Information Flow Across the Border: Is the Bureau of Competition Policy Considering The Public Interest Factor?*

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In a climate of growing international trade, inter-governmental sharing of information regarding anti-competitive practices between national jurisdictions is of increasing importance. The scope of the legal mandate of the Canadian official responsible for such information sharing — the Director of Investigation and Research of the Bureau of Competition Policy — has been subject to much debate. The author argues, however, that the Director ought to look beyond what is legally permissible and consider other circumstances and conditions to determine whether information should *be shared.*

Situations and types of conduct where it would, or would not, be in Canada's best interest to share information are examined. Procedural considerations to safeguard against inadvertent or improper disclosure of confidential commercial information are also discussed. The author suggests seven principles which should be used to determine under what circumstances and conditions information should be shared.

Dans un contexte où le commerce international ne cesse de s'accroître, il est de plus en plus important que les tribunaux nationaux échangent des renseignements sur les pratiques anticoncurrentielles. L'étendue du mandat que la loi confère au fonctionnaire canadien qui est responsable de cet échange de renseignements, soit le directeur de la Division des enquêtes et recherches du Bureau de la politique de la concurrence, est une question fort controversée. D'après l'auteur, pour déterminer si des renseignements devraient *être échangés, le directeur ne devrait pas tenir compte seulement de ce qui est permis par la loi, mais aussi de circonstances et de conditions non prévues par la loi.*

L'auteur examine des situations et des types de comportement qui démontrent qu'il serait, ou qu'il ne serait pas, dans le meilleur intérêt du Canada d'échanger des renseignements. De plus, il discute des mesures de protection qui pourraient être adoptées pour éviter que l'on divulgue sans autorisation ou par inadvertance des renseignements commerciaux confidentiels. Enfin, l'auteur propose sept principes qui devraient être appliqués pour déterminer dans quelles circonstances et à quelles conditions des renseignements devraient être échangés.

* D.L. Bumstead, W.G. Deeks, W.C. Holmes and J.A. Kazanjian provided thoughtful comments on a slightly different version of this paper; that having been said, no one is responsible for any errors herein, but me. In addition, this paper should not be taken as an indication that my clients are particularly sensitive with respect to, or interested in, the subject about which I have written. The paper was originally delivered at a conference of The Canadian Institute on *Competition Law and Competitive Business Practices* held on March 31, 1995.

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I. Introduction

A great deal of energy has been expended in recent times considering the extent to which the Director of Investigation and Research (the "Director") is lawfully able to share information with foreign competition law enforcement agencies, particularly in light of subsection 29(1) of the *Competition Act*.[1] This paper attempts to move beyond the legal debate about what the Director is *permitted* to do under Canadian law to consider when, and under what circumstances and conditions, information *should* be given to foreign competition law enforcement agencies by the Director and his or her staff at the Bureau of Competition Policy (the "Bureau"). It will also consider when, and under what circumstances, information should be protected from disclosure by the Director.

II. The Politics and Pragmatism of Information Sharing

A. *General*

It is clear that international trade has grown immensely in the last several decades.[2] With increased cross-border trade, naturally, the possibility of anti-competitive actions having effects in more than one country increases correspondingly.[3] Thus, a coordinated approach to competition law is highly necessary and desirable,[4] particularly in light of the fact that most jurisdictions have adopted the "effects" test for purposes of asserting jurisdiction in competition law matters.[5]

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[1] R.S.C. 1985, c. C-34 [hereinafter *Competition Act* or *Act*]. Excellent contributions to the debate can be found in the following places: S.M. Hutton & L.A.W. Hunter, "Confidentiality of Information Under the *Competition Act*: a Commentary on the Director's Draft Information Bulletin" (Autumn 1994) 15:3 Can. Comp. Pol. Rec. 32 [hereinafter "Commentary on the Draft Information Bulletin"]; J.F. Rill & C.S. Goldman, "Competition Policy in a Global Economy: Confidentiality in the Era of Increased Cooperation Between Antitrust Authorities" in W.S. Comanor *et al.*, eds., *Competition Policy in a Global Economy* (London: Routledge Press, 1995); Y. Beriault & M. Renaud, "Information Provided to the Director of Investigation and Research: To What Extent Should it be Kept Confidential?" in *Emerging Issues in Competition Law* (Toronto: Insight, 1994) 57; J.A. Kazanjian, "Confidentiality and the Competition Bureau" in *Emerging Issues in Competition Law*, *ibid.*, 79; L.A.W. Hunter & S.M. Hutton, "Draft Policy on Confidentiality of Information Provided to the Director: Protection and Pitfalls under the *Competition Act*" in *Emerging Issues in Competition Law*, *ibid.*, 87 [hereinafter "Protection and Pitfalls under the *Competition Act*"]; G.N. Addy, "Private Rights and the Public Interest Under Canada's *Competition Act*: Procedural Guarantees and the Independence of the Director of Investigation and Research" [1993] Fordham Corp. L. Inst. 221; A.C. Gourley & J.A. VanDuzer, *Merger Notification in Canada* (Toronto: CCH Canadian, 1994) c. 7. See also Director of Investigation and Research, Bureau of Competition Policy, Industry Canada, *Confidentiality of Information Under the* Competition Act (Ottawa: Minister of Supply and Services, 1994) [hereinafter *Draft Policy on Confidentiality of Information*]. This draft policy was replaced by Director of Investigation and Research, Bureau of Competition Policy, Industry Canada, *Communication of Confidential Information Under the* Competition Act (Ottawa: Minister of Supply and Services, 1995) [hereinafter *Communication of Confidential Information*] in which the Director formally adopted a position on the subject.

[2] "Protection and Pitfalls under the *Competition Act*", *ibid.* at 113, n. 43.

[3] *Ibid.* at 113. See also *Draft Policy on Confidentiality of Information*, *supra* note 1 at 1:"As business activity globalizes, the Canadian economy is becoming increasingly susceptible to anti-competitive practices occurring outside our borders."

[4] "Commentary on the Draft Information Bulletin", *supra* note 1 at 36.

[5] See generally W.C. Graham, "The Foreign Extraterritorial Measures Act" (1985-86) 11 Can. Bus. L.J. 410; C.S. Goldman, Address to the University of Toronto Conference:"The Internationalization

B. *Agreement Between Canada and the United States*

Recently, the United States government approved the *International Antitrust Enforcement Assistance Act of 1994*,[6] which authorizes the Government of the United States (or jointly the Attorney General of the United States and the Federal Trade Commission) to enter into agreements with foreign governments (or foreign competition law enforcement agencies) for the purpose of enabling the reciprocal disclosure of confidential information that may be relevant to criminal or civil competition law enforcement in either party's country. In the wake of the *International Antitrust Enforcement Assistance Act of 1994*, the Government of the United States of America and the Government of Canada entered into an *Agreement Regarding the Application of Their Competition and Deceptive Marketing Practices Laws* in August, 1995 (the "Canada / U.S. 1995 Information Sharing Agreement").

While the Canada / U.S. 1995 Information Sharing Agreement does not fall under the *International Antitrust Enforcement Assistance Act of 1994*,[7] both the agreement and the American legislation reflect a rapidly developing system for sharing information in the arena of competition law. In addition, both set in place a framework for the sharing of information between Canada and the United States with respect to Canada's competition laws and the antitrust laws of the United States.[8]

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of Competition Policy: Opportunities, Threats and Challenges" [unpublished] at 9-10; C.S. Goldman & J.D. Bodrug, "The Canadian Price Discrimination Enforcement Guidelines and Their Application to Cross-Border Transactions" (1993-94) 62 Antitrust L.J. 635 at 664-667; C.S. Goldman *et al.*, "International Mergers and the Canadian Competition Act" [1992] Fordham Corp. L. Inst. 217; "Protection and Pitfalls under the *Competition Act*", *supra* note 1 at 113, n. 44; B.M. Graham, "Horizontal Restraints - Canada and the United States" in *Emerging Issues in Competition Law*, *supra* note 1 at 26-33; V. Rose, ed., *Bellamy & Child: Common Market Law of Competition*, 4th ed. (London: Sweet & Maxwell, 1993) at 128-130; A.K. Bingaman, "The Role of Antitrust in International Trade" (Address to the Japan Society, March 3 1994) [unpublished] at 9-11.

See further *Foreign Trade Antitrust Improvements Act*, which added § 7 to the *Sherman Act*, 15 U.S.C. § 6(a), and § 5(a)(3) to the *Federal Trade Commission Act*, 15 U.S.C. § 45(a)(3); *Competition Act*, *supra* note 1, ss. 46, 82 & 83; *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *Hartford Fire Ins. Co.* v. *California*, 113 S.Ct. 2891 (1993); *A. Åhlstöm Osakeyhtiö & Ors* v. *E.C. Commission*, [1988] E.C.R. 5193 (*sub nom. Wood Pulp*); *Libman* v. *The Queen*, [1985] 2 S.C.R. 178; 21 D.L.R. (4th) 174.

6 15 U.S.C. § 6201, *et seq.*

7 Canada must amend or override subsection 29(1) of the *Competition Act* before an agreement under the *International Antitrust Enforcement Assistance Act of 1994*, *ibid.*, is possible.

8 It is noteworthy that the Canada / U.S. 1995 Information Sharing Agreement and the *International Antitrust Enforcement Assistance Act of 1994* both employ a "public interest" component. Such a component permits the withholding of information when it is thought to be in the best interests of the country possessed with the information. In this regard, (i) the Canada/U.S. 1995 Information Sharing Agreement indicates that information may be shared between those countries "to the extent compatible with [each country's] laws, enforcement policies and other important interests" (see Art. III.3 and Art. X.1); and (ii) before disclosure of any information under the *Act*, the Attorney General or the Federal Trade Commission must determine that the disclosure is "consistent with the public interest of the United States." (§ 8(a)(3)). Some commentators have called this exception the "wildcard which will determine how successful the AMAA concept proves to be ....": D.I. Baker *et al.*, "Global Forum on Competition and Trade Policy — Report on Harmonization of International Competition Law Enforcement" (Address to the Global Forum on Competition and Trade Policy, Tokyo, April 1994) [unpublished] at 28. See also the Release of the Department of Justice, "Attorney General Reno Unveils New Proposal to Strengthen International Antitrust Efforts" (13 June 1994) at 1-2: "The new

C. *Benefits of Sharing to Canadians*

In general, Canadians benefit when the Director takes action against anti-competitive conduct occurring, or having an effect, inside our borders because eliminating collusion and harmful exclusionary practices encourages open competition, the cornerstone of efficiency and choice. To the extent that the Director is better equipped to share information with foreign agencies, better enforcement of the *Competition Act* in relation to cross-border activities will result.[9] The Director has recently proven that cooperation can lead to results in the thermal fax paper case[10] and the plastic dinnerware case.[11] Both of these cases concerned criminal matters in the United States and one case also involved Canada.[12]

With respect to sharing information with foreign competition law enforcement agencies in civil matters, the tools within the Director's reach are crude. Canada can only share information with the United States,[13] for example, pursuant to a memorandum of

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legislation would enable the Justice Department and the Federal Trade Commission to obtain evidence from foreign antitrust agencies by authorizing the U.S. antitrust agencies to provide reciprocal assistance *where it is in the public interest to do so* and where foreign authorities will treat the information with the same confidentiality as the U.S. agencies".

