THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
The Voice of the Legal Profession
La voix de la profession juridique

December 5, 2003

REVISED

Gaston Jorré
Acting Commissioner of Competition
Competition Bureau
50 Victoria Street
Place du Portage
Gatineau, QC K1A 0C9

Philip Palmer
Senior General Counsel and Director
Justice Canada, Competition Law Division
50 Victoria Street
Place du Portage
Gatineau, QC K1A 0C9

Colleen Swords
Legal Advisor
Foreign Affairs and International Trade
125 Sussex Drive, Room C7-220
Ottawa, ON, K1A 0G2

Dear Sirs and Madam:

RE: ***Empagran* Decision**

We are writing on behalf of the National Competition Law Section and the National International Law Section of the Canadian Bar Association (the CBA Sections) to urge Canada's intervention in the *Empagran*[1] litigation in the United States. A petition for *certiorari* was filed in the United States Supreme Court on November 14, 2003 by Hoffman-La Roche. The CBA Sections believe that an intervention by the Canadian government is essential to protect important Canadian national interests.

In *Empagran*, the D.C. Court of Appeals ruled that foreign purchasers injured solely by the effect of an alleged global price-fixing conspiracy on their foreign transactions could bring suit in U.S. federal courts as long as the alleged conspiracy resulted in some harm to a party in the U.S. In effect, the

[1] *Empagran S.A. v. Hoffman-LaRoche Ltd.* (D.C. Circuit, January 17, 2003).

500 - 865 Carling, Ottawa, ONTARIO Canada K1S 5S8
Tel/Tél. : (613) 237-2925 Toll free/Sans frais : 1-800-267-8860 Fax/Télécop. : (613) 237-0185
Home Page/Page d'accueil : www.cba.org E-Mail/Courriel : info@cba.org

Empagran ruling may allow a foreign person to assert a private U.S. antitrust claim in U.S. courts provided the conduct giving rise to the foreign claim could also give rise to another claim that is related to U.S. commerce. This would allow, for example, a Canadian customer to sue a Canadian company in the U.S. for treble damages for injuries suffered entirely in Canada with respect to an alleged price-fixing conspiracy, so long as the alleged conspiracy involved some sales of the relevant product in the U.S., even if the value of the affected U.S. commerce were minimal. The Court based its decision in part on its belief that foreign competition authorities could not be relied on to enforce their antitrust laws in an appropriate manner.

The decision in *Empagran* is a high-water mark to the approach taken by the U.S. courts in respect of their jurisdiction in antitrust matters. We believe that the *Empagran* decision impinges on Canada's sovereign right to set its domestic competition policy, including the setting of appropriate remedial measures for Canadians who have been injured with respect to conduct taking place in Canada covered by the criminal provisions of the *Competition Act*. Moreover, the decision threatens the survival of the Bureau's immunity program, as companies will be discouraged from seeking immunity or leniency, thereby impairing enforcement of the Act. Finally, we believe that it is contrary to Canada's interest and the principles of international law for U.S. courts to assume jurisdiction unilaterally over damages suffered by Canadian claimants in Canada.

We believe it is important that the Canadian government take a strong position on this matter, for many of the same reasons expressed in the Canadian government's intervention in the U.S. in the *Bioproducts* case[2]. It is our understanding that the U.S. Department of Justice, as well as a number of other countries (including Australia, Germany and Ireland) are considering making similar arguments in the context of an intervention in this matter.

Undermining International Comity

As a matter of international law, the *Empagran* decision threatens the principle of international comity by severely undermining important interests, laws and polices of states. Antitrust enforcement mechanisms and civil remedies in Canada are materially different from those in the U.S. *Empagran* ignores this fact and subjects purely foreign conduct or transactions to the U.S. regime. The Court is effectively exporting substantive U.S. antitrust law to entirely foreign transactions, including in circumstances where the U.S. and Canada differ on what constitutes anticompetitive conduct or what is an appropriate remedy for that conduct. Such a precedent could have implications in areas not limited to antitrust law, such as securities regulation and international trade regulation.

