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ADDRESS

Approaches to the Extraterritoriality Issue

*by Thomas O. Enders**

I THINK ALL OF us feel that these last months, particularly since the start of the new American Administration, have been an exceptionally fruitful period in Canadian-American relations, one marked by much sensitivity to each other's concerns.

Former Prime Minister Trudeau and President Jimmy Carter have both remarked recently that we have been able to do much bilateral business to our mutual satisfaction this year. We negotiated the gas pipeline agreement in record time; we decided on a major revision of the toll structure on the St. Lawrence Seaway; we are in the process of resolving a long standing dispute on the environmental impact of the Garrison Diversion dam construction in the Dakotas; we have launched new, vigorous efforts to resolve our differences on boundary and resource issues connected with the 200 mile economic zone at sea and the long-standing West Coast salmon interception problem.

We have found our views converging on most international subjects, such as the control of the export of nuclear materials, efforts to encourage a peaceful transition to majority rule in Southern Africa, and the application of the principle of universality in developing relations with all countries.

The warmth and friendship between Mr. Carter and Mr. Trudeau affected the whole relationship. But our successes together also reflect a new realization on both sides of the border that neither of our societies can do well without the close support of the other.

Thus there are few problems or irritants in our relationship left to be solved. One of the few prickly issues remaining is the uranium antitrust case. We shortly expect to have discussions on how to handle the uranium problem, and I am hopeful that we can develop an approach that accommodates concerns on both sides.

It is characteristic of the way the relationship is going that we are trying not only to deal with the case at hand, but also to see whether we can make some structural improvement in the way we relate to each other so that extraterritoriality issues such as uranium become more manageable. What I would like to discuss today is this larger search for a structural solution to the problem of extraterritoriality.

The first thing to say is that the concept of extraterritorality is embraced in the legislation of both countries. Both countries wish to protect themselves against such potential threats as the use of foreign territory for conspiracy to

* United States Ambassador to Canada. These remarks were made at the Canada-United States Law Institute's Antitrust Conference, held September 30, 1977, at the University of Western Ontario, London.

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commit criminal acts at home, or the manipulation of foreign trade to restrain trade or to fix prices at home.

Indeed, if you look at it as a straight legal matter, the scope of Canadian anti-combines legislation and United States antitrust law is strikingly similar. As interpreted by the United States Supreme Court, the Sherman Antitrust Act may apply not only to domestic commerce, but to foreign trade; not only to United States nationals abroad, but also to the actions of foreign nationals that might cause a restraint of trade in the United States.

The Combines Investigation Act of Canada appears to have the same effect. In 1965, the Canadian Restrictive Trade Practices Commission held that "where any overt act which takes place in Canada flows from an agreement which is contrary to public policy, public interests or public order of Canada, such agreement comes within Canadian jurisdiction even if it was not made in Canada. In said circumstances, even if the agreement does not violate the law of the country where it was made, it is within the purview of Canadian courts." This principle has been upheld in various court decisions.

In practice, issues with extraterritorial aspects play a much bigger role in the United States than in Canada.

Although the concepts may be similar, United States antitrust authorities have generated a much larger number of investigations with extraterritorial implications than have Canadian anti-combines authorities.

Canada does not have legislation in two important fields—illicit payments and anti-boycott—in which American legislation has an effect outside the United States.

Finally, the fact that United States investment in Canada is far more important both relatively and absolutely than Canadian investment in the United States means that United States action raises extraterritoriality issues far more often than does Canadian action. However, even in the investment field, the issue does cut both ways. The Foreign Investment Review Act has an extraterritorial reach in providing that Canada may compel a foreign parent which merges or is sold to another foreign firm to divest itself of its Canadian subsidiary.

Canada and the United States have a long tradition of helping each other apply their separate national legislation. This is one of the most remarkable, and one of the most enduring aspects of our relationship.

