

## Increasing the Bite Behind the Bark: Extradition in Antitrust Cases

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The long arm of enforcers in the United States and elsewhere seems set to get longer with the increased use of extradition in cartel cases. Recent trans-Atlantic developments signal that extradition, or the threat of extradition, may become more common internationally. This will have important practical and legal consequences for business people with cartel exposure and for those who advise them. Although the prospect of extradition is real and growing, the most important impact of the latest developments may be the pressure they place on international executives to submit voluntarily to the jurisdiction of U.S. authorities.

There is growing international recognition that punishing individuals is an important part of effective cartel enforcement. Australia, Canada, Ireland, Israel, Japan, Korea, the UK, and the United States have, or are in the process of adopting, laws providing for criminal sanctions against individuals. Although the United States in particular has had remarkable success prosecuting foreign corporations in international cases, extradition—the ability of enforcers to get their hands on individuals outside their jurisdictions—is playing a more important role as enforcers target individuals in the fight against international cartels.

In most common law jurisdictions, there is a strong presumption that personal criminal jurisdiction lies only over a person who is physically present within the territory of the court, regardless of whether subject-matter jurisdiction exists. While jurisdiction has historically been established through personal service of process, other techniques, such as extradition, can be used by authorities to reach non-resident individuals—and perhaps even corporations. Extradition is the process by which one nation, usually (but not always<sup>1</sup>) by way of bilateral treaty, requests and obtains from another nation the surrender of an individual suspected or convicted of criminal wrongdoing. Extradition arrangements also exist in the form of multilateral treaties and conventions.

The number of extradition treaties in force in the world is staggering—virtually every country has multiple bilateral treaties. For example, the United States has treaties with well over 100 countries.<sup>2</sup> Canada has 50 bilateral treaties in force and is a party to 12 multilateral treaties con-

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<sup>1</sup> For example, apart from the United States or South Korea (the only countries with which Japan has specific extradition treaties), Japan will extradite persons other than Japanese nationals provided that the requirements of its legislation are satisfied. Toubou Hanzainin Hikiwatashi Hou [Extradition Act], Law No. 89 of 1953, as amended) article 3 item 2. Canada's Extradition Act, S.C. 1999, c. 18, which implements the London Scheme for Extradition within the Commonwealth (incorporating the amendments agreed at Kingstown in November 2002), see *infra* note 11, designates many Commonwealth countries as extradition partners without requiring a specific bilateral treaty to exist between the two countries. This, however, does not mean there is necessarily reciprocity between the two countries, just that there is a process by which the Government of Canada can make a request for the extradition of an individual located in the foreign jurisdiction. The role of reciprocity is shown in section 23 of the scheme, which provides that nothing in the scheme shall prevent the application of the scheme with modifications by one country in relation to another country that has not brought the scheme fully into effect.

<sup>2</sup> See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE OFFICE OF INTERNATIONAL AFFAIRS' ROLE IN THE INTERNATIONAL EXTRADITION OF FUGITIVES (Mar. 2002), available at <http://www.usdoj.gov/oig/reports/OBD/e0208/intro.htm>.

taining mutual legal assistance and extradition provisions.<sup>3</sup> The UK also has bilateral extradition treaties with roughly 50 countries.<sup>4</sup> Many EU Member States have similar numbers.

Extradition treaties usually adopt either an enumerative method or an eliminative method.<sup>5</sup> A treaty that follows the enumerative, or “list,” method sets out a list of the specific crimes for which extradition will be granted. The more modern eliminative, or “no-list,” method defines extraditable offenses in terms of their penal consequences according to the laws of the two countries by a minimum standard of severity.<sup>6</sup>

Both methods normally observe the principle of double criminality. This “requires that an act shall not be extraditable unless it constitutes a crime according to the laws of both the requesting and the requested States.”<sup>7</sup> The punishment required to create an extraditable offense is generally at least one-year imprisonment in both countries. However, this can and occasionally does vary.<sup>8</sup> For example, Canada’s Extradition Act<sup>9</sup> provides for extradition where the offense is punishable by imprisonment of at least two years or more in both countries, unless the relevant extradition treaty specifies otherwise. The Canada-U.S. treaty specifies that an offense will be considered extraditable if the punishment in both countries is imprisonment for a term exceeding one year.<sup>10</sup>

In the Commonwealth context, the London Scheme for Extradition Within the Commonwealth<sup>11</sup> is designed to increase cooperation in the administration of criminal justice. It provides a guideline for extradition within the Commonwealth arrangements that, among other things, simplifies provisions dealing with double criminality and includes provisions dealing with extraterritorial offenses.

