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Achieving Canada-United States Economic Competitiveness through Regulatory Convergence - A Common Cause Agency

Paul Meyer

David Fung

Timothy Boyle

Greg Wilkinson

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ACHIEVING CANADA-UNITED STATES ECONOMIC
COMPETITIVENESS THROUGH REGULATORY
CONVERGENCE – A COMMON CAUSE AGENDA

Session Chair – Paul Meyer
Canadian Speaker – David Fung
United States Speaker – Timothy Boyle
United States Speaker – Greg Wilkinson

INTRODUCTON

Paul Meyer

MR. MEYER: Good afternoon, everyone. My name is Paul Meyer. I am on the Advisory Board of the Canada-United States Law Institute.¹ I have only been on the Advisory Board for two years, but I go back a little further. In 1982, I was the Canada-United States Law Institute scholar at The University of Western Ontario.²

I work for a company called Towers Watson & Company, a \$3.5 billion publicly-traded company³ that was formed on January 1, 2010 by the merger of two of the world's largest employee benefit consulting firms, Towers, Perrin, Forster & Crosby and Watson Wyatt Worldwide.⁴

I am in-house counsel,⁵ and my responsibility is largely to manage litigation and litigation issues worldwide in the countries where we do business. We do business in, I believe, forty countries around the globe, including the United States and Canada.⁶

¹ See *Advisory Board*, CAN.-U.S. L. INST., http://cusli.org/about/advisory_board.html (last visited Oct. 1, 2010) (listing Paul Meyer as a member of the advisory board of the Canada-United States Law Institute).

² See *generally Curriculum and Exchange Program*, CAN.-U.S. L. INST., <http://cusli.org/curriculum/index.html> (last visited Oct. 1, 2011).

³ See *generally Management Consultants to Merge in All-Stock Deal*, N.Y. TIMES, June 28, 2009, at B3 (discussing the formation of Towers Watson).

⁴ See *Advisory Board*, *supra* note 1.

⁵ See CAN.-U.S. L. INST., 2010 CONFERENCE PROGRAM 10 (2010), available at http://cusli.org/conferences/annual/annual_2010/documentation/Final_program.pdf [hereinafter CONFERENCE PROGRAM].

⁶ See *Office Locations*, TOWERS WATSON, <http://www.towerswatson.com/about/OfficeLocations.asp?cid=1> (last visited Oct. 1, 2010) (listing Towers Watson office locations).

Towers Watson is not involved in international trade, but rather our clients are large corporations and governments that work across international borders.⁷ Two of our key service lines are tied to helping corporations and institutions manage their workforces on a global scale in terms of defining benefit plans.⁸

Before the merger, one of our predecessor firms Watson Wyatt provided actuarial or administrative services to twenty percent of the three hundred largest pension plans in the world.⁹ We also do consulting for group and health benefits and investments for pension funds.¹⁰

That takes me to my topic, which is international data privacy regulation, a crucial issue for companies who do international business.¹¹

Now I would like to introduce the rest of our panel. First we have Dr. David Fung, who is chairman and chief executive officer of the ACDEG Group in Vancouver, British Columbia.¹²

MR. FUNG: First of all, I am not a lawyer. I came here to learn about the issues that lawyers are discussing, because my job is to look into the future for where we should position our investment and capital. I would like to discuss some of the issues concerning how we are running international businesses and how the legal frameworks we use will have an impact on what we do and how we maintain our security and prosperity in North America.

I am on the Board of Canadian Manufacturers & Exporters.¹³ I am the immediate past chair.¹⁴ I am also on the Boards of Canadian Standards Association Group,¹⁵ the Canadian Green Chemistry & Engineering Network,¹⁶ and a number of transportation associations.¹⁷

⁷ *About Towers Watson*, TOWERS WATSON, <http://www.towerswatson.com/about/> (last visited Jan. 15, 2011).

⁸ *See Benefits*, TOWERS WATSON, <http://www.towerswatson.com/services/benefits/> (last visited Oct. 1, 2010) (describing benefit services offered by Towers Watson).

⁹ *See Babloo Ramamurthy*, Managing Dir., Watson Wyatt Europe, *Global Issues and Employee Benefits*, Special Address before the ASSOCHAM International Seminar (Mar. 7, 2006) (noting Watson Wyatt as the actuary to the greatest share of the 300 largest global pension funds with over twenty percent global market share).

¹⁰ *See Benefits*, *supra* note 8 (describing health and investment benefits services offered by Towers Watson).

¹¹ *See generally The Data Privacy Threat*, BLOOMBERG BUSINESSWEEK (June 11, 2010, 11:17 AM), http://www.businessweek.com/managing/content/jun2010/ca20100611_212333.htm.

¹² *See David T. Fung*, ASIA PAC. FOUND. CAN., <http://www.asiapacific.ca/about-us/senior-fellows/david-t-fung> (last visited Jan. 15, 2011).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

MR. MEYER: We also have Timothy Boyle, who is counsel of trade regulation at Eaton Corporation.¹⁸

MR. BOYLE: Good morning. I am going to talk about a number of areas of regulatory convergence related to my focus at Eaton Corporation here in Cleveland. We do business in about 175 countries and have about 70,000 employees.¹⁹ I am going to focus my comments on some fairly recent changes in Canadian competition law, and also in the area of anti-bribery and corruption. Lastly, I have some comments regarding securities law convergence.

MR. MEYER: Thank you. We also have Greg Wilkinson, who is vice president of public and government affairs at NOVA Chemicals.²⁰

MR. WILKINSON: Thank you. I am also not a lawyer. I work for a small company²¹ and am not an expert in any of these areas; in fact, I am not engaged in most of these areas on a regular basis. I think of myself as the customer for these processes.

It has been an interesting exercise for me to ponder how this system works for us, or against us, and how we influence it and engage in the process. I will talk a little bit more about that.

MR. MEYER: Thank you, Greg. My topic is on the disharmonies in managing international data privacy, particularly between the United States and Canada.²²

Now we will hear from Dr. Fung.

¹⁸ See CONFERENCE PROGRAM, *supra* note 5, at 11 (noting Timothy Boyle as Counsel of Trade Regulation at Eaton Corporation).

¹⁹ See *About Us*, EATON CORP., <http://www.eaton.com/EatonCom/OurCompany/AboutUs/index.htm> (last visited Oct. 1, 2010) (noting that Eaton has approximately 70,000 employees and does business in more than 150 countries).

²⁰ See News Release, Nova Chemicals, IPIC and NOVA Chemicals Announce Closing of Transaction (July 6, 2009), *available at* <http://www.novachem.com/appl/prelease/news.cfm?ID=453> (listing Greg Wilkinson as Vice President of Public and Government Affairs at NOVA Chemicals, 2003- June 2010); *see also* CONFERENCE PROGRAM, *supra* note 5, at 12.

²¹ See *generally About Us*, NOVA CHEMICALS, <http://www.novachemicals.com/index.cfm> (last visited Oct. 1, 2010).

²² Paul A. Meyer has chosen to submit a paper in lieu of his comments. His paper, which also pertains to disharmonies in managing international data privacy, is entitled, *Divergence and Convergence – of Data Privacy Rules – Myth and Reality* and is included, *infra*, note 191.

CANADIAN SPEAKER

*David Fung**

MR. FUNG: Thank you. Today I will be speaking about how businesses are running away from the legal framework that has been set up around the world. That is what we as business leaders do: we are risk seekers. If there is no risk, we are not interested because there is no money to be made.

On the other hand, we are not risk takers. We seek risk but then try to manage that risk. Our objective, of course, is to make money and make society better. To be innovators, we have to learn to fail frequently and fail fast. The worst thing to do is to have a project ninety-nine percent finished and then have to cut your losses. We survive by failing fast.

These are the characteristics of the different projects that we work on. As you can see from the slide, none of our businesses has only a single flag; each has multiple flags, meaning that our products are not produced in one country, but rather in many different countries.²³

As lawyers, what do you do to deal with my product when I take a piece of lumber from Canada that would cost \$1.00 if I were to sell it. However, I do not sell it, but ship it to China, and there it is cut up and made into finger-joint panels. Now the value has gone to \$5.00. But then again, I do not sell it, but ship it to Germany and make them into panels for kitchens or a living room. Now the value is forty dollars. What is the origin of that product? Is that a product of Germany when it gets into the consumers' hands because it is being finalized in Germany? Is it a product of China because the joint panel came from China? Or is it a product of Canada because the wood orig-

* Dr. David T. Fung is the chairman and CEO of the ACDEG Group of companies. He has partnerships in forest products, biomass energy, chemicals, electrical power cogeneration, agric-foods, marine equipment, OEM parts manufacturing, and packaging wastes recycling in North America, Europe, and Asia. He obtained his bachelor, master, and doctorate degrees in chemical engineering from McGill University and completed the senior business executive program at Queen's University. Dr. Fung is currently co-chair of the Members of the Canada Foundation for Innovation, vice chair of the Canada China Business Council, senior fellow of the Asia Pacific Foundation, and past president of the Canadian Society for Chemical Engineering. He is also a member of the national board of directors of Canadian Manufacturers & Exporters (immediate past chair), Canadian Standards Association Group (CSA), Canadian Green Chemistry & Engineering Network, International Science and Technology Partnership Canada (chair of China Subcommittee), CentrePort Canada Inc., and the Western Canadian Transportation System Strategy Group.

²³ David T. Fung, Presentation at the 2010 Canada-United States Law Institute Henry T. King, Jr. Annual Conference: Canada/USA Regulatory Convergence: Dare to Compete to Win 8 (Apr. 9, 2010), available at http://cusli.org/conferences/annual/annual_2010/presentations/Friday%20Session%20%20-%20Fung.pdf (showing slide of business with different flags from around the world).

inated from Canada and the process is managed by a Canadian company? I do not really know how trade lawyers deal with these issues.

We were one of the first companies that caused Export Development Canada to change its rules on insuring our United States receivables based on Canadian content, when we told them we had zero Canadian content. But we created substantial Canadian benefits because we were using the ports and railways of Canada, in addition to Canadian lawyers and bankers.²⁴ Also, when I made profits, I paid taxes in Canada.

We talked today about the issue of the oil sands, and I heard about legislation attempting to deal with the high carbon footprint of oil sands.²⁵ Those are things we as business leaders love to hear because it creates new risk. We are going to take wood from pine trees killed by beetles in British Columbia and turn it into wood pellets. We will then ship those pellets up to Fort McMurray and turn the oil sands into the greenest oil in the world; there will be no carbon emission at all using wood as the fuel to extract and refine the bitumen. That is the reason we love it when legislatures create new rules, because then we go and make more money.

As I mentioned earlier, when you harvest hardwood in North America, the yield is only sixty to seventy percent.²⁶ It is difficult to find any industry that is more wasteful than our North American hardwood industry. What do we do to solve this problem? We take what has been discarded, all those little short logs, and we ship them to China. In China, they are turned into furniture, and then we bring the furniture back to the United States to sell. Is that a product of China, when in fact the only component the Chinese added was the labor hours, which is insignificant? If it is not a product of China, do we need to satisfy the North American Free Trade Agreement's (NAFTA) rules of origin?²⁷ I ship the short logs to China, and then ship it back to Canada for the final stage of assembly. By satisfying the North American content, and the final assembly, this is North American furniture.²⁸

²⁴ See generally DEP'T OF FOREIGN AFFAIRS AND INT'L TRADE CANADA, GLOBAL TRADE, LOCAL BENEFITS (2002), available at <http://dsp-psd.pwgsc.gc.ca/Collection/E2-459-2002E.pdf> (describing potential benefits of trade to Canadian service sector).

²⁵ Shawn McCarthy, *U.S. Carbon Rules Pose Oil Sands Hurdles*, GLOBE & MAIL (Jan. 6, 2010, 8:15 PM), <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/us-carbon-rules-pose-oil-sands-hurdles/article1421521/>.

²⁶ Jan Widenbeck, *Factors that impact rough mill yield and value*, 73 FDM 62, 65 (2001), available at http://www.fs.fed.us/ne/newtown_square/publications/other_publishers/OCR/ne_2001_widenbeck001.pdf.

²⁷ North American Free Trade Agreement, U.S.-Can.-Mex., art. 401, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

²⁸ See *id.* art. 402.

As you can see from this slide, we decided that we are going to get into fish and shrimp farming.²⁹ There are technologies we are bringing into place that will make these endeavors completely sustainable. No waste water, no waste discharge. It is a complete ecological cycle. But I am not going to tell you more about it because it is too early. I do not want you to go out and copy us.

In Canada we suffered as much as anyone during this past recession.³⁰ As you can see from the graph,³¹ the United States imported more Chinese products than Canadian products, and the number of Chinese imports to the United States is steadily increasing.³² Canada is no longer able to compete with China in terms of being the largest shipper of goods to the United States.³³

Under NAFTA,³⁴ we have all done pretty well. But look at China; it did even better without NAFTA.³⁵

China is rising rapidly and graduating half a million students in technology fields.³⁶ Even assuming half of those graduates are not very good, we are still in trouble in regard to competing with the Chinese in awarding bachelor degrees in technology and the sciences.³⁷

We think they are stealing our technology.³⁸ Then we realize that China graduates more students with PhDs than the United States.³⁹ Pretty soon we will need to learn to steal their technology.

²⁹ See FUNG, *supra* note 23, at 14 (slide showing aerial view of fish ponds with a Japanese flag accompanied by flags of China, Canada, France, and Belgium).

³⁰ See Eric Beauchesne, *Massive Job Losses Hit Canada, U.S.*, CANWEST NEWS SERVICE (Dec. 5, 2008), <http://www.canada.com/topics/news/story.html?id=1036943>.

³¹ See FUNG, *supra* note 23, at 17 (slide of the market share percentages of United States Imports over the years 1989-2007).

³² See *Trade in Goods with China*, FOREIGN TRADE STAT., <http://www.census.gov/foreign-trade/balance/c5700.html#2010> (last visited Jan. 15, 2011) (showing U.S. imports from China at 334,141.6 million U.S. dollars); see also *Trade in Goods with Canada*, FOREIGN TRADE STAT., <http://www.census.gov/foreign-trade/balance/c1220.html#2010> (last visited Jan. 15, 2011) (showing U.S. imports from Canada at 252,164.4).