The reason for this cooperation is that we have broadly similar concepts of the rule of law in society and generally compatible values to defend. It is also true that in some cases our respective legislation would be unenforceable without the assistance of the other country, for example, in criminal cases governed by extradition treaties or in drug traffic. Much of this cooperation is informal or of a consultative type. But each country has legislation governing the actions that may be taken in connection with foreign court proceedings.

In the United States a 1964 law provides for broad assistance by American authorities to foreign courts and investigative bodies in such matters as serving documents and obtaining evidence, subpoenaing witnesses, and

transmitting requests for official assistance. I understand that the Evidence Act gives Canadian courts authority to grant letters rogatory under which the courts may subpoena witnesses or gather evidence on behalf of foreign judicial or investigative bodies.

However, in the field of access to information there are also major differences between the United States and Canada. Canada's law apparently leaves a large measure of discretion to the courts. The issuance of letters rogatory can be challenged on the ground that the foreign requestor is attempting to discover evidence rather than securing information already identified as evidence; but this does not give satisfactory assurance that the material will not be used to the prejudice of Canadian national interests, nor (in the case of classified information) does it properly insure confidentiality.

In addition, under Canadian law a member of the government may file an affidavit asserting crown privilege. As in other matters affecting letters rogatory, the court has discretion to decide. Other Canadian legislation—such as the Official Secrets Acts and the Atomic Energy Control Act—also constrains access to information by foreign courts and administrative bodies.

Almost none of these restrictions in access to information is present in the United States.

Thus, the law of each country contains provision both for extraterritorial application and for access to information for foreign legal proceedings, but in differing ways and to a substantially different extent. The question is how to find the right balance between our laws and our separate national interests. The most promising—as well as currently the most important—field in which to do this is antitrust and anti-combine action.

Since 1959 there has been an understanding between our two countries committing both to mutual notification and consultation on antitrust investigations as they develop. This understanding has helped antitrust and anti-combine authorities in both countries to enforce their legislation more effectively. It also has enabled us to identify in advance, and in some cases to head off, situations in which the interests of the two countries would clash.

At their meeting in February 1977, former Prime Minister Trudeau proposed—and President Carter warmly agreed—that we should try to go beyond the consultative agreement to see whether a more fundamental solution to the extraterritoriality problem could be found. Subsequently, Attorney General Bell came to Ottawa to officially meet with Minister of Justice Basford and other concerned ministers.

One approach to the issue is to establish two principles.

The first principle is *cooperation.* We would cooperate with each other in enforcing our respective laws, exchanging available information and facilitating, or certainly not obstructing, the access by courts and investigative bodies to information in the other country.

The second principle is *comity.* Justice Hugo Black defined comity as "a proper respect for state functions." Attorney General Bell defines it as yielding to the country whose interests at stake are clearly paramount. Thus, the United States or Canada would not pursue an antitrust investigation in such a way as

to challenge the significant national interests of the other. As such, access to information would be permitted unless it involved the paramount national interest of the country concerned.

If these principles were accepted the question then would be how to identify "significant or paramount national interests." Clearly, we should find some way to tell each other that fundamental interests are at stake. This alert should be made well in advance of the conflict situation and at a time when the policies defining interests on each side are first laid down. We would have to ensure that the determination of interests is coherent, orderly and authoritative, and that it is accepted by each of the key players, government bodies and courts alike.

Inevitably there would be situations in which the two countries might not agree as to whose interests were paramount. But such instances should be few and easily resolvable; for if we can establish an even broader pattern of cooperation in antitrust and anti-combine issues, it would be in nobody's interest to break it by insisting on prevailing in a given case.

It's too early to say yet whether we will be able to make progress in this difficult area, but we are hopeful that we can.

The Canada-United States Law Institute is uniquely well placed—with its own resources and its connections into the legal and academic professions in both countries—to help find a solution to the extraterritoriality problem. I hope you will make your deliberations today available to both governments, along with any suggestions and recommendations that you have. Clearly, both the United States and Canada would greatly benefit by finding a balanced and responsible solution to a problem which has plagued our relationship for so many years.