Foreshadowing the approach of the English courts in the *Norris Case*, discussed further below, the scheme specifically provides that it shall not matter whether the elements of the offense differ in two countries, as an offense will be looked at in its totality. Under the scheme, extraditable

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<sup>3</sup> See [http://www.rcmp-grc.gc.ca/intpolicing/centralauth\\_e.htm](http://www.rcmp-grc.gc.ca/intpolicing/centralauth_e.htm).

<sup>4</sup> UK FOREIGN & COMMONWEALTH OFFICE, BILATERAL EXTRADITION TREATIES, available at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1044360289117>.

<sup>5</sup> See UNITED NATIONS CRIME AND JUSTICE INFORMATION NETWORK, INTRODUCTION TO THE DATABASE ON BILATERAL AGREEMENTS ON EXTRADITION, JUDICIAL/LEGAL ASSISTANCE, CONTROL OF NARCOTIC DRUGS, AND PRISONER TRANSFER BY COUNTRY (June 1996), available at <http://www.uncjin.org/Laws/extradit/intro.pdf>.

<sup>6</sup> I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 134 (1971).

<sup>7</sup> *Id.* at 137.

<sup>8</sup> In Japan, “double criminality” is also required. Pursuant to article 2 items 3 and 4 of the Toubou Hanzainin Hikiwatashi Hou [Extradition Act], Japan cannot extradite an individual when the offense is not punishable by imprisonment of three years or more in either Japan or the requesting country. In other words, the offense needs to be punishable by imprisonment of three years or more in both Japan and the requesting country in order for Japan to extradite.

<sup>9</sup> Extradition Act, S.C. 1999, c. 18.

<sup>10</sup> Protocol Amending the Treaty on Extradition between the United States of America and Canada, Jan. 11, 1988, U.S.-Can., art. 1, 27 I.L.M. 422 (amending the Treaty on Extradition, Dec. 3, 1971, U.S.-Can., art. 2, 27 U.S.T. 983).

<sup>11</sup> London Scheme for Extradition within the Commonwealth (incorporating the amendments agreed at Kingstown in November 2002), formerly known as Commonwealth Scheme on the Rendition of Fugitive Offenders, adopted in 1966 and last amended in November 2002 at the Commonwealth Law Ministers’ meeting at Kingstown, St. Vincent and the Grenadines, available at [http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/%7B56F55E5D-1882-4421-9CC1-71634DF17331%7D\\_London\\_Scheme.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B56F55E5D-1882-4421-9CC1-71634DF17331%7D_London_Scheme.pdf). Not a formal treaty, the Scheme contains guidelines to be implemented in the extradition laws and agreements of Commonwealth countries. See also *Excerpts from the Communiqué of Commonwealth Law Ministers’ Meeting held in Kingstown, St Vincent and the Grenadines*, November 2002, COMMONWEALTH LEGAL ASSISTANCE NEWS (CRIMINAL LAW SECTION OF THE COMMONWEALTH SECRETARIAT), No. 51, Feb. 2003, available at [http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/%7B0B76D2D1-D641-4E1C-A4EC-BA29CA0414F8%7D\\_clan%2051.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B0B76D2D1-D641-4E1C-A4EC-BA29CA0414F8%7D_clan%2051.pdf).

conduct as between Commonwealth countries is an offense punishable by at least two years imprisonment, although nothing in the scheme prevents Commonwealth countries from making alternative provisions.<sup>12</sup> So, for example, under the UK Extradition Act 2003,<sup>13</sup> for Commonwealth countries, such as Canada, Australia, New Zealand, and South Africa, extraditable conduct is defined as offenses punishable by one year in prison.<sup>14</sup>