³³ *Id.*

³⁴ See generally NAFTA, *supra* note 27.

³⁵ See FUNG, *supra* note 23, at 20 (showing slide of the growth of merchandise trade with the United States during 1990-2005).

³⁶ Vivek Wadhwa et al., *Where the Engineers Are*, 23 ISSUES SCI. TECH., no. 3, 2007, available at <http://www.issues.org/23.3/wadhwa.html>.

³⁷ See *id.* (stating that in 2005, China graduated 500,000 students with bachelor degrees in engineering, computer science, and information technology; the United States graduated only 110,000).

³⁸ Christopher Drew, *New Spy Game: Firms' Secrets Sold Overseas*, N.Y. TIMES (Oct. 17, 2010), <http://www.nytimes.com/2010/10/18/business/global/18espionage.html> ("The U.S.-China Economic and Security Review Commission, appointed by Congress to study the national security issues arising from America's economic relationship with China, said in a report last year that even in instances without direct involvement by Chinese officials, China's government 'has been a major beneficiary of technology acquired through industrial espionage'").

In addition, China has surpassed our auto market.⁴⁰ North Asia is now the center of auto production; this was accomplished by using a large amount of containers.⁴¹

If the United States imposed a duty on parts being imported into the United States from China, one of the major casualties would be the assembly plants of Caterpillar; its products would become uncompetitive in the global market. The Chinese would not be hurt by this because the beneficiary of that legislation would be Komatsu of Japan, which would take over the global market from Caterpillar and buy more Chinese parts.⁴²

Bilateral trade is an obsolete concept. The Chinese get \$4 for assembling the Apple iPod.⁴³ To assemble the iPad, they get \$12.⁴⁴ Is it a product of China? In trade statistics, we show that \$120 to \$150 of an iPod comes into the United States.⁴⁵ And it is \$250 per iPad coming into the United States. China merely added \$4 or \$5 to an iPod, and \$12 in the case of the iPad.⁴⁶ Apple in California collects \$60 for an iPod and \$120 for an iPad.⁴⁷ We say

nage.”).

³⁹ See Wadhwa et al., *supra* note 36 (“China is racing ahead of the United States and India in its production of engineering and technology Ph.d’s . . .”).

⁴⁰ See *China surpasses U.S. in 2009 auto sales*, USA TODAY (Jan. 8, 2010, 5:06 PM), http://www.usatoday.com/money/autos/2010-01-08-china-auto-sales_N.htm; see also FUNG, *supra* note 23, at 25 (showing slide of new motor vehicle sales in China during 1978-2008 and in North America in 2009).

⁴¹ See WIEPING WU, PIONEERING ECONOMIC REFORMS IN CHINA’S SPECIAL ECONOMIC ZONES 119 (2006) (noting that Shanghai is the center of China’s auto production); see also APEC, THE CHANGING GLOBAL ECONOMY 16 (2006) (table showing China’s extensive use of containers in its supply chains).

⁴² See generally Bob Tita & Doug Cameron, *Caterpillar Welcomes Prospect of More Chinese Government Work*, WALL ST. J. (Jan. 21, 2011, 4:31 pm), <http://online.wsj.com/article/BT-CO-20110121-712434.html> (stating that Caterpillar “has had difficulty obtaining government-funded contracts because of regulations that give preference to Chinese companies.”).

⁴³ See Geoffrey (Kok Heng) See, *The Coming Chinese Century: Boon or Bane for Southeast Asia?*, 1 MICH. J. BUS. 53, 54 (2008); see also Gary G. Hamilton & Gary Gereffi, *Global Commodity Chains, Market Makers, and the Rise of Demand-Responsive Economies*, in FRONTIERS OF COMMODITY CHAIN RESEARCH 136, 145 (Jennifer Bair ed., 2009).

⁴⁴ See Press Release, Andrew Wassweiler, iSuppli, Midrange-ipad to Generate Maximum Profits for Apple, iSuppli Estimates (Feb. 10, 2010), available at <http://www.isuppli.com/Teardowns/News/Pages/Mid-RangeiPadtoGenerateMaximumProfitsforApple,iSuppliEstimates.aspx> (estimated that the cost of iPad manufacturing that takes place in China is \$11.2 USD); see generally OLIVIER CATTANEO ET AL., GLOBAL VALUE CHAINS IN A POSTCRISIS WORLD: A DEVELOPMENT PERSPECTIVE 278 (2010) (stating that assembly costs for iPads were much higher than those for iPods).

⁴⁵ See WILLIAM BOYES & MICHAEL MELVIN, ECONOMICS 236 (7th ed. 2008).

⁴⁶ See generally Arik Hesseldahl, *The iPad: More than the Sum of Its Parts; \$270 More, Actually*, BLOOMBERG BUSINESS WEEK, Feb. 22, 2010, at 24.

⁴⁷ See generally. DANIEL T GRISWOLD, MAD ABOUT TRADE: WHY MAIN STREET AMERICA

we have a trade deficit with China, yet all of this money actually comes right back to a corporation based in California.⁴⁸

Air transport is becoming a major component of trade. Victoria's Secret now picks up more market share by using air cargo rather than marine cargo.⁴⁹ Yet, in North America, our air cargo terminals are not keeping up.⁵⁰ The Asians have taken over this sector.⁵¹

Some say that higher fuel costs will impact globalization.⁵² However, if you look at the freight components, higher fuel costs are irrelevant.⁵³ Fuel costs can double or triple, and it does not matter.

The wealthiest nations in the world are trading nations.⁵⁴ This is because the scope of manufacturing has changed.⁵⁵ We no longer need to touch the product in order to capture the value. The value is in creating and delivering the product, not the fabrication.⁵⁶ This becomes very important for Canada and the United States when competing on a global basis.

We must have innovative business models in order to stay ahead. We are not here to compete with China or India. We are here to manage China and India. As a single engineer, I cannot compete against 40 Chinese engineers,

SHOULD EMBRACE GLOBALIZATION 61 (2009) (states that Apple reaps about \$80 per unit sold).

⁴⁸ See *id.*

⁴⁹ See generally Columbus Reg'l Airport Auth., *Quality Air Cargo Operations Attract Top Companies*, LOGISTICALLY SPEAKING 1 (2010), available at <http://www.columbusairports.com/news/publications/Newsletters/Logistically-speaking/2010-Summer-LS.pdf> (discussing the increasing use of air cargo trade for American companies for Limited Brands such as Victoria's Secret).

⁵⁰ See *Cargo Traffic 2009 Final*, AIRPORTS COUNCIL INT'L (Oct. 5, 2010), [http://www.airports.org/cda/aci_common/display/main/aci_content07_c.jsp?zn=aci&cp=1-5-54-4819_666_2_\(listing total cargo and percent change in cargo for various international airports in 2009\)](http://www.airports.org/cda/aci_common/display/main/aci_content07_c.jsp?zn=aci&cp=1-5-54-4819_666_2_(listing%20total%20cargo%20and%20percent%20change%20in%20cargo%20for%20various%20international%20airports%20in%202009)).

⁵¹ See *id.*

⁵² Jeff Rubin, *Could Rising Oil Prices Reverse Globalization*, N.Y. TIMES (May 29, 2009, 12:54 PM), http://research.cibcwm.com/economic_public/download/smay08.pdf.

⁵³ See BOS. CONSULTING GRP., *SOURCING CONSUMER PRODUCTS IN ASIA: MANAGING RISK—AND TURNING CRISIS TO ADVANTAGE* 6 (2009), available at <http://www.bcg.com/documents/file15448.pdf> (stating that shipping products is still very efficient despite higher oil prices); see also Fung, *supra* note 23, at 35 (showing the freight price components of consumer products in United States stores).

⁵⁴ Compare WORLD'S RICHEST COUNTRIES, <http://www.worldsrichestcountries.com> (last visited Jan. 16, 2011) (listing richest countries by 2008 GDP and per capita GDP) with *International Trade (MEI)*, OECD, (Jan. 16, 2011, 8:41 PM), <http://stats.oecd.org/Index.aspx?usercontext=sourceoecd> (listing net trade by country in U.S. dollars).

⁵⁵ See EISENHOWER C. ETIENE-HAMILTON, *OPERATIONS STRATEGIES FOR COMPETITIVE ADVANTAGE* 1 (1994).

⁵⁶ See RONAN McIVOR, *THE OUTSOURCING PROCESS STRATEGIES FOR EVALUATION AND MANAGEMENT* 100 (2005).

but I can manage 400, and I can even manage 4000. This is the model we are dealing with.

Small companies can do well by capturing the ability to go global. High Liner decided that they were going to buy from everyone else who goes fishing.⁵⁷ Bombardier became the world's largest train manufacturer by buying up a German company at the right time.⁵⁸

In North America, we have the right people with the right stuff to capture those values.⁵⁹ Yet, we are dismal in terms of our view of the world. We stay too enclosed, too insular, within North America. We create regulatory barriers that make us even less competitive.⁶⁰

I think you are all familiar enough with these issues that we could, if we wanted to, remove these minor obstacles and make ourselves a more integrated economy. In that way, we will be more competitive on a global basis. I am not going to go into the details, because my panelists are much more able to deal with each of these individual elements.

I am on the board of the Canadian Standards Association (CSA),⁶¹ and one way we have been approaching these issues is that instead of waiting for government to create harmonized regulations or regulatory convergence, CSA, Underwriters Laboratories, and other certification bodies have begun to take steps to overcome these regulatory discrepancies.⁶²

As I mentioned early on, if you look at the iPod and iPad, they contain so many different components that you cannot assign them to any one nation. It is difficult to assign an origin. But through integrated certification bodies, we can actually develop common standards to protect the public and become more competitive.

But why have we not done more? Sometimes, I think we do too much. We have different vested interests that want to stop us from harmonizing our

⁵⁷ See *About High Liner*, HIGH LINER FOODS, INC., <http://www.highlinerfoods.com/en/home/abouthighliner/overview.aspx> (last visited Jan. 16, 2011); see also FT.COM/MARKETSDATA, <http://markets.ft.com/tearsheets/businessProfile.asp?s=HLF:TOR> (last visited Oct. 14, 2010).

⁵⁸ See *Bombardier signs rail deal worth up to \$2.1B with Germany's Deutsche Bahn*, GUARDIAN (Jan. 6, 2009), [http://www.theguardian.pe.ca/Business/Freight-industry/2009-01-06/article-1370548/Bombardier-signs-rail-deal-worth-up-to-\\$2.1B-with-Germanys-Deutsche-Bahn/1](http://www.theguardian.pe.ca/Business/Freight-industry/2009-01-06/article-1370548/Bombardier-signs-rail-deal-worth-up-to-$2.1B-with-Germanys-Deutsche-Bahn/1).

⁵⁹ See OECD, HIGHLIGHTS FROM EDUCATION AT A GLANCE 2009, at 13 (2009) (showing percentage of population with tertiary degrees in top 10 OECD countries).

⁶⁰ E.g., see generally Brian Osler, *Rip-off USA: The North American Car Market*, CONSUMER POLICY REV., Nov. 1, 2002, available at <http://www.allbusiness.com/legal/contracts-agreements-sales/976697-1.html>.

⁶¹ David T. Fung, *supra* note 12.

⁶² *About Us*, CANADIAN STANDARDS ASS'N, <http://www.csa.ca/cm/ca/en/about-csa> (last visited Jan. 16, 2011); *About Us*, UNDERWRITERS LABORATORIES, <http://www.ul.com/canada/eng/pages/aboutus/> (last visited Jan. 16, 2011).

regulations. Maybe it is time for us to move forward with a smaller, more limited scope as we try to make North America more competitive.

Globally, in business, we are not looking to legislatures to help us, because they are bogged down in all these details. Yet, the world is not waiting for us. Asia is moving forward, and if we do not go and manage Asia, there will be no future for North America. We need to collaborate if we are going to survive and prosper.

It is important that we do not allow regulations to use up the scarce resources that we have. As business leaders and legislators, we must understand that if we do not embrace global innovations and integration with the rapid convergence of other countries, we are not going to win. I hope that we will work together and create the competitive environment that we need in order to win. Thank you.

MR. MEYER: Any observations or comments on Dr. Fung's topic?

MR. WILKINSON: You talked about the standards organizations. What do you see in the future in terms of the evolution of those organizations? More influence? More direct power authorized by governments?

MR. FUNG: If you look at the way the standard associations are all evolving, you will see they are becoming more international. In the past, each association started off within one country. Now these associations recognize that business has changed. Underwriters Laboratories (UL) has become international.⁶³ The Canadian Standards Association (CSA) has become international.⁶⁴ Today, every barbecue supplied to North America is certified by CSA.

UL focuses on the electrical components.⁶⁵ CSA is now expanding into Europe and China.⁶⁶ In many ways, these expanding associations are moving forward by not telling government what to do, but rather acting on what the different governments are doing and creating a common framework. These associations are creating a place where you and I can certify our products so that they will be accepted in various countries around the world.

CSA is moving to Europe because it understands that if it does not, then its standard and brand will not be competitive. A company, or association for that matter, must have one brand that can extend across the entire world.

MR. MEYER: Thank you. I have a few observations, Dr. Fung. From the perspective of someone working for a multinational, I think the govern-

⁶³ UNDERWRITERS LABORATORIES, *supra* note 62.

⁶⁴ See CSA INTERNATIONAL, <http://www.csa-international.org/> (last visited Oct. 15, 2010).

⁶⁵ See generally *UL Marks—Appearance and Significance*, UNDERWRITERS LABORATORIES, <http://www.ul.com/global/eng/pages/corporate/aboutul/ulmarks/mark/> (last visited Oct. 15, 2010).

⁶⁶ See CSA INT'L EUR., http://www.csa-europe.org/english/media/bg_int/ (last visited Oct. 15, 2010) (noting that CSA's services are available in European and Chinese markets).

ment and regulatory agencies need to consider how nimble companies are in the face of regulation. On one hand, companies are very fast. As you said, some companies will allow us to move into an area of regulatory pressure, for instance, in response to environmental issues. This is also happening with my company. We will probably benefit greatly from the healthcare legislation because we do health care regulation.

