

1988

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### Recommended Citation

Warren Grover, *Canadian Antitrust Aspects of Competing in Foreign Markets*, 14 Can.-U.S. L.J. 93 (1988)  
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## Canadian Antitrust Aspects of Competing in Foreign Markets

*Warren Grover\**

**T**o understand Canada's approach to antitrust, whether in the domestic or in the foreign markets, one must appreciate that the economy of Canada is fundamentally different from the economy of most other countries and notably from the economy of the United States. Canada is heavily dependent on exports and imports. Fully 30% of our gross domestic product in goods is exported and about the same proportion of our consumption of goods is imported. If one looks at the statistics on trade balances one will find that Canada has a very healthy trade balance in goods, but if one looks at other sectors, such as services and payments of interest and dividends one will find that our total balance of payments is not in good shape. There is a deficit each year. Similarly, if one looks at what Canada exports one will find that Canada has a tremendous volume of exports of raw or primary material, amounting to 65% of our exports, which represents a substantial excess over imports in the same category. On the other hand, in engineering products, we have a substantial trade imbalance the other way. To put these figures in context, the U.S. domestic economy accounts for about 90% of its national income with only 10% attributable to international commerce. So far as Canada is concerned, the United States is a net importer of raw materials and a net importer of finished goods. The United States also represents about 70% of Canada's international trade while Canada represents about 20% of the U.S. international trade.<sup>1</sup> The Canadian economy then, does not look like the American economy and the view of antitrust is not the same. The relative importance of international markets, particularly the U.S. market, is much greater from a Canadian perspective.

Canada also has had more government participation in its economy than is true in the United States. Many of our industries have, as one of the players, either a federally or a provincially owned entity. Examples include integrated oil companies, steel companies, telecommunications carriers, railroads, medical supplies and broadcasting. In other areas, the government is the dominant or only participant. The most common examples are the various government controlled hydroelectric utilities. Also, Canada has generally accepted regulation with more equanimity than one finds in the United States. Direct government involvement in

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<sup>1</sup> All the above statistics are derived from J. QUINN, *THE INTERNATIONAL LEGAL ENVIRONMENT* (1986).

the economy, then, is more accepted, more part of the Canadian way of life than it is in the United States. It is not surprising therefore, that regulated industries are generally thought to be exempt from antitrust legislation. Canada's version of the *Norr-Pennington* doctrine is much wider.

Nor is it surprising that the chief concern with respect to foreign markets is that they remain hospitable to Canadian exports. Thus, Canada is far more worried about the protectionists measures, so common in the United States, than it is with antitrust laws, whether U.S. or Canadian. At the 1986 Fordham Antitrust Lectures, Daniel Oliver stated that import restraints on steel alone could cost the U.S. consumers \$15 to \$18 billion through the end of this decade. Canada is one of the countries affected by those import restraints.

Similarly, Canada views with some alarm the countervailing duty, dumping, customs procedures, state or local buy-state or buy-America preferences and the escape clause embodied in section 201 of the U.S. Trade Act of 1974.<sup>2</sup> While antitrust is aimed at the behaviour of private entities, the major Canadian worry is government intervention so far as "foreign" markets are concerned. Antitrust is essentially better confined to the domestic market. Let me come back then and review with you the extent to which Canada views as permissible the application of antitrust laws in foreign markets.

### I. EXTRATERRITORIALITY

The antitrust laws of both Canada and the United States are based on the premise that a competitive market will deliver to ultimate consumers the products that they need and want at prices they can afford. To the extent that behaviour abroad interferes with that competitive market, there is logic in the antitrust or other laws trying to reach out to castigate that behaviour. However, there is also a question of sovereignty and of comity between nations which should not be forgotten in any logical analysis. While the *Lotus* decision<sup>3</sup> gives some international law stature to an "effects" approach in the reach of domestic criminal law, the basic Canadian view is that criminal law is territorial and that states have little interest in prohibiting activities that occur abroad and they are, as well, hesitant to incur the displeasure of other states.<sup>4</sup> In the 1986 Fordham lectures, Eleanor Fox said that the U.S. law on extraterritoriality is neither so extravagant nor so incoherent as some have charged. It is, she said, "rather reasonable and temperate." It would be difficult to find many scholars outside the United States who agree with that view. Whether it is antitrust abroad or protectionism at home, the view of most

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<sup>2</sup> See Ince, *Problems of Exporting to the United States—An American Perspective*, in *NEW DIMENSIONS IN INTERNATIONAL TRADE LAW* (J. Ziegel & W. Graham eds. 1980).