[9] The Director was quoted recently as saying that he believes "there is a lot of activity going unchecked as a result of our inability to co-ordinate information and co-ordinate investigations with our counterparts.": S. McCarthy, "Addy Hopes to Demystify Competition Field" 5:7 *Law Times* (21-27 February 1994) 1 at 4. He has indicated further that "[e]ffective information sharing, appropriately conducted, is an important tool in our efforts to combat anti-competitive practices conducted abroad that inflict harm in Canada.": *Draft Policy on Confidentiality of Information*, *supra* note 1.

James F. Rill testified in the course of the hearings preceding the approval of the *International Antitrust Enforcement Assistance Act of 1994* "that during his tenure ... the Antitrust Division was forced to abandon or restrict a number of significant international antitrust investigations because it could not obtain the foreign-located evidence necessary to file charges.": H.R. Rep. No. 772, 103 Cong., 2d Sess. § 11-12 (1994). And Anne K. Bingaman recently stated in her address to the Japan Society, *supra* note 5 at 12:

> Antitrust enforcement is fact intensive. It takes facts — recorded in documents, or described in the testimony of individuals — to reach a conclusion about whether unlawful conduct took place, or whether the effects of a transaction are, on balance, anti-competitive.
> In our global economy, the relevant facts are often spread around the world, just as the conduct, the transactions and the economic impact may be. But the fact-gathering tools at our disposal, and those of our counterpart agencies abroad, simply were not designed for today's global economy. We are moving into the 21st century with what are, in many ways, tools designed in the 19th century.

[10] *United States* v. *Kankazi Specialty Papers, Inc.*, 6 Trade Reg. Rep. (CCH) ¶ 45,094 (Case No. 4086).

[11] J. Davidson, "Four Men Plead Guilty to Fixing Prices of Plastics" *The Wall Street Journal* (10 June 1994); J. Saunders, "Polar Plastic Plot Flops" *The [Toronto] Globe and Mail* (10 June 1994); Department of Justice, News Release, "Antitrust Division Breaks Price Fixing Conspiracy in Disposable Plastic Dinnerware Industry" (9 June 1994). Another recent example of cooperation involved the Department of Justice and the European Commission in connection with the settlement of a computer software case: *United States* v. *Microsoft Corp.*, 6 Trade Reg. Rep. (CCH) ¶¶ 45,094 and 50,764 (Case. No. 4088).

[12] In the thermal fax paper case, fines and guilty pleas were obtained in both Canada and the United States, while in the plastic dinnerware case, fines were obtained only in the United States.

[13] While this paper is intended to deal generally with the sharing of information between the Bureau and other foreign competition law enforcement agencies, it must be recognized that the vast majority of such information exchanges are going to concern the United States. In this regard, between 1988 and 1993 the Bureau reported that 186 formal notifications took place between Canada and

understanding,[14] the Canada / U.S. 1995 Information Sharing Agreement[15] and the *Mutual Legal Assistance in Criminal Matters Act*.[16] None of the three permit the sharing of confidential information for purposes of civil competition law enforcement.[17] Thus, the United States could be forced to take criminal action against a Canadian business where it needs information from the Bureau, even though it would prefer to take civil action.[18] With the removal of impediments to the Bureau's sharing of confidential information with foreign competition law authorities for purposes of civil antitrust enforcement, Canadians can further benefit from fairer and more appropriate remedies being sought in certain instances.

III. The Concerns of the Canadian Business Community in Regards to Information Sharing

A. *General*

Few large businesses operate in a jurisdictional glass jar. Today, most large companies compete for business in several different jurisdictions, many of which may have significantly different laws concerning competition.

Ordinarily, Canadian businesses that are competing primarily within — but also outside of — Canada will focus on Canadian laws in establishing their selling policies.

foreign countries concerning competition law matters and of these notifications 88% (163) involved the United States. These notifications occurred as a result of either the Memorandum of Understanding between Canada and the United States as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws (9 March 1984) or the Revised Recommendation of the OECD Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade, OECD Doc. No. C(86)44 (21 May 1986). See Director of Investigation and Research, Bureau of Competition Policy, Ministry of Consumer and Corporate Affairs [now Industry Canada], *Annual Report for the year ended March 31, 1993* (Ottawa: Minister of Supply and Services, 1993) at 25; Director of Investigation and Research, Bureau of Competition Policy, Ministry of Consumer and Corporate Affairs, *Annual Report for the year ended March 31, 1992* (Ottawa: Minister of Supply and Services, 1992) at 27; Director of Investigation and Research, Bureau of Competition Policy, Ministry of Consumer and Corporate Affairs, *Annual Report for the year ended March 31, 1991* (Ottawa: Minister of Supply and Services, 1991) at 24; Director of Investigation and Research, Bureau of Competition Policy, Ministry of Consumer and Corporate Affairs, *Annual Report for the year ended March 31, 1990* (Ottawa: Minister of Supply and Services, 1990) at 41; Director of Investigation and Research, Bureau of Competition Policy, Ministry of Consumer and Corporate Affairs, *Annual Report for the year ended March 31, 1989* (Ottawa: Minister of Supply and Services, 1989) at 39; Director of Investigation and Research, Bureau of Competition Policy, Ministry of Consumer and Corporate Affairs, *Annual Report for the year ended March 31, 1988* (Ottawa: Minister of Supply and Services, 1988) at 33.

[14] Memorandum of Understanding between Canada and the United States as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, *ibid.*

[15] The Canada / U.S. 1995 Information Sharing Agreement is subject to both the laws of Canada and the laws of the United States: Art. X.1 & Art. XI.1. Canadian law prohibits the disclosure of confidential information concerning civil competition law matters, unless permitted by section 29 of the *Competition Act*.

[16] R.S.C. 1985 (4th Supp.), c. 30. See also the *Mutual Legal Assistance in Criminal Matters Treaty* between Canada and the United States (18 March 1985).

[17] None of the other mutual legal assistance treaties signed by the United States concern non-criminal matters either. See H.R. Rep. No. 772, 103 Cong., 2d Sess. § 12 (1994) and Trade Reg. Rep. (CCH), no. 338, pt. 2, 35, n. 8, which indicates that the United States has entered into 12 other such treaties with Switzerland, the Netherlands, Spain, Italy, Turkey, Thailand, Morocco, Mexico, Argentina, Uruguay, the Bahamas and the Cayman Islands and that "all [are] confined to criminal matters".

For reasons of pragmatism, these policies usually will not distinguish between conduct which is acceptable in Canada and not elsewhere, nor *vice versa.* Thus, a policy concerning tied-selling will not contemplate the fact that such a practice can be treated as a presumed-illegal offence in the United States and only a reviewable practice in Canada.[19]

In this regard, it is important to recognize that there are many substantive differences between Canada's competition laws and those of other countries, including those of its closest neighbour.[20] One of the reasons for the divergence stems from the fact that some competition laws have little to do with sound economics and more to do with populist concerns about "bigness" or, more precisely, the little guy being trampled over. Witness the *Robinson-Patman Act.*[21]

Even the most hard-core competition law offence, *i.e.* a conspiracy to fix prices, receives different treatment in different jurisdictions. It is illegal in Canada if it has an undue lessening of competition,[22] while it is *per se* illegal in the United States[23] and

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[18] D.I. Baker, *supra* note 8 at 17.

[19] Depending on the potential for effects in the United States, the policy may simply say to get legal advice if tied-selling is contemplated or it may say that tied-selling is normally acceptable unless the company has a significant market share.

[20] In addition, most jurisdictions have more than one substantive category of anti-competitive conduct. Witness the *per se* and *rule of reason* offences in the United States, the Article 85 and 86 offences in Europe and the criminal and reviewable practices in Canada.

[21] "Report of the White House Task Force on Antitrust Policy," 2:2 Anti. L. & Econ. Rev. 11, at 41-44. Today, little enforcement of the *Robinson-Patman Act,* 15 U.S.C. sec. 13 takes place because its enforcement is commonly viewed as doing little for competition. See W.C. Holmes, *Antitrust Law Handbook 1994 Edition* (Deerfield, Ill.: Clark Boardman, 1994) at 426, n. 8, citing U.S. Department of Justice, *Report on the Robinson-Patman Act* (1977) and Remarks of Chairman D. Oliver before the American Bar Association, Antitrust Law Section, 7 Trade Reg. Rep. (CCH) ¶ 50,003 (12 August 1986).

[22] In Canada, an undue lessening of competition must be proven before a conviction for conspiracy can be obtained, although the "undue" standard may not be very high in the face of "particularly injurious behaviour," such as price fixing. See P.S. Crampton & J.T. Kissack, "Recent Developments in Conspiracy Law and Enforcement: New Risks and Opportunities" 38 McGill L.J. 569 at 588-596. It is possible, however, that horizontal price fixing could be prosecuted as a *per se* offence under paragraph 61(1)(a) of the *Competition Act*: see *R.* v. *Campbell* (1979), 51 C.P.R. (2d) 284 (B.C. Co.Ct.); and B.M. Graham, *supra* note 5 at 4.