On the other hand, as we see with our multinational clients, if regulators put up too many barriers, it is very easy to avoid them. Companies have become more nimble. It has never been easier for companies to avoid regulations; in addition, many jurisdictions have become too burdensome.

MR. FUNG: I think regulations have the tendency to create inefficiencies, and if we want the market to allocate resources properly, we need very intelligent regulations. If we are to maintain the prosperity of North America, our regulations must help our industries to become more competitive; not the other way around. I am very concerned that our politicians may not fully understand, or have not been educated to understand, how international business is actually working. As a result, politicians make regulations that prove to be counterproductive and create unintended consequences. And that is a major, major concern.

MR. MEYER: Thank you. Our next speaker will be Tim Boyle from Eaton.

UNITED STATES SPEAKER

*Timothy Boyle**

MR. BOYLE: Just to follow up on what David was saying, there is this concept of standards that I was not going to speak about, but it is very relevant. It is not just Underwriters Laboratories and people who create safety standards; it is really very common and increasingly growing throughout the world, and it is not just limited to the United States and Canada law.

I am going to talk about competition laws. Competition has evolved to embrace the setting of common standards for the reason that here and in Canada, you can plug something in the wall, and it works in both countries. There is a standard for that, and it allows a platform for competition among rivals, but it is based on a platform that is common and established, in this case, by the rivals themselves.

The rules of engagement in that area have evolved as well and are pretty consistent within the United States, Canada, Europe, and even to a large extent, Asia.⁶⁷ There are many different things that have been incentivizing people to do that, and I think it is a great way to avoid those regulatory costs and unintended consequences that are quite common, unfortunately, with regulation.

As I said before, I am going to talk about competition issues. There have been some big changes in Canada in the past twelve weeks. I am also going to talk a little bit about anti-bribery. There are some things going on in Canada that are quite interesting, actually. In addition, I will talk a little bit about securities law.

In 2009, Canada passed the Budget Implementation Act,⁶⁸ part of it went into effect right away, and part of it just went into effect this past March.⁶⁹

* Timothy E. Boyle is currently vice president and chief counsel – Competition and Trade Regulation at Eaton Corporation. Mr. Boyle handles antitrust and competition issues, export and import regulatory issues, and internal investigations for Eaton. Eaton Corporation is a diversified power management company with 2009 sales of \$11.9 billion. Eaton manufactures electrical components and systems for power quality, distribution, and control; hydraulics components, systems, and services for industrial and mobile equipment; aerospace fuel, hydraulics, and pneumatic systems for commercial and military use; and truck and automotive drivetrain and powertrain systems. Eaton has approximately 70,000 employees and sells products to customers in more than 150 countries. Prior to joining Eaton in 2002, Mr. Boyle was a partner at Howrey LLP, in Washington, D.C., where he practiced for sixteen years. Mr. Boyle graduated, with honors, from Duke University School of Law in 1986.

⁶⁷ See generally H. STEPHEN HARRIS, *COMPETITION LAW OUTSIDE THE UNITED STATES* 333 (2001).

⁶⁸ See Budget Implementation Act, S.C. 2009, c.2 (Can.).

Basically, it brought a number of things Canadian into sync with what the United States does and, to a certain extent, other parts of the world.⁷⁰

Criminalizing antitrust violations is something that is not done across the board. There are about eleven or twelve countries that have criminalized cartel behavior, conspiracies, price fixing, bid rigging, or allocating markets.⁷¹

The Canadians have criminalized antitrust for some time.⁷² The recent changes took certain agreements among competitors like fixing prices or allocating customers or markets and made them illegal in a civil case, no questions asked.⁷³ There is no justification for a price fix or a market allocation, for which before you had to prove an effect on the market. It really changes the way people litigate. So, that is one change that went into effect with the statute.⁷⁴ That particular change just went into effect this past March.⁷⁵

There are agreements between competitors that are not always illegal.⁷⁶ Rivals get together to decide other horizontal agreements, or agreements between competitors,⁷⁷ such as the standards I just mentioned. California has a gasoline grade that is unique to California, called Carb gasoline,⁷⁸ and the makers of the petroleum products got together with the California Air Resources Board and decided what that was going to be.⁷⁹ That kind of horizontal agreement is legal.⁸⁰ It is not like price fixing.

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ See generally Chris Ahern et al., *Australia: Australia and South Africa Move to Criminalize Cartel Behavior Offenses*, MONDAQ (Feb. 17, 2009), <http://www.mondaq.com/australia/article.asp?articleid=74548&login=true&nogo=1> (noting that nine of the twenty-seven European Union member countries as well as Canada, Cyprus, Israel, and Japan have criminalized cartel behavior).

⁷² See generally YVES BERIAULT & OLIVER BORGERS, *OVERVIEW OF CANADIAN ANTITRUST LAW, THE ANTITRUST REV. OF THE AMERICAS* 2004, at 76 (2004), available at http://www.mccarthy.ca/pubs/antitrust_overview.pdf (noting that the Competition Act is the oldest antitrust statute in the western world).

⁷³ See Competition Act, R.S.C 1985, c. C-34 (Can.).

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See Joe Sims, *Developments in Agreements Among Competitors*, 58 ANTITRUST L.J. 3, 433 (1989-1990) (stating that agreements between competitors may be illegal or legal depending on specific facts).

⁷⁷ See *id.* at 436.

⁷⁸ News Release, Cal. Energy Comm'n., CARB gasoline production drops 5 percent in state refineries (Oct. 19, 2005), available at http://www.energy.ca.gov/releases/2005_releases/2005-10-19_carb_gasoline.html.

⁷⁹ See Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEX. L. REV. 685, 718 ("Unocal participated actively in the rulemaking process, advocating a set of standards that closely resembled the ones ultimately adopted by CARB.").

⁸⁰ News Release, Fed. Trade Comm'n., FTC Charges Unocal with Anticompetitive Con-

But those kinds of agreements can still be challenged. They can be illegal, in fact.⁸¹ In that context, Canada recently changed its standards to fit exactly what the United States' standard is, substantially lessening competition.⁸²

Canada also did two other things in repealing criminalization of certain types of conduct. Canada is the only country in the world that made these things criminal.⁸³ As a result, much of the world is looking at them quite differently. I will explain what they mean in a minute.

With regard to price discrimination, say you make bicycles and are going to sell them to Walmart. If you are going to sell the bicycles to small sporting goods stores, do they get the same price? If selling to those two different buyers, the big one and the little one, at different prices under certain circumstances is price discrimination, then it can be illegal.⁸⁴ In Canada, it could be criminal.⁸⁵

Now, the United States has not brought a price discrimination case since about 1980,⁸⁶ largely due to the fact that economists actually believe it is more output-enhancing to do this than to not do it.⁸⁷

In 2006, Singapore passed a comprehensive competition law and did not put price discrimination in it,⁸⁸ following the Australians who actually wrote it out of their laws around 1990.⁸⁹ Canada has not brought criminal cases in

duct Related to Reformulated Gasoline (Mar. 4, 2003), available at <http://www.ftc.gov/opa/2003/03/unocal.shtm> ("While companies are and must be free to petition the government, the right to petition does not include the right to commit fraud during the CARB regulatory process to obtain monopoly power . . ."); see generally AM. BAR ASS'N, ANTITRUST COMPLIANCE MANUALS: A COMPENDIUM OF STATE-OF-THE-ART MANUALS FOR TODAY'S CORPORATIONS 324 (1995) (lists all horizontal agreements that may be found to be illegal).

⁸¹ See Fed. Trade Comm'n, *supra* note 80.

⁸² Bruno L. Peixoto et al., *International Antitrust*, 44 INT'L LAW. 45, 47 (2010).

⁸³ *Id.*

⁸⁴ See Robinson-Patman Act of 1936, 15 U.S.C. § 13 (prohibiting anticompetitive practices, like price discrimination, by producers and providing for criminal penalties, but granting a specific exemption for cooperative associations).

⁸⁵ See generally JOHN M. CONNOR, *STUDIES IN INDUSTRIAL ORGANIZATION: GLOBAL PRICE FIXING* 67 (Springer, 2nd ed. 2007); see also Peixoto, *supra* note 82.

⁸⁶ See *United States v. American Telephone & Telegraph Co.*, 460 U.S. 1001 (1983).

⁸⁷ STEVEN E. LANDSBURY, *PRICE THEORY AND APPLICATIONS* 331 (7th ed. 2008).

⁸⁸ *But cf.* Catherine Tay Swee Kian, *New Developments in Competition Law in Singapore*, BUS. L. R., May 2006, at 122, ("The prohibited behavior would include limiting production, tying agreements, *price discrimination* and predatory pricing towards competitors such as sustained pricing at below average variable cost. But there may be an objective justification defence such as a price promotion or a refusal to supply which may be justified by the poor creditworthiness of the buyer.") (emphasis added).

⁸⁹ See generally THE WORLD TRADING SYSTEM: CRITICAL PERSPECTIVES ON THE WORLD ECONOMY 81 (Robert Howse, ed., 1998) (states that in 1990 Australia removed a specific prohibition on price discrimination from its antitrust legislation).

the recent past,⁹⁰ but to the rest of the world, to antitrust lawyers, that seemed like a very strange thing.

I realize that to some, these issues seem narrow and technical, but they have a profound effect on commerce. I was in Washington this week in a meeting about one antitrust issue, and I heard someone say: “Well, this anti-trust issue just is not sexy.” I responded that that is not true; antitrust lawyers just have lower standards.

The other thing Canada changed is resale price limits. You go into a store and see the manufacturer’s suggested price on something. The reason you see that is because, in this country, starting in 1911, it was illegal to require your reseller to not go below a certain price.⁹¹ You could suggest it. You could cajole them. You could even inspire them. But you could not make them. And two years ago, the United States federal law changed.⁹² The Supreme Court flipped that around, reversed its earlier precedent.⁹³ Canada was the only country making that kind of behavior criminal behavior. That, too, no longer applies. Now it is merely a civil violation.⁹⁴ The rest of the world has not followed the United States on this issue, and it remains illegal everywhere else.⁹⁵ Every industrialized country has antitrust laws, which is most of them.⁹⁶ Also, a lot of these cases in the United States are private causes of action,⁹⁷ which is a little unusual elsewhere. But you can bring a private cause of action before the Competition Tribunal for this, which before was not available.⁹⁸

The last thing they did with this law is shorten the merger waiting period,⁹⁹ which is actually a big deal. My company does business in about 175 countries.¹⁰⁰ You have filings in Germany, Austria, Brazil, and China, and

⁹⁰ See Interview with Russ Wofford, Partner, King & Spalding, and Jeffrey Brown, Partner, Stikeman Elliott LLP, in *The Metropolitan Corporate Counsel* (Oct. 4, 2010), available at <http://www.metrocorp.counsel.com/pdf/2009/October/44.pdf>.

⁹¹ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407-08 (1911).

⁹² See *Leegin Creative Leather Products, Inc. v. PSKA, Inc.*, 127 U.S. 2705, 2713 (2007).

⁹³ See *id.*

⁹⁴ See Competition Act, R.S.C. 1985, c. C-34 §§ 114(2)-123(1), amended by R.S.C. 2009, c. C-10 §§ 437-439 (Can.).

⁹⁵ See generally Interview with Frederic M. Scherer, Aetna Professor of Public Policy, Harvard Kennedy School, John F. Kennedy School of Government (July 12, 2007), available at <http://www.hks.harvard.edu/news-events/publications/insight/markets/scherer> (stating that most nations have now made resale price maintenance illegal).

⁹⁶ See generally WILBUR FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 517 (2nd ed. 1996).

⁹⁷ See 15 U.S.C. §§ 15(a), 26.

⁹⁸ See Competition Act, R.S.C. 1985, c. C-34 §§ 114(2)-123(1), amended by R.S.C. 2009, c. C-10 §§ 437-439 (Can.).

⁹⁹ See *id.*

¹⁰⁰ See EATON CORP., *supra* note 19 (noting that Eaton does business in more than 150 countries).

you want to close your deal, but if you have disharmony in these waiting periods, lots of things can happen: you lose employees, incur all kinds of costs, and miss opportunities to integrate and create value. Bringing these things into sync is actually pretty significant.

I am going to move onto corruption now. Canada has a law that is a lot like the United States Foreign Corrupt Practices Act (FCPA).¹⁰¹ Those laws make it illegal for companies in Canada or in the United States to bribe foreign officials, for instance, in China. And when you do bribe foreign officials, you violate the law of Canada or the law of the United States.¹⁰² Canada signed on in 1997 to the Organization for Economic Cooperation and Development convention on combating bribery, and passed the FCPA as a result.¹⁰³

The difference between Canada and the United States is that, in the United States, the growth in enforcement action is two to three times the number from the year before.¹⁰⁴ For those of you who do not know, this is one of the hottest issues right now in the United States Justice Department.¹⁰⁵

You have probably read about Siemens and its more than one billion dollar fine from the United States government.¹⁰⁶ British Aerospace, just about a month ago, got fined around \$400 million by the United States and 50 to 100 million equivalent United States dollars by Britain.¹⁰⁷ The United States fines are actually much bigger than the ones they got from their own government.¹⁰⁸

¹⁰¹ See Corruption of Foreign Public Officials Act, 1998 S.C., c. 34 (Can.).

¹⁰² See *id.*

¹⁰³ See *Corporate Social Responsibility – Bribery and Corruption* DEP'T FOREIGN AFF. & INT'L TRADE CAN., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/9-report-rapport.aspx> (last updated Feb. 11, 2010) (noting that Canada signed the OECD Convention on December 17, 1997).

¹⁰⁴ See *FCPA and Related Enforcement Actions Chronological List 2010*, U.S. DEP'T JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/cases/2010.html> (last visited Jan. 16, 2011) (reviewing the sixteen instances of FCPA enforcement in 2010).

¹⁰⁵ See PRICEWATERHOUSECOOPERS, *CORRUPTION CRACKDOWN: HOW THE FCPA IS CHANGING THE WAY THE WORLD DOES BUSINESS* (2009), http://www.pwccn.com/webmedia/doc/633862908465493306_forensic_fcpa_corrupt_aug2009.pdf (discussing the increase in FCPA investigations over the last several years).