<sup>3</sup> *Lotus* (Parties to the case abbrev.), 1927 P.C.I.J. (Ser. A.) No. 10.

<sup>4</sup> *Libman v. The Queen*, [1985], 21 D.L.R. 4th 174, 178.

commentators outside the United States is to see U.S. law and policy as founded on no more logical a basis than what benefits the U.S. economy is what the rest of the world should accept.

A recent antitrust dispute between Canada, Britain, Australia and France on one side and the United States on the other is a good example. This is the celebrated uranium cartel case. What happened in the uranium cartel case, from a Canadian point of view, was that the United States closed the U.S. market to imports of uranium from foreign countries in order to protect its domestic producers, an act which, in the view of some commentators, violated the U.S. obligations under the General Agreement on Tariffs and Trade ("GATT").<sup>5</sup> As the United States was by far the largest consumer of uranium, this unilateral act by the U.S. Government caused enormous dislocation in the markets outside the United States and forced the governments of the uranium producing countries to take strong measures in order to avoid a collapse of their domestic industries. The result was the establishment outside the United States of marketing arrangements involving many uranium producers, with the encouragement of various governmental authorities. Meanwhile, back in the United States, a U.S. corporation made an unfortunate series of commercial decisions in deciding not to obtain secure sources of supply for long-term delivery contract obligations to nuclear plants which it had constructed. It therefore had to go out and buy uranium and found that the price was much higher than it had anticipated. Rather than blame itself or the U.S. Government, it blamed the world cartel and sought a multi-billion dollar civil damage suit against the foreign producers. From the viewpoint of the foreign countries involved, any damage that was caused to the U.S. entity was caused, albeit indirectly, by the violation of international obligations undertaken by the Government of the United States of America. The U.S. antitrust law that facilitated the prosecution of the suit was viewed as overreaching by the governments and the courts of both the United Kingdom<sup>6</sup> and Canada,<sup>7</sup> jurisdictions which are normally staunch allies of the United States.

Canada and the United Kingdom have not been the only countries to disagree with the U.S. approach. The French Government was incensed over the treatment accorded the "Potasses d'Alsace" in 1929.<sup>8</sup> The Dutch Ambassador registered an official protest in the American courts in a case involving incandescent lamps.<sup>9</sup> A grand jury investigation into the practices of foreign shipping conferences led to official protests from various affected nations.<sup>10</sup>

Canada has normally taken a very conservative attitude with respect

<sup>5</sup> See Graham, *The Foreign Extraterritorial Measures Act*, 11 CAN. BUS. L.J. 410 (1986).

<sup>6</sup> *In re Westinghouse Uranium Contract*, [1978] 2 W.L.R. 81 (H of L).

<sup>7</sup> *Gulf Oil Corp. v. Gulf Canada Ltd.*, [1908] 2 S.C.R. 39.

<sup>8</sup> *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (1929).

<sup>9</sup> *United States v. General Electric*, 115 F. Supp. 835 (1953).

<sup>10</sup> Verzijl, *The Controversy Regarding the So-Called Extraterritorial Effect of the American An-*

to the jurisdictional reach of its own laws. Normally Canadian courts require that at least some of the constituent elements of the offence occur within Canada as a prerequisite for asserting jurisdiction. In the anti-trust field there are no examples of which I am aware where the courts have even been asked to consider behaviour outside of Canada. In the Phosphorus Products Report of the Restrictive Trade Practices Commission, a Canadian subsidiary, which had a monopoly in the production and sale of one type of phosphorus in Canada, entered into a "Hunting Ground Agreement" with other producers around the world, effectively dividing up various markets. The Commission said:

In addition to the Hunting Ground Agreement there were other arrangements, in some of which Erco participated, limiting competition in the sale of phosphorus. In August 1959, before the Hunting Ground Agreement was negotiated, Imperial Chemical Industries and Erco (through Duff) took turns in filling orders for red phosphorus from Makina in Turkey. Duff paid a commission to I.C.I. on sales to India and to China before the communists assumed control on the mainland. I.C.I. did not participate in the Hunting Ground Agreement.