[23] § 1 of the *Sherman Act, supra* note 5, reads:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

While a further test of competitive "reasonableness" has been read into this statutory language by the courts (see *e.g. Standard Oil Co.* v. *United States,* 221 U.S. 1 at 65 (1911)), price fixing, horizontal market allocations and certain other types of conduct are held to be *per se* illegal (see *e.g. United States*

Europe.[24] As stated by one highly respected observer, "[o]ne man's cartel might be another's joint venture."[25]

For these reasons, it makes sense for governments to share information about anti-competitive behaviour only in respect of laws that have a common footing in both jurisdictions. As stated by Diane Wood in a speech given in late 1993:

> It comes as no shock to anyone here that cooperation among antitrust agencies takes place only to the extent that the substantive laws each one enforces, and the confidentiality rules under which each one operates, permit.[26]

The burden of proof and the elements necessary in proving a breach of a law would certainly be part of the substantive aspects of the law.[27]

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v. *Socony-Vacuum Oil Company*, 310 U.S. 150 (1940)).

[24] Art. 85(1)(a) of the *Treaty for the Establishement of the European Economic Community*, 25 March 1957, 298 U.N.T.S. 3 (*sub nom. Treaty of Rome*), states:

> The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the common market, and in particular those which:
> (a) directly or indirectly fix the purchase or selling prices or any other trading conditions [...].

[25] D.A. Wood, "Trade and Competition Policy: Forever Linked; Forever Separate?" (Address to the University of Toronto Conference: "The Internationalization of Competition Policy: Opportunities, Threats and Challenges") [unpublished] at 29 [hereinafter "Trade and Competition Policy"].

[26] D.A. Wood, "Antitrust and Competition Policy: Developments in the U.S. and Europe" (Address to the European-American Chamber of Commerce, 8 October 1993) [unpublished] at 2.

[27] Aside from the qualitative scope of information sharing, the quantitative scope of information sharing is also relevant. In the Director's recent draft policy on the Bureau's treatment of confidential information, *Draft Policy on Confidentiality of Information*, *supra* note 1 at 13, the Director stated, in connection with sharing information with other Canadian law enforcement agencies: "Should communication of information to a Canadian law enforcement agency be justified, such disclosure would only be made *to the extent necessary to provide the Canadian law enforcement agency with information which is relevant to its law enforcement mandate*." [Emphasis added.] In connection with information that would advance an investigation under the *Competition Act*, the Director stated, *ibid.*: "Should disclosure of information to a Canadian law enforcement agency be necessary to further the Director's inquiry, disclosure is generally made *only to the extent necessary to enable the agency to provide to the Director the assistance sought*." [Emphasis added.] The Director appeared to be more willing to share information on a broad basis with foreign law enforcement agencies than with Canadian law enforcement agencies. For example, he stated in the draft policy statement (*ibid.* at 15-16):

> The Director is committed to enhancing the effectiveness of Canadian enforcement efforts through cooperation with foreign agencies enforcing similar legislation. [...] one key element [in] the effort to strengthen cooperation among agencies is to improve information sharing.

And in another part (at 17):

> Disclosure of confidential information would generally occur only where the Director's objective in a particular matter cannot be achieved as effectively through alternative means. *The single exception to this policy is with respect to the possible disclosure of non-section 29 information in certain specific circumstances to foreign agencies enforcing similar legislation.* [Emphasis added.]

Whether or not this apparent difference in treatment between Canadian law enforcement agencies and foreign competition law enforcement agencies can be justified as being in the public interest is open to question. It should be noted in this regard that subsection 29(1) of the *Competition Act* does not limit the Bureau in the scope of information that may be shared with Canadian law enforcement agencies,

B. *The Scope of the Information Sharing*

A. *Conduct that is Reviewable in Canada*

Obviously, the big question is this: in connection with what types of conduct and in what circumstances will the Director share information with foreign competition law enforcement agencies? For example, if the Director obtains information about a potential abuse of dominance in Canada that might have some impact south of the border, will the Director share it with the U.S. Department of Justice assuming the conduct at issue is capable of being treated as a crime under § 2 of the *Sherman Act*?[28]

In my view, the answer should be "no." Parliament could not have intended that the Director indirectly seek criminal sanctions in relation to conduct for which Parliament had provided civil remedies.[29]

I think the business community in Canada would be deeply concerned in the wake of the recently approved *International Antitrust Enforcement Assistance Act of 1994* to hear that one of the purposes of the new legislation is to eliminate the divergent application of competition laws.[30] It must be recognized that Canada has been vigilant in protecting its citizens and industry from the unfair application of the competition laws

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such as only to information which is relevant to a Canadian law enforcement agency's mandate. On the other hand, even if the Director is correct in his view that the "administration and enforcement" exception enables him to share information with foreign agencies, the disclosure must be limited to that which directly assists in the administration or enforcement of the *Competition Act* in a particular matter.

[28] § 2 of the *Sherman Act*, *supra* note 5, states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony ....

To illustrate the other side of the coin, we have made it a crime in Canada to refuse to supply a customer because of its low pricing policy: *Competition Act*, s. 61(1)(b). No such crime occurs if such conduct, and its effect, is felt only in the United States: *Center Video Industrial Co., Inc.* v. *United Media, Inc.*, [1993-1] Trade Cas. ¶ 70,214 (4th Cir. 1993).

[29] "Protection and Pitfalls under the Competition Act", *supra* note 1 at 25. See also J. Kazanjian, "The Disclosure of the Director's Disclosure Policy: The Draft Information Bulletin and Information Sharing with Foreign Agencies" (Address to the Canadian Bar Association, National Comp. Law Section, 30 September 1994) at 4 [hereinafter "Disclosure of the Director's Disclosure Policy"]: "[I]t is very difficult to accept as sound for Canadians an information sharing approach that sees the Director volunteering, unsolicited, confidential business information to foreign agencies where [...] the activities would not constitute an offence under Canadian law".

of foreign countries, most notably those of the United States.[31] Witness the *Foreign Extraterritorial Measures Act*.[32]

If it is considered unfair for a corporation or individual to be subject to prosecution in the United States for conduct not considered criminal in Canada, the unfairness of the result is only exacerbated if the prosecution takes place at the hands of the Director. The result of such a policy would surely be that Canadian companies would have to comply with the strictest competition law regime applicable in any given circumstance and assume the ultimate application of such regime in all discussions and dealings with the Bureau,[33] notwithstanding Canadian law with respect to the conduct.[34]

Consequently, no information concerning anti-competitive conduct treated civilly in Canada should be shared with a foreign competition law enforcement authority unless the latter is able and willing to undertake to consider the conduct only in a civil context.[35]

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[30] "[...] it is no longer acceptable for anti-competitive conduct to be subject to widely divergent competitive enforcement policies and procedures.": H.R. Rep. No. 772, 103 Cong., 2d Sess. § 8 (1994).

[31] In this regard, the National Competition Law Section of the Canadian Bar Association appropriately made note of the fact: that Parliament saw fit to enact the FEMA in 1985,

> [at]approximately the same time it entered into the MOU with the United States, [which] indicates that disclosure of information and cooperation with U.S. antitrust prosecutors cannot be presumed to be in the best interests of Canada. ("Commentary on the Draft Information Bulletin", *supra* note 1 at 36.)

See further "Disclosure of the Director's Disclosure Policy", *supra* note 29 at 6:

> Examples of information sharing with the U.S. in other areas such as securities, tax and customs are not reasons for the Director to decide for himself whether and how he can share information in the competition law context [...]. A more useful reference would be to federal blocking legislation or to provincial business records legislation which are expressions of the desire of Canadians not to have confidential business information cross the border.

J.A. Kazanjian, "Competition Law and Trade Policy: Honk if You Love Competition Policy" 14 Can. Comp. Pol. Rec. 71 at 74-75:

> Someone will also have to have a fairly good explanation for the Canadian business community as to why, after spending 50 years passing laws designed to impede the extraterritorial application of U.S. antitrust laws, Canada had suddenly changed its mind. It is also hard to imagine why the Canadian business community would be willing to expose itself to U.S. procedures and remedies, when a few years earlier it strenuously resisted the inclusion of similar provisions in Canada's domestic competition laws.

D.I. Baker, *supra* note 8 at 8: "Blocking statutes are plainly incompatible with the objectives of enforcement harmonization".

[32] R.S.C. 1985, c. F-29. Among other things, the *Foreign Extraterritorial Measures Act* states that where a foreign court or tribunal has given a judgment under an antitrust law, which in the opinion of the Attorney General of Canada is likely to adversely affect significant Canadian interests in relation to international trade or commerce, the Attorney General may order that the judgment not be recognized or enforced in Canada: see s. 8(1). See also sections 46, 82, 83 and 84 of the *Competition Act* which respectively deal with, among other things, foreign directives in furtherance of a conspiracy, foreign judgments that would adversely affect competition in Canada if enforced, foreign laws that would adversely affect competition in Canada if adhered to, and a foreign supplier's refusal to supply a product to, or discrimination against, a person in Canada.

[33] See further *supra* note 7 and accompanying discussion.

[34] See "Trade and Competition Policy", *supra* note 25 at 28.

[35] The Canada / U.S. 1995 Information Sharing Agreement specifically provides that the sharing of information may be subject to and dependent upon the acceptability of assurances given by the recipient "with respect to confidentiality and with respect to the purposes for which the information will be used": Art. X.3. The Agreement also requires each country to consider the important interests of the other country (i) at all stages of an investigation or proceeding, including the stage at which "the nature of the remedies or penalties [to be] sought in each case will be decided (Art. VI.1) and (ii) in

If the ability is lacking or the willingness wanting, it is difficult to see how assistance to the foreign government would be in Canada's best interests.

It should be noted that the recently approved *International Antitrust Enforcement Assistance Act of 1994* defines the phrase "foreign antitrust laws" in § 12(7) to mean "the laws of a foreign state ... that are substantially similar to any of the Federal antitrust laws *and that prohibit conduct* similar to conduct prohibited under the Federal antitrust laws." Reviewable practices under the *Competition Act* may not fall within this definition. Such practices are not prohibited in the absence of an order from the Competition Tribunal. For example, subsections 77(2) and 79(1) of the *Competition Act* state: "[w]here, on application by the Director, the Tribunal finds [certain reviewable practices to be having a certain impact on competition] the Tribunal *may* make an order [prohibiting the conduct]."[36] Since information may only be shared by the Attorney General of the United States or the Federal Trade Commission with foreign antitrust agencies for purposes of enforcing "foreign antitrust laws," there is an issue as to whether the *International Antitrust Enforcement Assistance Act of 1994* permits the U.S. antitrust agencies to assist the Bureau in relation to reviewable practices.