¹⁰⁶ See News Release, U.S. Dept. of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), *available at* <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html> (announcing the guilty plea of Siemens and three of its subsidiaries for violations of the FCPA).

¹⁰⁷ See News Release, U.S. Dept. of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (March 21, 2010), *available at* <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html> (announcing the guilty plea of BAE Systems for conspiring to make false statements about its FCPA compliance program).

¹⁰⁸ See *EU Commission Slaps Huge Fine on Siemens for Price Fixing*, DEUTSCHE WELLE

Transparency International, which is an organization that keeps track of a lot of this kind of information,¹⁰⁹ has been critical of Canada because it has a requirement in its current law that Canada is impacted in some way from that bribe in China by the affiliate of a Canadian company.¹¹⁰ That is important because most of the time it is not going to have an effect back home. Thus this law has been a bit of a paper tiger. There is also a bill now before Parliament to change that and bring it into sync with what the FCPA is doing.¹¹¹ That is important because in many respects, the United States has been out in front of this issue.

Until 1995 in Germany, you could write off your bribes as a business expense.¹¹² The world is changing. It is changing at a very fast clip. And there are many places in the world where bribery is required just to do ordinary things such as import product or get a passport; you have to put money in someone's pocket just so they can pay their people. The government officials' compensation is so low that it seems like the government expects them to make up some money on the side. However, that will likely change if countries like Canada and the United States are out there reaching beyond their borders to deal with this kind of behavior.¹¹³

Lastly, the securities laws in the two countries are actually very similar, but the model we use is very dissimilar. In Canada, it is controlled by the provinces.¹¹⁴ The provinces have an umbrella organization called the Canadian Securities Administration (CSA), which tends to try to smooth over those edges and have consistency.¹¹⁵ However, it has been quite a difficult task to regulate securities in that way. But Parliament has now passed legis-

(Jan. 24, 2007), <http://www.dw-world.de/dw/article/0,,2324897,00.html> (noting that the EU Commission imposed a fine of 396.6 million Euros (\$513 million) on Siemens).

¹⁰⁹ See *About Us*, TRANSPARENCY INT'L, http://transparency.org/about_us (last visited Oct. 1, 2010) (noting that Transparency International is a global organization that works to fight corruption on the national and international stage).

¹¹⁰ See TRANSPARENCY INT'L, PROGRESS REPORT 25 (2010), available at <http://www.transparency.org/content/download/53670/856410/file/2010+PROGRESS+REPORT.pdf> (stating Canada has "little or no enforcement" of the Corruption of Foreign Public Officials Act) [hereinafter PROGRESS REPORT].

¹¹¹ See An act to amend the Old Age Security Act, c-31, 40th Parliament (3rd Sess. 2010) (Can.).

¹¹² See KIMBERLY ANN ELLIOT, CORRUPTION AND THE GLOBAL ECONOMY 22-23 (1997).

¹¹³ See PROGRESS REPORT, *supra* note 110, at 8 (noting "[t]he current situation is unstable because the Convention is predicated on the collective commitment of all the parties to end foreign bribery").

¹¹⁴ See CANADIAN COUNCIL OF CHIEF EXECES., CREATING AN ADVANTAGE IN GLOBAL CAPITAL MARKETS ii (2008), available at <http://www.expertpanel.ca/eng/documents/public-consultation-paper.pdf>.

¹¹⁵ See CANADIAN SECURITY ADMINIS., <http://www.securities-administrators.ca/> (last visited Jan. 3, 2011).

lation to establish a securities regulatory regime over the next three years.¹¹⁶ And they are drafting a securities act, which is embedded, and it is going to become federal law.¹¹⁷

The CSA, the umbrella organization I just described, has had a number of components adopted that are very much similar to the United States Sarbanes-Oxley law. These include auditor oversight,¹¹⁸ the fact that the chief executive officer and the chief financial officer have to certify that these financials are correct,¹¹⁹ in addition to a national instrument of audit committees.¹²⁰ There are some standards for audit committees that have been pushed out through this that are very similar to those in the United States.

Canada and United States securities regulatory authorities have implemented a multijurisdictional disclosure system that enables large United States issuers to be offered to Canadians while using only the United States registration statements.¹²¹ This is to facilitate getting United States securities into the hands of Canadians.

All those things have been done at the provincial level,¹²² but now with the federal level coming in,¹²³ it will need to be seen how that works out. It is not controversial in the sense of a structural change. It remains to be seen, however, what changes will occur when there is only one authority.

That is all I have. Any questions?

MR. MEYER: On the antitrust theory, I have not looked at the antitrust law in Canada recently, but I recall in the past that, although it looked structurally like the Sherman Act, it had a different sort of enforcement emphasis.¹²⁴ The Canadian enforcement model was geared more to protect interna-

¹¹⁶ See Canadian Securities Regulation Regime Transition Office Act, 2009 S.C., c.2 § 297 (Can.).

¹¹⁷ See DEP'T OF FIN. CAN., A NEW CANADIAN SECURITIES REGULATORY AUTHORITY 1-3, 11 (2010), available at <http://www.fin.gc.ca/n10/data/bg-eng.pdf> (discussing the pending decision by the Supreme Court of Canada on whether the securities act falls within Parliament's constitutional powers).

¹¹⁸ National Instrument 52-108: Auditor Oversight 27 O.S.C.B. 3227 (2004) (Can.).

¹¹⁹ Multilateral Instrument 52-109: Certification of Disclosure in Issuer's Annual and Interim Filings 27 O.S.C.B. 3230 (2004) (Can.); Companion Policy 52-109CP to Multilateral Instrument 52-109 27 O.S.C.B. 3238 (2004) (Can.).

¹²⁰ Multilateral Instrument 52-110: Audit Committees 27 O.S.C.B. 3252 (2004) (Can.); Companion Policy 52-110CP to Multilateral Instrument 52-110 27 O.S.C.B. 3264 (2004) (Can.).

¹²¹ See Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers, Exchange Act Release No. 33-6902 [1991 Transfer Binder] 56 Fed. Reg. 30036 (proposed July 1, 1991) (codified at 17 C.F.R. §§ 200, 201, 210, 229, 230, 239, 240, 249, 260, 269).

¹²² See CANADIAN COUNCIL OF CHIEF EXECS., *supra* note 114, at 4.

¹²³ See DEP'T OF FIN. CAN., *supra* note 117.

¹²⁴ See H. STEPHEN HARRIS, ABA SEC. ANTITRUST L., COMPETITION LAWS OUTSIDE THE UNITED STATES 8 (2001) (stating "[t]he underlying principles and structure of Canadian com-

tional competitiveness rather than police internal business.¹²⁵ A good example of that was the Canadian Tyler Exemption, which was actually written into the statute.¹²⁶ Is there a different emphasis now in enforcement?

MR. BOYLE: I would not go as far as you went with that in terms of a general characterization. As Canada is a relatively smaller country (and you see this all the time), you think you need to nurture your own to get scale to be competitive in order to be a low-cost producer or provider of whatever it is you are selling. In Canada, there has been less of a focus on what I would call unilateral conduct or monopolization. The thresholds on mergers to be reviewed are quite a bit higher.¹²⁷ In my twenty-something years of practice, I have never had a filing in Canada, although I have been everywhere else it seems.

But I do not think that the difference in enforcement in Canada is driven by the fact that it is government-driven enforcement. In the United States, the Department of Justice, the Federal Trade Commission, and the fifty states enforce these laws.¹²⁸ But you can bring a claim as a private party challenging almost all of the things we have discussed. It depends on what the nature of the claim is and whether there is standing or not.¹²⁹ However, by and large, a rival can challenge its rival; a customer can sue its supplier. You do not have as much of that in Canada, and that is the biggest difference.

MS. LUSSENBURG: My name is Selma Lussenburg, and I am from Toronto. On the securities side, you may be aware that there is a movement afoot that would put in place a single securities regulator.¹³⁰ That would definitely impact our relationship with the United States and, I think, benefit Canada and United States trade. The multijurisdictional disclosure created a real boon to the business community because it was such a nuisance. Not

petition law are broadly similar to those of the antitrust laws of the United States.”).

¹²⁵ See *id.* at 16 (stating “[a]nother aspect of Canadian competition law is its emphasis on domestic economic efficiency to enhance Canada’s international competitiveness.”).

¹²⁶ See *id.* at 51 (reviewing exceptions to Canada’s Competition Act).

¹²⁷ See George N. Addy, Dir. of Investigation and Research Bureau of Competition Policy, Address at the Fordham Corporate Law Institute 21st Annual Conference: Merger Review Under Canadian Competition Law (Oct. 27-28, 1994), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01059.html> (stating “[t]he notification thresholds are considerably higher than in the United States”).

¹²⁸ See Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 676-77 (2004) (describing that while antitrust primarily refers to federal statutes enforced by the U.S. Department of Justice and Federal Trade Commission, states’ enforcement predated federal law and now plays an active enforcement role).

¹²⁹ See John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C. L. REV. 219, 219-21 (1985-1986) (describing private enforcement of federal antitrust laws).

¹³⁰ See DEP’T OF FIN. CAN., *supra* note 117, at 1-3 (discussing the pending decision by the Supreme Court of Canada on whether the securities act falls within Parliament’s constitutional powers).

only do you have ten provinces to deal with, you have to then deal with the United States and the costs, which adds no real benefits to the productivity of the industry. I think in that sense, it has been very positive.

On the competition law side, I wonder if you can comment on the following. I think the initiatives you highlighted are quite significant, because having been engaged with cross-border trade, those issues do come up all the time. People shake their head and ask: "Why do we have one set of rules in the United States and one set of rules in Canada?" My understanding is that the Canadian legislation (the new legislation) is now much closer to the Hart-Scott-Rodino legislation in the United States.¹³¹ Hart-Scott-Rodino is out of sync with the rest of the world. When you step back, it is interesting to think that Canada adopted a more United States-centric approach as opposed to taking the approach followed by the European Union or other parts of the world. I wonder whether you wanted to comment on that and what your experience has been?

MR. BOYLE: Just let me put Hart-Scott-Rodino into a nomenclature so we all can understand it as non-antitrust lawyers. If you want to do a merger, there is a rule you must follow: you must tell the government about the merger and let the government, in the case of the United States, decide whether to take you to court to stop it, or in the case of every other country on the planet, approve or disapprove the merger.¹³²

There have been some changes on the waiting period that I mentioned.¹³³ However, there have not been changes on the threshold. The threshold is still fairly high.¹³⁴

Most deals that might get reported in what I will call the hair-trigger jurisdictions of Germany, Austria, Brazil, or China do not end up getting reported in Canada at all, even if there are Canadian assets engaged in the deal, because their thresholds are just higher.¹³⁵

In regard to the Hart-Scott issue you mentioned as being out of sync, there are actually a lot of things going on right now. Justice Carl Shapiro is the

¹³¹ Compare Competition Act, R.S.C. 1985, c. C-34 (2010) (as amended) (Can.) (amending the Notifiable Transactions Regulations, SOR/87-348) with Clayton Act 7A, 15 U.S.C. § 18a (2010).

¹³² See DOUGLAS F. BRODER, A GUIDE TO US ANTITRUST LAW 134-35 (2005) (describing the U.S. merger review and approval process instituted).

¹³³ See Susan M. Hutton & Ashley M. Weber, *Canada: Canadian Merger Notification Regulations Revised*, COMPETITOR (March 4, 2010), <http://www.thecompetitor.ca/2010/03/articles/competition/merger-review/canadian-merger-notification-regulations-revised/> (describing Canada's new merger notification guidelines and their similarity to analogous legislation in the United States).

¹³⁴ See Addy, *supra* note 127 (stating "[t]he notification thresholds are considerably higher than in the United States.").

¹³⁵ See DAVID E. VANN, JR. ET AL., INTERNATIONAL MERGER CONTROL 319-21 (2008).

chief economist, and he is going to try to rewrite the Department of Justice merger guidelines, because this is all about industrial organization economics.¹³⁶ It is all about how firms make pricing and output decisions. In that sense, it is really important because firms make lots of pricing and output decisions, and we are all consumers.

The way the guidelines have been operating, the way they are written, and the way they have been enforced are different.

I think that the changes in the Canadian antitrust law, vis-a-vis merger review, really do not go to that content. The United States changes are really less about what is in the statute than whether the government is choosing to intervene and stop two companies from merging.¹³⁷ In that sense, I do not think it is out of sync. In fact, I will tell you, the things that I have been saying about the United States and Canada are on a much broader scale than that. Ten years ago, governments started talking in this area. And every single day there are conversations among United States agencies, Europe, and all these other countries I have been talking about. The amount of convergence in this area is significant. There are organizations like the Organization for Economic Co-operation and Development.¹³⁸ There is the International Competition Network of the governments, which meets regularly and tries to bring convergence¹³⁹ in an attempt to avoid the GE-Honeywell situation that we experienced ten years ago.¹⁴⁰ Actually, there is more and more convergence occurring. I have just highlighted a few of the differences.

However, the real story here is just getting more of the same, and that is important because just like underlying commercial law, you want to be able to have a transaction and have the same semblance of reality in country B that you get from country A. The same thing is true with competition. If you

¹³⁶ See generally Carl Shapiro, Deputy Assistant Attorney General U.S. Dep't of Justice, Address at the American Bar Association Antitrust Section Fall Forum (Nov. 12, 2009), available at <http://www.justice.gov/atr/public/speeches/251858.pdf> (reviewing multiple aspects of U.S. merger guidelines that are under review).

¹³⁷ See Diane Bartz, *Proposed U.S. Merger Guidelines Flexible—Experts*, REUTERS (Apr. 20, 2010, 12:00 PM), <http://www.reuters.com/article/idUSN2010473520100420> (noting U.S. merger reforms give U.S. regulators greater discretion in approving mergers).

¹³⁸ See ORG. FOR ECON. CO-OPERATION AND DEV., <http://www.oecd.org> (last visited Oct. 15, 2010).

¹³⁹ See WILLIAM E. KOVACIC, VICE CHAIR FOR OUTREACH, INTERNATIONAL COMPETITION NETWORK OUTREACH STUDY CONCEPT PAPER (2010), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc593.pdf> (reviewing the creation of International Competition Network that provides a forum for national competition agencies and NGOs to “address enforcement and policy issues of common interest.”).