None of these manoeuvres had any measurable effect upon the Canadian consumer. The Hunting Ground Agreement which apparently enjoyed indifferent success because of Japanese competition, involved only red phosphorus used in the match industry. Dr. Jones testified that the agreement concerned sales to countries where there was no domestic production and had no reference to Canada. Presumably if the signatories to the Hunting Ground Agreement could agree not to challenge each other in their respective export territories, they would be safe from each other's competition in red phosphorus in their home markets. However, the Canadian market for this product is small (\$19,000 in 1959) and Dr. Jones testified that European red phosphorus would have to be dumped to overcome the Canadian tariff of 20 percent [sic]. It is not likely that the Hunting Ground Agreement was intended to have, or had, any effect upon the Canadian market.<sup>11</sup>

This is the closest any antitrust tribunal in Canada has come to suggesting that actions abroad might be of interest if they had an impact on the domestic market.

So far as court decisions are concerned, the Canadian jurisprudence is scant in the antitrust area, but there are some decisions in other areas that are indicative of our approach. Perhaps the most informative case is a recent decision of the Supreme Court of Canada in a securities fraud case.<sup>12</sup> The facts in the case were simple. A man named Libman hired

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*titrust Laws*, 8 NETH. INT'L. L. REV. 3 (1961). The three examples in notes 7, 8 and 9 are all cited by Graham, *supra*, note 5.

<sup>11</sup> PHOSPHORUS PRODUCTS REP. OF THE RESTRICTIVE TRADE PRAC. COMMISSION, RESTRICT TRADE PRACTICE REPORT NO. 41 at 101 (1966).

<sup>12</sup> *Libman*, 21 D.L.R. 4th at 174.

employees who were instructed to telephone U.S. residents from Libman's place of business in Toronto and convince them to buy shares in a Honduras or Panamanian company. The companies were worthless and misrepresentations were made routinely in order to encourage investment. The money was sent by the U.S. residents to associates of Libman in Panama or Honduras and Libman visited those countries in order to pick up his slice of the profits. When faced with a criminal prosecution for fraud Libman claimed that the court was without jurisdiction as the deceit was practiced on people outside Canada and the money was sent to Panama or Honduras.

Mr. Justice LaForest reviewed the earlier jurisprudence and noted that the English courts in the 1960s, led by the writings of a leading academic, Glanville Williams, tried to look for one jurisdiction as being the appropriate jurisdiction in which to try the offence, namely the jurisdiction where the gravamen of the offence was committed.<sup>13</sup> However the English courts broadened their approach in the 1970s, coming closer to an "effects" doctrine, when an actor, who had committed acts abroad, injured U.K. citizens within the United Kingdom and subsequently returned to England.<sup>14</sup> He concluded that, in a shrinking world, we are all our brothers' keepers and all that is necessary to make an offence subject to the jurisdiction of a Canadian court was that a significant portion of the activities constituting the offence took place in Canada.

This approach is clearly a long way from the approach adopted by Judge Hand in the *Alcoa* case,<sup>15</sup> where a Canadian national, which was found to have operated at arms length from its U.S. affiliate, was still subject to the jurisdiction of the American courts when it specifically intended to affect exports into the United States. While some American courts have recently adopted a reasonableness test in asserting jurisdiction where foreign activities are concerned,<sup>16</sup> there are many cases going the other way.<sup>17</sup> Generally, overreaching by U.S. courts is a standard complaint of academic writers and judges outside the United States.