2. *Conduct that is Criminal in Canada*

Another area of difficulty concerns information disclosure in the context of substantive differences in the elements of offences known, by name, to be common to Canada and a foreign jurisdiction. For example:

> in Canada, we have an "undueness" requirement in our conspiracy law — not so in the United States;
> in Canada, we have a quantity component to our price discrimination law — not so in the United States; and,[37]
> in Canada, we have an export consortium defence to conspiracy — it isn't recognized in the United States.[38]

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light of the degree of conflict or consistency between the laws of each country (Art. VI.5(iv)). An example of a situation where such an undertaking might be given is tied-selling as a monopolizing practice, which can be pursued either civilly or criminally under § 2 of the *Sherman Act*, *supra* note 5. Tied-selling might also be pursued under § 5(a) of the *Federal Trade Commission Act*, *supra* note 5: see *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357 (1965); and discussion in note 21.

In regard to the pursuit of civil action under the recently approved *International Antitrust Enforcement Assistance Act of 1994*, *supra* note 6, Anne K. Bingaman indicated that one of its purposes was to "supplement MLAT cooperation in criminal antitrust matters ... [to] enhance our ability to cooperate with foreign antitrust authorities in civil matters.": A.K. Bingaman, *supra* note 5 at 13. In the same speech, Ms Bingaman indicated that a Civil Task Force had been created to greatly increase the Department of Justice's civil enforcement record: *ibid.* at 14.

[36] This contrasts with the structure of § 5 of the *Federal Trade Commission Act*, *supra* note 5, which states that: "[u]nfair methods of competition ... are hereby declared unlawful."

[37] See generally C.S. Goldman & J.D. Bodrug, *supra* note 5.

[38] While the United States has its own export consortium exemptions, which are found in the *Webb-Pomerene Act*, 15 U.S.C. § 61, *et seq.*, and the *Export Trading Company Act of 1982*, 15 U.S.C. § 4001, *et seq.*, it does not recognize the equivalent defence found in the *Competition Act*. Similarly, the competition law enforcement agencies of the United States do not expect foreign governments to exempt *Webb-Pomerene* type organizations from the application of their laws. See Department of Justice and Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations* (Washington: April, 1995) at 6.

And it works the other way too.[39]

What is the Director going to do under an information sharing arrangement when the Bureau has gathered information about conduct that may constitute a competition law offence in a foreign country, but not an offence in Canada? For example, what is the Director going to do if he looks into a price-fixing conspiracy between a Canadian and American company and discovers that the two companies have a very small combined market share?[40] The conduct is *per se* illegal south of the border, but probably would not reach the "undue" standard in section 45 of the *Competition Act*.

If the Director discloses information to the U.S. Department of Justice in the above example, doesn't he violate a rudimentary proposition that what isn't illegal in Canada is presumed lawful and proper? In addition, wouldn't the disclosure of information invite sanction of behaviour that the Director has no authority, as opposed to jurisdiction, to call into question?

It is respectfully suggested that the Director should not provide assistance to a foreign competition law enforcement agency in such circumstances.[41] Only when conduct would be treated criminally in Canada should the Director consider sharing information with a foreign competition law enforcement agency that is investigating, or wishes to investigate, conduct treated criminally in that foreign jurisdiction.

In this regard, it is suggested that the Director should only disclose information to a foreign antitrust enforcement agency for purposes of a criminal investigation when the conduct of concern could also be treated criminally in Canada, if proven. The "double criminality" requirement is well-known to Canada and appears in the *Extradition Act*.[42] An interesting extradition case for purposes of illustrating the requirement is *Washington (State)* v. *Johnson*,[43] where a fugitive was convicted of theft in the second degree in the State of Washington.[44] The fugitive escaped to Canada and resisted extradition. The

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39 For example, in the United States, a resale price suggestion coupled with a threat of discontinuing business is not necessarily illegal — in Canada it is: *Competition Act*, s. 61(1)(a) and (3). See *Isaksen* v. *Vermont Castings, Inc.*, [1987-2] Trade Cas. ¶ 67,658 (U.S.C.A.) at 58,345-346: "This is a rather sorry excuse for an antitrust case .... Isaksen testified that when Vermont Castings discovered how low his prices were, it began to threaten him, and otherwise harass him, in a variety of ways [...] Harassment by itself, however, would not violate section 1 of the Sherman Act [...] harassment is unilateral".

40 A more subtle example might involve a company agreeing with a small competitor to supply it with product on condition that it shut down its production facilities. In the United States, this could receive *per se* illegal treatment, while in Canada illegality is unlikely. See *Palmer* v. *BRG of Georgia, Inc.*, 111 S.Ct. 401 (1990).

41 Moreover, disclosure in such circumstances could be viewed as being inconsistent with one of the purposes of the *Competition Act*, namely, expanding opportunities for Canadian participation in world markets. See *Competition Act*, s. 1.1.

42 R.S.C. 1985, c. E-23. See also *Gulf Oil Corporation* v. *Gulf Canada Limited*, [1980] 2 S.C.R. 39 at 62, 11 D.L.R. (3d) 74 [hereinafter *Gulf Oil* cited to S.C.R.]:

> Public policy is therefore involved in the application of rules of conflict of laws, as where the enforcement of foreign law in Canadian litigation may be denied because, for example, the foreign law may be a penal law or a tax law and therefore within the categories that are denied enforcement on policy grounds.

43 [1988] 1 S.C.R. 327, 2 W.W.R. 673 [hereinafter *Johnson* cited to S.C.R.]. See similarly *Re United States of America and Dynar* (1995), 25 O.R. (3d) 559, 101 C.C.C. (3d) 271 (C.A.).

44 Basically, Johnson took a musical organ on loan from an elderly couple promising to try to sell it for them. He never returned it, although he did put forward some third party offers for the couple's consideration, which were rejected as too low.

majority of the Supreme Court of Canada, per Wilson J., stated that if the law of the requesting state does not clearly have all of the elements of the offence as it exists in Canada, it must be proven that these elements form part of the crime as a matter of fact.[45] Since the crime of theft in the second degree was not proven to necessarily require fraudulent intent, as required in Canada, extradition was denied.[46]

It could be argued that the *Mutual Legal Assistance in Criminal Matters Act*[47] runs against the grain of any "double criminality" requirement. This *Act* does not require that an offence or illegal activity for which one country seeks assistance be an offence in the other. Thus, it could be argued that Parliament contemplated the disclosure of information to foreign governments regardless of the illegality of the conduct in Canada. It may be that the Director has adopted such a view. He has stated:

> [...] the Director would consider disclosing non-section 29 information to a foreign agency in circumstances such as [...] where information comes to the Director's attention suggesting that *the competition laws of another country* may be or are being violated.[48]

Nevertheless, there are good arguments to the contrary: first, the *Mutual Legal Assistance in Criminal Matters Act* expressly requires that any assistance under the *Act* be in Canada's public interest.[49] Second, the Department of Justice (Canada) requires, as a matter of policy, conduct to be an offence in Canada where a foreign country

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[45] *The Canadian Encyclopedic Digest (Ontario)*, vol. 12 (Toronto: Carswell, 1994) at 61 para. 49. *Johnson* concerned an extradition request in the face of a conviction, where the standard for extradition requires proof that the fugitive has been convicted of an "extradition crime" within the meaning of the *Extradition Act*, s. 18(1)(a). An "extradition crime" is: (a) any crime that, if committed in Canada, or within Canadian jurisdiction, would be one of the crimes described in Schedule I to the *Extradition Act* or; (b) any other crime specifically agreed upon by the parties to the applicable arrangement: *Extradition Act*, s. 2. The standard for extradition in the face of an alleged crime is that the evidence justify the committal of the fugitive for trial if the conduct had been committed in Canada because the evidence is compelling and the conduct is also criminal in Canada: *Extradition Act*, s. 18(1)(b); see *The Canadian Encyclopedic Digest (Ontario)*, *ibid.* at 61 para 40.

[46] The OECD Working Party No. 3 on Cooperation Between Member Countries noted in its report on Mutual Assistance Agreements that "different standards concerning the intentional element of the infraction, differences in predicate offences, [and] differences with regard to charging the perpetrator of the underlying offence with money laundering" should not affect the ability or willingness of the countries to provide each other with mutual legal assistance: OECD, Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy, Working Party No. 3 on Cooperation Between Member Countries, "Mutual Assistance Agreements" (22 April 1993) at ¶ 33.

[47] R.S.C. 1985 (4th Supp.), c. 30.

[48] *Draft Policy on Confidentiality of Information*, *supra* note 1 at 18.

[49] Accordingly, there is an obligation to consider the circumstances under which the request arises, including whether or not the offence is known to Canada, in determining if assistance is in Canada's best interests. The supporters of the *International Antitrust Enforcement Assistance Act of 1994*, *supra* note 6, also anticipated that the public interest would be considered in such circumstances. As indicated in the House Report relating to the *Act*:

> the Attorney General and the Commission will [have to] carefully evaluate, in applying the 'public interest' precondition in section 8(a)(3) of the bill, whether providing assistance in a foreign investigation of U.S. firms for conduct that would not violate U.S. antitrust law is consistent with U.S. public policy. (H.R. Rep. No. 772, 103 Cong., 2d Sess. § 15 (1994).)

requests, pursuant to the *Mutual Legal Assistance in Criminal Matters Act*, a search or seizure to be conducted in Canada.[50]

There are only two circumstances in the criminal context in which the Bureau's sharing of information with foreign competition law enforcement agencies is clearly justified as being in Canada's best interests. First, it is reasonable to cooperate with a foreign agency through information sharing in the case of a joint investigation, such as the thermal fax case, because a crime appeared to have been committed in Canada. Second, it is reasonable to share information with a foreign competition law enforcement agency when the foreign agency is conducting an investigation into conduct that, if successfully tried under the *Competition Act*, would be illegal in Canada. If this position is accepted, it becomes incumbent upon the Director to make appropriate inquiries to determine if conduct would be criminal in Canada before sharing information with a foreign competition law enforcement agency in such circumstances.