¹⁴⁰ See Donna E. Patterson & Carl Shapiro, *Transatlantic Divergence in GE/Honeywell: Causes and Lessons*, ANTITRUST, Fall 2001, at 18, available at <http://faculty.haas.berkeley.edu/shapiro/divergence.pdf> (describing the contradictory anti-trust positions Europe and America took on the proposed merger between GE and Honeywell).

want a pricing policy with your distributors, you want to be able to have a single platform that would pass muster in all of these different countries.

MR. MEYER: Thank you, Tim. Our last speaker is Greg Wilkinson.

UNITED STATES SPEAKER

*Greg Wilkinson**

MR. WILKINSON: I will take a moment to introduce my company. We are small, certainly compared to the big global companies. We have 2,500 employees, but we make a lot of product.¹⁴¹ We make 10 billion pounds of product every year and ship it across the border in large volumes:¹⁴² 20,000 shipments a year, mostly in railcars.¹⁴³ With large shipments, and large volumes of border imports of raw materials and equipment, regulatory harmonization is clearly important to us.

I want to first talk about our performance in terms of the environment, because I think that is what earns us a seat at the table. We are the good guys. We produce things that are important to people. We save energy, preserve food, and package medicines; and we do it in an extremely responsible way.¹⁴⁴

* Greg Wilkinson is the president of Third Oak Associates Inc., a strategy, communications, and advocacy consultancy based in Toronto. Before retiring from NOVA Chemicals in 2010, his career included executive roles in both Canada and the United States. He was NOVA Chemicals' senior public policy representative in Canada and the United States, and was responsible for government, media, and community relations, as well as corporate and marketing communications. Greg is the chairman of the board of the Canadian Plastics Industry Association, past chairman of the Public Affairs Committee of the Chemistry Industry Association of Canada, and also served on the Board of the Carnegie Science Center in Pittsburgh and the Pittsburgh Regional Canada Forum.

Greg was born in Guelph, Ontario, and attended The University of Western Ontario, earning his bachelor of arts in history. His career includes marketing and sales roles with Canadian Pacific, transportation management with PanCanadian Resources, and a series of leadership roles with NOVA Chemicals prior to founding Third Oak Associates Inc.

¹⁴¹ See NOVA CHEMICALS, *supra* note 21.

¹⁴² See *Business snapshot*, NOVA CHEMICALS, http://www.novachem.com/aboutus/aboutus_businesssnapshot.cfm (last visited Oct. 15, 2010) (reviewing the products and capacities of NOVA Chemical production sites).

¹⁴³ See Letter from NOVA Chemicals to the Rail Freight Service Review Secretariat (May 7, 2010), available at <http://www.tc.gc.ca/media/documents/policy/134-nova-chemicals-eng.pdf> (stating “[a]nnually, our company ships tens of thousands of railcar shipments of plastics resins and chemicals . . .”).

¹⁴⁴ See *Responsible Care at Nova Chemicals*, NOVA CHEMICALS, <http://www.novachem.com/socialresp/> (last visited Oct. 15, 2010) (reviewing NOVA Chemicals adherence to industry safety standards).

This graphic shows something that is described by the process control folks as loss of process control.¹⁴⁵ The people at the plant describe it as keeping stuff in the pipes. Responsible Care® is the global ethic that started in Canada and was adopted immediately by the United States, and is now practiced in over fifty countries around the world.¹⁴⁶ It drives performance improvement like this and, as a result, we think we deserve to have a seat at the table.

Yes, I am Canadian, so there has to be a hockey slide.¹⁴⁷ But notice that it is Canada and the United States. And I will also not mention that gold medal-winning goal. Competition is a good thing. Competition between Canada and the United States is clearly healthy and exists on many planes. However, I love the comment that the chap from Detroit made last night that we make things together. Our supply chains are so integrated that we cannot let competition get in the way of harmonizing our regulations so that we can compete, as Dr. Fung was saying, with others.

This slide describes polyethylene, which is the major product that we manufacture.¹⁴⁸ There are seventy million tons of polyethylene traded around the world every year.¹⁴⁹ The size of the arrows indicates the volume of trade. As you can see from the slide, approximately twenty percent of the volume of polyethylene that is produced in North America is sold elsewhere.¹⁵⁰ You can see arrows going from the Pacific Rim to China.¹⁵¹ We have been very active in that market for over twenty-five years,¹⁵² as are other North American producers. But, if you look at the arrow that heads from the Middle East to China, it is a much bigger arrow.¹⁵³ Yes, we compete

¹⁴⁵ Greg Wilkinson, Presentation at the 2010 Canada-United States Law Institute Henry T. King, Jr. Annual Conference: The Competitiveness Imperative 3 (Apr. 9, 2010), http://cusli.org/conferences/annual/annual_2010/presentations/Friday%20Session%202%20-%20Wilkinson.pdf (showing spills, releases, and loss of process containment from 2001 to March 2010).

¹⁴⁶ *Who We Are*, RESPONSIBLE CARE, <http://www.responsiblecare.org/page.asp?p=6406&l=1> (last visited Jan. 16, 2011).

¹⁴⁷ WILKINSON, *supra* note 145, at 4.

¹⁴⁸ See *Business snapshot*, *supra* note 142; see also *id.* at 5.

¹⁴⁹ See CHEMSYSTEMS, REPORT ABSTRACT: EXECUTIVE REPORT GLOBAL COMMERCIAL ANALYSIS I (2010), available at http://www.chemsystems.com/reports/search/docs/abstracts/POPS09_Exec_Abstract.pdf (describing the marketplace for polyolefins, which includes polyethylene, and stating “[g]lobal polyolefins demand is estimated at 111 million tons in 2009.”).

¹⁵⁰ WILKINSON, *supra* note 145, at 5.

¹⁵¹ *Id.*

¹⁵² See generally NOVA CHEMICALS, JOFFRE SITE HISTORY (2010), available at http://www.novachem.com/joffre/docs/joffre_history.pdf (describing NOVA Chemicals polyethylene production at the Joffre Manufacturing Site that started in 1973).

¹⁵³ WILKINSON, *supra* note 145, at 5.

with the other North American producers. However, the real competitor, the low-cost competitor, is the Middle East.¹⁵⁴

Again, we make things together in the United States and Canada that we sell to others. Does anybody know what this is? Anybody care to guess what this is?

MR. ROBINSON: An accelerator in a Toyota?

MR. WILKINSON: I like it. I like it. Does the name Ed Deming mean anything to anyone? Quality guru from the 80s and 90s.¹⁵⁵ This was a tool Mr. Deming used in his seminars. It is called the Red Bead Experiment,¹⁵⁶ and it works like this. Take a bucket, add 4,000 beads, twenty percent of them red. The participant comes and you put a blindfold on him. They take this paddle and shove it in the bucket, pull it out, and then they are told the red ones are contaminants. Reducing the red ones is the objective.

You shove the paddle in, and you pull it back out. Are there more red ones or less red ones? Who knows? Put it in again and again and you get a random outcome. Then you add team members. The team members are not allowed to touch anything. The blindfold is still on. And you are still going to put the paddle in the bucket. The team members say: "Get fewer red ones." That is for the first round. Next round they say: "Fred, you are not reducing the red ones. Can you please do better?" Deming stops the game at that point. It is clear that unless you change the fundamental process or system, you are not going to see any improvement.

Why am I talking about this? When I thought about regulatory harmonization and the entire system that exists to manage these regulations, what role do small businesses, industry folks like my company, play? I am afraid we are all a lot like the team members in the Red Bead Experiment. We are often on the sidelines, either applauding or criticizing. And, as I am fundamentally a PR guy,¹⁵⁷ I know one of the easiest ways to get a headline is to trash the government. We often do the easy thing instead of being engaged in the process, which I think we need to do more of.

When I talked to the folks at our company about how things are going in this area, the answer was a little bit surprising to me: "darn well." There are a lot of cases where we have had success—where the governments and the

¹⁵⁴ See CHEMSYSTEMS, *supra* note 149, at 4 (stating "[t]he Middle East will continue to be an attractive location for capacity additions due to advantaged feed stocks as will Asia to keep up with increasing demand in the region.").

¹⁵⁵ See William B. Gartner & M. James Naughton, *Review: The Deming Theory of Management*, ACAD. MGMT. REV., Jan. 1988, at 138.

¹⁵⁶ See *id.* at 139-40 (describing W. Edward Deming's Red Bead Experiment).

¹⁵⁷ See CONFERENCE PROGRAM, *supra* note 5, at 12; see also *Greg Wilkinson's Professional Profile*, LINKEDIN, <http://ca.linkedin.com/pub/greg-wilkinson/5/1b6/677> (last visited Oct. 15, 2010) (noting that Greg Wilkinson was "[r]esponsible for corporate and business communications" at NOVA Chemicals until June 2010).

agencies in Canada and the United States are working together very closely. There are a lot of positives.

Climate change is on that list of successes. It is only on the list because we have not done too much yet on this front, and consequently there has not been anything to impact a business like ours. We are one of those high-carbon-trade industry sectors. Not doing very much yet about climate change is good news for us.¹⁵⁸ Having someone like Minister Prentice in Canada say that Canada is not going to move dramatically until the United States does is very encouraging to us.¹⁵⁹

However, there are many challenges as well, especially in the export area. For instance, read what came back from our logistics folks when I asked them. They said there are two different systems: one is very user-friendly with lots of reporting capability and easy to upload data; the other one is rigid, complex, and time consuming in addition to having more significant penalties if there are errors or omissions.

Again, there are lots of things we can still work on. One of the things that keeps me up at night is the border. The border is important to us and important to everyone; in addition, it is potentially a political issue, so it can be a little frightening.

Chemicals management is a case where the Canadian system is terrific. Non-governmental organizations (NGOs) like it, the industry likes it, and it is a very thorough risk-based system. The European system, however, is not very good. The United States is currently reviewing the Toxic Substance Control Act;¹⁶⁰ our fervent hope is that it will use the Canadian model rather than Registration, Evaluation, Authorisation, and Restriction of Chemicals (REACH) in Europe.¹⁶¹

¹⁵⁸ See NOVA CHEMICALS, *MANAGING GREENHOUSE GAS EMISSIONS 2010*, at 3 (2010), available at http://www.novachem.com/socialresp/docs/GHG_2010.pdf (stating NOVA Chemicals has reduced its “direct GHG emissions intensity by about 18% from 2003 to 2009.”).

¹⁵⁹ See Stephanie Dearing, *Canadian Government Adopts U.S. Greenhouse Gas Reduction Goals*, DIGITAL J. (Feb. 2, 2010), <http://www.digitaljournal.com/article/286869> (stating “[C]anada will not regulate industries for greenhouse gas emissions, and would only institute measures such as cap-in-trade should the United States adopt such a policy.”).

¹⁶⁰ Toxic Substance Control Act, 15 U.S.C. §2601 (1976); see also Sara Goodman, *Sen. Lautenberg Introduces Chemicals Reform Bill, Saying Current Regulation ‘Is Broken,’* N.Y. TIMES (April 15, 2010), <http://www.nytimes.com/gwire/2010/04/15/15greenwire-sen-lautenberg-introduces-chemicals-reform-bil-25266.html> (describing a proposed amendment to the Toxic Substance Control Act).

¹⁶¹ See generally RICHARD A. DENISON, PH.D., *NOT THAT INNOCENT: A COMPARATIVE ANALYSIS OF CANADIAN, EUROPEAN UNION AND UNITED STATES POLICIES ON INDUSTRIAL CHEMICALS* (2007), available at http://www.edf.org/documents/6149_NotThatInnocent_Fullreport.pdf (explaining differences between the nations’ chemical regulations).

My final slide concerns a domestic regulation introduced by the Canadian government regarding clean air management. Four years ago, the Canadian federal government came out with an air management plan, and in the process they managed to anger the provincial environment ministries, the environmental NGOs, and industry in general (the irritant trifecta),¹⁶² which one would have said was quite difficult to do.

Following the proposal, a number of the NGOs and industry associations got together and believed they could develop a better air management plan; in fact, they even asked permission to do so by sending a letter to the prime minister.¹⁶³ It certainly garners a lot of attention when the prime minister receives a letter with the following organizations across the letterhead: the Sierra Club; the Lung Association; Pollution Probe; Mining Association; and the Forestry, Cement, and Chemistry industries.¹⁶⁴ The prime minister told us to go ahead and give it a shot.

Four years have passed, and I have talked to people who have been engaged in the process. They described it as painful, messy, sloppy, and aggravating and stated that no one is happy with how things were moving along.

This week, however, they actually managed to put something forward; they put it back to the environment minister with a proposal that should work.¹⁶⁵ Now, we will see. At least they came up with a product. Like a labor negotiation, since nobody is happy, it is probably an okay thing.

Finally, who is the lady in the picture? Anyone?

MR. CUNNINGHAM: Margaret Mead.

MR. WILKINSON: Margaret Mead.¹⁶⁶ Did you say that? Outstanding. Margaret Mead, indeed. Ironically, last night, Margaret Mead came up in conversation a few times. What does Margaret Mead have to do with all of this? She is not remembered very much today, and is mostly visible on coffee cups and T-shirts at this point.

¹⁶² See Harvey F. Chartrand, *A Comprehensive Air Quality Management System is Being Developed for Canada with Substantial Input from the Domestic Chemistry Industry*, CATALYST, Fall 2010, at 15, 16-17, available at <http://www.nxtbook.com/nxtbooks/naylor/CDCQ0310/#/0>.

¹⁶³ See *id.* at 17.

¹⁶⁴ See *id.* (stating that ten members wrote the letter).

¹⁶⁵ See Chartrand, *supra* note 162, at 17 (stating “[i]t took about three years for the CAMS Steering Committee to prepare a report entitled, *Comprehensive Air Management System: A Proposed Framework to Improve Air Quality Management in Canada*, which came out in April 2010”).

¹⁶⁶ See NANCY LUTKEHAUS, MARGARET MEAD: THE MAKING OF AN AMERICAN ICON 1 (2008) (stating “Margaret Mead was the best-known, and most controversial anthropologist in twentieth-century America.”).