For example, the perceived overreaching by the American courts in the uranium cartel cases resulted in the Canadian Cabinet adopting the Uranium Information Security Regulations to prevent the disclosure of information concerning uranium marketing arrangements for the purposes of a foreign tribunal. It also resulted in the enactment of the Foreign Extraterritorial Measures Act.<sup>18</sup> This new law contains four elements:

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<sup>13</sup> This is not unlike the approach of Mr. Justice Holmes in *American Banana v. United Fruit Co.*, 213 U.S. 347 (1909).

<sup>14</sup> *Treacy v. Director of Public Prosecutions*, [1971] App. Cas. 537.

<sup>15</sup> *United States v. Aluminum Co. of America*, 148 F.2d 416 (2nd Cir. 1945).

<sup>16</sup> *Timberlane Lumber v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) appears to be the seminal case introducing the new approach.

<sup>17</sup> *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980) is a clear example.

<sup>18</sup> 1984 Can. Stat. 49.

1) It permits the Attorney General to prohibit the furnishing of documents or records before a foreign tribunal. This type of provision is often referred to as a "gag" or "blocking" law.

2) It permits the Attorney General to prohibit persons from complying in Canada with foreign government or court orders or policy directives.

3) It permits the Attorney General to declare that a judgment of a foreign court is not enforceable in Canada or, in the case of a money judgment, to reduce the amount. This is to get rid of the treble damage awards of American courts.

4) It permits a Canadian, that has paid an antitrust judgment abroad, to recover any amount that the Attorney General has alleged to be "excessive" from the Canadian assets of the successful foreign suitor.

This statute, while very explicitly aimed at extraterritoriality in American antitrust cases, is simply the culmination of concepts already contained in the Competition Act. Thus section 31.5 of the Act provides that, upon application by the Director of Investigation and Research, the Restrictive Trade Practices Commission may, after a hearing, if it finds that a foreign judgment can be implemented in Canada, in whole or in part, and the implementation of the judgment would have certain adverse effects on Canadian competition, trade or industry, order that the judgment not be implemented in Canada, or that it be implemented only in the manner prescribed by the Commission.

In the context of a proceeding pursuant to section 31.5, the Commission will consider whether the implementation of the judgment would adversely affect competition in Canada; adversely affect the efficiency of trade or industry in Canada without bringing about or increasing in Canada competition that would restore or improve such efficiency; adversely affect the foreign trade of Canada without compensating advantages, or otherwise restrain or injure trade or commerce in Canada without compensating advantages.

Although this provision could be used to block the implementation of a foreign judgment with an anti-competitive impact, the section is somewhat oddly placed in an antitrust law, since it could also be used to block enforcement of a foreign antitrust order. In reality, the primary focus of the section is the protection of Canadian sovereignty, rather than the promotion of competition.

Section 31.6 is similar to section 31.5, except that it is aimed at the implementation of foreign laws and at directives, instructions, policies and other communications from foreign governments and from persons in foreign countries, such as parent corporations, who are in a position to direct or influence the policies of a person or company in Canada.

Section 31.6 could be used to prevent the implementation in Canada of an anti-competitive directive from an American parent to a Canadian subsidiary. However, like section 31.5, its primary focus is sovereignty,

rather than competition. In 1982, when the United States amended the Export Administration Regulations to prevent foreign subsidiaries of American companies from exporting equipment for the Siberian gas pipeline, the Director of Investigation and Research commenced an inquiry with a view to applying to the Restrictive Trade Practices Commission for an order under section 31.6 directing that no measures be taken in Canada by a Canadian company to implement the U.S. regulations. The matter was then resolved through diplomatic channels so the case never came ahead.

In addition, section 31.6 and section 32.1 deal with cases where a foreign person who is in a position to influence the policies of a Canadian person or company directs the Canadian to give effect to a conspiracy entered into outside Canada. By virtue of section 31.6, the Commission may order that no measures be taken in Canada to implement the directive. By virtue of section 32.1 it is an offence for a corporation carrying on business in Canada to implement such a directive.

