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## CROSS-BORDER CANADA/U.S. COOPERATION IN INVESTIGATIONS AND ENFORCEMENT ACTIONS VIS À VIS PRIVATE PARTIES

*Konrad von Finckenstein*

First of all, I am delighted to be here. For three years, Henry has invited me. This year, finally, I managed to make it rather than sending a deputy.

Debra just finished off saying we need to exchange information. I totally agree. There is actually a bill before Parliament and a discussion is going to take place on Monday. There is going to be a big public debate in Canada on that very point. But, let me quickly run through what we do on the criminal side, having heard from Debra Valentine on the civil side.

First of all, the Canadian Competition Bureau is basically the Federal Trade Commission and the Deputy Attorney General (Antitrust) in the United States rolled into one. We are responsible for the Competition Act and three labeling acts. So we have the responsibility for addressing both anti-competitive conduct and consumer information.

In the current business environment there are new challenges. The elimination of barriers to trade, and tremendous market integration, both in North America and globally. There is the challenge of E-commerce on the Internet that brings new business models, new ways of doing business.

All of this has a tremendous impact in terms of competition and, unfortunately, also in terms of illegal competition. Today's anti-competitive activity operates on a continental and/or a global scale. We see coordinated conspiracies that are systematically planned, literally splitting up the globe in different markets deciding who gets what share. In order to fight this kind of continental and global anti-competitive conduct, we need coordinated competition law enforcement, and cooperation both at the bilateral and multilateral level.

With such coordination, there will be synergies. First of all, we must make sure we do not get in the way of each others' attempts at investigation or accidentally tip off somebody. In terms of remedies, we seek to ensure that they work together, rather than cross purposes. Second, we get much more information through access to a wider information pool. We find out things that we do not know about our own country and vice-versa. The idea is to try to make sure that borders cannot be used as a shield. Enforcement has to work on a global scale since we are dealing with conduct on a global scale.

I want to talk about three topics today. First of all, what we do in Canada and the United States with regard to criminal investigations. Second, I would like to address some new laws, initiatives, and tools that we have developed in Canada. Lastly, I would like to point out future priorities.

We have seen a three-fold increase in joint investigations between Canada and the United States since 1995. It is really quite unbelievable what is going on in this field. There has been very vigorous prosecution by the Attorneys General, both in the United States and in Canada, resulting in unprecedented fines. We used to achieve fines up to a million dollars. One over a million dollars used to be a big thing. This year, we had a single fine of forty-eight million dollars; the largest fine ever levied in Canadian criminal history. Last year alone, we collected over 100 million dollars, which, by Canadian standards, is just unheard of.

For instance, we had a case involving pharmaceutical companies and vitamins. It was a conspiracy among some German, French, Japanese, Swiss, and American firms, who were meeting to carve up the market for Vitamin E. They decided who gets what, what the sales rate would be, and what the price levels would be. They started out with twenty-five percent of the Japanese market. Their sales grew to thirty-three percent, so their sales had to slow down, otherwise they would go over their target. All of this was actually taped and it was fascinating. So it was, in effect, a systematic criminal activity meant to hurt the consumer.

We also obtained fines against two foreign nationals. Interestingly enough, one of these foreign nationals was quite willing to be fined, but he would not set foot in North America because he was afraid that the moment he came to Canada, we would get an extradition request from the Americans. Under our law, you can plead guilty through videoconference. So, we actually had a videoconference with the man in Switzerland. He pled guilty and was fined. He paid his fine, but he never came to North America.

We also had a former Vice President of a company sentenced to nine months imprisonment. It is very unusual to imprison an executive in Canada. On the other hand, it sends quite a distinct message through the business community that this is really serious business.

We also have a mutual legal assistance treaty (MLAT) with the Americans. It is really a very useful tool because, essentially, it allows us to send our requests to the Americans, and the Americans can send requests to us. On the basis of such requests, we can use court processes in order to coordinate our searches. We do them at the same time on both sides of the border. The evidence gets seized and it can be exchanged. A perfect example

of the use of the MLAT was in the fax paper case,<sup>1</sup> which resulted in guilty pleas and fines.

