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## Regulation of Competition in the Canada/U.S. Context-- Extraterritorial Reach of U.S. Antitrust Law--A Canadian Perspective

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REGULATION OF COMPETITION IN THE CANADA/U.S.  
CONTEXT – EXTRATERRITORIAL REACH OF U.S.  
ANTITRUST LAW – A CANADIAN PERSPECTIVE

*Crystal L. Witterick\**

I. INTRODUCTION

Over the past several years, the enforcement of Canadian competition law has taken on an increasingly international dimension in response to the internationalization of commerce.

A former Director of Investigation and Research noted that:

[G]lobalization ... heightened pressures for international convergence and expanded international cooperation in antitrust enforcement. It has accelerated the internationalization of competition policy  
....<sup>1</sup>

It is now being recognized that effective antitrust enforcement in today's global economy is dependent on three factors:

(i) the "extraterritorial" application of a country's laws (i.e. their application to conduct occurring wholly or partly outside that country where such conduct is having anticompetitive effects in that country);

(ii) cooperation among antitrust agencies in the enforcement of their laws; and

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<sup>1</sup> George N. Addy, *The Canadian Competition Act as a Model of Flexible Forward-Looking Competition Law*, Address to Conference on the Promotion of Competitiveness in Monterrey, Neuvo Leon, Mexico, Oct. 5, 1997, at 8.

(iii) the adoption of principles on positive comity to avoid disputes arising from a country's extraterritorial application of its antitrust laws.<sup>2</sup>

In the recent *Nippon Paper*<sup>3</sup> case, the U.S. Court of Appeals explained the necessity of such an approach as follows:

We live in an age of international commerce, where decisions reached in one corner of the globe can reverberate around the globe in less time than it takes to tell the tale. Thus, a ruling in [Nippon's] favour would create perverse incentives for those who would use nefarious means to influence markets in the United States, rewarding them for erecting as many territorial firewalls as possible between cause and effect.

The United States has been very aggressive in its approach regarding the extraterritorial application of competition laws compared to Canada. Canadians have historically been anxious about the "long arm" approach of U.S. antitrust enforcement, both public and private. The Canadian government has historically taken steps to protect Canadian citizens from attempts by the U.S. government, courts, and people to compel the production of evidence in antitrust proceedings and other litigation.

In the context of increasing cooperation between competition authorities and the recognition that antitrust laws must adapt to business in global markets, there is evidence of a Canadian shift from a territorial approach to jurisdiction to the use of a U.S.-style "effects doctrine."<sup>4</sup> In this climate, the recognition of positive comity obligations is necessary to facilitate enforcement efforts and reduce the frictions which inevitably arise when two or more countries assert jurisdiction over the same transaction or conduct. However, positive comity does not address the impediments to "international" enforcement. The need for law enforcement to keep up with the integration of markets has fostered the development of a very close cooperative relation-

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<sup>2</sup> Joel I. Klein, *Anticipating the Millenium: International Antitrust Enforcement at the End of the Twentieth Century*, Address at Fordham Corporate Law Institute (Oct. 6, 1997) (transcript available from U.S. Dep't of Justice Antitrust Division).

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

<sup>4</sup> For a further discussion of the law and developments in this area, see C. Goldman et al., *INTERNATIONAL MERGERS AND THE CANADIAN COMPETITION ACT*, (B. Hawk ed., Fordham Corp. L. Inst., Transnational Juris Publications, Inc. (1992)) [hereinafter *INTERNATIONAL MERGERS*]. For a Canadian perspective on the recent extension of the extraterritorial reach of U.S. antitrust laws, see P. Crampton, *The 1995 U.S. Antitrust Enforcement Guidelines for International Operations: A Foreign Perspective*, *INT'L BUS. L.J.* 99 (1996).

ship between Canada and the United States. This trend to greater cooperation creates new legal and practical issues for businesses with operations in both countries. Among these concerns are the treatment of confidential information gathered in one country that is (or might be) provided to the other and, within that context, the ability of authorities in one country to use a firm's computer system to access and seize information in the other country.

These remarks review Canada's position on the extraterritorial assertion of jurisdiction, outline the framework for cooperation among Canadian and U.S. antitrust authorities, discuss Canada's response to U.S. attempts to claim jurisdiction over Canadian actors, and briefly identify current issues arising out of the increasing cooperation between Canadian and U.S. antitrust authorities in response to cross-border anticompetitive conduct.

## II. EFFECTS-BASED JURISDICTION – THE CANADIAN PERSPECTIVE

U.S. courts and enforcement authorities have asserted antitrust jurisdiction with respect to conduct which has a substantial and foreseeable effect on U.S. commerce, regardless of where the impugned conduct occurs.<sup>5</sup> The government of Canada and Canadian courts have historically taken a more restrictive approach to the extraterritorial assertion of jurisdiction, applying a more limited effects-based jurisdiction test, circumscribed by principles of international comity.