Legislation enacted in each country allows for the implementation of the scheme, without any requirement for further instruments, such as a treaty between the countries. The scheme has been implemented by legislation in most Commonwealth countries. Because much of the legislation was enacted some time ago, however, there has been some push for member countries to review their domestic laws for extradition to determine if they are sufficient to implement the scheme fully.<sup>15</sup>

### The Canada-U.S. Experience: Extraditing to Canada

The Canada-United States Extradition Treaty<sup>16</sup> allows each country to request from the other the extradition of individuals who are charged with, or have been convicted of, an offense within the jurisdiction of the requesting state. This enables each country to establish personal jurisdiction over individuals who may be found in the other country, when the two conditions standard to extradition treaties are met:

- The principle of double criminality is satisfied; that is, the conduct in question must be criminal in both countries. (It is the *conduct*, not the *name of the offense*, that is relevant.)<sup>17</sup>
- In addition, extradition will be granted only for offenses punishable by imprisonment of more than one year.

The current treaty adopts the “no-list” approach, but the double criminality and the minimum penalty requirements appear to be met for hard-core cartel offenses under both the Sherman Act and the Competition Act. This is certainly the view of the Canadian Competition Bureau, and there is supportive case law.<sup>18</sup> Interestingly, although extradition has been invoked on occasion in competition cases by both Canada and the United States, matters have not yet proceeded to the stage of litigation or judicial decision in either country.

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<sup>12</sup> *Id.* art. 23.

<sup>13</sup> Extradition Act, 2003, c. 41 (Eng.).

<sup>14</sup> *Id.* §§ 137 & 138.

<sup>15</sup> COMMONWEALTH SECRETARIAT, REPORT OF THE COMMONWEALTH COMMITTEE ON TERRORISM (CCT): COMMONWEALTH PLAN OF ACTION (2002), available at <http://www.thecommonwealth.org/Templates/Internal.asp?NodelD=35145>.

<sup>16</sup> Treaty on Extradition, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 983 [hereinafter *Canada-United States Extradition Treaty*].

<sup>17</sup> The concept of double criminality is captured in Article 2 of the *Canada-United States Extradition Treaty*, which provides: “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.”

<sup>18</sup> “In cartel matters, section 45 of the *Competition Act* corresponds with section 1 of the *Sherman Act*. For the purposes of double criminality, by analogy, reference can be made to the decision in *Falconbridge* [ . . . ] to support the appropriateness of extradition in respect of cartel conduct.” See Denyse Mackenzie, Senior Deputy Commissioner, Criminal Matters Branch, Competition Bureau, Canada, International Cartel Enforcement: Enforcers Sans Frontières, Address Before the Insight International Competition Law Conference 21 (May 16, 2006). Although *obiter dicta*, the Ontario Court of Appeal in *Falconbridge* (a decision under the Mutual Legal Assistance Treaty (MLAT)) concluded that section 45 of the Competition Act is the substantive counterpart of section 1 of the Sherman Act. See *Canada (Commissioner of Competition) v. Falconbridge Ltd.*, [2003] O.J. No. 1563 (Ont. C.A.). This was an appeal of a judgment of the Ontario Superior Court of Justice, Docket No. 11140, Oct. 1, 2002. Leave to appeal to the Supreme Court of Canada was denied. *Canada (Commissioner of Competition) v. Falconbridge Ltd.* [2003] S.C.C.A. No. 302, File No. 29845.

Two deceptive marketing cases involving extradition to Canada are as close as the two countries have come to formal extradition in the North American competition context, although extradition *from* Canada appears to have been under consideration in the *Disposable Plastic Dinnerware* case in the United States.<sup>19</sup>

In *Thomas Liquidation*,<sup>20</sup> deceptive marketing charges under the Competition Act were brought against parties resident in the United States as a result of claims they made to Canadians.<sup>21</sup> An extradition request was made on behalf of the Attorney General of Canada and an arrest warrant was issued in the United States, preparatory to the commencement of extradition proceedings. However, the American suspect waived his right to an extradition hearing and came to Canada to plead guilty to the offense. In fact, the individual did not plead in his personal capacity, but on behalf of the corporate accused.

