law.

Article 3(2) provides:

*(2) When the offense for which extradition is requested was committed outside the territory of the requesting State, the executive or other appropriate authority of the requested State shall grant extradition if the laws of the requested State provide for jurisdiction over such an offense committed in similar circumstances. If the laws in the requested State do not so provide, the executive authority in the requested State may, in its discretion, grant extradition.*

Jurisdiction under Article 3(2) would also be a matter of American law, or policy if the matter were left to executive discretion.

Article 4 of the Treaty contains certain exclusions, the first of which could conceivably apply depending on the timing of an extradition request by Canada to the United States. Article 4(1)(i) provides:

*(1) Extradition shall not be granted in any of the following circumstances:*

*(i) When the person whose surrender is sought is being proceeded against, or has been tried and discharged or punished in the territory of the requested State for the offense for which his extradition is requested.*

Thus if the United States were to prosecute the employees of a foreign corporation first, for participation in the same conspiracy as that with which Canada sought to charge them, Article 4(1)(i) could be a barrier to their extradition to Canada.

Article 8 of the Treaty confirms that whether or not extradition will be granted is a matter of the law of the requested state, in this case the United States.

Article 9 lists certain procedural requirements for an extradition request. In particular, pursuant to Article 9(3), Canada's request for extradition would have to include a Canadian warrant for the arrest of the employees and such evidence as would be sufficient to justify the arrest and

committal for trial of the employees in the United States, if the conspiracy had been committed there.

Article 10(1) deals with the sufficiency of the evidence required under Article 9(3). It provides:

*(1) Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found, either to justify his committal for trial if the offense of which he is accused had been committed in its territory or to prove that he is the identical person convicted by the courts of the requesting State.*

Thus whether Canada could obtain extradition would depend on whether an American court found the evidence submitted by Canada sufficient according to American law.

Finally, it is conceivable that under Article 17b, the United States government could decide that it too has jurisdiction over the foreign employees in respect of the same conspiracy offence, and that the United States ought to keep and prosecute them there rather than extraditing them to Canada. In that event, Article 4(1)(i) would then apply to preclude subsequent extradition to Canada.

#### Procedure

From a procedural point of view, Canada would have to send an extradition requisition for surrender from the United States, accompanied by a Canadian warrant for the arrest of the foreign corporation's employees and, as noted above, sufficient evidence as would justify in an American court the committal of the employees to trial if the offence had been committed there.<sup>46</sup> Arrest of the employees would be conducted by American authorities pursuant to an American warrant and would be governed by American law. As discussed above, Canadian authorities do not have jurisdiction to serve criminal process or conduct an arrest in a foreign state.<sup>47</sup>

A final point worth noting with respect to extradition, and jurisdiction over employees of a foreign corporation, is that under the *Extradition Act*, Canada may enter a specific extradition arrangement with a country with which it does not otherwise have an extradition treaty, for the purpose of dealing with a particular case.<sup>48</sup> While this may resolve a problem with jurisdiction over the person in a particular case, it will not resolve any problems that may exist with jurisdiction over the offence charged.

#### Conclusion

Competition counsel representing foreign corporations with no business presence in Canada need to consider carefully the various jurisdiction issues that arise on a charge of conspiracy under subsection 45(1) of the *Competition Act*. Where the alleged conspiracy is international in scope, counsel should analyse whether or not there is a sufficient connection between the alleged wrongdoing and Canada for the Canadian courts to assert jurisdiction over the offence. Counsel must also consider the procedural jurisdiction issues associated with service of criminal

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<sup>46</sup> *Extradition To and From Canada, supra* at p. 31.

<sup>47</sup> *Extradition To and From Canada, supra* at p. 225.

<sup>48</sup> *Extradition Act*, s. 10.

process and extradition, before advising their foreign clients whether they are subject to the process of the Canadian courts. Counsel ought not to assume that a mutual legal assistance treaty will assist the Crown in overcoming any jurisdictional hurdles it may face in a prosecution under subsection 45(1). Until the courts have an opportunity to rule on an international conspiracy charge against foreign corporations, many jurisdiction issues will remain open to challenge by both sides.

September, 2000