In the leading Canadian decision in this regard, *Libman v. The Queen*,<sup>6</sup> the Supreme Court of Canada defined the limits of territoriality on the basis of whether a significant portion of the activities which constituted the offence took place in Canada.<sup>7</sup> The need for a real and substantial link between the offence and Canada was identified as the basis for the assertion of jurisdiction. However, the Court imposed the requirement of compliance with the principles of international comity, meaning that if the assertion of jurisdiction

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<sup>5</sup> This principle was first established in *Aluminum Company of America v. United States*, 148 F.2d (416) (2d Cir., 1945), and expanded upon in the *Nippon Paper* case. *Id.* See also the revised International Operations Enforcement Guidelines jointly issued by the U.S. Department of Justice and the Federal Trade Commission.

<sup>6</sup> 2 S.C.R. 178 (1985), at 212-13.

<sup>7</sup> There are two aspects to any jurisdictional question – in the language of international law, the first aspect is referred to as prescriptive (or legislative) jurisdiction, and the second is referred to as enforcement jurisdiction. The discussion in this Article focuses on prescriptive jurisdiction. Prescriptive jurisdiction is the question of whether Canada has the ability to prescribe a certain rule of law that reaches the subject matter at issue. Enforcement jurisdiction is the question of whether the Canadian courts and tribunals have the ability to enforce that law against a particular person. In other words, in addition to possessing prescriptive jurisdiction over the subject matter, a state also needs jurisdiction over the person in order to enforce its laws.

by one country would conflict with the laws of another country, then the court should decline to assert jurisdiction

A similarly circumscribed position was taken in the amicus brief filed by the Canadian government in the *Hartford Fire* case,<sup>8</sup> a case in which the U.S. Supreme Court considered the appropriate limits on the extraterritorial application of U.S. antitrust law. In its brief, the Canadian government argued that customary international law enjoins a state from applying its economic law to regulate the conduct of persons located in a foreign territory where doing so directly conflicts with the laws of the foreign territorial sovereign.

In addition to the limits established by Canadian courts on the assertion of effects-based jurisdiction, the criminal provisions in the Competition Act<sup>9</sup> must be interpreted in the context of subsection 6(2) of the Canadian Criminal Code.<sup>10</sup> Subsection 6(2) provides that subject to the Code or any other Act of Parliament, "no person shall be convicted ... of an offence committed outside Canada." However, there are a number of provisions in the Competition Act which support the assertion of jurisdiction where foreign conduct is having an anticompetitive effect. For example, under section 46 of the Competition Act, it is a criminal offence if a corporation carrying on business in Canada implements a foreign conspiracy or agreement that, if entered into in Canada, would contravene the conspiracy provisions in section 45. Although there were no contested proceedings on the issue of jurisdiction, in June 1993, Chemagro Ltd. was convicted and fined \$1.25 million in respect of a foreign-directed conspiracy to lessen competition unduly in the sale of chemical insecticides.<sup>11</sup>

The inclusion of section 46 in the Competition Act does not necessarily preclude the application of section 45 to an illegal agreement entered into outside Canada. Section 45 itself contains no express territorial restriction. In fact, this section was recently used to convict, on guilty pleas, a U.S. company and a Japanese company which, according to the Director, had entered into an agreement outside Canada which the Director alleged threatened to lessen competition for the sale of thermal fax paper in Canada.<sup>12</sup>

On May 27, 1998, Archer Daniels Midland Company pleaded guilty to having participated in price fixing and market sharing conspiracies, contrary to section 45 of the Competition Act. According to the Competition Bureau's

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<sup>8</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

<sup>9</sup> *Competition Act*, R.S.C. 1985, c. C-34, as amended.

<sup>10</sup> *Criminal Code*, R.S.C. 1985, c. C-46.

<sup>11</sup> Consumer and Corporate Affairs Canada, *Chemagro Fined a Record \$2 Million for Conspiracy Under the Competition Act*, News Release NR-11228/93-18 (June 14, 1993).

<sup>12</sup> Competition Bureau, *Mitsubishi Paper Mills, Ltd. Pleads Guilty Under the Competition Act and Pays \$850,000 Fine in the Thermal Fax Paper Inquiry*, News Release (Feb. 28, 1997).

News Release,<sup>13</sup> the “offences relate to the participation of the firm in an international conspiracy to fix prices and allocate market shares in the lysine and citric acid markets worldwide.” The Agreed Statement of Facts states that the relevant “conversations and meeting [giving rise to the unlawful agreement] occurred in locations outside Canada.”