3. *Comity Considerations*

Comity is essentially a "doctrine of politeness and good manners."[51] It is based upon international courtesy, which each state pays to the other.[52]

Perhaps the best illustration of the factors that should be considered in the comity exercise is given in the Canada / U.S. 1995 Information Sharing Agreement. The document is particularly helpful because of its currency and because it reflects the agreement of more than one country as to what constitutes "good comity manners." The Agreement states in Article VI.5 that:

> [w]here it appears that one Party's enforcement activities may adversely affect the important interests of the other Party, each Party shall, in assessing what measures it will take, consider all appropriate factors, which may include but are not limited to:
>
> (i) the relative significance to the anti-competitive activities involved of conduct occurring within the Party's territory as compared to conduct occurring in that of the other;
> (ii) the relative significance and foreseeability of the effects of the anti-competitive activities on one Party's important interests as compared to the effects on the other Party's important interests;
> (iii) the presence or absence of a purpose on the part of those engaged in the anti-competitive activities to affect consumers, suppliers or competitors within the enforcing Party's territory;
> (iv) the degree of conflict or consistency between the first Party's enforcement activities (including remedies) and the other Party's laws or other important interests;[[53]]

[50] See Department of Justice, *Law Enforcement in the Global Village: A Manual for Mutual Legal Assistance in Criminal Matters* (Ottawa: Minister of Supply and Services, 1990) at 5. W.H. Corbett, Q.C., the author of the Department of Justice manual, confirmed that this precondition is not found in the *Mutual Legal Assistance in Criminal Matters Act*, *supra* note 47, but is rather a precondition unilaterally imposed as part of the process of determining whether or not assistance is in the public interest.

[51] D.I. Baker, *supra* note 8 at 5.

[52] *Re Westinghouse Electric Corporation and Dusquesne Light Company* (1977), 16 O.R. (2d) 273 at 290, 78 D.L.R. (3d) 3 (H.C.) [hereinafter *Re Westinghouse* cited to O.R.].

[53] See also American Bar Association, Section of Antitrust Law and International Law, *Report of the Section of Antitrust Law and the Section of International Law and Practice of the American Bar Association on the Proposed International Antitrust Enforcement Assistance Act* (1 August 1994) at

> (v) whether private persons, either natural or legal, will be placed under conflicting requirements by both Parties;
> (vi) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;
> (vii) the location of relevant assets;
> (viii) the degree to which a remedy, in order to be effective, must be carried out within the other Party's territory; and
> (ix) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, would be affected.[54]

If the Director believes that proceedings should not be taken against a Canadian company in a particular case, the Director should not share information in respect of the matter. After all, why let the horse out of the barn only to have to chase it back inside?

The facts surrounding the *Uranium* case[55] serve as a useful example of the type of situation in which cooperation with foreign competition law enforcement agencies clearly cannot be rationally considered to be in the public interest. The case was commenced by private litigants[56] and is summarized by one commentator in the following way:

5: "[...] the refusal to provide investigatory cooperation [under the *International Antitrust Enforcement Assistance Act of 1994*] on the ground of inconsistency with the public interest could involve foreign policy considerations [...]".

[54] See similarly the Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws (23 September 1991). The Agreement was rendered void by the European Court of Justice in August, 1994, but was endorsed by the European Parliament on January 20, 1995: see *BNA Antitrust & Trade Regulation Report*, vol. 68, p. 107 (24 January 1995). In the United States, comity has played a role in the antitrust authorities declining to bring an action in U.S. courts and a role in U.S. courts declining to exercise jurisdiction from time to time. See Department of Justice and Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations* (Washington: U.S. Gov't Printer, April 1995) at 21. Pursuant to these *Guidelines* (at 20-21), there are only two items that are to be considered by the Department of Justice and the Federal Trade Commission in the comity exercise which are not mirrored in the Canada / U.S. 1995 Information Sharing Agreement or the Agreement Between the United States and Europe; namely, (i) the nationality of the persons involved in or affected by the conduct and (ii) the effectiveness of foreign enforcement as compared to U.S. enforcement. The courts in the United States tend to look to *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597 at 613-614 (9th Cir. 1976), in applying the following factors in the comity exercise:

> [T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

See also *Hartford Fire Insurance Co.* v. *California*, 113 S. Ct. 2891 (1993).

[55] *Re Uranium Antitrust Litigation*, 480 F. Supp. 1138 (N.D. Ill., 1979), aff'd 617 F.2d 1248 (7th Cir. 1980) [hereinafter *Uranium*].

[56] After a three year investigation by the U.S. Department of Justice, Antitrust Division, only one company, Gulf Oil, was charged with violating U.S. antitrust law. It was fined a mere $40,000. No uranium producer located outside of the United States was charged with violating any U.S. law. See E. Gray, *The Great Uranium Cartel* (Toronto: McClelland and Stewart, 1982) at 224-226. On the other hand, numerous civil actions were filed in the United States against almost every producer of uranium throughout the world alleging violations of U.S. antitrust laws. This resulted in what has been described as "The War of Litigation": *ibid.* at 229-261.

> [w]hile indeed it is clear that there was agreement between foreign uranium producers *at the encouragement of their various government authorities*, it is also clear that the companies and governments involved were of the view that they were obliged to take this action because of the American government's own conduct in shutting the [doors of the] U.S. market to imports from foreign countries in order to protect its domestic producers, an action which, it is argued, violated the United States' obligations under the General Agreement on Tariffs and Trade.[57] [Emphasis added.]

Obviously, comity considerations involving Canadian policy would dictate against assistance to the United States if such an incident arose again in the context of an information sharing agreement with the United States.[58] *Rivendell Forest Products, Ltd.* v. *Canadian Forest Products, Ltd.*[59] comes to mind.

It must be recognized that many Canadian industries attract a fair amount of attention in terms of Canadian law and policy. It would be perverse if those policies and laws were threatened or ignored in a competition law action brought by a foreign agency as a result of the sharing of information by the Bureau.[60]

Thus, before any disclosure of information takes place under an information sharing arrangement, the Bureau should first consider comity factors in determining

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[57] W.C. Graham, *supra* note 5 at 416-417. Another account can be taken from *Gulf Oil*, *supra* note 42 at 42:

> Canada, with federal government encouragement, had begun to develop a uranium industry in the 1950's, having access to the United States and United Kingdom markets. Until an embargo was put on foreign uranium by the United States in 1964, it had consumed about 70 per cent of the free world demand for uranium. The embargo left only 30 per cent of the free-world market available to Canadian and other non-United States producers of uranium. After stockpiling uranium and instituting other programmes to assist the uranium industry in Canada, the federal government and representatives of private uranium producers entered into negotiations in 1972 with the governments of France, South Africa and Australia, with certain producers in those countries and with the United Kingdom to establish a marketing arrangement of which a central feature would be the maintenance of minimum prices for the export of uranium to countries other than to members of this cartel arrangement and to the United States. By 1975, uranium prices had risen above the fixed minimum prices and on March 27, 1975 federal government directions in this respect ended.

[58] As a result of the *Uranium* case (*supra* note 55), the Government of Canada passed a regulation under the *Atomic Energy Control Act*, R.S.C. 1970, c. A-19, called the *Uranium Information Security Regulations*, SOR/76-644, which prohibited anyone having possession of notes, documents or materials in connection with discussions, meetings or conversations between January 1, 1972 and December 31, 1975 concerning the production, import, export, transportation, refining, possession, ownership, use or sale of uranium from disclosing such information, except in limited circumstances. In considering the regulation in *Gulf Oil*, *supra* note 42 at 58, where a court in the United States had issued letters rogatory to compel production of "uranium documents" in Canada, the Supreme Court said (quoting Robins J. in *Re Westinghouse*, *supra* note 52 at 291:

> To decline to lend a foreign Court assistance through the use of domestic judicial machinery in such circumstances is not to act in breach of the doctrine of comity but in accord with it.

Interestingly, the Canada / U.S. 1995 Information Sharing Agreement requires a country to give notification of its enforcement activities that may affect the "important interests" of the other country and indicates that enforcement activities relating to conduct that is believed "to have been required, encouraged or approved by the other Party" would ordinarily affect the important interests of such other country: Arts. II.1 and II.2(d). See also Art. II.2(e).

[59] [1993-1] Trade Cas. ¶ 70,144 (D.C., Col.).

[60] In a similar vein, policies and laws in Canada often lead to industries that are more highly concentrated than in the United States. See M.E. Porter, *Canada at the Crossroads: The Reality of a New Competitive Environment* (Ottawa: Business Council on National Issues, 1991) at 39, 56, 59-60

whether disclosure is in Canada's best interests,[61] as opposed to waiting and hoping that the foreign agency comes to the "right" decision in determining whether or not to take enforcement action against the conduct of concern.[62] In this regard, it must always be remembered that American private plaintiffs are not seriously going to consider comity factors should the Department of Justice raise an issue with respect to a particular industry in the process of an investigation and then ultimately decline to exercise its enforcement powers.[63]

4. *Credibility of Information*

A great deal of anti-competitive conduct is viewed in the light of a criminal provision. Before disclosing information that may be suggestive of improper criminal behaviour, the Bureau should ensure that the information is credible.[64] In relation to civil

& 63; and J.T. Fried, "Competition Cooperation" (Paper presented at the 2nd Annual Competition Law Conference, Montreal, 30 September 1994) [unpublished] at 1.

Indeed, I think it is fair to say that many Canadians hold a view that "companies ha[ve] to be large to compete with foreign firms"(M.E. Porter, *ibid.* at 63) and that "big might be beautiful" (R.J. Roberts, *Roberts on Competition/Antitrust: Canada and the United States*, 2nd ed. (Toronto: Butterworths, 1992) at 3). Since the antitrust agencies in the United States come across highly concentrated industries less frequently, there is a concern that behaviour that would be readily identified by the Bureau as consistent with free competition would be treated differently at face value by the Department of Justice or the Federal Trade Commission. One only has to consider some of the cases the Federal Trade Commission has brought over the years to recognize the validity of the concern. Witness the *Ethyl* case: *E.I. du Pont de Nemours & Co.* v. *Federal Trade Commission*, 729 F.2d 128 (2d Cir. 1984).

[61] As noted in the context of Bill C-13, which was given 1st reading in November of 1977 (*Proposals for a New Competition Policy for Canada: Second Stage*, (Ottawa: Ministry of Supply and Services, 1977) at 21):

> Canada, with its heavy dependence upon foreign trade and as a host to many multinational enterprises, has a particular interest in bilateral and multilateral arrangements for co-operation in the prevention of restrictive business practices. Such practices entered into abroad or directed from abroad may have adverse effects on Canadian trade. *Also, other countries may apply their competition laws in ways which have adverse effects upon Canadian trade and development, especially where multinational enterprises with affiliates in Canada are involved.* [Emphasis added.]