The extraterritorial application of U.S. antitrust law has been the subject of long standing disagreement with Canada. In 1959, the Attorney General of the United States, William Rogers, and the Canadian Minister of Justice, Davie Fulton, reached an informal agreement on consultative procedure between the two countries. This is known as the Fulton-Rogers Understanding of 1959. It provides for the holding of discussions between the two governments when it becomes apparent that interests in one country are likely to be affected by the enforcement of the antitrust laws of the other. The purpose of such discussions is to explore means to avoid objections or misunderstanding in the other country. The cooperation between antitrust officials which flowed from this Understanding served to diminish to a large extent the problems brought about by the extraterritorial application of U.S. antitrust law at that time.

In 1969, discussions were held between Ron Basford, Canadian Minister of Consumer and Corporate Affairs and John Mitchell, Attorney General of the United States, with a view to confirming and extending the Fulton-Rogers Understanding, and to relate it to the 1967 Organization for Economic Cooperation and Development recommendation on restrictive business practices. Aside from reaffirming the notification and consultation procedure agreed to in 1959, the Basford-Mitchell Understanding provides for the exchange of information between antitrust authorities, and provides that the antitrust enforcement agencies of the two countries, each within its own jurisdiction will, where possible, coordinate the enforcement of their respective laws against the restrictive business practices of multinational corporations affecting international trade. Their meeting resulted in an agreement upon certain basic principles for guidance to officials for negotiating a more formal and strengthened notification and consultation procedure in antitrust cases affecting national interests. Finally, in 1984 a "Memorandum of Understanding Between the Government of the United States of America and the Gov-

ernment of Canada as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws" was signed. However, that Memorandum does not extend to private antitrust proceedings which have often been the chief problem in disputes between the two countries over the antitrust laws.

## II. EXPORT CARTELS

Both the United States and Canada have shown an increasing interest in the export markets as trade is liberalized around the world. The competition legislation in both countries contains provisions conferring a limited degree of antitrust immunity on firms who combine forces for the purposes of effecting sales in foreign markets on a basis which, if undertaken in the domestic market, might otherwise expose those firms to prosecution or liability.<sup>19</sup> The Canadian provisions work as an exception to the general prohibition against the conspiracy offences. Thus, subsection 32(4) provides that, in a conspiracy prosecution, the court shall not convict the accused if the conspiracy relates only to the export of products from Canada. This exemption from prosecution is qualified in that the exemption will not apply if the conspiracy has resulted in (or is likely to result in) a reduction or limitation of the real value of exports of a product, has restricted any person from entering into or expanding the business of exporting products from Canada or has lessened competition unduly in the supply of services facilitating the export of products from Canada. While these provisions have never been tested in the courts, it is quite clear that Canada is prepared to allow conduct among domestic nationals that only impacts on exports, that would not be countenanced in the domestic market. This provision is not a great favourite of the academics who believe that competition law is a question of policy and not a question of geography in a sense of "beggar your neighbour."

Since 1918 when the Webb-Pomerene Act was introduced, foreigners have believed that the United States was attempting to limit the scope of antitrust application for their own nationals so far as it related to the export trade, although the scope of the limitation was not clearly understood. In 1975, the Canadian Government commissioned Corwin Edwards, then professor *emeritus* of the University of Oregon, to prepare a summary of the real impact of the statute so the Canadian Government could consider it when introducing the 1976 statutory amendments.<sup>20</sup> Edwards explained, among other things, that the export associations were not limited to nationals or residents of the United States and could include non-nationals reaching the same market, provided the market was not a domestic market of the United States and that some U.S. enterprise was involved. Initially, any impact on domestic prices that was

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<sup>19</sup> J.T. KENNISH, COMPETITION ISSUES ARISING FROM FREE TRADE—A CANADIAN PRACTITIONER'S PERSPECTIVE (1986).