What are some of the new tools we are using? With recent Competition Act amendments, there is now a new offense of deceptive telemarketing. If you are a telemarketer and, for example, you insist on payment before you deliver a prize or something, that is an offense and can result in imprisonment and fines. The reason we use this approach is, the task force that Debra talked about found out that of the 400 billion dollar telemarketing business, ten percent of it is illicit. For the Canadian part, just divide that by ten. So that is a four billion dollar hit to the Canadian market. What has happened, of course, has completely cast a negative image on legitimate business. What we wanted to do was protect legitimate business but, at the same time, we wanted to go after the illicit ones. So we figured the best way to do that was to enact a standard of behavior. If they stay within the rules, fine. If not, then we will go after them.

Additionally, we now have the authority to wire tap for price fixing, market allocation, bid rigging, and deceptive telemarketing. Of course, you do have to prove you have reasonable cause to use wire-tapping. If possible you must use a less intrusive tool such as search and seizure. Search and seizure is less intrusive than wire tapping, the way our laws are written.

Also, we now have authority to seek interim injunctions and third-party injunctions against people who supply illicit telemarketers. These people can be prohibited from supplying these companies. So not only can you go after the telemarketer, but you can also go after his or her source of supply, and you can hold both of them liable.

Finally, we also provided specific whistle blower protection. In order to protect the identity of a person reporting offenses and to make sure that the employee is protected as much as possible against reprisal by the employer, we made it a criminal offense in Canada for a company to take action against an employee who has blown the whistle.

We also recently revised our immunity policy. We have emulated the U.S. model. It is a very straightforward program. It says that if you become party to a conspiracy, if you come forward and you are the first to do so, then we will recommend immunity; if the Attorney General agrees, she will grant immunity. We are prepared to offer this deal in two circumstances: One when we are unaware of the crime; and two, if the person who is first to come forward does so when we are aware of the offense but do not have enough evidence to refer the case for prosecution. This does not apply to the leader or the instigator of the conspiracy. This is very important because once

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<sup>1</sup> U.S. v. Nippon Paper Indus. Co., 944 F. Supp. 55 (D. Mass. 1996), *rev'd* 109 F.3d 1 (1st Cir. Mass. 1997).

there is a question that somebody may be blowing the whistle, the greater incentive is for the instigator to come forward. Most of these cases start in the United States, because exposure there is greater than in Canada, and we did not want to have the instigator come forward and have to be put in a position to give them immunity, instead of a less culpable party.

The cooperating party must terminate the illegal activity. They have to provide timely and complete cooperation and be fully truthful. Cooperation has to be full, continuous, and expeditious. If you hold anything back, or you are party to a second conspiracy and you do not tell us that, in effect, it may void immunity on the first offense.

In order to seek immunity, you must take the following steps: You must first contact the Bureau. Often this is done through counsel to maintain anonymity. Then you seek a provisional guarantee, based on a hypothetical disclosure of information. Then full disclosure is made with the Attorney General executing the immunity agreement.

Such requests for immunity are usually initiated by a party who has been involved in an offense. However, there may be situations when the Bureau approaches a target of an investigation. We may have suspicions about the company and have some information. We have looked at the various people who are most likely involved. Then, we may decide to approach the company who is the most appropriate candidate for immunity. Then we inform them of the existence of our immunity program. If they come forward, then we can recommend immunity. We have found this to be effective. Americans have dealt the same way with the large conspiracies.

The key is that the process goes forward in both jurisdictions. It usually starts in the United States. There is great exposure in the United States, you have civil exposure and treble damages. You normally contact the United States first. Similarly, were we have been contacted first, we will urge the applicants to go to other jurisdictions as well. We will not restrict disclosure to other jurisdictions unless there is something covert going on. The Americans apply the same rule. This is absolutely key in terms of our cooperation. When someone comes to Canada first, we recommend that they go down South.