See further "Commentary on the Draft Information Bulletin", *supra* note 1 at 31-32.

[62] See "Interview: Anne K. Bingaman" (on file with author) 8 at 9:

> I cannot define with precision when we would not file a case solely because of comity considerations. I would hope that where conduct is aimed at, and has a substantial impact in, the United States, only in the most unusual situations would we actually stay enforcement of U.S. antitrust laws.

[63] Clearly private litigants differ in their willingness and responsibility to consider comity factors. See *Re Westinghouse*, *supra* note 52 at 292:

> Westinghouse, in applying for letters rogatory, did not reveal to the Courts in Richmond or Pittsburg that Canada had enacted the Security Regulations; that it intended to attack the validity of the Government's enactment of those Regulations if the letters rogatory were granted; that a policy statement had been made by the Minister and that the matter was regarded by Canada as one of sovereignty. In seeking assistance by invoking comity these are clearly matters of considerable importance.

See also D.I. Baker, *supra* note 8 at 6-7, n. 26 and 16, n. 64; and W.C. Graham, *supra* note 5 at 428.

[64] Credibility can be tested in a number of ways. The credibility of an informant, for example, can be tested by reference to documentation supporting the informant's allegations and by persons who can speak to the reputation and integrity of the informant. Certain information sharing models, such as those developed to assist in dealing with international money laundering and securities regulation concerns, are inappropriate in the competition law context because they call for the disclosure of

matters, the concern over credibility is less of a concern, although still a factor to be weighed, since it is not in the best interests of Canada to trigger an ill-founded investigation in the United States, or elsewhere, that results in the potential flow of hundreds of thousands or millions of dollars south of the border.[65] Nor is it in Canada's best interest to tarnish the reputation of Canadian companies through an ill-founded investigation.[66]

In this regard, it seems inconceivable that the business community would support the Director's earlier draft policy on the sharing of information with foreign agencies, which stated that:

> the Director would consider disclosing non-section 29 information to a foreign agency [...] (1) where information comes to the Director's attention suggesting that the competition laws of another country may be or are being violated, although there does not appear to be a competitive impact in Canada; or, (2) where information in the Director's hands does not necessarily point to similar behaviour in another country, but its communication would assist the Director or the foreign agency in the identification of anti-competitive issues.
>
> The purposes of these disclosures is to advise the foreign agency so that it may undertake its own investigation. Such communications would enhance cooperation leading to the effective enforcement of competition law.[67]

The blind sharing of tidbits in the hopes of reciprocity just isn't enough of a reason, in the face of substantively different laws, to share information with foreign competition law enforcement agencies and to subject Canadian business to speculation, investigation and possible criminal action. At the very least, the information should be verified, tested and, ultimately, judged to be credible enough that the Director would launch an inquiry if the choice and jurisdiction was his or hers.[68]

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information relating to "suspicious" behaviour. With respect to money laundering, see OECD, Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy, Working Paper No. 3 on Cooperation Between Member Countries, *Mutual Assistance Agreements* (Apr. 22, 1993) at ¶ 32 [hereinafter *Mutual Assistance Agreements*]. With respect to securities regulation, see *ibid.* at ¶ 43. Australia's *National Companies and Securities Commission Act*, 1979, n. 173, provides that documents may be disclosed if in the public interest. The view is that disclosure to foreign regulators is generally in the public interest, although one of the factors considered in making that assessment is "the source of the information and how NCSC obtained it": *ibid.* at ¶ 46.

65 Costs incurred on a monthly basis in the defence of an antitrust case can easily exceed $100,000 (U.S.). Costs include outside counsel, industry experts, expert economists and firms specializing in document handling. In this regard, the transaction costs in defending oneself in the United States tend to be significantly higher than in Canada owing to, among other things, differences in the cost of professional services and the manner in which litigation is conducted.

66 Without disclosing confidential information in the course of an investigation, it is possible for third party contacts of a competition law enforcement agency to get wind of concerns that the agency has in regards to particular players in a market. For example, if the Department of Justice is investigating price fixing in a market in which there are only two or three producers, it becomes obvious which companies are causing the agency concern.

67 *Draft Policy on Confidentiality of Information*, *supra* note 1 at 18-19.

68 Before the Director can launch an inquiry in Canada in relation to an offence under Part VI or VII of the *Competition Act*, there must be reasonable grounds upon which to believe that an offence has been or is about to be committed: *Competition Act*, s. 10(1)(b)(iii).

C. *The Potential for Disclosure*

1. *Integrity of Process*

(a) *Disclosure in Sharing*

Given the present state of the law in Canada, it is respectfully suggested that the task of determining when disclosure can take place is so difficult and the risk of error so great that the integrity of the process cannot be assured, regardless of the best intentions of the Director and his or her staff. For example, who is going to consider whether information is privileged;[69] who is going to consider whether common law duties of confidentiality attach to information;[70] who is going to consider whether an implied duty of confidentiality arises as a result of the *Access to Information Act*[71] in relation to information;[72] and, who is going to make these decisions — the Director, his or her counsel, his or her senior staff or line level officers?[73] If appropriate legislation is passed in Canada, such as the *International Antitrust Enforcement Assistance Act of 1994,* undoubtedly the risk of error will be dramatically reduced.[74]

Even assuming such legislation is passed, however, there is a compelling argument to be made for further protections in the sharing process. In particular, the National Competition Law Section of the Canadian Bar Association recently recommended in its report of December, 1994 that:

> consideration should be given to informing a person that the information is going to be provided to another law enforcement agency [because] [...] [t]his [would] allow the person whose information is going to be disclosed to bring additional factors to the Director's attention to suggest that disclosure should not be made or take such other action as may be necessary to protect its interests.[75]

The report points out that the Director may not appreciate the potential harm that may be caused by the disclosure of particular information.[76]

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[69] For example, information may be privileged by virtue of settlement negotiations, in which event the Director cannot unilaterally disclose the information. See *Middelkamp* v. *Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276, 96 D.L.R. (4th) 227 (C.A.); and "Commentary on the Draft Information Bulletin", *supra* note 1 at 17.

[70] See A.C. Gourley & J.A. VanDuzer, *supra* note 1 at ¶¶ 7095-7100; "Commentary on the Draft Information Bulletin", *supra* note 1 at 18; *Crestbrook Industries Ltd.* v. *Canada* (1992), 140 N.R. 397, 41 C.P.R. (3d) 34 (F.C.A.); T.J. O'Sullivan and M.A. Yach, "The Protection of Confidential Information in the Private Sector: An Overview" in *I've Got a Secret — The Duty of Confidentiality in the Private Sector* (Toronto: Canadian Bar Association, 1994) at 8-9.

[71] R.S.C. 1985, c. A-1, ss. 16, 20 & 24.

[72] See Y. Beriault & M. Renaud, *supra* note 1 at 9-13; "Protection and Pitfalls under the Competition Act", *supra* note 1 at 16; and J.F. Rill & C.S. Goldman, *supra* note 1 at 19, n. 44.

[73] "Commentary on the Draft Information Bulletin", *supra* note 1 at 8-9. See also D.I. Baker, *supra* note 8 at 33-34.

[74] While risks will remain with respect to foreign government use and disclosure and also waiver of privilege, these risks would be reduced to as low a level as might reasonably be expected to be achieved. See further D.I. Baker, *supra* note 8 at 25-26.

[75] "Commentary on the Draft Information Bulletin", *supra* note 1 at 21.

[76] *Ibid.* at 21, n. 24. On the other hand, the *International Antitrust Enforcement Assistance Act of 1994, supra* note 6, did not specifically provide for notice to the author or provider of information, since "it would not be advisable in some instances [such as where] the party is a target or subject in a criminal investigation being conducted [...]": H.R. Rep. No. 772, 103 Cong., 2d Sess. § 20 (1994).

The position adopted by the Director in 1995 on the sharing of confidential information[77] may lead some to conclude that the Director is not going to adhere to the rigours of the foregoing steps before sharing information with third parties, including foreign competition law enforcement agencies. In this regard, the Director risks becoming viewed as the captain of a "leaky ship." As pointed out in the National Competition Law Section's report, it would be disappointing if the Director's initiatives to improve the administration and enforcement of the *Competition Act* led to exactly the opposite result.[78]

(b) *Disclosure in Use*

It is commonly acknowledged that the information obtained by the Bureau and foreign competition law enforcement agencies is often extremely sensitive, commercial information.[79] For example, such information often includes customer, supplier, price and discount lists,[80] as well as future marketing or business strategies.[81]

Clearly, the Bureau is entitled to use such information in the course of "administering" and "enforcing" the *Competition Act*, as this is expressly contemplated in the confidentiality provision of the *Act* and is necessary in order to perform the task that the Bureau is charged with performing.[82] Nevertheless, information can be used for

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Nevertheless, the House Report did acknowledge that consideration should be given to providing prior notice of an intended disclosure of information to a foreign competition law enforcement agency in the course of the "public interest" assessment. See further, *supra* note 2, 52 and 56; D.I. Baker, *supra* note 8 at 28, n. 107. Interestingly, the Canada / U.S. 1995 Information Sharing Agreement does require a competition authority of one country to consider, upon request by a competition authority of the other country in the case of concurrent or coordinated enforcement activities, whether persons that have provided confidential information will "consent to the sharing of such information between the Parties' competition authorities":Art. IV.4.

77 See *Communication of Confidential Information, supra* note 1.

78 This concern led the Task Force on the North American Free Trade Agreement of the Antitrust Section of the American Bar Association to say in their report ("Commentary on the Draft Information Bulletin", *supra* note 1 at 26, n. 30.):

> [...] some restrictions on the ability of competition authorities to exchange information are in order. Such restrictions are particularly important in the context of information supplied voluntarily to competition authorities by private parties. A concern that such information could be disclosed to another agency may inhibit compliance initiatives by private parties and efforts by private parties to achieve cost-effective consensual resolutions in particular cases. Such an outcome would be clearly perverse in the context of an international agreement intended to promote effective competition law enforcement. As such, the Task Force is of the view that information supplied voluntarily by private parties to competition authorities should not be disclosed to another country's competition authority except with the consent of the party supplying the information.