<sup>20</sup> 1 C. EDWARDS, STUDIES OF FOREIGN COMPETITION POLICY AND PRACTICE (1976).

incidental or inconsequential was also not condemned. However, this approach, according to Edwards, was varied in the period 1940-50 to ensure that foreign export associations did not work with foreign cartels to allocate markets or stabilize domestic prices. Ultimately, the Commission made available to associations mimeographed lists of prohibited and permitted activities. The lists were derived from particular cases compiled over a decade and certain inconsistencies appeared that deprived them of full coherence. Nevertheless, they were very effective and Canada considered following that approach but decided against it. Similarly, export associations were always registered under the Webb-Pomerene provision and are still registered under the Export Trading Company Act, but Canada has not followed this registration concept either. Edwards stated that concern was expressed in the United States about whether the exemption applied to sales abroad when the sales were made to the U.S. Government or to foreign buyers who used funds supplied by the U.S. Government. The answer was a resounding negative in the United States, but the Canadian Government has ignored the issue.<sup>21</sup>

Registration is perhaps the most important missing concept of the Canadian provisions compared to their U.S. counterparts. Canada has no concept of registration of trade associations that operate in the foreign markets, whereas there are many registered associations with a total of several hundred members in the United States, as I understand it. Way back in 1960, antitrust policy in the United States was relatively negative to the export cartels. However, the growth of foreign demand for goods and services worldwide and the increase in import competition in many domestic markets made it clear that a major source of future economic growth in the United States would come from increased exports. The attention paid to exports was reflected in the Export Trading Company Act of 1982. That Act permitted an export trading company to be lawfully formed so long as it was not likely to have substantial anti-competitive effects within the United States.<sup>22</sup> This new U.S. law has taken the registration provisions away from the antitrust enforcement people and allowed the Secretary of Commerce, with the concurrence of the Attorney General, to issue a certificate of review that provides significant protection from antitrust suits against specified export conduct which meet certain statutory standards. The only limitation is that the exemption will not apply where there is a direct, substantial and reasonably foreseeable effect on commerce in the United States. The concept in Canada is merely a defense to a combined prosecution. The much more sophisticated approach of the United States would be an important advance for Canadian exporters and I cannot discern why, when the statute was amended in 1986, the registration concept was ignored.

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<sup>21</sup> *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968).

<sup>22</sup> Margulies, *U.S. Export Conduct Under U.S. Antitrust Law*, FORDHAM CORP. L. INST. (1984); Fox, *Extraterritoriality and Antitrust—is 'Reasonableness' the Answer?*, FORDHAM CORP. L. INST. 51, 62 ff. (1986).

Furthermore, certification in the United States can remove antitrust uncertainty in "gray-area" cases by allowing an exporter the opportunity to confirm the often qualified conclusions of counsel that particular export conduct is not likely to violate the antitrust laws. There has been some focus on the problems of free riding<sup>23</sup> in the United States and much sophisticated debate in the learned literature. None of that debate has trickled over the border into Canada as yet.

Shortly put, while the Canadian statute has an export exemption from the conspiracy offences and the policy of Canada is clearly to encourage Canadian exports abroad (even if based on conduct that would be illegal at home) there is no sophisticated jurisprudence or academic writing relating to the whole area. There is no registration of export cartels and no safeguards that pop out automatically if one is registered. This may be surprising when one recognizes the extent of Canada's dependence of export trade, but one must also recognize that Canada has had a relatively ineffective antitrust policy throughout its history. The lack of activity in the export exemption is just a natural corollary to the general theorem.

### III. THE IMPORTANCE OF MARKET DEFINITION IN MERGER ANALYSIS

The new merger provisions in the Competition Act in Canada make no reference to the word "Canada," a noticeable change from the earlier provisions. A merger is defined to be the acquisition of control of a significant interest in the whole or a part of the business of a competitor, supplier, customer or other person. The Tribunal must find that the proposed merger prevents or is likely to lessen competition substantially among the outlets in which the trade or industry operates before it can enter a conviction. In the section setting out the factors which the Tribunal must consider, the first one is the extent to which foreign products or foreign competitors are likely to provide effective competition to the business of the parties involved in the merger or proposed merger. This is a clear recognition of the globalization of markets which has been commented on so often in the literature.<sup>24</sup>

The current structure of merger proceedings in Canada is unlikely to result in any judicial determination of market boundaries in the geographical sense. This is because the Director of Investigation and Research has made it clear that he will not resort to the Tribunal except in extreme circumstances. He proposes to negotiate most mergers to a conclusion acceptable to the parties or issue a challenge that will, in most cases, deter the businessman from going ahead with the proposed venture. Accordingly, one should not anticipate Canadian jurisprudence to

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<sup>23</sup> Hilke, *Free Trading or Free Riding: An Examination of the Theories and Available Empirical Evidence on Gray Market Imports*, 32 W. COMP. 75 (1988).