The *Thomas Liquidation* outcome highlights several points: most notably that the threat of extradition can be used, in effect, to bring a nonresident corporate defendant within the jurisdiction of the enforcement authority. The extradition of a corporate employee does not automatically entail jurisdiction over the corporation because of the separate legal personality of the corporation.<sup>22</sup> However, under Canadian law, the presence of a senior executive (“manager, secretary or other executive officer”) can, in the right circumstances, be sufficient to establish jurisdiction over a company when that executive is present in Canada.<sup>23</sup> And in a closely held corporation, the threat of extradition against one of the executives or owners may be sufficient to procure agreement on the part of the corporation itself to come in and accept responsibility.

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<sup>19</sup> In a 1995 price-fixing case, two Canadians, among the seven individual defendants who pleaded guilty and received jail sentences from 4 to 21 months, were the first foreign executives ever to agree to serve time in U.S. prisons for violations of the Sherman Act. Pursuant to an MLAT request from the United States, and through execution of domestic search warrants, simultaneous raids took place on conspirators’ offices in Montreal, by the Royal Canadian Mounted Police, and in California, Massachusetts, and Minnesota, by the FBI. While there is no public reference to possible extradition, the risk of an extradition request may have been influential in the decisions of the Canadian defendants to go to the United States to plead guilty. See Press Release, U.S. Dept’t of Justice, Antitrust Division Breaks Price Fixing Conspiracy in Disposable Plastic Dinnerware Industry (June 9, 1994), available at [http://www.usdoj.gov/atr/public/press\\_releases/1994/211853.htm](http://www.usdoj.gov/atr/public/press_releases/1994/211853.htm).

<sup>20</sup> Press Release, Competition Bureau, Canada, Thomas Liquidation Inc. Fined \$130,000 for One Count of Misleading Advertising Under the Competition Act (Feb. 7, 1995), available at <http://cb-bc.gc.ca/epic/internet/incbbc.nsf/vwGeneratedInterE/ct00119e.html>.

<sup>21</sup> The other marketing case involves a U.S. extradition request against three Canadian citizens resident in Canada indicted in the United States for telemarketing fraud targeting American citizens. The individuals were arrested on extradition warrants in 2004 and ordered extradited. The case currently is under appeal and the individuals are in custody.

<sup>22</sup> Lower level employees may not represent the company in a role or capacity of sufficient seniority that would enable them to be served on behalf of the corporate entity itself, as a senior management role must be shown, if an individual is to be served on behalf of a corporation. They may be formally employed by a subsidiary of the primary corporate accused. Or the individual’s employment may be terminated, prior to execution of a warrant for their extradition, if they were sufficiently senior. There is also case law indicating that, for corporate service to be effective, the officer or employee who is in Canada must be shown to be present on the business of the company. While there does not appear to be any jurisprudence under the Criminal Code dealing with circumstances in which an executive officer is present in Canada, jurisprudence under Ontario’s Rules of Civil Procedure suggest that a representative of a foreign corporation will not properly be served in Canada unless its representative is in the country to carry on the business of the corporation. See *Santa Marina Shipping Co. v. Lunham & Moore Ltd.*, [1978] 18 O.R. (2d) 315 (Ont. H.C.J.).

<sup>23</sup> As noted, for corporate service to be effective, the officer or employee who is in Canada must be shown to be present on the business of the company. That representative premise seems unlikely in the case of a person who has been extradited to Canada exclusively for the purpose of his or her trial, or the execution of a sentence, for a specific cartel offense. However, where key individuals are exposed to a risk of extradition, it certainly increases the pressure to resolve, by agreement, both individual and corporate criminal liability. *Thomas Liquidation* demonstrates that compelling the attendance of a corporate representative by extradition may, in some situations, be all that is really required to reach the company.