Canada has made careful and deliberate policy choices in the Act regarding when and if antitrust violations give rise to private rights of action and what remedies are available in those actions. The *Empagran* decision will impose U.S. law, remedies and procedures in Canada, thereby overriding Canada's policy choices.

From a substantive perspective, Canada will be precluded from adopting a less restrictive law than the U.S. Canada and the U.S. differ in their legal tests for anticompetitive conduct (Canada has an "effects" based test while the U.S. provides for "per se" offences). Therefore, certain conduct that is legal in Canada (and therefore not actionable in this country) is illegal in the U.S. *Empagran* is problematic because it grants Canadians a private cause of action in the U.S. for Canadian conduct that may be legal and therefore not actionable in Canada. This will create a real reluctance to disclose the relevant conduct voluntarily to the foreign authorities.

---

[2] *Brief of Amicus Curiae The Government of Canada in Opposition to the Plaintiffs' Joint Motion to Compel Bioproducts to Produce Its Governmental Submissions*, In Re Vitamin Antitrust Litigation, United States District Court for the District of Columbia, Misc. No. 99-197 (TFH), May 8, 2002.

From a procedural perspective, *Empagran*, in conjunction with other recent decisions in the U.S. vitamins proceedings, lessens the procedural protections available to a Canadian litigant in a number of respects, including: (i) the protection of privileged communications is greater in Canada than in the U.S.; (ii) U.S. civil litigants are subjected to far wider and intrusive discovery; and (iii) the general "costs follow the event" rule does not apply in the U.S. For example, written plea agreements are commonly used to resolve investigations in Canada. These plea agreements may be less attractive to companies given that recent decisions in the U.S. have allowed U.S. plaintiffs access to written submissions made to Canadian authorities in the context of immunity/leniency negotiations, despite the fact that those documents would be exempt from production in Canadian proceedings on the grounds of settlement privilege.[3]

The choices which shape our law reflect uniquely *Canadian* values and are designed to maintain a balance between criminal and civil – as well as public and private – enforcement of antitrust laws. In short, the *Empagran* decision threatens to override Canada's legislation, and substitute U.S. values and legislative policy for the power to determine civil liability between Canadian parties for events occurring in Canada.

An Attack on Canada's Leniency Program

From Canada's perspective, this decision will impede Canada's sovereign power to control and settle antitrust cases within its own borders. Many of the Bureau's investigations of antitrust violations are brought to its attention through its immunity and leniency program. The success of these enforcement tools is dependent on the willingness of parties to come forward and voluntarily provide information and cooperation in exchange for immunity or a favourable settlement.

Empagran may seriously restrict the ability of Canada to discover and resolve antitrust violations. It will alter the factors under consideration by parties deciding whether to seek immunity. In short, *Empagran* creates the risk that the benefits of cooperating with Canadian authorities (either by way of an immunity/leniency application or by voluntarily entering a guilty plea) will be outweighed by the possibility of being sued in the U.S. for treble damages on global commerce (as opposed to just U.S. commerce).

By providing a strong incentive against voluntary disclosure and cooperation in foreign jurisdictions, *Empagran* will reduce the success of immunity and leniency programs, critical to effective antitrust enforcement, both in Canada and globally.

We thank you for the opportunity to express our views on this matter. The CBA Sections have established a task force to examine the issues raised by the *Empagran* decision. We would be pleased to meet with you to discuss these issues or to assist in any way we can. We encourage you to consider as soon as possible an intervention by the Canadian government in *Empagran.*

Yours truly,

Original copy signed by Tamra L. Thomson for Susan Boughs and Randall Hofley

Susan S. Boughs
Chair,
National Competition Law Section

Randall Hofley
Chair,
National International Law Section

---

[3] See *Revised Report and Recommendations of the Special Master Respecting Plaintiff's Joint Motion to Compel Bioproducts to Produce its Governmental Submissions,* In Re Vitamin Antitrust Litigation, United States District Court for the District of Columbia, Misc. No. 99-197 (TFH), September 17, 2002. This was a civil case concerning the Vitamin Antitrust Litigation