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*by Roy M. Davidson**

EARLIER THIS MORNING Mr. Donald Baker introduced his remarks with a comment on conflict among friends. I should say that I have experienced a certain conflict too. For the past thirty years I have been tangling with the legal community in Canada in the combines field because my background is economics and not law. There is a constant conflict in our operation between the economic perspective and the legal one. Consequently, since my remarks are going to be directed primarily from an economic perspective, I am probably running the risk of making many of the lawyers here today unhappy.

The title of my contribution this morning is not quite as I would have phrased it myself. In my Department we have never considered ourselves or our legislation to be in any adversary relationship with our friends in the United States antitrust agencies, nor with the laws they administer. Looked at as a whole, the effects of the United States antitrust laws upon Canada we think, have been benign. I wonder sometimes if people should not ask themselves what it would be like for Canada to have to trade with a cartelized America.

It has to be recognized that in various sectors of industry, all countries are faced by oligopolies operating on a world scale. Where such an international industry structure is dictated by economic imperatives, it is idle to complain. What this means however is that, unlike oligopolies operating only in national markets, in the case of international oligopolies no monitoring agency exists to exercise any control over them. In these circumstances, and despite some serious difficulties they have caused, we think the constraints imposed by the United States antitrust laws upon American multinationals abroad have been generally consistent with Canadian laws and interests.

These statements are not just based on random observation. Some years ago we attempted to assess the situation in a systematic way, though the facts are difficult to come by. At that time we examined every United States antitrust case we could find which appeared to have had some identifiable impact in Canada. It turned out that in most such cases, Canadian export opportunities increased, or import prices dropped, or barriers to the entry of new competition in Canada declined.

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As I shall explain in a few moments, the international aspects of the Stage I and Stage II amendments are directed *primarily* at attempting to control certain international restrictive business practices affecting Canada adversely. Nevertheless, as I have said, there have been some difficulties stemming from the overseas reach of United States laws, and some of the concern about that is reflected in the Stage I amendments. Let us begin by looking at the earlier record of some of these difficulties and Canadian responses to them.

In 1947, a grand jury in the United States subpoenaed International Paper Company, a New York corporation, to produce documents under the control of two affiliates in the Province of Quebec, one of which was Canadian International Paper (CIP). The United States court found that CIP was doing business within United States jurisdiction, itself or by an agent, and was therefore subject to the court's order for the production of documents within its control, even though they were located in Canada.[1] It was compulsion of this kind by the United States courts which led to the enactment of legislation in Quebec and Ontario concerning the removal of business records. Both statutes prohibit removal of corporate records in compliance with any requirement, order, direction, or subpoena of a legislative, administrative or judicial authority in a jurisdiction outside the province. I understand, however, that these laws are not quite as strong in practice as they may sound. For example, they do not prevent a foreign parent from obtaining records from a Canadian subsidiary. Recently, they were not considered adequate to prevent transfer of certain uranium documents abroad.

The *Imperial Chemical Industries* case[2] of 1951 is an interesting example of how the United States antitrust laws can have an effect in Canada even without the assertion of jurisdiction in Canada. DuPont, an American company, and Imperial Chemical Industries (ICI), a British company, were ordered to divest themselves of holdings in any companies which they owned jointly. This included Canadian Industries Limited (CIL), then our largest chemical company by far. The assets of this company were divided, and DuPont sold its shares in CIL to ICI and set up a separate chemical firm in Canada.

A case which was to have broader repercussions for our international relations was the *Canadian Radio Patents Limited* case.[3] In 1958, the United States Department of Justice filed a civil suit against two United States companies, General Electric Company and Westinghouse Electric Corporation and against N. V. Philips from the Netherlands, all engaged in the manufacture of radio and television sets, charging a contravention of the United States antitrust laws. The complaint alleged that the defendants, operating

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[1] *In re* Grand Jury Subpoena Duces Tecum Addressed to Canadian International Paper Company *et al.*, 72 F. Supp. 1013 (S.D.N.Y. 1947).

[2] United States v. Imperial Chemical Industries, 100 F. Supp. 504 (S.D.N.Y. 1951); *see also id.*, 105 F. Supp. 215 (S.D.N.Y. 1952).