Thus, the mere risk of extradition for a cartel offense will generate significant legal and practical pressure on both the company and on its senior individuals. It may be tactically important, as the *Thomas Liquidation* case shows, for the enforcement agencies to initiate extradition to bring that pressure to bear.<sup>24</sup>

### The Recent UK-U.S. Experience: Extraditing to the United States

In 2003 the United States and the UK updated their extradition arrangements in the context of the fight against international terrorism, but the changes are also relevant in the fight against international cartels. The UK ratified and statutorily incorporated the terms of the new treaty into UK law through the Extradition Act 2003 the same year the treaty was negotiated. The U.S. Senate eventually ratified the treaty in September 2006, and it will likely become fully effective once signed by the President of the United States and after both governments exchange instruments of ratification.

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Under the Extradition Act 2003, the United States is listed as a “category 2” territory with which a fast-track extradition process may be implemented. While a dual criminality requirement remains, the Act effectively broadens the list of extraditable offenses by doing away with the old system and including any offense punishable under the laws of both territories by at least one year imprisonment. In the result, most white-collar financial crimes will be caught.<sup>25</sup>

Under the current treaty, the U.S. prosecutor has to outline the extraditable offense and provide information that would justify the issuance of a warrant for arrest in the UK. In other words, the *allegation* of an extraditable offense appears to be sufficient. Although UK requests for extradition from the United States still require a showing of “probable cause,” and thus the submission of some evidence, the UK authorities insist that the requirements in each country do not constitute a substantial difference in the evidentiary burden between the two countries.

### The Norris Case

The most notable antitrust extradition case to date involves Ian Norris—the first foreign national indicted under the Sherman Act ever to be ordered extradited to the United States (although an appeal is pending). Norris, the former CEO of Morgan Crucible, which, with its subsidiaries, was convicted for cartel offenses in the United States and Canada,<sup>26</sup> was indicted in the United States

<sup>24</sup> For the individual, of course, arrest on an extradition warrant in one’s own place of residence is only different in degree from serving a sentence in a foreign country. The very extended proceedings involving General Augusto Pinochet in the United Kingdom may substantiate that view, even though the eventual result in that case was rejection of the extradition proceedings. *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 3), [1999] 2 All E.R. 97. General Pinochet was under 24-hour armed guard in a rented house from October 1998 to January 2000.

<sup>25</sup> The first post-Extradition Act 2003 case that put issue of extradition for white-collar crime into the public spotlight involved a U.S. request for the extradition of three UK bankers to face charges in the United States for Enron fraud-related charges. While not a cartel case, the *NatWest Three* case illustrates the UK’s willingness to respond favorably to extradition requests from the United States under the Extradition Act 2003. The extraditions were made in the face of very considerable public protests. See *Norris v. Government of the United States of America*, [2007] All E.R. (D) 199 (Jan.), available at <http://www.bailii.org/ew/cases/EWHC/Admin/2007/71.html>.

<sup>26</sup> See Press Release, Competition Bureau, Canada, Morgan Companies Fined \$1 Million for Obstruction and Price-Fixing (July 16, 2004), available at <http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02917e.html>; US. Dep’t of Justice Antitrust Case Filings, *United States v. Morganite, Inc. and The Morgan Crucible Company plc*, available at <http://www.usdoj.gov/atr/cases/morganite0.htm>. In Europe, however, Morgan Crucible was one of the first companies to be granted full immunity from fines. See Press Release, EUROPA, Commission Fines Five Companies in Carbon and Graphite Products Cartel, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/03/1651&format=HTML&aged=1&language=EN&guiLanguage=en>.

on charges of price fixing and for allegedly orchestrating a conspiracy to obstruct justice, tamper with witnesses, and corruptly persuade others to destroy documents.