<sup>24</sup> J. ORDOVER, *TRANSNATIONAL ANTITRUST AND ECONOMICS* 233 (1984).

clarify any of the merger provisions within the next ten to twenty years. By that time the economy will have changed and we will be back to wondering what the statute means. However, it is most instructive for Canadians to recognize that there are decisions of external Tribunals which lend credence to the view that markets do not have to be seen as Canada only. Thus, for example, in *de Laval-Stork*<sup>25</sup> the European Commission decided that the market for steam turbines, pumps and compressors encompassed at least the European Community, the remainder of Europe, the Near East and South Africa, if it did not encompass the entire world. Similarly, in a 1975 decision the European Commission stated that the market for reprocessing of nuclear fuel included the nine European Community nations plus nine additional European countries.<sup>26</sup>

In my experience, the approach of the antitrust authorities can lead firms to abandon merger plans. This is also true in the European context where the uncertainties of rebutting a presumption of market domination make it difficult for firms to predict accurately the likelihood of obtaining antitrust approval for specific concentrative activities.<sup>27</sup> The point is that the effect of a limited evaluation of geographic markets is often one method to encourage a subtle prohibition of merger activity. Firms are considerably less willing to spend funds on merger activity when faced with an unquantifiable risk of the merger being prohibited and perhaps sanctions being imposed. The Canadian literature in this area is scant indeed, but the Bureau of Competition Policy is considering the impact of international markets. The fact is that in many international markets it is unlikely that Canada can have more than one competitor. This always seems to be disastrous when one looks only at the domestic market, especially if there is some sort of unstated preference for the Canadian producer. Thus, one often sees in Canada a high domestic concentration which militates against any finding of adequate competition existing in the markets.

From an economic point of view, it seems clear that market definition should be merely an aid for determining whether market power exists. Thus, to define a market in geographic terms is to say that if prices were appreciably raised or volume curtailed for the product within a given area, supply from other sources could or could not be expected to enter promptly enough to restore the old price or volume.<sup>28</sup> However, as Posner has noticed, this approach has not been used by the courts, perhaps because of a lack of confidence in our ability to measure elasticities.<sup>29</sup> The general recognition of market power as the key factor in the

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<sup>25</sup> 11 O.J. EUR. COMM. 215 (1977).

<sup>26</sup> United Reprocessors, GmbH., 7 O.J. EUR. COMM. 51 (1976).

<sup>27</sup> Oliver, *Internationalizing Markets—Effects on German Competition Policy and Law*, 32 W. COMP. 19 (1988).

<sup>28</sup> L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 41 (1979).

<sup>29</sup> R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE*, 125 (1976).

economic literature has led only to extensive legal consideration of the market definition problem in transnational mergers.<sup>30</sup> Whether or not we will find an analysis of market power starting to emerge in Canada remains to be seen. Certainly, from a practitioner's point of view, the extensive literature abroad will help us in convincing our regulatory authorities that the geographic market needs to be considered in the world context in many industries.

#### IV. CONCLUSION

Canadian experience in examining antitrust issues in export markets or international markets is very limited indeed. While the statute is hospitable to export cartels and the possibility of international market definitions in merger cases, Canadian law has been generally hostile to an overreaching approach to the extraterritorial effect of antitrust. All this, however, is in the context of very few judicial pronouncements and even less serious scholarly writing. The history of Canadian antitrust has been to borrow most ideas from the United States, and I am sure we will find much reference to U.S. source documents in submissions made to the Bureau of Competition Policy, although probably without attribution. It is interesting to note how far advanced the European Community is in this regard, as Canada likes to think that it has a European perspective as well as a North American one.

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<sup>30</sup> BAKER, MARKET DEFINITION OF TRANSNATIONAL JOINT VENTURES, MERGERS AND MONOPOLIZATION 115 (1984).