My favorite Margaret Mead-ism is, “Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it is the only thing that ever has.”¹⁶⁷

As I thought about this system of regulations and harmonization, I had to think that we are a privileged few. We are a small group that can have an influence on something that is fundamentally important, because if we are able to harmonize regulations, we improve competitiveness and, as a result, create wealth.¹⁶⁸ Creating wealth is a very good thing in social terms. I thank you for your attention, and I am happy to take any questions.

DISCUSSION FOLLOWING THE REMARKS OF DAVID FUNG,
TIMOTHY BOYLE, AND GREG WILKINSON

MR. CUNNINGHAM: Mr. Wilkinson, when you said the word “REACH,”¹⁶⁹ it is a term that is near and dear to the hearts of my Brussels office and my business force.

MR. WILKINSON: I can imagine.

MR. CUNNINGHAM: It brought to mind something. We are sitting here talking about United States-Canada regulatory issues. I did some work for a couple years with Peter Mandelson, when he was trade commissioner for Europe.¹⁷⁰ One of the things he said many times was, “Europe is going to become the dominant figure in world economics because we are going to be the regulator for the world.”¹⁷¹ This is true, he would say, for two reasons. One, Europe arguably has the largest market; but most importantly, it regulates more comprehensively and more strictly than anyone.¹⁷² I never saw something he did not want to regulate.

¹⁶⁷ *Id.* at 4.

¹⁶⁸ See E. LOUKASS, COMM. ON TRADE, U.N. ECONOMIC COMMISSION OF EUROPE, HARMONIZING STANDARDS IN THE UNECE REGION: APPROACHES, TOOLS, AND BEST PRACTICES 8 (2006), available at, <http://www1.unece.org/unece/collect/unece/pdf/s14986e/s14986e.pdf> (stating “[s]tandards harmonization can provide myriad benefits. . .helps reduce non-tariff barriers to trade by making it easier and less expensive for manufacturers to sell their products in other countries.”).

¹⁶⁹ See DENISON, *supra* note 161.

¹⁷⁰ See *Mandelson to Step Down as EU Commissioner*, GUARDIAN.CO.UK (Mar. 22, 2007, 3:29 pm), <http://www.guardian.co.uk/world/2007/mar/22/eu.labour> (stating that “Mr. Mandelson became trade commissioner in 2004 after twice resigning from the cabinet.”).

¹⁷¹ See Peter Mandelson, European Comm’r for Trade, Speech at the Chambre de Commerce et de l’Industrie: Openness, trade and the European Union (June 30, 2010), available at http://trade.ec.europa.eu/doclib/docs/2007/july/tradoc_135131.pdf (stating “[i]t is the rules of the single market which give us the foundation to export our rules and standards around the world . . .”).

¹⁷² See *Charlemagne: Brussels Rules OK: How the European Union is Becoming the World’s Chief Regulator*, ECONOMIST, Sept. 22, 2007, at 28 (stating that “Brussels is becoming the world’s regulatory capital.”).

You all are multinational companies. You have to deal with Europe as well as the United States and Canada. Can you really do an effective job of harmonizing regulatory regimes just in North America, or are we going to get in the position where multinational companies say, “Yeah, yeah, but I still have to do the overlay on top of that, because I have to sell my product in Europe as well as in North America”? How does that fit in with a harmonization program like the one we are talking about here?

MR. WILKINSON: I will start, and I am sure everybody will want to comment on that. Yes, absolutely. We are going to want to have harmonization at as high a level as possible. We also vote with our feet. Investment in our industry in Europe is very, very limited—almost negligible. We were bought by a company last year, an Abu Dhabi concern,¹⁷³ and they own manufacturing in the Middle East, Europe, and in North America. The expansion in that group is in the Middle East. Investment will not flow to Europe.¹⁷⁴

MR. MEYER: My experience with data privacy is that, yes, it is troublesome to deal with Europe. We have works councils.¹⁷⁵ We have their laws, which can often be strict, but we cannot let that get in the way right now. We have created a situation where it is easier to deal with Europe or with North America than it is for them to deal with each other. We are moving trade in the wrong direction. I think, given the strength of the relationship, it is something that cannot be ignored.

MR. BOYLE: I do not think one size fits all. You can find certain regulatory contexts where an outlier can be treated as an outlier. You might be able to create a platform everywhere else where something works, but then it may not work in a particular place. The lowest common denominator can rule, but it is going to depend entirely on what regulatory regime we are talking about.

To add to that, if you look forward, well forward, globalization may not necessarily mean one big standard on how a company, say, manufactures a product. You may find things like fuel costs driving a global company to produce and not ship as far.¹⁷⁶ Produce more locally. You may lose scale.

¹⁷³ See Rick Stouffer, *Abu Dhabi buying Nova Chemicals for \$2.3B*, PITT. TRIB. REV. (Feb. 24, 2009), http://www.pittsburghlive.com/x/pittsburghtrib/business/s_613096.html (stating “Nova Chemicals...said Monday it’s being acquired for \$2.3 billion in cash and assumed debt by an Abu Dhabi government-owned energy company.”).

¹⁷⁴ See CHEMSYSTEMS, REPORT ABSTRACT, *supra* note 149, at 4 (stating “[t]he Middle East will continue to be an attractive location for capacity additions due to advantaged feed stocks as will Asia to keep up with increasing demand in the region.”).

¹⁷⁵ See *European Works Councils (EWCs)*, EUROPEAN TRADE UNION CONFEDERATION, <http://www.etuc.org/a/125> (last modified May 8, 2008) (stating that the EWC Directive 94/45/EC requires for companies with 1,000 or more employees to establish European Works Councils with representatives from all EU Member States the company operates in).

¹⁷⁶ Larry Rother, *Shipping Costs Start to Crimp Globalization*, N.Y. TIMES (Aug. 3, 2008),

But if shipping costs become high enough, that might be the model you adopt. I can see trends in that direction today.¹⁷⁷

MR. HERMAN: Larry Herman from Toronto. Mr. Wilkinson, could you talk about how the industry standards are supplanting, in many cases, government-led standards? To what extent does that affect the chemical industry and other industries? Governments are on the regulatory side, domestically, and are notoriously slow; and, internationally, they are even slower in getting common standards in place. In the meantime, businesses are moving ahead. What is your experience in this area?

MR. WILKINSON: I can give you an example. In the plastics business, I was part of a group that works on standards for importing products for retail in North America and set standards on things like bar coding. I was there because of clothing hangers, the clear plastic ones.¹⁷⁸ In order to have the system work, you need to have the same hangers in Thailand, Vietnam, and China. In addition, Saks on 5th Avenue needs to know what to expect: the size and how it is going to hang.

This was an organization that came together in order to ensure that there was harmonization of the bar codes, the size of the boxes, and even the type of hangers that would need to be used. It was extremely effective, remarkably so, even down to the components of the hangers, which is why I was there lobbying to have our product used in China. I agree with Dr. Fung that, absolutely, those organizations are moving far faster than governments are.

MR. MEYER: Dr. Fung, do you have a comment?

MR. FUNG: I came from the chemical industry as well. I came from Imperial Chemical Industries of England and was a research manager for Canada.¹⁷⁹

I think another element that is arising quickly is genetically modified organisms (GMOs).¹⁸⁰ Again, this is an element which we need to keep an eye

<http://www.nytimes.com/2008/08/03/business/worldbusiness/03global.html> (stating “[c]heap oil, the lubricant of quick, inexpensive transportation links across the world, may not return anytime soon, upsetting the logic of diffuse global supply chains that treat geography as a footnote in the pursuit of lower wages.”).

¹⁷⁷ *Id.* (describing Tesla Motors decision to shift manufacturing from Thailand to a location closer to their California headquarters to avoid shipping costs).

¹⁷⁸ See generally Dr. Vasily Simanzhenkov et al., Presentation at 8th World Congress of Chemical Engineering in Montreal, Quebec, Canada: Technology for Producing Petrochemical Feedstock from Heavy Aromatic Oil Fractions 19 (Aug. 23-27, 2009), available at <http://www.novachem.com/researchtech/docs/2009-10.pdf> (listing the end-products made by NOVA Chemicals).

¹⁷⁹ See *Canadian Society for Chemical Engineering Board of Directors Nominations (2005-2006)*, CAN. CHEM. NEWS (May 1, 2005), http://goliath.ecnext.com/coms2/gi_0199-5767845/Canadian-Society-for-Chemical-Engineering.html (stating “Fung was the research manager of C-I-L Inc. and managed the C-I-L Chemical Research Laboratory in Mississauga, ON.”).

on, because if we regulate GMOs out of existence, it is to our own detriment. China is moving ahead to use GMO rice that can increase productivity six-fold. Who is going to doubt the safety of GMOs if there are 1.3 billion people in China eating GMO rice who do not turn into monsters?

Somewhere along the line, Europe is really going to pay a price for being the regulatory regime in the world; we will all sell to them, but we are not going to do anything with Europe if they continue to move in that direction.

MR. ROBINSON: Michael Robinson from Toronto. Just a few comments in praise of the emphasis the panel has given to the utility of private organizations that are developing the harmonization that governments then follow.

On the competition law area, I think we should be aware of the International Bar Association (IBA) and the role it played long before governmental organizations got their acts together and started to talk about harmonizing law.¹⁸¹ The IBA is an organization comprised entirely of private lawyers.¹⁸² We must have been six or seven years ahead of the governments, and we worked and spurred them on.¹⁸³

The other one is a small comment on the corruption issue. I am on the board of Transparency International in Canada.¹⁸⁴ We were hideously embarrassed year after year because we had to report to the head office in Berlin, which then reported to the Organisation for Economic Cooperation and Development (OECD), that everyone was out of step but Canada.¹⁸⁵ That is, we were the only OECD country that still operated on the territorial principle in enforcing our law.¹⁸⁶

¹⁸⁰ See generally *The European Regulatory System: Genetic Engineering, Plants, and Food*, GMO COMPASS (June 2, 2006), http://www.gmocompass.org/eng/regulation/regulatory_process/156.european_regulatory_system_genetic_engineering.html (reviewing labeling and other regulations the EU places on GMOs).

¹⁸¹ See *About the IBA*, INT'L BAR ASS'N, http://www.ibanet.org/About_the_IBA/About_the_IBA.aspx (last visited Oct. 30, 2010) (reviewing the history and institutional goals of the IBA).

¹⁸² *Id.* (stating the IBA "has a membership of more than 40,000 individual lawyers and 197 bar associations and law societies spanning all continents.").

¹⁸³ See Scott Proudfoot, *The Campaign Against International Political Corruption*, HILLWATCH.COM (Sept. 2001), http://www.hillwatch.com/Publications/Policy_Briefs/Campaign_Against_International_Political_Corruption.aspx (stating "[u]ntil very recently, policy corruption has been a taboo topic internationally," and noting the IBA's role in bringing about legislation against political corruption).

¹⁸⁴ See PROGRESS REPORT, *supra* note 110, at 25 (specifically citing Canada's unique jurisdictional requirement of "a nexus between the alleged offence and Canada" to trigger their international corruption legislation).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

We have been bellyaching for so long about extra-territorial application of United States law, particularly competition law in Canada. Every year we have to file our reports and say that this was a national disgrace. Then finally, out of the blue, comes Bill C-31,¹⁸⁷ which is exactly what we had been asking them to do for ten years: to change the act and say that the national principle applies in full force.

Where is the bill? Nowhere. It died on the order paper.¹⁸⁸ It has to be re-introduced. And it will be.

The Royal Canadian Mounted Police, I can tell you, are just salivating. They have cases prepared and are ready to go on the nationality principle against Canadians,¹⁸⁹ which is why Transparency International had a little seminar last month in Toronto that tried to frighten Canadian business.¹⁹⁰ I cannot give you any more details, but we had better be ready to pay more attention to that statute.

MR. MEYER: I would like to thank the panelists. They had some very interesting points. Thank you for your attention as well.

¹⁸⁷ See Gregory J. Levine, *Fighting International Corruption-Canadian Law Initiatives*, CAYMAN FIN. REV. (Jan. 5, 2010), <http://www.compasscayman.com/cfr/2010/01/05/Fighting-International-Corruption-%E2%80%93-Canadian-Law-Initiatives/>; see also C-31, *supra* note 111.

¹⁸⁸ See Milos Barutciski, Bennett Jones LLP, *Canada*, in GETTING THE DEAL THROUGH: ANTI-CORRUPTION REGULATION IN 46 JURISDICTIONS WORLDWIDE 2010, at 43 (Homer E. Meyer, Jr. et al. eds., 2010) (stating “Bill C-31 died on the legislative Order Paper when Parliament was proquoed (sic) in December 2009.”).

¹⁸⁹ See *Ottawa International Anti-Corruption Unit - “A” Division*, ROYAL CANADIAN MOUNTED POLICE, <http://www.rcmp-grc.gc.ca/ottawa/anti-corruption-eng.htm> (last modified Sept. 23, 2010) (stating “[t]he A Division Unit recently laid one charge of International corruption and continues to investigate other allegations of corruption.”).

¹⁹⁰ See “*Avoiding the Pitfalls: Don’t get shafted*,” 14 TRANSPARENCY INT’L CAN., INC. NEWSLETTER, no. 1, Summer 2010, at 2, available at <http://www.transparency.ca/Reports/Newsletters/TIN1401.pdf>; see also *Events*, TRANSPARENCY INT’L CAN., INC., <http://www.transparency.ca/Events/Events.html>.

DIVERGENCE AND CONVERGENCE OF DATA PRIVACY RULES – MYTH AND REALITY

By Paul A. Meyer¹⁹¹

Business between Canada and the United States sometimes struggles under tensions driven as much by perceptions as by reality. When there is a convergence of what laws and perceptions mandate, trade flourishes. When there is a divergence, barriers are created. Sometimes this divergence results from real legal differences. At other times, this divergence arises more from perceptions than reality. These perceptions can be overcome if the desire for a convergence exists.

An example of this tension is differences in the regulation of data privacy in the United States and Canada and the effect on North American businesses. Canada's Privacy Commissioner has observed that "Canada's largest single trading partner is the United States (accounting for approximately eighty-five percent of the value of Canada's export trade), so it is little surprise that much personal information about Canadians finds its way into the databanks of companies in the United States."¹⁹² And yet, some perceived

¹⁹¹ Paul Meyer is senior counsel with the legal department of Towers Watson, a global consulting firm. He has managed claims, litigation, and risk management issues throughout the United States, Canada, the Caribbean, and Europe since 1994.