[3] United States v. General Electric Company, 82 F. Supp. 753 (D.N.J. 1949), *modified* 115 F. Supp. 835 (D.N.J. 1953).

through Canadian subsidiaries, engaged with co-conspirators in an unlawful conspiracy in restraint of foreign trade and commerce in radio and television receiving sets, between the United States and Canada. Such restraint was alleged to have been accomplished by the organization of a Canadian patent pool (Canadian Patents Limited) controlled by the defendants' Canadian subsidiaries, which prevented the importation into Canada of radio and television receiving sets manufactured in the United States. Among other things, the patent pool was alleged to have refused to license dealers who wished to import United States made apparatus into Canada. The complaint alleged that the Canadian market had been virtually closed to United States manufacturers, and that United States consumers had been adversely affected, by being deprived of the benefits of the increased volume of such articles that would have been produced, had the patent pool not existed.

The suit caused concern in Canada as its object was to force Canadian companies to make changes in their commercial practice, a matter which was regarded as coming under Canadian laws rather than United States laws. (The question of whether the imposition of private barriers to trade was in Canada's interest, was never really addressed.) The situation gave rise to discussions between the Attorney General of the United States and the Minister of Justice of Canada and an informal agreement on consultative procedure between the two countries was reached—the Fulton-Rogers Understanding of 1959. The Honourable E. Davie Fulton described the discussion as follows:

> [I]t was readily agreed that in any similar situation in the future, discussions will be held between the two governments at the appropriate stage when it becomes apparent that interests in one of our countries are likely to be affected by the enforcement of the antitrust laws of the other. Such discussions would be designed to explore ways and means of avoiding the sort of situation which would give rise to objections or misunderstandings in the other country. It was, however, made clear that each government would have to reserve its ultimate responsibility to decide for itself what action it should take, and that such consultations should not be regarded in any way as necessarily implying approval of the action ultimately taken.
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> I believe that the arrival at an understanding on prior consultation is a real accomplishment. . . .[4]

The conclusion of that Understanding was followed by a long period during which there were very few difficulties of any consequence between Canada and the United States on antitrust matters. A few potentially abrasive situations were quietly worked out in a mutually satisfactory way. To the extent possible under the rules of confidentiality, each country notified the other at the earliest possible stage and kept the other informed of significant developments in the litigation. I might add, in case there is any doubt, that

[4] *See generally* [1959] 1 HOUSE OF COMMONS DEB. 619 (Can.) (statement of Hon. E.D. Fulton, the Minister of Justice).

most of the advice about inquiries impacting on the other country came, of course, from the United States where the antitrust administration has always been much more active and had much stronger legislation than is the case in Canada.

The fifteen years following the Fulton-Rogers Understanding saw what can best be described as cautious (Corwin Edwards called it glacial) progess in international cooperation in antitrust matters. The OECD Committee of Experts on Restrictive Business Practices, which had come into being in the early 1960's became increasingly active. It is not irrelevant to note that Mr. Justice D.H.W. Henry, who was then the head of our Bureau, was Chairman of that Committee for a long period. And Mr. Wilbur Fugate, then Chief of the Foreign Section of the United States Antitrust Division chaired a working party of the Committee whose concern was international cooperation on antitrust matters.

Much of the impetus for the work of the Committee came from the rapid development of antitrust laws in Europe and Japan. One result of that work was the OECD Recommendation of 1967 Respecting Consultation and Notification. It provided for notification and consultation by member countries much along the lines of the Fulton-Rogers Understanding. In addition, the Recommendation envisaged active cooperation among countries in the control of restrictive business practices affecting international trade. These latter parts of the Recommendation state:

> That where two or more Member countries proceed against a restrictive business practice in international trade, they should endeavour to co-ordinate their action in so far as appropriate and practicable under national laws.
> To supply each other with information on restrictive business practices in international trade whcih their laws and legitimate interests permit them to disclose.
> To co-operate in developing or applying mutually beneficial methods of dealing with restrictive business practices in international trade.[5]

I would not want to exaggerate the practical effects of that Recommendation. However, the many notifications which have been made under it, combined with the other work of the Committee, have certainly contributed to an international flow of information on antitrust matters.

In 1969, discussions were held between Canada and the United States to reaffirm and extend the Fulton-Rogers Understanding and to relate it to the 1967 OECD Recommendation.