79 *Communication of Confidential Information, supra* note 1 at 2. See also H.R. Rep. No. 103-772, 103 Cong., 2d Sess. § 13 and 16 (1994):

> Because of the high degree of competitive sensitivity of antitrust evidence — information such as a company's market share in various markets, and its business strategy for the future — the free-market, pro-competitive goals of antitrust enforcement dictate that this information be kept strictly confidential unless there is a compelling law enforcement need to disclose it in the course of a criminal antitrust prosecution or civil antitrust enforcement action.

80 Such information is worthy of protection in the context of common law actions for breach of confidence. See T.J. O'Sullivan & M.A. Yach, *supra* note 1 at 13.

81 See A.C. Gourley & J.A. VanDuzer, *supra* note 1 at ¶ 7005; and *ibid.*

82 *Competition Act*, s. 29(1).

purposes of competition law administration and enforcement in a variety of different ways and careless use of information by the Bureau should be avoided. For example:

> the Bureau should be able to gather information by asking "what would you estimate the sales of [the subject of the inquiry] to be?" instead of "[the subject] has advised that its sales are $1,000,000. Do you think that sounds likely?"[83]

Accordingly, the Bureau should only enter into information sharing arrangements with foreign competition law enforcement agencies that have a reputation of carefully protecting the confidentiality of information in the course of using that information.

2. *Private Actions*

Some Canadian business people look at the American system of antitrust justice and say it's not fair; others say it's excessive, outrageous or abominable. Usually the comments follow a primer on the plaintiffs' antitrust bar.[84] In the not so distant past, concerns about certain aspects of private antitrust litigation, such as class actions, damage trebling, an inability to recover legal costs (even if a defendant prevails) and jury trials, played a significant role in shaping the view of Canadians who helped to formulate the *Foreign Extraterritorial Measures Act* and certain sections in the *Competition Act* concerning foreign judgments.[85]

Therefore, an assurance of continuing confidentiality of any information shared with a foreign competition law enforcement agency is essential in order to engender the confidence of business people that disclose sensitive information to the Bureau. If the disclosure of information to the Bureau were to lead to a barrage of ill-founded private

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83 "Commentary on the Draft Information Bulletin", *supra* note 1 at 12.

84 The business person sees a system where very small plaintiffs can sue very large companies without putting up any money to fund the suit, since lawyers take on such cases for contingency fees. A group of local folks are asked to flip a coin and decide whether sophisticated business dealings have crossed the line into the antitrust prohibited zone. If liability is found, the jury determines the damages. Once damages are determined, they are trebled. Sometimes, however, plaintiffs get token settlements in the form of coupons or discounts from future purchases, while plaintiffs' counsel are handsomely rewarded for their efforts in the form of a cash payment that is equal to many multiples of their billables on the file. See *In re Domestic Transportation Antitrust Litigation*, [1993-1] Trade Cas. ¶70,165, where plaintiffs' counsel billed approximately $8 million on the file and received $14 million in compensation, while plaintiffs received a little cash and a lot of coupons, in a case where success on the merits was viewed by the judge as "very low," but the potential downside was in excess of $6,000,000,000. Plaintiffs can then seek recovery from any particular defendant (assuming more than one) and that unlucky defendant has no right to sue the other defendants for contribution. See *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630 (1981). Occasionally, even the continued existence of large corporations is at risk. For example, in the *Uranium* case, *supra* note 55, it has been reported that the continued existence of Rio Algom Mines, Denison Mines and Gulf Canada was threatened. See W.C. Graham, *supra* note 5 at 411-412. It should be noted that, in Canada, the *Competition Act*, s. 67(4), states that a corporation charged with an offence under the *Act* shall be tried without a jury. See also *Competition Act*, s. 73(2), which states that individuals should also be tried without a jury in certain instances.

85 *Competition Act*, ss. 82 & 83. See also "Commentary on the Draft Information Bulletin", *supra* note 1 at 36. As stated by W.C. Graham, *supra* note 5 at 411:

> The provisions permitting a reduction in a damage award in the *Foreign Extraterritorial Measures Act* are new in Canadian law and [...] a response to the threat of punitive damages which may be recoverable from Canadian corporations in American civil antitrust actions where triple damages may be awarded to the successful plaintiff.

antitrust suits south of the border in matters investigated by the Bureau, but not acted upon, the business community's faith in the Director would quickly dwindle.[86]

Of key importance in this regard are the legal safeguards in a foreign jurisdiction that protect against the disclosure of information to private parties. In relation to the United States, the *International Antitrust Enforcement Assistance Act of 1994* goes a long way in alleviating concerns of direct disclosure of confidential information to private parties.[87]

In Canada, the issue is more difficult. On the one hand, it is possible to interpret section 29 of the *Competition Act* as enabling the disclosure of section 29 information, as it is becoming commonly known, to those seeking to "enforce" the *Act* through private actions.[88] The Director has indicated in the recent policy paper on the subject of information sharing that the Bureau will not voluntarily provide information to persons contemplating or initiating a private action.[89] Similarly, the Director has indicated that the Bureau's response to an *Access to Information Act* request is generally to recommend denying such requests.[90] Perhaps of most importance is the fact that the Canada / U.S. 1995 Information Sharing Agreement now requires each country to "oppose, to the fullest extent possible consistent with that Party's laws, any application by a third party for disclosure of [...] confidential information [provided by one of the other country's competition authorities]."[91]

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[86] "Commentary on the Draft Information Bulletin", *supra* note 1 at 6; "Protection and Pitfalls under the *Competition Act*", *supra* note 1 at 26.

[87] See discussion *infra* notes 95 and 99.

[88] See A.C. Gourley & J.A. VanDuzer, *supra* note 1 at ¶¶ 7070-7075. Anthony VanDuzer and I provide an illustration of how the issue might arise:

> [A]ssume that the Tribunal made an interim order under section 100 requiring parties to a proposed merger to hold separate and to operate their two enterprises independently for a fixed period of time, but that in breach of the order a large number of employees were laid off by the parties. If the employees brought an action against the two parties alleging damages resulting from a breach of the Tribunal's order, could the Director give the employees access to the information supplied by them pursuant to the Notification Provisions, such as any decisions, commitments or undertakings by the two parties in respect of post-merger employment levels?

While the example is interesting, it must be noted for purposes of this paper that information obtained by the Department of Justice and the Federal Trade Commission pursuant to the *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 15 U.S.C. § 18a, is exempt from the application of the *International Antitrust Enforcement Assistance Act of 1994* by virtue of § 5(1) thereof.

[89] See *Communication of Confidential Information*, *supra* note 1 at 4.

[90] *Ibid.* See also C.S. Goldman & J.T. Kissack, "Joint Sovereign Criminal Investigations [By] U.S. and Foreign Governments - Can They Really Do That?: A Canadian Perspective" (Address to the Criminal Antitrust Law and Procedure Workshop, Dallas, Texas, February 1995) [unpublished] at 5; and *supra* note 79.

[91] Art. X.2. See similarly the Agreement Between the United States and the European Commission, which states:

> Each Party agrees to maintain, to the fullest extent possible, the confidentiality of any information provided to it in confidence by the other Party under this Agreement *and to oppose, to the fullest extent possible, any application for disclosure of such information by a third party that is not authorized by the Party that supplied the information.*

(Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws (23 September 1991), Art. VIII.2.) Also, the Australian Trade Practices Commission has indicated that if a third party seeks an order of a court of competent jurisdiction to force the Commission to deliver up documents considered confidential and obtained in the course of the Commission's activities, the Commission will

On the other hand, the Director is put in somewhat of a difficult position under Canadian law upon receipt of a subpoeña. Documents can be subpoenaed from the Director by third parties[92] and the ability and willingness of the Director to protect information against disclosure in such circumstances is somewhat an open issue at present. For example, the Director stated in the recent policy statement on the sharing of confidential information that:

> [t]he Director would oppose compliance with subpoenas for production of documents while an investigation is ongoing if compliance would have a potential to impede his [or her] investigation or otherwise undermine his [or her] ability to enforce the Act. Should the Director's opposition be unsuccessful, protective orders would be sought. Should a subpoena be served upon the Director after the investigation has been completed, it may be complied with once the action has been initiated and the information provider has been apprised of the request. Whether the Director would seek to invoke available privileges would be considered on a case-by-case basis.[93]

In addition, and perhaps more problematic, defendants to private litigation are sometimes asked to disclose "all documents given to agency X" in relation to an investigation covering issues similar to those raised in the private action.[94] The Director has stated in his final policy on the sharing of confidential information that the Bureau will consider intervening to claim privileges on behalf of the Canadian government on a case-by-case basis.[95] It should be noted that in relation to confidential information provided by competition authorities in the United States, the Canada / U.S. 1995 Information Sharing

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normally defend the interests of the informant through to appellate courts. See A.C. Gourley & J.A. VanDuzer, *supra* note 1 at ¶ 7075, n. 16.

[92] In the case of the United States, the *International Antitrust Enforcement Assistance Act of 1994* specifically prohibits any sharing of any information received from a foreign agency with a third party: § 8(b).

[93] *Draft Policy on Confidentiality of Information*, *supra* note 1 at 22. See also J.F. Rill & C.S. Goldman, *supra* note 1 at 36 and 41-42.

[94] D.I. Baker, *supra* note 8 at 31, n. 121; C.S. Goldman & J.T. Kissack, *supra* note 90 at 17.

[95] In relation to how information might be protected by the Bureau, one might look to the example set by the Federal Trade Commission, which recently intervened in private litigation to claim an "investigatory privilege". The privilege was recognized and an order was made requiring, among other things, that "no one [...] ask whether [...] anyone [...] made any disclosures to or [...] had any contact with the FTC." See materials supplied by D.E. Rosenthal, "Confidentiality of Information Provided to the Bureau" in *Emerging Issues in Competition Law* (Toronto: Insight, 1994); and A.C. Gourley & J.A. VanDuzer, *supra* note 3 at ¶ 7255, n. 56. See also § 1313(c)(3) of the *Antitrust Civil Process Act*, 15 U.S.C. § 1313, which prohibits the disclosure of documents and information produced by private parties in response to a Civil Investigatory Demand by the Department of Justice without the consent of the producing party. In contrast, see *Novak* v. *Orca Oil Co.*, S.C. No. S-5637/5638 (Alaska, 1994).