The price maintenance provisions in section 61, which make it an offence to attempt to unilaterally increase the price at which another person supplies a product, were used to convict, based on guilty pleas, Mitsubishi Corporation of Tokyo, Japan and Mitsubishi Canada Ltd. for their direct or indirect refusals to supply thermal fax paper to a Canadian business because of its low pricing policy in Canada.<sup>14</sup>

This strict approach to the extraterritorial application of laws also extends outward to protect Canada’s sovereignty. In commenting on the 1949 *Canadian Radio Patents* case,<sup>15</sup> the Canadian Minister of Justice expressed the view that a U.S. decree requiring directors of Canadian companies to take actions dictated by U.S. law which would not be dictated or in accord with Canadian business policy, “could only be regarded as an infringement of Canadian sovereignty.”<sup>16</sup>

In the past, Canada has adopted a number of measures in order to block attempts by foreign persons to compel testimony from persons or the production of documents located in Canada for the purpose of foreign proceedings. For example, U.S. plaintiffs and U.S. authorities in antitrust matters have historically had difficulty in enforcing letters rogatory in Canada (letters rogatory are documents requesting Canadian production of information and testimony for the purpose of U.S. proceedings).<sup>17</sup> In a 1977 case, an Ontario court denied an application brought by Westinghouse, a U.S. company, for the enforcement of letters rogatory issued by a U.S. court, which sought production of documents in Canada (including documents in the possession of

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<sup>13</sup> Competition Bureau, *Competition Bureau Will Request a Tribunal Consent Order with Respect to ADM’s Acquisition of Flour Mills from Maple Leaf Mills Inc.*, News Release (Feb. 28, 1997).

<sup>14</sup> Bureau of Competition Policy, *Second Fine Levied Under the Competition Act in Joint Canada-U.S. Investigation*, News Release 11546/194-18 (Aug. 5, 1994).

<sup>15</sup> *United States v. General Electric Company*, 82 F. Supp. 753 (D.N.J. 1949). For a detailed discussion of this case, see *Competition Law of Canada*, § 13.03[1]-25.

<sup>16</sup> Hansard, House of Commons Debates, Vol. 1, at 618 (1959).

<sup>17</sup> The Canada Evidence Act (R.S.C. 1985, c. C-5, s. 46) and similar provincial legislation grant Canadian courts jurisdiction to enforce letters rogatory. However, Canadian courts have interpreted these laws to authorize compliance with letters rogatory only if the material is required for the purpose of trial (not discovery), enforcement is necessary for the purpose of justice, and the effect of enforcement is not contrary to public policy. See *Raychem Corp. v. Canusa Coating Systems, Inc.*, [1971] 1 O.R. 192 at 197 (C.A.); *McCarthy v. Mentin*, [1963] 2 O.R. 154 (C.A.); *Adams v. Adams*, [1970] 3 All E.R. 572 (P.D.A.).

private parties, the Canadian government, and Crown corporations).<sup>18</sup> The letters were issued in the course of antitrust proceedings brought by sixteen American companies against Westinghouse, alleging that Westinghouse failed to fulfill its obligations under certain uranium supply contracts, and an investigation by the U.S. Department of Justice Antitrust Division into alleged price fixing. Westinghouse pleaded in defense that because a cartel of foreign governments (including Canada) and uranium producers conspired to artificially increase the prices of uranium, it was commercially unreasonable for Westinghouse to fulfill its obligations under those contracts. The evidence sought by Westinghouse was critical to its defense as well as a civil action brought by it against a group of uranium producers. The Canadian government opposed Westinghouse's application. It enacted regulations prohibiting the production of the documents or the giving of testimony relating to any aspect of the uranium business unless required to do so by a law of Canada or the Federal Government, and introduced an affidavit by Canada's then-Minister of Energy to the effect that producing the documents would be contrary to Canadian public policy. The Supreme Court of Ontario refused to enforce the letters rogatory, partly on grounds that enforcement of letters rogatory is founded on international comity and that comity cannot be exercised in violation of the public policy of the country to whom an appeal for assistance is made.<sup>19</sup> The Government's position on the issue of public policy was clear from the regulations and the Minister's affidavit.

Gulf Oil, a respondent in Westinghouse's civil action, also brought an application to have the letters rogatory enforced in Canada because it needed the information for its defense. The Supreme Court of Canada declined, again for public policy reason, to compel the production of documents or force testimony.<sup>20</sup> The Court stated that it was applying the rules of private international law at the request of the Canadian government to exclude the extraterritorial enforcement of a foreign law in violation of Canadian sovereignty.<sup>21</sup>

The uranium cases are not the first instance where the Canadian government has sought to stop the reach of U.S. antitrust laws. Following an attempt in 1947 by the U.S. government to obtain production of documents in the possession of Canadian International Paper Company,<sup>22</sup> a subsidiary of a

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<sup>18</sup> *In re Westinghouse Electric Corp. and Duquesne Light Co.* (1977), 79 D.L.R. (3d) 3, 31, C.P.R. (2d) 164 *sub nom. In re Westinghouse Electric Corp. Uranium Contract Litigation*, 16 O.R. (2d) 273.