He is a regular speaker at professional associations throughout the world on risk management, professional standards, electronic discovery, data privacy laws, arbitration, and the challenges facing in-house attorneys of global companies. Prior to practicing in-house, he was an associate at the Washington, D.C. office of Deacons – Graham & James. Before that, he maintained a trial practice at a leading real estate firm in the metropolitan Washington area.

Paul is currently a member of the Sedona Conference's "Working Group 6: International Electronic Information Management, Discovery and Disclosure," the Corporate E-Discovery Forum, the Advisory Board of the Canada-United States Law Institute, and Association of Corporate Counsel and the Washington Metropolitan Area Corporate Counsel Association.

Paul received his B.A. in philosophy, *cum laude*, from the University of Pittsburgh's Honors Program. He graduated from Case Western Reserve University School of Law, where he served for two years on the Law Review (staff and Associate Editor) and authored a Note published at 33 Case W. Res. L. Rev. 294-325. In his third year of law school, Paul attended the University of Western Ontario's Law School and Graduate School of Business Administration as Canada-United States Law Institute Scholar. He completed the Harvard Leadership Development Program sponsored by Watson Wyatt at the Harvard Business School in 1997.

Paul is admitted to practice in Virginia, Maryland, the District of Columbia, and the U.S. Tax Court, the U.S. Court of Appeals for the Sixth Circuit, and numerous U.S. District and Bankruptcy Courts. All opinions expressed or errors contained in this article are his own.

¹⁹² Jennifer Stoddard, *Privacy Implications of USA Patriot Act*, CAN. PARLIAMENTARY

differences in data privacy handling have been used to resist transfers of Canadian personal privacy data to the United States or, indeed, to even use United States service providers who may maintain systems across borders.¹⁹³

One perception stems from the different treatment of Canadian and the United States data privacy laws by the European Community. The European Community has concluded that Canadian law provides “adequate protection” while United States law does not. Thus, transfers of European personal data to Canada are treated no differently than to a member of the European Community. Transfers to the United States are permitted but additional safeguards are required. This disparate treatment was not the result of a factual analysis into commercial practices of each country but, rather, a reaction to differences in the federal and regulatory structure of the United States and Canada. Simply put, Canada could invoke a nationally regulated, all encompassing “right” of privacy more expeditiously than the United States, and Canada did so. Regardless, processes that each country has devised to work with Europe are effective in facilitating trade with Europe. They can be as effective in dealings within North America.

Another perception is that maintaining data in the United States would subject it to unacceptable risks of disclosure created by the enactment of the USA PATRIOT Act (Patriot Act).¹⁹⁴ This perception arose in large part from actions taken in British Columbia in 2004 that barred government entities in the province from storing data of Canadian employees with United States firms.¹⁹⁵

While the Patriot Act has been the subject of much fanfare about its reach both inside the United States and elsewhere, its application may be more limited and conventional in its approach than is often understood. Moreover, recent efforts by international law enforcement bodies to reconcile privacy expectations with needs to share data in response to global terrorism may be mitigating this concern.

REV., Winter 2004-05, at 18.

¹⁹³ Approximately two-thirds of Canadians surveyed were concerned about their government’s transfer of individual personal information across borders by outsourcing works to companies in the United States. EKOS RESEARCH ASSOCS., *REVISITING THE PRIVACY LANDSCAPE A YEAR LATER* (2006), available at http://www.privcom.gc.ca/information/survey/2006/ekos_2006_e.asp.

¹⁹⁴ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, H.R. 3162, Pub. L. No. 107-56 (2001) [hereinafter Patriot Act].

¹⁹⁵ The Freedom of Information and Protection of Privacy Amendment Act, 2004, S.B.C. 2004, c. 64 (Can.).

I. DIVERGENCE AND CONVERGENCE OF LAWS

Data privacy regulation is as dynamic as the technologies through which it is managed, stored, and transferred. As electronic communication and exchange media have evolved, vast quantities of information can be manipulated and exchanged at historically unprecedented volumes and speed. How businesses manage information creates competitive opportunities while spawning a new generation of legal issues. These issues multiply as information is used, stored, or transmitted across international borders. This information includes personal data about which individuals often have deeply held expectations of privacy.

Not surprisingly, different governments have taken different approaches to privacy regulation. In Europe and Canada, privacy is viewed as a “right” to different degrees. Thus, regulation of data privacy emanates from the individual’s right to privacy in data regardless of where or how it is manipulated. The result is omnibus privacy regulation.¹⁹⁶

United States regulations, by contrast, typically focus upon the conduct of entities handling sensitive information.¹⁹⁷ Thus, federal privacy regulations limited to subject areas are set forth in specific statutes, particularly in the arena of health care regulation. States also enact their own versions of privacy regulations but are constrained to abstain from the subject matter of federal privacy laws. This leads to a more balkanized approach than in jurisdictions with omnibus privacy laws.

A. European Data Privacy Laws

The modern concept of data privacy as a right originates in European attitudes and laws following World War II. The current incarnation of these laws is reflected in Directives by the European Parliament. In 1995, the European Parliament adopted Directive 95/46/EC,¹⁹⁸ which required Member States to enact privacy legislation consistent with the principles of the Directive.¹⁹⁹ Directive 95/46/EC requires legislation that addresses the “processing of personal information” in a Member State.²⁰⁰ The legislation is

¹⁹⁶ MIRIAM H. WUGMEISTER & CHRISTINE E. LYON, *GLOBAL DATA EMPLOYEE PRIVACY AND DATA SECURITY LAW* 6 (2009).

¹⁹⁷ Laws in the U.S. tend to target “specific instances of abuse or perceived market failures, or to protect particularly sensitive information, such as health information, and groups deemed worthy of special protections, such as children.” *Id.*

¹⁹⁸ Directive 95/46, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L281) 31 [hereinafter Directive].

¹⁹⁹ WUGMEISTER & LYON, *supra* note 196, at 29.

²⁰⁰ *Id.* at 30.

then implemented in each Member State by a national Data Protection Authority empowered by the State's legislation.²⁰¹

The purpose of the Directive is to prohibit the "processing" of sensitive personal data and to prohibit transfers unless "adequate protection" is afforded to the transfer.²⁰² Processing encompasses any accessing, modification, or transfer of data. Sensitive personal data encompasses data revealing ethnic origins, race, political beliefs, union membership, health information, or information about sexual preference.²⁰³ Processing data requires compliance with rules set forth by Data Privacy Authorities, often with their approval.²⁰⁴ Organizations are required to enter into written contracts with any data privacy processors that address the conditions under which data will be processed, the obligation to protect security and confidentiality, and a provision to enforce these obligations.²⁰⁵

Cross border transfers of personal data are consistent with the Directive only if made within the European Union or to countries outside the European Union that have been determined to provide "adequate protection" to the data transferred. Canada, which has an omnibus privacy law, is such a country.²⁰⁶ The United States is not.²⁰⁷

Organizations in the United States may satisfy European Union requirements for transferring sensitive data in one of two ways. One is to qualify for the Safe Harbor Framework developed by the United States Department of Commerce and the European Commission.²⁰⁸ The Safe Harbor Principles set forth seven principles that the United States organization must satisfy:

- (i) **notice** of the purpose for collection of the information and how individuals can contact the organization and to whom it will be shared;
- (ii) a **choice** to opt out;
- (iii) the obligation to follow EU contracting standards in **onward transfers** to third parties;
- (iv) **access** rights so individuals may correct data;
- (v) **security** precautions must be adequate;

²⁰¹ *Id.* at 99 (listing each EU Member State's statute and Data Protection Authority).

²⁰² *Id.* at 31.

²⁰³ *Id.* at 33; Directive, *supra* note 198, art. 8.

²⁰⁴ WUGMEISTER & LYON, *supra* note 196, at 34.

²⁰⁵ *Id.* at 36; Directive, *supra* note 198, art. 17.

²⁰⁶ See Commission Decision of 20 December 2001 Pursuant to Directive 95/46/EC of the European Parliament and of the Council on the Adequate Protection of Personal Data Provided by the Canadian Personal Information Protection and Electronic Documents Act, 2002 O.J. (L2) 13; see also WUGMEISTER & LYON, *supra* note 196, at 39.

²⁰⁷ Other countries that have not been granted "adequate security status" include Australia, China, India, and Japan. WUGMEISTER & LYON, *supra* note 196, at 39.

²⁰⁸ See generally *U.S.-EU & Swiss Safe Harbor Frameworks*, EXPORT.GOV, <http://export.gov/safeharbor/> (last updated July 12, 2010).

- (vi) **data integrity** steps should ensure that data is “reliable for its intended use [and] is accurate, complete and current”; and
- (vii) **enforcement** provisions that empower the organization to enforce complaints and verify compliance with other principles.²⁰⁹

Organizations in the United States can also be involved in the transfer of processing of sensitive personal data of Europeans if they enter into contracts with Standard Clauses approved by Data Privacy Authorities that satisfy these principles.²¹⁰

B. Canadian Privacy Laws

In 2001, the federal government enacted the Personal Information Protection and Electronic Documents Act (PIPEDA)²¹¹ to regulate how organizations could collect, use, and disclose personal information collecting during commercial activity. This was extended in 2004 to all businesses to which a “substantially similar” provincial law does not apply.²¹² PIPEDA requires

²⁰⁹ See *Safe Harbor Overview*, EXPORT.GOV, http://www.export.gov/safeharbor/eg_main_018236.asp (last updated Jan. 4, 2010).

²¹⁰ The Directive enabling the use of Model Clauses reads as follows:
 (1) Pursuant to Directive 95/46/EC Member States are required to provide that a transfer of personal data to a third country may only take place if the third country in question ensures an adequate level of data protection and the Member States’ laws, which comply with the other provisions of the Directive, are respected prior to the transfer.
 (2) However, Article 26(2) of Directive 95/46/EC provides that Member States may authorise, subject to certain safeguards, a transfer or a set of transfers of personal data to third countries which do not ensure an adequate level of protection. Such safeguards may in particular result from appropriate contractual clauses.

Commission Decision of 27 December 2001 on Standard Contractual Clauses for the Transfer of Personal Data to Processors Established in Third Countries, under Directive 95/46/EC, 2002 O.J. (L6) 52; see also WUGMEISTER & LYON, *supra* note 196, at 45-48.

²¹¹ Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 (Can.).

²¹² “Substantially similar” laws have been passed by Alberta, British Columbia, and Quebec. WUGMEISTER & LYON, *supra* note 196, at 91. Section 30.4 of the British Columbia Freedom of Information and Protection of Privacy Act provides that: “An employee, officer or director of a public body or an employee or associate of a service provider who has access, whether authorized or unauthorized, to personal information in the custody or control of a public body, must not disclose that information except as authorized under the Act.” Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165, § 30.4 (Can.). Breaches of section 30.4 are punishable by fines of up to \$2,000 per individual or up to \$500,000 for an organization. *Id.* at § 74.1(5). At least two prosecutions under the Act were pending before the BC Privacy Commissioner as of August 2010. See Bull, Housser & Tupper, *Privacy Law Prosecutions*, LABOUR & EMPL. NEWSLETTER, Aug. 27, 2010, at 1, available at http://bht.com/cms/newsletters/2010_AUGUST_LABOUR_EMPLOYMENT_NEWSLETTER.pdf#page=1.

adherence with requirements similar to the seven Safe Harbor Principles, but adds the following:

- (i) **consent** to collect and use the information must be express or implied;
- (ii) all organizations subject to PIPEDA must designate a **privacy officer**;
- (iii) **written** policies must be available for review;
- (iv) written **data retention guidelines** must be implemented on the preservation and destruction of data; and
- (v) **cross border transfers** are not prohibited or restricted; however, the organization remains responsible for data wherever it is located.²¹³

Cross border transfers is a substantial difference between Canadian privacy law and European law.²¹⁴

C. United States Data Protection Law

In the United States, the federal government and forty-seven states have data security laws. Federal data privacy laws have been enacted to protect personal financial and health information. Regulations of the use of non-public financial information by financial institutions are codified in a set of regulations known as the Financial Privacy Rule.²¹⁵ Personal health information is regulated by the Health Information Portability and Privacy Act of 1994 (HIPAA). HIPAA and recent legislation in Massachusetts provide good benchmarks of United States data privacy law.

²¹³ WUGMEISTER & LYON, *supra* note 196, at 93-94.

²¹⁴ Canada's Data Privacy Commissioner says the following about contractual privacy protections:

It is to respond to and to attempt to bring some globally recognized privacy standards to this flow of information that PIPEDA states that transfers of personal information can only be made if the requirements of the Act are satisfied – that is to say, if the organization receiving the information promises to protect the information. Organizations transferring personal information must use “contractual or other means” to ensure that a company located in another country provides a level of protection to the personal information comparable to that which it would receive in Canada if the laws in that country do not provide for comparable protection. Stoddard, *supra* note 192, at 18-19.

²¹⁵ The Financial Privacy Rule includes regulations promulgated by the Federal Reserve Board, the Federal Deposit Insurance Corporation, Federal Trade Commission, the Securities and Exchange Commission, the Commodities Futures Trading Commission, and the National Credit Union Administration. See WUGMEISTER & LYON, *supra* note 196, at 9.

1. HIPAA

The Health Insurance Portability and Accountability Act of 1996 (HIPAA)²¹⁶ regulates the use and disclosure of personal health information of individuals in the United States through the regulation of those who manage and use the data. The law imposes obligations on “Covered Entities” in managing “Personal Health Information.”²¹⁷ Confidentiality obligations are imposed on “Business Associates” who may have access to data by contract and regulation.²¹⁸

Personal Health Information is any health record or information related to health status and identifying information such as name, social security number, address, any contact information, and any record identifiers or serial numbers.²¹⁹

Covered Entities include health care providers, health plans, and health care information clearinghouses. The scope of HIPAA is expansive. “Health Care Providers” is defined as providers of medical or other health services and providers of services defined in the Social Security Act.²²⁰ Health care plans are insurers or others who pay for the cost of health services and includes group health plans, employee welfare plans, health insurance issuers, health maintenance organizations, Medicare and Medicaid programs, long-term care policies, employee welfare benefit plans, health care programs for active military personnel, veteran health programs, civilian health and medical programs, Indian health service programs, and federal employee health programs.²²¹

HIPAA supersedes state law.²²² HIPAA’s protections were enhanced by the Health Information Technology for Economic and Clinical Health Act of 2009 (HITECH),²²³ which extends the privacy and security provisions of HIPAA to business associates and includes new breach notification requirements.