The crux of the *Norris* case is whether the price-fixing and obstruction of justice offenses he is charged with in the United States are “extradition offenses” for the purposes of the Extradition Act 2003. Dual criminality is directly at issue, because the conduct in question took place before the enactment of the Enterprise Act,<sup>27</sup> which explicitly criminalized price fixing in the UK in 2002.<sup>28</sup>

The Crown Prosecution Service (on behalf of the United States) has so far successfully circumvented this issue by characterizing Norris’s conduct as equivalent to a conspiracy to defraud, which was a criminal offense during the relevant period. The High Court ruled that an agreement to price-fix dishonestly comes within the scope of this common law offense. On the issue of dual criminality, the High Court did not accept Norris’s textual argument that, unlike the English concept of a conspiracy to defraud, dishonesty was not an essential element of section 1 of the Sherman Act. Extradition treaties, the High Court held, were to be given broad construction so as to enable them to serve their transnational purpose of bringing to justice those accused of serious crimes.<sup>29</sup>

The High Court went on to say the abolition of the evidentiary burden<sup>30</sup> by the Extradition Act 2003 meant that it was neither sensible nor necessary to expect a requesting state to ensure exact correspondence between the legal ingredients of the two offenses. It was sufficient to compare the conduct constituting the alleged offense in the United States with the offense that would have been established, if the conduct had occurred in the UK. The important point in this case was that Norris’s conduct in the UK at the relevant time could have constituted the common law offense of conspiracy to defraud—that was all that had to be shown for the dual criminality requirement to be satisfied.

In January 2007 Norris’s High Court appeal was dismissed. In March 2007, however, two High Court judges certified several issues as important points of law that were appropriate to be heard by the House of Lords. An appeal to the House of Lords can only be made on a point of law of general public importance and where it is agreed by the High Court that the point is one which should be considered by the House of Lords. The five issues certified by the High Court for the House of Lords to consider include several key issues of general application in the context of extradition for cartel offenses. One, obviously, is whether price fixing is equivalent to a conspiracy to defraud and, if so, whether it matches the U.S. offense of price fixing and satisfies the requirements of the Extradition Act 2003. A second issue is whether obstruction of or interference with U.S. administrative, investigative or judicial authorities is an extradition offense under the Extradition Act 2003, and third, whether the passage of time is a bar to Norris’s extradition, considering the U.S. authorities have disclosed no evidence. Although the High Court judges have certified these issues as being of general public importance, and although Norris’s lawyers have

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<sup>27</sup> Enterprise Act, 2002, c. 40 (Eng.).

<sup>28</sup> In the Pinochet case the House of Lords held that extradition will not be granted for offenses under foreign law that were criminalized in the UK after the conduct terminated. *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 3), [1999] 2 All E.R. 97.

<sup>29</sup> *Norris*, *supra* note 25, ¶ 123.

<sup>30</sup> Under the new regime it is no longer necessary to put before the court evidence sufficient to justify a committal for trial or a case to answer if the conduct constituting the offense had been committed in the UK. It is enough for the requesting state to identify the conduct and for the court to consider whether it would, if proved, have constituted an offense in the UK.

stated they will appeal to the House of Lords immediately, there is no guarantee that the House of Lords will accept the case. Most observers appear to think that the key legal issue for determination, if leave to appeal is granted, will be the characterization issue, that is, whether the common law offense of conspiracy to defraud is in law equivalent to section 1 of the Sherman Act.

A Canadian precedent may be instructive on this issue, not in the context of extradition, but as an indication of the relatively easy judicial acceptance of the equivalence between a classical cartel offense and fraud. In the *Canadian Dredging* case, *R. v. McNamara (No. 1)*<sup>31</sup> in 1981, 13 individuals and corporations were convicted on seven counts of conspiracy to defraud, under sections 338(1) and 423(1)(d) of the Criminal Code. The conduct in question related to dredging contracts between public authorities and the accused, where their bids were alleged to have been tendered on a collusive basis, with the low bidders including in their costs compensation to be paid to the “high bidders” or “non-bidders.” Such a bid-rigging conspiracy is indisputably one of the more common offenses under section 1 of the Sherman Act. Although bid rigging was equally clearly an offense under what is now section 4 of the Competition Act, the case was prosecuted as conspiracy to defraud, rather than bid rigging. The characterization of the offense was not considered in any of the appeal judgments, much less appealed, and, while the case ultimately went to the Supreme Court of Canada, the question at issue there was corporate criminal liability. There simply was no judicial question that the bid-rigging conspiracy might not constitute fraud. If the House of Lords does deal with the issue of characterization in the future, they may find the Canadian treatment of *McNamara* to be of interpretive help.