<sup>19</sup> *Id.* at 291.

<sup>20</sup> *Gulf Oil Corporation v. Gulf Canada Limited et al.*, [1980] 2 S.C.R. 39.

<sup>21</sup> *Id.* at 61-62.

<sup>22</sup> *In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian International Paper Company*, 72 F. Supp. 1013 (S.D.N.Y. 1947).

U.S. company, two provinces and the Federal Government enacted legislation, referred to as “blocking” legislation, prohibiting the production of documents at the request of a foreign country where it is contrary to public policy.<sup>23</sup> In addition, sections 82 and 83 of the Competition Act allow the Canadian Competition Tribunal to prohibit the production of documents in U.S. or other foreign proceedings. Grounds for making such an order include where compliance would adversely affect competition, foreign trade of Canada, or commerce generally. Although these provisions have never been applied, their potential application is very broad. Concerns over the scope of jurisdiction and international comity principles also impact on the granting of anti-suit injunctions, extradition requests, and enforcement of foreign awards.<sup>24</sup>

### III. A SEA OF CHANGE

Growing acceptance of effects-based jurisdiction and the practical realities of antitrust enforcement in global markets has led to a broadening of the historical Canadian approach to the extraterritorial assertion of jurisdiction. In the *Controni* case,<sup>25</sup> which involved proceeding to extradite a Canadian citizen to the United States to face drug trafficking charges, Supreme Court Justice La Forest stated:

It would be a sad commentary on our law if it was limited to the prosecution of minor offenders while permitting more seasoned criminals to operate on a worldwide scale.

What is more, I do not think that the free and democratic society that is Canada should confine itself to parochial and nationalistic concepts of community.<sup>26</sup>

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<sup>23</sup> The Foreign Extraterritorial Measures Act (FEMA), S.C. 1984, c. 49; Business Records Protection Act (Ontario), R.S.O. c. B-19; and Business Concerns Record Act (Quebec), R.S.Q. c. D-12. For a further discussion of blocking legislation, see COMPETITION LAW OF CANADA, §§ 5.07, 13.02 (C. Goldman & J. Bodrug eds., Juris Publishing, Inc.).

<sup>24</sup> For example, section 8 of FEMA provides that, if the Attorney General of Canada determines that a judgment issued by a foreign tribunal under an antitrust law has or will adversely affect Canadian sovereignty, the Attorney General may order that judgment not be recognized or reduce the monetary amount of the judgment. For a detailed discussion of these issues, see COMPETITION LAW OF CANADA, § 13.04 [4], [5], [6] (C. Goldman & J. Bodrug eds., Juris Publishing, Inc.).

<sup>25</sup> *United States of America v. Controni* (1989), 48 C.C.C. (3d) 193.

<sup>26</sup> *Id.*, at 56.

Further, as a result of the greater cooperation among antitrust authorities in the face of globalization, Canadian courts may be more understanding of the need to facilitate foreign enforcement efforts and more willing to regard granting enforcement assistance as consistent with Canadian public policy. For example, an Ontario court recently granted an application<sup>27</sup> to enforce letters rogatory that had been issued by a Florida court. The Court found that there was no way that the proceeding could proceed without assistance from Canada. The Court did not find any violation of public policy or comity principles in enforcing the letters rogatory.

The use of effects-based jurisdiction is also supported by both the actions and public comments of the current and previous Directors. In a 1991 speech, former Director George Addy recognized that the practical implications of globalization may require the exercise of jurisdiction over conduct outside a state's borders:

The phenomenon of increasing internationalization of business and commerce has been accompanied by equal efforts on the part of states to assert their authority over transnational economic activity. In these circumstances, there have been attempts to extend jurisdiction beyond national borders . . . .

Yet some extraterritorial reach may be essential in order to avoid allowing the transnational character of a business practice to remove it from the ambit of a state's law. For example, few would argue that a private conspiracy to raise prices in a national market should escape discipline simply because it was entered into beyond a state's borders but implemented on its territory.<sup>28</sup>

In the Director's News Release<sup>29</sup> regarding the conviction of a U.S. citizen and company under the criminal misleading advertising provisions in the Competition Act (in the course of which extradition proceedings were commenced to encourage the U.S. individual to plead guilty) the Director stated:

This case is the first in which international agreements have been used to cause an American corporation and individual to attend a

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<sup>27</sup> *Somerset Pharmaceuticals, Inc. v. Interpharm, Inc.* (1994), 52 C.P.R. (3d) 317 (Ont. Gen. Div.).