The key is for the applicants to understand that there is no reward for being first outside Canada. You must be first in vis-à-vis the relevant jurisdiction. This is something both Joel Klein and I live by. It's essential, if you want to take care of all jurisdictions where you may be exposed, to be first in each of those jurisdictions. Otherwise, what can happen is somebody jumps the gun, and you get immunity in the States, but you do not get it in Canada or vice-versa. Unfortunately, we have had cases like that.

We have a cooperation agreement, which provides for notification, cooperation, and information exchange. We have the same thing with the European Union (E.U.). It has the same kind of effect. It also has a very significant side effect. The E.U. has a very open process. They have hearings where the staff presents its view once it has finished its work. The merging party presents its view, and the opposing party presents its view. This is an open hearing, so they lay all the facts on the table. Signatories with the E.U. on cooperation, such as the United States and Canada, can participate in those hearings; therefore, we can learn a lot of information that is very relevant. Since the E.U. has very strict time periods in which they have to approve mergers, they usually are one of the first ones to deal with them.

Now I'd like to address future priorities. The 1995 Canada/U.S. Agreement is an excellent model. We want to have other agreements like it with our other trade partners. We are in the process of negotiating an agreement with Chile. We are also negotiating with Australia and New Zealand. They are considered the leaders in terms of innovative advances in competition policy, and we are setting our sights on the Mexicans as well.

One of the points Debra mentioned was positive comity. The United States and the E.U. have a positive comity agreement. We are in the process of discussing one with the United States. The whole idea of positive comity is to avoid extraterritorial problems. When you have an issue that affects both sides of the border, positive comity involves one jurisdiction asking the other to take appropriate action, take charge of the matter, investigate it, and find a resolution that would solve the problem in both jurisdictions. The other agency will, therefore, hold off.

Technically speaking, such an agreement reserves the right to step in. Accordingly, one thing that is absolutely important is that the agencies involved are constantly in touch with each other, because the agency that holds back waiting for the other one to act is under considerable domestic pressure to do something, and is constantly being barraged with requests and petitions and the like. So it has to be able to find out what is happening. To tell a country to wait for further development is not good enough.

On the other hand, under the U.S./E.U. agreement, matters have to be resolved within a time frame of six months. I think the experience between the United States and the E.U. has shown that six months is far too short to deal with these problems. We should probably try to work out a more flexible time frame.

There is also, as I mentioned, the International Antitrust Enforcement Assistance Act.<sup>2</sup> It is a wonderful tool that has been enacted by Congress. It

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<sup>2</sup> International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6201-6212.

allows, in effect, the exchange of documents with another country in all antitrust matters provided there is equal protection for the confidentiality. We do not have such an act. We have a bill before Parliament that we hope will be enacted which will permit us to apply the MLAT criminal antitrust process to non-criminal antitrust matters.

At the same time, we are pushing very hard to have competition be part of the new round of World Trade Organization (WTO) negotiations. This issue failed in Seattle but, hopefully, it will come back again. I am convinced in the long run that we need common standards in terms of basic principles and basic procedures of competition. This hodge-podge that we see around the world right now is not helpful and it can be abused. You can use competition law to foster national champions. You should not, but the temptation may be there, especially in some world nations. The WTO is very important and Canada remains a firm advocate for inclusion at the WTO of a regime of competition essentially modeled on the intellectual property model: general principles, general procedure rules, and implementation according to each countries' laws, traditions, and procedures. I think there probably should be no dispute settlement because dispute settlement ties into individual decisions, but peer review may be appropriate to measure implementation.

So, in closing, all I can say is Canada and the U.S. are models of cooperation on competition law, basically because our laws are very similar. We have the same attitude. It is also much easier than in the trade policy area because there is no implicit protection in competition law for domestic industries. Competition by definition is blind to ownership, and neither of us has an overt or covert idea of fostering national champions, so we both look at competition law to be nothing more than a means to ensure a competitive, fair market. We have worked very closely on the criminal side. We have worked daily on the merger side. It is a model that is very much used in the Organization for Economic Cooperation and Development to show how cooperation can work, and we hope that we can foster this on a multi-lateral basis.

Thank you.