In November 1969, the Honourable Ron Basford, now of course Minister of Justice, but at the time Minister of Consumer and Corporate Affairs, and the United States Attorney General, the Honourable John N. Mitchell, issued a joint communiqué confirming and extending the Fulton-Rogers Understanding of 1959. It reads in part as follows:

[5] *See* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, RECOMMENDATION OF THE COUNCIL CONCERNING CO-OPERATION BETWEEN MEMBER COUNTRIES ON RESTRICTIVE BUSINESS PRACTICES AFFECTING INTERNATIONAL TRADE 1 (Oct. 5, 1967).

> In addition, therefore, to continuing the Notification and Consultation Procedure in accordance with the 1959 Understanding, the two cabinet members agreed that the O.E.C.D. Recommendation of 1967 should be actively implemented as between Canada and the United States in relation to restrictive business practices and international trade. Notification and consultation will continue under both arrangements. Each country will, *in so far as its national laws and legitimate interests permit,* provide the other with information in its possession of activities or situations, affecting international trade, that the other requires in order to consider whether there has been a breach of its restrictive business practices laws.
>
> A primary concern would be cartel and other restrictive agreements and restrictive business practices of multinational corporations affecting international trade. The enforcement agencies of the two countries, each within its own jurisdiction, will where possible co-ordinate the enforcement of their respective laws against such restrictive business practices.[6]

About this time, new factors were developing which were destined to have an impact upon the antitrust relations between Canada and the United States. One was a substantial increase in the resources devoted by the United States to enforcement in the international arena. Another was the increasing involvement of government in industrial policies. A third factor was the growing concern in Canada about the high levels of foreign ownership in Canadian industry, often reflecting the acquisition of Canadian enterprises rather than new investment.

Many of you will recall the Gray Report on *Foreign Direct Investment in Canada* which appeared in 1972. Aside from leading to the creation of the Foreign Investment Review Agency, that report had an influence on the Stage I amendments to the Combines Investigation Act, which came into force in 1976. It has also influenced the Stage II amendments, which I shall discuss in a few moments.

By no means all the findings of the Gray Report were negative, but some of them were, including the following:

> —that a large percentage of forieng-controlled companies were operating under export restrictions imposed by their parents;
> —that certain United States laws, notably the Trading-with-the-Enemy Act, restricted the freedom of foreign-owned firms in Canada to compete in some foreign markets;
> —that some Canadian industries under heavy foreign control had become small-scale replicas of the United States industries. Faced with a small market, they consisted largely of "truncated" rather than integrated firms. The Report expressed concern that the United States antitrust laws might conflict with a policy of restructuring of such industries.

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[6] The Basford-Mitchell Understanding was announced and described in U.S. Dep't of Justice, Joint Statement (press release, Nov. 3, 1969) (emphasis added) (copy on file at the offices of the *Canada-United States Law Journal*).

There have, in addition, been several inquiries which have brought out some of the difficulties faced by a country like Canada in dealing with restrictive practices by international enterprises. Some of you will recall the *Report of the Royal Commission on Farm Machinery* in 1971. It documented the existence of a multiple price system on farm tractors operated by the world's leading manufacturers which were mainly based in North America but which had important production facilities in Europe and particularly in Britain. Prices on sales in Europe were, and probably still are, substantially lower than on sales in North America. The study identified certain restrictive practices in Britain which helped achieve that result by preventing shipments from low to high priced markets. Despite the fact that one of the firms, Massey Ferguson, was Canadian based, there proved to be little that could be done to protect Canadian farmers from the effects of this international price discrimination.

Then there was our case against the Electric Reduction Company, Erco.[7] Erco, a wholly owned subsidiary of a British firm, Albright and Wilson, was the only Canadian producer of red phosphorus. The parent firm was a member of an international cartel. Erco was not a signatory to the agreement which was styled the Hunting Ground Agreement, but it was *de facto* a part of it because of the parent company's control over its foreign trade. However, the fact that Erco was only indirectly involved made it unlikely that a prosecution on a conspiracy charge under the Combines Investigation Act would succeed, even though the possibility of off-shore competition in Canada was eliminated by the arrangement.