<sup>28</sup> George N. Addy, *International Coordination of Competition Policies*, paper delivered to the HWWA – Institut für Wirtschaftsborschung – Hamburg, Germany, Oct. 9-11, 1991, at 11-12.

<sup>29</sup> Bureau of Competition Policy, *Thomas Liquidation, Inc. Fined \$130,000 for One Count of Misleading Advertising Under the Competition Act*, News Release (Feb. 7, 1995).

Canadian criminal court and answer charges under the Competition Act. It should send a message to advertisers that Canada will not hesitate to use the extradition process to enforce the Act. The action taken in this case is in line with the Bureau's commitment to international cooperation in detecting and fighting unfair and deceptive marketing practices.<sup>30</sup>

The Director has also sought remedial relief against a U.S. corporation for conduct occurring outside Canada. In the *Chrysler* case,<sup>31</sup> the Competition Tribunal ordered Chrysler Canada Ltd. to supply the complainant auto parts exporter under section 75, the refusal to deal provision, of the Competition Act. Subsequently, the Director filed a motion seeking the issuance of an order requiring not only Chrysler Canada Ltd. but also its U.S. parent corporation to show cause why they should not be held in contempt of the Competition Tribunal's order. The Director alleged that Chrysler U.S. and its officer refused to fill certain of the complainant's orders in an attempt to persuade the complainant to encourage the Director to compromise certain appeals relating to the Competition Tribunals' original decision.

There are other examples of the assertion of effects-based jurisdiction by the Director. With respect to mergers, the Director has interpreted the pre-merger notification provisions in sections 109 and 110 of the Competition Act to require prenotification where the merger is between two foreign companies with subsidiaries in Canada. The Director has also sought review of mergers between foreign companies with Canadian subsidiaries.<sup>32</sup> For example, the Director asserted jurisdiction to review the proposed takeover in 1991 by Schneider of Square D even though the takeover was by an American company of an American company, because there were potential effects on competition in Canada. Schneider ultimately agreed to a hold-separate undertaking, even after the U.S. antitrust agency passed on the merger.<sup>33</sup> The implications of the assertion of effects-based jurisdiction is that it often results in more than one country asserting jurisdiction over an international transaction, which inevitably leads to disputes.

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<sup>30</sup> *Id.*

<sup>31</sup> Director of Investigation and Research v. Chrysler Canada Ltd. (1989), 27 C.P.R. (3d) 1.

<sup>32</sup> See INTERNATIONAL MERGERS, *supra* note 4 (discussing the Competition Bureau's practice of reviewing mergers occurring outside Canada on the basis of the effects of the merger in Canada).

<sup>33</sup> Following completion of his review, the Director concluded that the merger would not unduly affect competition in Canada.

#### IV. POSITIVE COMITY

Positive comity helps to minimize frictions between states that have concurrent jurisdiction over a particular matter.<sup>34</sup> It respects the sovereignty of participating countries by recognizing that the country whose market is most immediately affected has a principal responsibility for enforcement.<sup>35</sup>

The Canadian amicus brief in *Hartford Fire* stated that Canadian courts do not generally apply Canadian law where to do so would displace or undermine the laws or established policies of another state.<sup>36</sup> However, positive comity does not alleviate the enforcement problems which arise in the context of cross-border transactions. Positive comity does not contemplate any convergence in laws or enforcement approach, and does not by itself permit the exchange of confidential documents and testimony. The uranium cases illustrate the practical difficulties which may arise where one country either fails to support or opposes the extraterritorial application of a foreign state's antitrust laws to nationals of the first country. In this regard, Joel Klein has noted that one serious problem facing international antitrust enforcement is the inability to obtain crucial evidence located outside the enforcer's jurisdiction, the possible lack of personal jurisdiction, and the risk of arousing foreign sovereignty concerns. He suggests that cooperation and coordination between and among national antitrust authorities can help in managing this problem.<sup>37</sup>

#### V. COOPERATION AMONG ANTITRUST AUTHORITIES

One of the challenges faced by an antitrust authority that seeks to apply laws on an extraterritorial basis is the ability to get the information it needs to proceed and then to enforce whatever penalties it chooses to impose. The

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<sup>34</sup> The concept of positive comity developed from a 1967 Council Recommendation of the Organisation for Economic Cooperation and Development (OECD) on Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade. In 1986, the OECD passed a recommendation encouraging Member Countries to notify other Members of domestic investigations or proceedings with respect to restrictive business practices that may affect important interests of other Member Countries (OECD document C(86) 44 (final) June 5, 1986).