Another aspect of HITECH is the empowerment of either the Department of Health and Human Services or state Attorneys General—or both—to take legal action to enforce and punish data breaches. Thus in the event of a data

²¹⁶ Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of 26, 29, and 42 U.S.C.) [hereinafter HIPAA]. The HIPAA Privacy Rule is found at 45 C.F.R. §§ 160.101-164.534 (2009).

²¹⁷ 45 C.F.R. § 160.102.

²¹⁸ *Id.* § 164.508.

²¹⁹ *Id.* § 164.501.

²²⁰ *Id.* § 160.103.

²²¹ *Id.*

²²² *Id.* § 160.202.

²²³ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

breach, a commercial entity might find itself prosecuted under state law after fully complying with the notice requirements of a data breach under federal law.²²⁴ Enforcement actions by the federal agencies have resulted in fines of millions of dollars per entity, creating very robust incentives for compliance with these United States privacy laws.²²⁵

2. Massachusetts Data Privacy Law

The Massachusetts Data Privacy Law²²⁶ that went into effect on March 1, 2010 applies to any organization that handles personal information of a Massachusetts resident. It requires a “comprehensive security program” for any such organization, regardless of where it is located, that includes the following: a written security policy; appointment of an accountable security officer; adoption of comprehensive security policies; encryption of personal information transmitted through any public network or wirelessly; encryption of portable security devices and backup media on a prospective basis; limitation of the amount of personal information gathered; limitation of the number of those with access to personal information, regular monitoring and assessment of security; requiring service providers to maintain adequate safeguards and security systems to combat malware and viruses; and documentation of actions taken in connection with any security breach.

The Massachusetts law is addressed largely as an example of the most stringent attempt by a state to legislate privacy practices at the time of this writing. As a practical matter, businesses that operate throughout the United States often have to comply with this law if they have employees or engage in business in any state with a uniquely broad law, even if it exceeds the standards of most other states. This means that individual states on the extreme of any regulatory issue can often impose their more burdensome standards on operations in other states. This phenomenon of the tail of one state’s legislature wagging the dog of national commercial practice is not unique to any state or any area of the law. In this case, Massachusetts law is the cur-

²²⁴ Several attorneys general have taken action against entities for self-reported disclosures. See *Employee Benefits Update*, REINHART, August 2010, at 5, available at <http://www.reinhartlaw.com/Publications/Documents/ea%20201008%20EB.pdf> (Conn. Attorney General Blumenthal sued HealthNet immediately after it made the disclosure required under federal law); Cheryl Clark, *Hospital fined \$250,000 For Late Reporting of Data Breach*, HEALTHLEADERS MEDIA (Sept. 9, 2010), <http://www.healthleadersmedia.com/content/TEC-256217/Hospital-Fined-250000-For-Not-Reporting-Data-Breach###>.

²²⁵ See, e.g., Hunton & Williams LLP, *CVS Pays \$2.45 Million in Record HIPAA Settlement*, PRIVACY & INFO. SECURITY L. BLOG (Feb. 20, 2010), <http://www.huntonprivacyblog.com/2009/02/articles/hipaa-1/cvs-pays-225-million-in-record-hipaa-settlement/>.

²²⁶ Standards for the Protection of Personal Information of Residents of the Commonwealth, 201 MASS. CODE REGS. § 17.00 (2010).

rently stringent standard imposed by default on national—even multinational—entities doing business within that state. Next year, some other state may impose a more stringent or inconsistent standard.

D. Practical Similarities

While the scope of laws differ in the two countries, there is a convergence emerging in what steps should be taken. Complaint policies, security requirements (which increasingly include encryption), written policies, and accountable privacy officers are becoming a norm. Confidentiality obligations have long been standard commercial practice and are enforceable in the United States under contract law and the doctrine of promissory estoppel.²²⁷ These obligations protect the intellectual property right of the owners of data²²⁸ and prevent misconduct and crime.²²⁹ The arrival of data privacy regulation through statutes such as HIPAA, although more incremental than the approach taken in Canada and Europe, reflects what has been characterized as “a necessary element of line-drawing along different coordinates to shape personal interest in personal data and permissible kinds of use.”²³⁰ Limitations on the use of personal health information by legislation such as the Americans with Disabilities Act²³¹ enhance this developing rubric of legislative privacy protection by creating rules that prohibit use of health information in some circumstances.

Moreover, all jurisdictions are increasingly focusing on the power of organizations to use written contracts with service providers to delineate in detail the obligation to protect sensitive personal information. Clearly, there is an emerging common privacy culture among organizations that must manage personal information.

²²⁷ See Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1057-1060 (2000) (although Volokh worries that data privacy laws may erode First Amendment protections in the United States, he acknowledges the vitality and validity of measures to protect confidential information by commercial parties).

²²⁸ *Id.* at 1063-1076.

²²⁹ *Id.* at 1119-1122.

²³⁰ Paul M. Schwartz, *Free Speech vs. Information Privacy: Eugene Volokh's First Amendment Jurisprudence*, 52 STAN. L. REV. 1559, 1567-68 (2000) (arguing that participants in a democracy have the right and ability to insist on regulatory enforcement of personal information rather than reliance on commercial self-regulation).

²³¹ Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2009).

II. PERCEIVED DIVERGENCE OF NATIONAL SECURITY CONCERNS AND USA PATRIOT ACT

A. A Provincial Reaction and the Canadian Response

Another source of divergence is a prevalent belief that maintaining data in the United States subjects the data to the Patriot Act. In 2004, the government of British Columbia placed a data outsourcing contract on hold over claims by the B.G. Government Employees' Union that a contract with a United States service provider would violate the Medicare Protection Act, the Canada Health Act, and the Freedom of Information and Protection of Privacy Act.²³² Similar concerns were raised about the Canadian government's use of a subsidiary of a United States multinational to work on the 2006 census.²³³

This concern is based on the fear that data can be seized under the Act without the kind of notice required under PIPEDA and the perception that the Canadian government would not be advised of the investigation.²³⁴

And yet, although the powers of the Patriot Act are not limited to the United States, this is not as novel as some believe. As Privacy Commissioner Stoddard has observed, "Canadian law often permits government agencies to share personal information that is held in Canada (by government or the private sector) with foreign governments and organizations, even without the consent of the individual to whom the information relates."²³⁵ She notes that transfers of personal data without consent of the individual can be done in a number of circumstances. The Privacy Act allows transfers of information under control of the Government of Canada to a foreign state to administer or enforce any law or lawful investigation.²³⁶ These include requests for information by law enforcement under the Canada-United States Mutual Assistance Treaty, the Proceeds of Crime and Terrorist Financing Act, the De-

²³² See MICHAEL GEIST & MILANA HOMSI, THE LONG ARM OF THE USA PATRIOT ACT: A THREAT TO CANADIAN PRIVACY? 4 (2004) (containing an analysis of how the USA Patriot Act operates).

²³³ *Id.*

²³⁴ See SEDONA CONFERENCE WORKING GROUP, FRAMEWORK FOR ANALYSIS OF CROSS-BORDER DISCOVERY CONFLICTS: A PRACTICAL GUIDE TO NAVIGATING COMPETING CURRENTS OF INTERNATIONAL DATA PRIVACY AND E-DISCOVERY 7 (2008), available at <http://www.aija.org.au/Law&Tech%2008/Papers/Daley%20Framework.pdf>. (in the context of civil litigation, "[c]ross-border discovery represents a 'Catch-22' situation in which the need to gather relevant information from foreign jurisdictions often squarely conflicts with blocking statutes and data privacy regulations that prohibit or restrict such discovery – often upon threat of severe civil and criminal sanctions.").

²³⁵ Stoddard, *supra* note 192, at 19.

²³⁶ *Id.*

partment of Immigration and Citizenship Act, and the Canadian Security Intelligence Service Act.²³⁷

PIPEDA Section 7 requires organizations in Canada to disclose personal information to comply with a subpoena or laws court order. Commissioner Stoddard provides an example of a typical request for personal information maintained by a government in Canada. The United States would make a request to the Government of Canada under the Canada-U.S. Mutual Assistance Treaty or some other law or treaty. Canada's federal Department of Justice would then apply to a court for a subpoena or order to compel disclosure of the information.²³⁸

The Patriot Act, in contrast, could be used to collect data about Canadians maintained in the United States.²³⁹ The Patriot Act was enacted in 2001 to amend the U.S. Foreign Intelligence Surveillance Act of 1978 ("FISA").²⁴⁰ The Patriot Act permits the Federal Bureau of Investigation to apply to a court governed by FISA for an order compelling organizations to provide information and documents to enable an investigation bearing on national security issues such as international terrorism. Proceedings of FISA courts are not publicized, the targets of investigations are not informed of the proceedings, and the producing party can be ordered not to disclose the target of the investigation.

First, how active have the FISA courts been under the USA Patriot Act? To find out, the American Civil Liberties Union (ACLU) filed suit to enforce a request under the Freedom of Information Act. That suit resulted in the disclosure that there have only been thirty-five cases in which it has been granted between 2001 and 2010.

Aside from the infrequency of its use, what is the risk that personal information of Canadians will be gathered without regard to the rights of Canadians? Commissioner Stoddard has provided the following assessment:

Research by the Office of the Privacy Commissioner and discussions with the Department of Justice suggest that the USA Patriot

²³⁷ *Id.* at 20.

²³⁸ *Id.* at 19.

²³⁹ For a discussion of the procedures and safeguards that U.S. courts observe in issuing search warrants for electronically stored information, *see generally* *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162 (9th Cir. 2010) (*per curiam*).

²⁴⁰ The Obama administration has refrained from adding privacy protections to the USA PATRIOT Act by signing into law H.R. 3961, which extends for two years the ability of law enforcement to engage in "roving wiretaps" and to demand circulation lists from public libraries. Medicare Physician Payment Reform Act of 2009, H.R. 3961, 111th Cong. (2009) (enacted); *see also* Steptoe & Johnson LLP, *As the Days Grow Longer, So Do the Sunsets*, E-COMMERCE L. WEEK, Mar. 6, 2010, available at http://www.steptoe.com/publications-pdf.html/pdf/?item_id=6696.

Act is not likely in the normal course of events to be used to obtain personal information held in the United States about Canadians. It is far more likely that existing means of obtaining such information will continue to be used such as “grand jury subpoenas,” “national security letters,” and ordinary search warrants in criminal investigations.²⁴¹

Commissioner Stoddard observes that all governments have long exercised the right to obtain information held by organizations within their borders, and Canada is no different from the United States in this respect.²⁴²

B. European Union-United States Data Sharing Agreement

In 2010, Europe and the United States moved closer to a common arrangement for sharing personal data in the interest of security while attempting to reconcile differing approaches to privacy. On June 28, 2010, the European Union announced that it reached a five-year agreement with the United States, effective on August 1, 2010, to allow the United States to request financial data relevant to terrorist investigations.²⁴³

Following a decision by the European Union’s Justice Ministers on May 26, 2010, the European Commission adopted a draft mandate to negotiate an agreement with the United States to allow for the transfers of data to combat terrorism while harmonizing data sharing with differing approaches to privacy rights.²⁴⁴

The draft mandate adopted by the European Union provides for the following: (1) coherent and harmonized data protection standards including essential principals such as proportionality, data minimization, minimum retention periods, and purpose limitation; (2) all necessary data protection standards in line with the EU’s existing data protection rules such as enforceable rights for individuals, administrative and judicial redress, or a non-

²⁴¹ Stoddard, *supra* note 192, at 21.

²⁴² *Id.* at 20.

²⁴³ Ellen Nakashima, *European Union, U.S. to Share Banking Data To Fight Terrorism*, WASH. POST (June 29, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/28/AR2010062805052.html>.

²⁴⁴ Juliana Gruenwald, *EU-US Launch Talks On Protecting Data in Terrorism, Crime Probes*, NAT’L J. (Dec. 9, 2010, 11:01 AM), <http://techdailydose.nationaljournal.com/2010/12/euus-launch-talks-on-protectin.php>; Jim Kouri, *US, EU to discuss new agreement to fight terrorism and crime*, CAN. FREE PRESS (Dec. 9, 2010), <http://www.canadafreepress.com/index.php/article/30878>; *EU-US Personal Data Agreement to Fight Terrorism or Crime*, ETN GLOBAL TRAVEL INDUSTRY NEWS (Dec. 3, 2010), <http://www.eturbonews.com/19874/eu-us-personal-data-agreement-fight-terrorism-or-crime>.

discrimination clause; and (3) the effective application of data protection standards and their control by independent public authorities.²⁴⁵

Under the program, the United States would have the right to retain data for five years.²⁴⁶

III. CONCLUSION

Organizations in both Canada and the United States are accustomed to dealing with data privacy rules and contractual obligations to keep sensitive personal information secure. The law and commercial practice of protecting personal information in cross border transactions can be, and is, managed through prudent commercial contracts. From the commercial context, parties have economic incentives to structure relationships in a manner to prevent liability, regulatory reaction, and brand damage as a consequence of data loss incidences.

Differences exist, but these differences are manageable. This is borne out by the measured approach of Commissioner Stoddard and recent efforts by the European Union to balance the interests of security from terrorism with a legal framework for protecting prevailing privacy rights.

A regulatory convergence has developed to facilitate data transfers while protecting the confidentiality of personal information. Due to differences in approaches to privacy law, that convergence will not be seamless, but with cross-border transactions and information sharing as an inextricable part of our global economy, it is crucial. This is especially true for the nations of North America. As some form of convergence of privacy laws continues to evolve between Canada and the United States, convergence of perceptions should follow.

²⁴⁵ Gruenwald, *supra* note 244.

²⁴⁶ Nakashima, *supra* note 243, at 52.