

1979

Discussion

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Recommended Citation

Wilbur L. Fugate, *Discussion*, 2 Can.-U.S. L.J. 215 (1979)

Available at: <http://scholarlycommons.law.case.edu/cuslj/vol2/iss/32>

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by *Wilbur L. Fugate**

IT IS A stimulating experience today to participate in this conference on the extraterritorial application of the United States antitrust laws and Canada's response thereto. I have spent a considerable time over the years on this subject of extraterritoriality and it seems to become a more current topic every day.

When I was in the Antitrust Division of the United States Department of Justice, we had a very active and satisfactory liaison with the Office of the Director of Investigations under the Combines Investigation Act, the Director then being Mr. D.H.W. Henry, now Justice Henry of the Ontario Supreme Court.

At that time it was our custom to meet very often with officials of the Canadian Combines Branch, and to discuss as fully as possible our cases and investigations and the impact any of them might have upon Canada. The Combines Branch was equally frank. It was my pleasure to deal with Mr. Henry, with Mr. Davidson who has already spoken to you, and with Mr. Quinlan, now Chairman of the Restrictive Practices Commission. These meetings, insofar as they concerned policy issues which either government considered important to it, always included representatives of our State Department and of the Canadian External Affairs Department. I am pleased that discussions of this kind are continuing or have resumed and, particularly, that they have involved policy-making officials of both governments.

I do not know whether the current conflicts in antitrust between the two countries with respect to uranium and potash indicate that there was some breakdown in this liaison or whether the issues raised were of such consequence that friction could not be avoided in any case. One important aspect of the discussions as they were conducted some years ago was that emphasis was placed upon advance notice and consultation as to what each party intended to do, and this resulted in a softening of any repercussions from the action of one country affecting the important interests of the other country. In some instances action by the United States was delayed or the manner of taking it was changed, or the Canadian government itself determined to remedy the antitrust problems which were raised.

There appears to be agreement between Mr. Baker and Mr. Davidson with respect to the salutary influence of United States antitrust cases upon Canadian interests. I am sure that this agreement on the part of Mr. Davidson is not entirely shared, however, throughout the Canadian government or even by some other departments of the United States Government. It may be that

* Of Counsel, Baker, Hostetler, Frost & Towers, Washington, D.C.; former Chief, Foreign Commerce Section, Antitrust Division, United States Department of Justice. 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.

there will be, on occasion, conflicts in policy which cannot be accommodated through consultation between the antitrust authorities. It may be that some conflicts cannot even be solved by the diplomatic means.

Fortunately, differences in policy on antitrust have been exceedingly rare. There was the so-called *Radio Patents* decision which prompted the first attempt to create a consultation procedure between the United States and Canada. I do not believe that the outcome of that case seriously injured Canadian interests. Before that, there was the divestiture decree in a United States antitrust case involving the Canadian company CIL, which had been held jointly by two competitors, the American Dupont Company and the British Imperial Chemical Industries. Again, I believe that CIL has prospered despite the change of ownership required by the decree.

Such cases however, have occasioned an understandable amount of friction between the two countries. The potash cases and the Department of Justice grand jury uranium investigation are current matters which have provoked considerable reaction in Canada. I do not know how much discussion preceded the institution by the Department of Justice of the potash cases and its decision to begin the uranium grand jury investigation, but such matters would appear to be covered by the United States-Canada understanding. It is of course essential to have full discussion before the institution of suits by the United States Department of Justice. This is not the entire answer since the uranium cartel was brought to public attention by private suits, particularly the suit by utility companies against the Westinghouse Company in the United States.

I agree with Mr. Baker that if a country has decided upon some international arrangement which the United States would term an international cartel, and which might be prohibited by United States law, it avoids antitrust problems for the country to make such an international arrangement part of its own policy and to affirmatively mandate its implementation. Commodity agreements are prime examples of the fact that governments do have agreements with respect to production and price which, in absence of governmental approval and implementation, would probably run afoul of United States and other countries' antitrust laws.

It is the rule under the United States antitrust law that a foreign government must *require* anticompetitive action rather than merely approve such action for there to be any relief for private companies engaging in the activity in question. The usual rule for an exemption also is that the activity must take place within the boundaries of the country requiring it. An exception to this rule in the United States was established by the *Occidental Petroleum* case, in which Venezuela clearly advised American companies that oil produced in Venezuela should not be sold to certain United States outlets which were outside Venezuela. The reasoning of the United States court in this case, however, was that if the companies did not abide by the Venezuelan order, the trade in question between the United States and Venezuela would have become non-existent.

To conclude, I believe that the interests of the United States and Canada

in commercial matters are very much the same. The United States should consider that its actions may have a disproportionate effect upon the Canadian economy; it should be very careful to fully respect Canada's sovereignty. I believe also that the antitrust policies of the two countries are very parallel. I suggest that antitrust consultation should be emphasized, as indeed it is at this time, and that the two countries should mutually consider a balancing of their respective important national interests whenever antitrust action is contemplated.