<sup>35</sup> Positive comity obligations are included in the 1995 Agreement Between the Government of Canada and the Government of the United States of America Regarding the Application of their Competition and Deceptive Marketing Practices Laws (the 1995 Agreement).

<sup>36</sup> See *supra* note 8, at 7.

<sup>37</sup> See Joel I. Klein, *The Internationalization of Antitrust: Bilateral and Multilateral Responses*, Address at the European University Institute Conference on Competition, Florence, Italy (June 13, 1997) (transcript available from U.S. Dep't of Justice Antitrust Division).

current Director of the Competition Bureau, Konrad von Finckenstein, has recently described international cooperation as a necessary response to markets without borders.<sup>38</sup> In recognition that it takes a multinational effort to address multinational conduct, there is now extensive cooperation and information sharing among antitrust agencies, particularly between Canada and the United States. In 1996, the last year for which statistics are available, the Bureau received thirty-eight notifications from foreign competition authorities, seventy-four percent of which were from the United States. At the same time, seventy percent of the notifications sent by the Competition Bureau to foreign authorities were sent to the United States.<sup>39</sup> From the U.S. perspective, Joel Klein has commented that the relationship with Canada should be a model for bilateral arrangements with other countries.<sup>40</sup>

Steps recently taken to increase the extent of cooperation and information sharing between Canada and the United States include:<sup>41</sup>

- the establishment of the U.S. International Competition Policy Advisory Committee to advise the U.S. Attorney General on international antitrust issues;<sup>42</sup>
- the signing on August 3, 1995 of an agreement between Canada and the United States regarding the application of their competition and deceptive marketing practices laws (the 1995 Agreement);<sup>43</sup>

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<sup>38</sup> See 73 ANTITRUST TRADE & REG. REP. 216.

<sup>39</sup> *International Cooperation in the Enforcement of Competition Laws, Recent Canada-United States Criminal Experience*, paper presented by Martin Low, Senior General Counsel, Competition & Consumer Law Division, Canadian Bar Association 1997 Annual Competition Law Conference, Aylmer, Quebec (Sept. 19, 1997). Such notifications may be in respect of conduct in one country that may be of interest to enforcement authorities in the other, or a prelude to a request for information and/or information exchanges between the two countries.

<sup>40</sup> See Joel I. Klein, *Criminal Enforcement in a Globalized Economy*, Speech presented at the Advanced Criminal Workshop, Phoenix, Arizona, Feb. 20, 1997, at 5-6.

<sup>41</sup> For a more detailed discussion of these arrangements and their implications, see C.S. Goldman, Q.C. & J.T. Kissack, *Current Issues in Cross-Border Criminal Investigations: A Canadian Perspective*, Fordham Corporate Law Institute, Twenty-Second Annual Conference, International Antitrust Law & Policy, Oct. 26-27, 1995.

<sup>42</sup> In the Department of Justice Press Release announcing the establishment of the Committee, Assistant Attorney General Joel Klein remarked that, "the changing competitive realities have resulted in new challenges for enforcement of our antitrust laws. Cooperation and coordination among international antitrust enforcers is more crucial than ever." *Reno, Klein Unveil First-ever Committee To Attack Anticompetitive Cartels*, Dep't. of Justice Press Release, Monday, Nov. 24, 1997.

<sup>43</sup> See *supra* note 35. The 1995 Agreement is much more extensive and important than the 1984 Memorandum of Understanding (MOU) that it supersedes. First, it is a binding agreement – the MOU was not. Second, much greater detail is provided with respect to the

- the issuance in June 1995 by the Canadian government of a Discussion Paper<sup>44</sup> concerning proposals to amend the Act, among other things to permit greater cooperation and information sharing between Canadian and foreign antitrust agencies;
- the passage of the U.S. International Antitrust Enforcement Assistance Act;
- the extension in 1991 of the Extradition Treaty between Canada and the United States to offences punishable by the laws of both countries by imprisonment for a term exceeding one year or greater (which includes antitrust offences);<sup>45</sup> and
- the signing, on March 18, 1985, of the Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters (MLAT), which came into force January 14, 1990.<sup>46</sup> Examples of assistance include exchanging information, providing documents and records, and executing searches and obtaining testimony.

In addition to formal procedures for cooperation and information exchange, competition authorities also engage in informal information contacts to discuss common issues.<sup>47</sup>

There are several examples of successful cooperative enforcement efforts between Canada and the United States. In early 1994, the United States announced that Polar Plastics Mfg. Ltd., Plastics, Inc., Comet Products Inc., and a number of individuals had been charged following a U.S. investigation in which Canadian authorities, pursuant to a U.S. request for assistance under the Mutual Legal Assistance Treaty, raided the Canadian offices of one of the firms. A number of executives, including a Canadian, went to jail in connec-

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extent of coordination between the two governments and, for the first time, comity considerations are included to assist in avoiding conflicts in investigations.