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### The Implications of *Norris*

*Norris* is significant for international cartel enforcement for at least two reasons. First, it appears to open the door to extradition in other cases involving U.S. antitrust offenses that occurred prior to the entry in force of the Enterprise Act. The position of former Christie’s Chairman Sir Anthony Tennant, a resident of the UK, may be a case in point. Tennant has so-far avoided trial in the United States for his involvement in the Christie’s/Sotheby’s price-fixing case, although his counterpart at Sotheby’s, Alfred Taubman, was sentenced to a year and a day in prison, on conviction under the Sherman Act.<sup>32</sup> The determination that dual criminality might be established using conspiracy to defraud could, in the abstract, lead to a re-evaluation of the Tennant case. As a practical matter, U.S. limitation periods will often limit the extent to which there will be extradition for old crimes, at least where the individuals have not previously been indicted in the United States.<sup>33</sup> Nevertheless, the threat remains.

Second, the *Norris* case may also open the door to extradition for cartel offenses from countries—at least those with a non-list approach to extradition like Commonwealth members—that have not yet criminalized price fixing for individuals but do, like the UK, have a conspiracy to

<sup>31</sup> [1981] 56 C.C.C. (2d) 193, *aff’d sub nom.* *R. v. Canadian Dredge & Dock Co.*, 9 O.A.C. 321, 59 N.R. 241, [1985] 1 S.C.R. 66.

<sup>32</sup> See Press Release, U.S. Dep’t of Justice, Former Chairmen of Sotheby’s and Christie’s Auction Houses Indicted in International Price-Fixing Conspiracy (May 2, 2001), available at <http://www.usdoj.gov/opa/pr/2001/May/199at.htm>. In addition to serving his one year and a day prison sentence, Alfred Taubman had to pay a \$7.5 million fine for his role in a scheme between Sotheby’s auction house and Christie’s to fix the price of sellers’ commissions at fine art auctions.

<sup>33</sup> There is no statute of limitations for cartel offences in Canada, which also investigated the Christie’s/ Sotheby’s case, so Tennant and other international cartellists will face at least potential exposure to liability in Canada for the rest of their lives.

defraud offense.<sup>34</sup> This is because the case holds that the conduct underlying section 1 of the Sherman Act is sufficient to constitute conspiracy to defraud and hence satisfies the double criminality requirement in countries where there is no criminal liability for cartel offenses, as such. If the House of Lords accepts that position, (or declines an appeal), *Norris* may become a persuasive precedent in other common law jurisdictions. Extradition for competition offenses from and between Commonwealth countries may in particular be facilitated, given the broad policy underlying the London Scheme for Extradition within the Commonwealth.

### Travel Alerts in Extradition Cases

The willingness of the UK authorities to extradite for foreign cartel offenses, coupled with the increased risk that other, particularly Commonwealth, countries might follow the *Norris* precedent, brings significant new risks to traveling business people.

This risk stems partially from the invocation of Interpol “Red Notices” for assistance.<sup>35</sup> The U.S. authorities were the first to use these in antitrust cases, but Red Notices are commonplace in other criminal enforcement contexts, and other jurisdictions may well follow the lead of the United States. When a Red Notice is issued, people sought by a particular country (so called fugitives from justice) are placed on lookout lists, which are provided by Interpol to foreign enforcement authorities throughout the world. If a foreign police authority (for example, at an immigration check point) identifies a listed individual, Interpol then notifies the seeking country, which has the option either to request a provisional arrest as a matter of urgency or to make a formal extradition request. For example, a Japanese national who had been indicted in the United States in the *Nucleotides* case was arrested on a Red Notice after trying to enter India.<sup>36</sup> Although the Justice Department’s extradition efforts were ultimately unsuccessful, the Ajinomoto executive was held in custody in India for several months.