In 1971, while the Gray Report was being written, the Honourable Ron Basford introduced Bill C-256, the Competition Act. The bill met a solid wall of hostility from the legal profession and the business community. It is not surprising that some of the concerns about foreign ownership found expression in that Bill, nor that some of its provisions were finally enacted in the Stage I amendments to the Combines Investigation Act in 1975.

Sections 31.5 and 31.6 of the Act as amended in 1975 deal with the implementation in Canada of foreign judgments, laws and directives. The Restrictive Trade Practices Commission is empowered, upon application by the Director, to review and issue remedial orders respecting the implementation in Canada of foreign judgments, laws and directives which would have specified adverse effects in Canada. The Act is not a general facility for blocking foreign orders. To attract an order there must be a finding that implementation of the foreign judgment or order would: (a) adversely affect competition in Canada; (b) adversely affect the efficiency of trade and industry in Canada; (c) adversely affect the foreign trade of Canada without compensating advantages; or (d) would otherwise restrain or injure trade or commerce in Canada without compensating advantages.

It bears emphasis that the foreign judgment or order must have an adverse effect of the kinds specified in the Act. The section was not designed

[7] Trade Practices in the Phosphorus Products and Sodium Chlorate Industries, Report of the Restrictive Trade Practices Commission, Ottawa, 1966, RTPC No. 41.

to provide a safeharbor in Canada for foreign owned firms who wish to engage in anticompetitive practices which would be illegal in their countries of origin.

It is of interest to note that the Gray Report expressed strong support for similar sections which had originally been proposed in Bill C-256. However, the Report also recommended that the Combines Act be amended so as clearly to cover compliance with foreign subpoenas or other orders to produce documents, as well as voluntary compliance by foreign owned firms to foreign requests for documents. That recommendation has not been implemented.

The amendments of 1975 also contain two other provisions which I should mention. They are intended to deal with cases such as Erco where a firm in Canada is involved by foreign directive in the implementation of collusive arrangements entered into outside Canada which, if entered into within Canada, would be contrary to section 32. There is a civil procedure to deal with that in section 31.6 and a criminal provision in section 32.1. Both may not be applied to the same case. It is proposed in the Stage II amendments to clarify and strengthen these sections.

The Stage II amendments as contained in Bill C-42 propose no changes in the existing provisions respecting the implementation in Canada of foreign judgments or laws. They do, however, extend significantly the law's defences against private restrictive business practices emanating from abroad. They also include provisions to facilitate international cooperation in the control of restrictive business practices.

A new section 31.61 relates especially to the multinational enterprise. The section provides that the Competition Policy Advocate may apply to the Competititon Board for a remedial order, where a corporation carrying on business in Canada has agreed with or received instructions from an affiliate abroad, to substantially restrict imports or exports. The Board must find that the restriction is designed to protect the price level in a Canadian market from import competition or to protect the price level in a foreign market from Canadian competition. The Board may not issue an order unless it is satisfied that the corporation accounts for at least twenty-five percent of Canadian production or supply.

This section is responsive to one of the most serious concerns expressed in the Gray Report, that of international trade restrictions placed upon foreign controlled firms in Canada. It has been carefully drafted so as not to interfere with normal and legitimate management decisions. It does not, for example, affect the international rationalization of productive facilities by a multinational. The section would apply to a major firm in an industry which consistently, on orders from a foreign affiliate, conforms to an international market allocation scheme designed to protect different price levels in different countries with results adverse to Canada.

Another provision of interest in the State II revisions is a new section numbered 32.1, which deals with participation of Canadian firms in international cartels rather than with the relationships among affiliates of a multinational firm which I have just discussed. At the present time, the only prohibi-

tion which could be applied to an international cartel is section 32 relating to collusive arrangements. While there is a lack of jurisprudence on the matter, it appears that the requirement of undueness in that section may create difficulties. The proposed section 32.1 has no requirement of undueness. It would be an offence for one or more persons in Canada to agree with one or more persons abroad to restrict exports or imports of a product or otherwise adversely affect competition in Canada. It would be a defence to such a charge if the court were satisfied that the accused did not account for fifty percent or more of Canadian production or supply. The section will not apply to agreements authorized by Parliament.