<sup>44</sup> Industry Canada, Competition Act Amendments (Discussion Paper, June 1995).

<sup>45</sup> Treaty of Extradition, Mar. 22, 1976, United States-Canada, 1976 Can. T.S., No. 3 (as amended by an exchange of Notes on June 28 and July 29, 1974 and a Protocol dated Jan. 11, 1988).

<sup>46</sup> 1990 Can. T.S., No. 19.

<sup>47</sup> See George Addy, Address to the American Bar Association Section of Antitrust Law, Chicago (Aug. 6, 1995), at 2. See also J.F. Rill & V.R. Metallo, *Trans-Border Enforcement of Competition Law: A Perspective from the United States*, Paper prepared for presentation to the 1995 Annual Competition Law Conference of the Canadian Bar Association National Competition Law Section (Sept. 1995), at 25.

tion with the resulting U.S. prosecutions.<sup>48</sup> Also in 1994, Mitsubishi Corporation, Kanzaki Specialty Papers Inc., and Mitsubishi International Corporation were convicted in what was described as the first joint prosecution involving the United States and Canada following extensive cooperation under the MLAT.<sup>49</sup>

In late 1995, officials in both Canada and the United States once again highlighted information sharing and cooperation between them in the ductile pipe case, in which a Canadian firm was convicted of market allocation with a U.S. firm.<sup>50</sup>

## VI. SOME CURRENT ISSUES

The trend to greater cooperation creates new legal and practical issues for businesses with operations in more than one country.

### A. Protection of Confidential Information

There have been growing concerns on the part of businesses about the scope of information-sharing activities among antitrust agencies and preserving the confidentiality of sensitive business information. Section 29 of the Competition Act prohibits the Competition Bureau from disclosing information gathered using compulsory process (e.g. through a search warrant or section 11 order) other than to a Canadian law enforcement agency or "for the purposes of the administration or enforcement of "the Competition Act."<sup>51</sup> Voluntarily supplied information, for example, by a person seeking immunity or a settlement of Competition Bureau investigation, is not protected by section 29, although the Competition Bureau's current practice is to treat all voluntarily supplied information as if it were protected by section 29.<sup>52</sup>

A very significant issue is whether the information protected by section 29 may be provided under the MLAT to U.S. and other authorities. A past Director has stated that, in his view, the phrase "administration or enforcement" of the Competition Act permits disclosure to a foreign agency where

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<sup>48</sup> *Antitrust Division Breaks Price Fixing Conspiracy in Disposable Plastic Dinnerware Industry*, U.S. Dep't of Justice, News Release, June 9, 1994.

<sup>49</sup> *Antitrust Division Breaks International Price Fixing Conspiracy in Fax Paper Industry*, U.S. Dep't of Justice, News Release, July 14, 1994.

<sup>50</sup> *Canada Pipe Company Ltd. Pleads Guilty and Pays Record \$2.5 Million Fine For Conspiracy Offence Under the Competition Act*, Bureau of Competition Policy, News Release, Sept. 27, 1995.

<sup>51</sup> See *Competition Act*, *supra* note 9, at s.29(1).

<sup>52</sup> *Communication of Confidential Information Under the Competition Act*, Bureau of Competition Policy, Industry Canada (May 1995), at 2.

the communication is for the purpose of receiving the assistance or cooperation of the foreign agency in respect of the Canadian investigation.<sup>53</sup>

The National Competition Law Section of the Canadian Bar Association has indicated it disagrees with the Director's interpretation of section 29 and that amendments are necessary to give the Director power to engage in international information sharing.<sup>54</sup> The disagreement over whether the law permits the Director to share information with a foreign authority created a highly undesirable degree of uncertainty. Thus, in June 1995, Industry Canada issued a Discussion Paper respecting proposed amendments to the Competition Act which, among other things, would have clarified the Director's authority to engage in international enforcement cooperation.<sup>55</sup>

Given the complexity of the issues in this area, the Director formed a Consultative Panel to consider and make recommendations for amendments to the Act. The Panel's Report recognized that there may be circumstances where providing notice to a firm under scrutiny could prejudice an ongoing investigation. For that reason, the Panel considered a proposal providing for notice and possible judicial review of information sharing after the risk of harm to an investigation had passed. The Panel's report states that it was unable to reach a consensus in this regard.<sup>56</sup> As a result of pending litigation on related issues, the amendments respecting confidentiality and information sharing were postponed.

## B. Computer Searches

Another particular issue of concern to businesses in today's information age which is now being discussed in Canada and elsewhere is the extent to which the Competition Act authorizes the Competition Bureau to use a Canadian firm's computer system to access records located in the databases of foreign affiliates. This includes the practical problem of how to decide where information is located for purposes of determining whether the law is being applied extraterritorially.