To date, what was considered as the weak link of the Red Notice system is that the ability to secure the transfer of the individual to the country that wants him or her is co-extensive with the scope of applicable extradition arrangements. Until now that principle had the effect of limiting extradition in cartel cases to a handful of countries. However, with the move to modern “no list” extradition treaties and cases like *Norris*, foreign executives will be well advised to avoid not just those jurisdictions with criminal cartel laws, but the many others that recognize conspiracy to defraud.

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<sup>34</sup> Similarly, numerous jurisdictions have obstruction offences, and the case reinforces the fact that extradition may also occur not for the core cartel conduct, but for related criminal conduct if obstruction is part of the charge. On this, see B. Byrne et al., *Extending the Long Arm of United States Antitrust Law: The Ian Norris Extradition Battle*, GLOBAL COMPETITION REV., May 2006, at 13, available at [http://www.cgsh.com/files/tbl\\_s47Details/FileUpload265/616/CGSH\\_Extending\\_the\\_long\\_arm.pdf](http://www.cgsh.com/files/tbl_s47Details/FileUpload265/616/CGSH_Extending_the_long_arm.pdf).

<sup>35</sup> James M. Griffin, Deputy Ass’t Atty. Gen., Antitrust Division, U.S. Dep’t of Justice, *The Modern Leniency Program After Ten Years—A Summary Overview of the Antitrust Division’s Criminal Enforcement Program*, Address before the Annual Meeting of the ABA Section of Antitrust Law (Aug. 2003), available at <http://www.usdoj.gov/atr/public/speeches/201477.htm>.

<sup>36</sup> See D. Singh, *Japanese Held*, TELEGRAPH (India), Dec. 22, 2002, available at [http://telegraphindia.com/1021222/asp/nation/story\\_1505528.asp](http://telegraphindia.com/1021222/asp/nation/story_1505528.asp); see also Scott D. Hammond, Director of Criminal Enforcement, Antitrust Div., U.S. Dep’t of Justice, *Charting New Waters in International Cartel Prosecutions*, Address before the Twentieth Annual National Institute of White Collar Crime of the ABA Criminal Justice Section (Mar. 2, 2006), available at <http://www.usdoj.gov/atr/public/speeches/7647.htm>.

## Conclusion

As with so many enforcement efforts, the threat of extradition and the Red Notice initiative are investments in psychology.<sup>37</sup> Apart from their deterrent effect, such enforcement efforts are designed to encourage voluntary cooperation by criminal participants.

A particular practical threat of extradition and Red Notices is the restrictions they place on travel freedom. International executives value and indeed, very frequently require, the ability to travel freely. The U.S. experiences in recent years demonstrates that these individuals often prefer to admit liability and accept punishment, even imprisonment, instead of becoming geographically isolated for many years. (It is also just plain bad for business if executives are effectively excluded from meeting their foreign customers and conducting business abroad.)<sup>38</sup>

Even where extradition would be difficult or potentially unavailable, the mere knowledge that one is a “person of interest” to police is liable to heighten personal anxiety. The increasingly real risk of delays at immigration or even temporary incarceration while a “hit” is investigated is, at the least, disquieting, for executives traveling on business or pleasure. Together with other elements of moral suasion, the threat of extradition is in that sense simply another element for offshore executives to consider in deciding whether they should face the music in the United States, Canada, or another of the growing number of jurisdictions that are adopting criminal cartel regimes. ●

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<sup>37</sup> Another such enforcement effort is the web of Mutual Legal Assistance Treaties entered into between the United States and many of its enforcement allies.

<sup>38</sup> Scott D. Hammond, Director of Criminal Enforcement, Antitrust Div., U.S. Dep’t of Justice, When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual’s Freedom?, Address before the Fifteenth Annual National Institute of White Collar Crime of the ABA Criminal Justice Section (Mar. 8, 2001), available at <http://www.usdoj.gov/atr/public/speeches/7647.htm>.