

EXTRATERRITORIALITY

The unilateral application of laws by foreign countries, particularly the United States, in a manner which seeks to displace Canadian authority over its own territory or which has the effect of placing Canadian companies in the position of having to choose between conflicting legal requirements, has remained of serious concern to Canada. In particular, the areas of antitrust, export controls, and recently U.S. criminal law investigations have resulted in significant international legal developments.

In the antitrust field, a Memorandum of Understanding between Canada and the United States as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws was signed on March 9, 1984. In June, 1985, Canada joined with the Governments of Australia, France and the United Kingdom in filing an amicus curiae brief before the United States Supreme Court in the pending case of Matsushita Electric Industrial Co. Ltd., et al. v. Zenith Radio Corporation et al. regarding certain aspects of the "foreign sovereign compulsion" defense.

In the field of export controls, several representations were made over the last two years to the United States Administration and Congress regarding objectionable provisions of the Export Administration Amendments Act of 1985. At the same time, Canada has continued its long-standing cooperation with the United States, through ongoing consultation, on the administration and enforcement of strategic export controls.

The question of the appropriate limits upon a foreign court's powers to compel the discovery of documents located abroad was brought into sharp focus by two cases involving the Bank of Nova Scotia before Florida courts. In these cases, the Bank was ordered by a U.S. court to produce documents in the possession of branches located in Caribbean jurisdictions that have enacted strict bank secrecy laws. Canada's concern with the fact that the Bank would be subject to severe sanctions in the United States for failure to produce the information in question, or be subject to severe sanctions in the Caribbean jurisdictions if it did produce the documents, was reflected in four amicus curiae briefs filed by Canada in the latter case. Discussions with the United States regarding the problems caused to Canadian corporations by these and other subpoenas resulted in the formation of a "Subpoena Working Group". Comprised of legal officials of both countries, the group provides an informal "early warning" mechanism and forum for consultations on practical approaches that might avoid the conflicts caused in the Bank of Nova Scotia cases.