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<sup>53</sup> *Id.* at 3.

<sup>54</sup> *Commentary on the Draft Information Bulletin of the Director of Investigation and Research Respecting Confidentiality of Information Under the Competition Act* (Dec., 1994).

<sup>55</sup> *Competition Act Amendments*, Bureau of Competition Policy, Discussion Paper, June, 1995.

<sup>56</sup> Report of the Consultative Panel on Amendments to the Competition Act, Mar. 6, 1996. Note that in its *Statement on International Cooperation Between Antitrust Authorities*, the ICC expressed the view that a firm should receive prior notification of any proposed information exchange. See International Chamber of Commerce, Commission on Law and Practices Relating to Competition, *Statement on International Cooperation Between Antitrust Authorities*, Doc. No. 225/450, Rev. 3, Mar. 28, 1996.

It is not clear whether access by an antitrust authority to computer records located in a foreign jurisdiction constitutes an infringement of national sovereignty or a breach of national privacy laws. A further question arises whether the notification provisions in the MLAT or 1995 Agreement would require the Competition Bureau to notify the U.S. Department of Justice when accessing records located in the United States.<sup>57</sup>

The broadest position is that any record accessible through a computer terminal located in the authority's jurisdiction and capable of being worked on and copied in that jurisdiction is "located" in the authority's jurisdiction and within its reach, regardless of where the document originated or is stored. The narrow argument is that only those documents which are stored on the computer system located in the authority's jurisdiction are legitimately accessible to such authority.<sup>58</sup> It also remains to be determined the extent to which a Canadian firm (or its foreign affiliate) could sever the link between them during the course of a search in Canada to prevent access by authorities in Canada.<sup>59</sup> The issues in this area are largely untested before the courts. In that context, and given their complexity and importance, the Canadian Bar Association has established a computer records task force to consider these issues, in consultation with members of the Bureau and the Canadian Department of Justice. Members of the Antitrust Section of the American Bar Association are monitoring the progress of the task force. In addition, the International Chamber of Commerce has created a working group to study and develop recommendations respecting these issues in an international context.<sup>60</sup>

## VII. CONCLUSION

The globalization of commerce requires that antitrust authorities consider the effects of conduct in their jurisdiction regardless of where the conduct

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<sup>57</sup> It is arguable, for example, that notice may be required under the 1995 Agreement which provides that each Party shall notify the other Party with respect to its enforcement activities that may affect important interests of the other Party, including those that involve the seeking of information located in the territory of the other Party, whether by personal visit by officials of a Party to the territory of the other Party or otherwise. Article II.

<sup>58</sup> The implication of this position is that conceivably an entity could avoid possible detection and prosecution in a given jurisdiction by locating all its records in another jurisdiction which does not have or does not enforce competition laws, or which is not willing to cooperate with foreign interests in an investigation, *i.e.* a "Cayman Islands" for computer records.

<sup>59</sup> See C.S. Goldman, Q.C., et al. *Cross-Border Computer Searches: A Computer in Your Canadian Office Can Expose Files at Home*, Paper presented at the Grocery Manufacturers of America 1997 Annual Legal Conference, Washington, D.C., Oct. 1997.

<sup>60</sup> The Working Group is chaired by Richard Corley, Partner, Davies, Ward & Beck, Toronto, Ontario.

occurred. The developments reviewed above suggest that the Director is prepared to adopt some form of an effects test as the basis for the extraterritorial application of the Competition Act. However, this approach has not been tested in the courts or before the Competition Tribunal, and it remains to be seen whether the Director's position will be supported. In particular, in *Libman*<sup>61</sup> and related cases where the Court adopted a modified effects test, there was some activity constituting an essential element of the offence which took place in Canada. It remains to be seen how a court will deal with a situation where all elements take place outside Canada.

In the meantime, continued close cooperation between the Canadian and U.S. authorities and the potential broad access to information through computer searches means that companies doing business on both sides of the border must ensure, now more than ever, that their conduct complies with the antitrust laws of both countries. It is particularly important to understand the current enforcement practices of both Canada and the United States given the uncertainty in the Canadian law regarding the authority of the Director to exchange information with foreign agencies.

#### VIII. GOING FORWARD

In addressing the issues raised by increasing cooperation, it is important to balance public policy objectives against ensuring adequate protection for confidential business information. In responding to this challenge, the Canada-U.S. experience is a model which can be used to assess the benefits of and issues raised by increasing cooperation among antitrust authorities and convergence in enforcement policy, if not laws. This experience can then be used as a foundation for going forward on a broader scale, and perhaps, ultimately, at a multilateral level.

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<sup>61</sup> See *supra* note 6.