Finally, Bill C-42 places some emphasis upon international cooperation in the control of restrictive business practices. In the first place, although the Bill continues and slightly strengthens the existing exemption for export agreements in section 32, it provides for removal of that exemption where an export agreement "is contrary to any agreement into which Canada has entered with any other country relating to private restrictions on international trade." For example, if the United States agreed with Canada that it would provide no exemptions for Webb-Pomerene arrangements when the Canadian market was affected, it would be open to Canada to make a reciprocal agreement that export exemption under Canadian law would be lost if the arrangement played against the United States market.

Moreover, a new section 47.1 makes specific provision for Canada to enter into international agreements on antitrust matters. The section provides in part:

> The Minister may, with the approval of the Governor in Council, enter into agreements with the governments of other countries providing for the elimination of private restrictions on international trade, asistance in the administration and enforcement of laws relating to the safeguarding of competition or the exchange of information relevant to the administration and enforcement of such laws, and the Competition Policy Advocate may supply and receive information in accordance with any such agreement notwithstanding any other provision of this Act.

Perhaps you will now understand more clearly my opening remark that I was not entirely happy with the title of my topic. It is at best an oversimplification to describe the Stage I and Stage II amendments as Canada's response to the overseas reach of United States antitrust law. It is true that sections 31.5 and 31.6 relating to foreign judgments, laws and directives would apply where a United States antitrust proceeding had the specified adverse effects on Canada. Fortunately, however, not many such proceedings have those adverse effects upon Canada. There is a much higher probability that the sections could have been applied successfully, to past manifestations of the Trading-with-the-Enemy Act.

Most of the Stage I and Stage II amendments I have described are Canada's response in a different sense. They are Canada's response to concerns, some of which are shared by our American friends, about international

restrictive business practices. True, our concerns and our reponses are coloured by the particular features of our economy. As predominantly a host country to multinationals, we are more prone than are the Americans, to identify certain internal practices of multinations as restrictive. And, possibly because we do not have the same strength to enforce our laws abroad, we confine ourselves to proceedings and remedies which can be applied in our own territory.

I suggested earlier that one of the developments not fully taken into account by Fulton-Rogers and Basford-Mitchell was the growing involvement of governments in industrial policies. The three most recent United States antitrust proceedings which created difficulties were all complicated by that factor. The potash case involved the Government of Saskatchewan and the uranium case involved Ottawa. The Rolls-Royce-Pratt and Whitney case also involved federal policies.

Some of the Stage II amendments increase the likelihood of conflicts arising in the application of Canadian and American competition laws. I am thinking particularly of the provisions respecting mergers and specialization agreements. Both provisions contain what can best be described as an efficiency override. A merger or a specialization agreement which offers important gains in efficiency will be approved even where competition is substantially lessened. These provisions were inserted to take account of problems associated with Canada's relatively small domestic market. The United States has no similar problems and no similar provisions in its antitrust laws.

Moreover, the proposed Competition Board would be empowered to prohibit or to place its stamp of approval on mergers and specialization agreements which were challenged before it, and not to mandate them. Also, in the case of specialization agreements, applications for approval will be made by the parties rather than by the Competition Policy Advocate, so you can see what problems are likely to arise given what Donald Baker has said about the sovereign immunity issue.

An American owned subsidiary in Canada might well hesitate to participate in an application for approval of a specialization agreement for fear of violating United States law, and this could frustrate Canadian policies enunciated in law. It is reasonably clear from United States jurisprudence that American law would not extend to a subsidiary where its action was compelled by a law of the country in which it was established, but even that statement has to bear some nuances as Donald Baker has pointed out. The subsidiary's position is at best unclear, however, if it is involved in a merger or specialization agreement which has been approved by the Competition Board but which is of a kind which normally would be in violation of United States law.

The potash and uranium cases, which I do not intend to discuss today, also brought to public attention problems created by the collection of documentary and other evidence in Canada by United States antitrust authorities. As these cases have illustrated, Canadian authorities may not always believe it to be in the Canadian interest for evidence to be transferred abroad.

Fortunately for me, it is beyond my terms of reference this morning to offer solutions to these recent problems or to forecast what Canada's responses will be. Judging from the past record, I would expect an important element of the solution to emerge from amicable discussions between our two countries and a growing awareness of each other's problems.