It is interesting to note that the Director indicated in the draft policy on the sharing of confidential information that the Bureau would comply with a subpoena after an investigation has been completed if the persons from whom information was obtained have been notified so that "*such persons* may [...] seek any protective order [...] *they* deem necessary". See *Draft Policy on Confidentiality of Information*, *supra* note 1 at 22. The final policy slightly stepped away from this position when it was written that:

> [s]hould a subpoena be served upon the Director after the investigation has been completed, it may be complied with once the action has been initiated and the information provider has been apprised of the request. *Whether the Director would seek to invoke available privileges would be considered on a case-by-case basis.* (*Communication of Confidential Information*, *supra* note 1 at 4.)

Agreement goes some distance in forcing the Director to aggressively protect such information.[96]

3. *Other Government Uses of Information*

To a *Canadian* business person, anti-dumping laws are viewed as an irritating cost of doing business in the United States. These laws are particularly irritating since most Canadians perceive that Canada has had a history of being on the receiving end of such actions,[97] even though the statistics may indicate otherwise.[98]

The business person sometimes sees a world in which, when prices go up, competition law allegations arise and, when prices go down, anti-dumping laws are invoked. Business people often feel they just can't win.[99]

Of course, both laws have fundamentally distinct policy foundations.[100] While rational economic theory justifies most of the competition laws in Canada and the United States, rational economic theory justifies very little of our respective anti-dumping laws.[101] Thus, it is probably safe to say that Canadian business would be deeply concerned if the sharing of information with foreign competition law enforcement agencies could be used for purposes other than competition law enforcement.[102]

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96 See *ibid.*

97 J.A. Kazanjian, *supra* note 31 at 74:

> [m]any have argued that current U.S. and Canadian anti-dumping laws impede the efficient allocation of resources in an integrating market and, as applied by Canadian and U.S. administrators, constitute an irritating and distorting intervention in cross-border trade.

98 M.J. Trebilcock, "The Case for Replacing Anti-Dumping with Antitrust" (University of Toronto Conference, "The Internationalization of Competition Policy: Opportunities, Threats and Challenges") [unpublished] at 26:

> [b]etween July, 1980 and June, 1988, American producers brought 24 anti-dumping actions against Canadian exporters, while Canadian producers brought 45 actions against American exporters. Canada imposed anti-dumping duties in 26 of the 45 actions, while the U.S. imposed anti-dumping duties in 9 of the 24 actions.

See also J.A. Kazanjian, *supra* note 31 at 75. Absolute numbers may not reflect, however, the relative significance of the impact of the actions to the overall economies of the two countries.

99 A good example of this is given by W.C. Graham, *supra* note 5 at 418:

> [s]imilarly, the "Swiss watch manufacturers" case provoked both the ire of the Swiss government [...] and also of the Swiss press which saw national economic sovereignty and the interests of employment in the Swiss watch industry threatened by the application of American laws to [...] arrangements which had received the sanction of Swiss law. The American prosecution was perceived at that time as being particularly iniquitous as the American Tariff Commission had previously raised the tariff on Swiss watches on the grounds that they were being exported to the United States at prices that were too low. The companies now were being prosecuted for agreeing to prices for export which were too high [...].

100 Indeed, the two laws are viewed as being in conflict with one another. See D.P. Wood, "'Unfair' Trade Injury: A Competition-Based Approach," 41 Stan. L. Rev. 1153 at 1155; I.R. Feltham, *et al.*, *Competition (Antitrust) and Antidumping Laws in the Context of the Canada-U.S. Free Trade Agreement* (A study for the Committee on Canada-United States Relations of the Canadian Chamber of Commerce and the Chamber of Commerce of the United States); T. Kennish, "Bumping Dumping —What's Involved" (University of Toronto Conference, "The Internationalization of Competition Policy: Opportunities, Threats and Challenges") [unpublished] at 20; M.J. Trebilcock, *supra* note 98 at 24.

101 See M.J. Trebilcock, *supra* note 98 at 24-25.

102 As another example, in many countries Canadian businesses sell product directly to foreign governments or their agencies. If the business community believed that a foreign government or its

Recognizing these concerns, the Canada / U.S. 1995 Information Sharing Agreement specifically prohibits each country from communicating information received from the other country "to third parties or to other agencies of the receiving competition authorities' government" or "for purposes other than competition law enforcement". The *Mutual Legal Assistance in Criminal Matters Act*[103] operates with similar effect.[104]

D. *Multiple Proceedings*

The 1986 OECD Council Recommendation Concerning Cooperation Between Member Countries on Restrictive Business Practices recognizes that the "unilateral application of national legislation, in cases where business operations in other countries are involved, raises questions as to the respective spheres of sovereignty of the countries concerned" and that "the need for Member countries to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of co-operation in the field of restrictive business practices [is important]." Consequently, the Council Recommendation expressly requires a Member country to give notification to another Member country when it undertakes an investigation or proceeding which might affect important interests of that other Member country. The notification was intended to permit the Member country that was undertaking the investigation or proceeding to take account of "such remedial action as the other Member country may find it feasible to take under its own laws to deal with the restrictive business practices."[105]

Consistent with the OECD Council Recommendation, it is suggested that the Bureau ought only to share information with foreign competition law enforcement authorities, where the effects of the anti-competitive activities are uncertain and all of the relevant companies are within Canada, on the condition that the foreign country undertake not to independently commence action unless the impact in the foreign country is substantial and not *de minimus*.[106] Such an undertaking might also assist in the

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agencies would make commercial use of information provided to them by the Bureau, confidence in the Bureau would be lost and cooperation rendered difficult.

[103] *Supra* note 47.

[104] If the United States or any other foreign country requests information for one purpose and then wants to use it for another, consent of the disclosing country must first be obtained. See Department of Justice, "Law Enforcement in the Global Village: A Manual for Mutual Legal Assistance in Criminal Matters" (Ottawa: Minister of Supply and Services, 1990) at 48.

[105] Revised Recommendation of the OECD Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade, OECD Doc. No. C(86)44 (21 May 1986), Art. A.1(a). In addition, Art. 4(c) states that a Member country that is consulted in connection with alleged restrictive business practices engaged in by enterprises within that country's borders "should attempt to ensure that these enterprises take remedial action, or should itself take whatever remedial action it considers appropriate, including actions under its legislation on restrictive business practices or administrative measures, on a voluntary basis and considering its legitimate interests" if it agrees that such enterprises are engaging in such practices.

[106] See also *supra* note 40 and accompanying text. Another situation where multiple proceedings are not sensible is when a civil remedy, such as a cease and desist order, is sought in one jurisdiction against certain parties where the same remedy against the same parties would be the natural outcome of any successful civil action in another jurisdiction. Similarly, the Agreement Between the United States of America and the European Commission contemplates deference when one party takes enforcement action against anti-competitive conduct. It states:

> [i]f a party believes that anti-competitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party

settlement of any action brought by the Bureau in such circumstances, since the parties would be somewhat less concerned about the consequential effects of a guilty plea or any other admission or finding of facts in relation to potential subsequent litigation.[107]

The Canada / U.S. 1995 Information Sharing Agreement adopts or assists in the implementation of several of these suggestions. First, it requires notification of anti-competitive activities carried out in whole or in part in the territory of the other country, "except where the activities occurring in the territory of the other country are insubstantial."[108] Second, it requires the parties to consider coordinating their enforcement activities when pursuing a related matter[109] particularly when one country can secure by itself effective relief against the anti-competitive activities of concern.[110] Third, it permits the sharing of information to be subject to whatever assurances the competition authorities of each country agree upon.[111]

IV. Recommended principles in Any Information Sharing Arrangement Between Canadian and Foreign Competition Law Enforcement Authorities

Today, we operate in a legal glass jar. Notwithstanding statements of the Director to the contrary,[112] the ability of the Director to share any section 29 information with a foreign agency is doubtful. It would appear that new legislation is required.

Nevertheless, assuming new legislation is passed or the Bureau shares information pursuant to the Director's interpretation of the "administration and enforcement" exception in subsection 29(1), the Director will have to consider in each case of information disclosure whether or not the public interest is served by the disclosure of information. In the process of making such a determination, the following guidelines are suggested:

> (a) in relation to conduct treated civilly in Canada, but criminally in a foreign jurisdiction, information should only be shared with the relevant foreign authority if it is able and willing to undertake that any legal proceedings subsequently taken in respect to the conduct will only be civil and not criminal;[113]
> (b) in relation to conduct treated criminally in both Canada and a foreign jurisdiction, information should only be shared with the relevant foreign authority if (i) the Director would launch an inquiry into the conduct in Canada based on the facts, as then known, assuming the conduct had an adverse effect in Canada and (ii) no additional information is reasonably available to, or obtainable by, the Director that might reveal that the conduct would not be treated criminally in Canada;[114]

> and may request that the other Party's competition authorities initiate appropriate enforcement activities.

(Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws (23 September 1991), Art. V.2.) See similarly the Canada / U.S. 1995 Information Sharing Agreement, Art. V.2.

107 C.S. Goldman & J.T. Kissack, *supra* note 90 at 15; and *supra* note 81.

108 Art. II.2(b).

109 Art. IV.1.

110 Art. IV.2(c).

111 Art. X.3.

112 G.N. Addy, *supra* note 1; *Communication of Confidential Information*, *supra* note 1 at 3.

113 See pp. 241-243, above.

114 See pp. 243-246, above.

(c) no information should be shared with a foreign authority if important interests of Canada could be adversely affected by subsequent proceedings that might be taken by that foreign authority and comity considerations suggest that such proceedings should not be taken by that foreign authority in respect to the relevant conduct;[115]
(d) no information should be shared with a foreign authority unless the information is credible;[116]
(e) no information should be shared with a foreign authority if there is a risk of improper disclosure on the part of the foreign authority;[117]
(f) no information should be shared with a foreign authority if the information is accessible to, or may be obtained by, third parties[118] or a government department or agency whose mandate has nothing to do with the administration or enforcement of competition laws;[119] and
(g) no information should be shared with a foreign authority if the information will form the basis of civil proceedings brought by the Director which will, if successful, adequately remedy the relevant conduct.[120]

In addition, it is suggested that in certain circumstances the Director may wish to give notice to the author or provider of information so that concerns about such disclosure may be brought to the attention of the Director before any legal rights such party may have in respect to such information are effectively abrogated by the Director.[121]

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115 See pp. 246-49 and 256-57, above.
116 See pp. 249-50, above.
117 See pp. 251-53, above.
118 See pp. 253-56, above.
119 See pp. 256-57, above.
120 See *ibid.*
121 See pp. 257-58, above.