



ABA International

Canada Committee

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Welcome

Welcome to the inaugural issue of the Canada Committee newsletter. The Steering Committee has supported the idea of a newsletter for over a year, however it only became a reality when Alex stepped forward and agreed to be our editor. Please note that the newsletter will be issued on a quarterly basis, so continue to send your articles and news to Alex at ajeglic@yahoo.com. Thanks Alex for a great job!

I would like to take this opportunity to also introduce you to the Canada Committee and our plans and programs for 2009. John Boscariol and I are currently the Committee Co-Chairs. Our Vice-Chairs are:

Marc Golstein, Peter Kirby, Alex Jeglic, Mark Katz and Del Atwood.

The Steering Committee has about 20 members that hold a monthly phone call on the first Wednesday of every month. This is where we plan our programs and events. The calls are open to all members and are your opportunity to join us and become more involved in the Committee.

Fortunately, we have a very active Committee. Recently, we held a Holiday Party in Toronto on December 19th. The event was spearheaded by Marc Goldstein and everyone had a good time even though it was held during a snowstorm.



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Mike Burke, Secretary/Operations Officer and member of the Executive Committee of the International Law Section, braved the storm to join us. On January 14th the Committee, in conjunction with the International Law Section of the Canadian Bar Association ("CBA"), held a well-attended luncheon at Fasken Martineau DuMoulin in Montreal to discuss the Canada-U.S. relationship under the new administration. The luncheon, also discussed in this issue, was spearheaded by Peter Kirby and Len Gold and featured Governor Jim Blanchard, former Governor of the State of Michigan and former U.S. Ambassador to Canada, Mr. Thomas D'Aquino, Chief Executive and President of the Canadian Council of Chief Executives and was moderated by Mr. Raymond Chretien, Former Canadian Ambassador to the U.S.

On February 14th we are cosponsors with the CBA and the Ontario Bar Association ("OBA") of a luncheon program to be held simultaneously in Canada and the U.S. on *U.S. Export Controls vs.. Canadian Human Rights and Employment Laws*. The program will be held at Heenan Blaikie LLP in Toronto and Steptoe and Johnson LLP in Washington, D.C. and feature Meredith Rathbone (Steptoe), Trevor Lawson (McCarthy Tetrault), Steven Vaz (Counsel and Global Export Compliance Lead at Accenture) and Kathleen Palm (Counsel, International Trade Regulation at General Electric). It will be moderated by John Boscaroli (McCarthy Tetrault) who is spearheading the program.

This brings us to the April 14 - 17, 2009 Spring Meeting in Washington, D.C. I have been fortunate to be one of the co-chairs of the meeting so can give you a brief preview of what we have planned and our Committee's programs. The meeting will be again held at the Fairmount Hotel in Georgetown. On April 15th, our Rule of Law day, our luncheon will feature former Congressman Michael Oxley who will discuss the globalization of the Sarbanes-Oxley Bill. That evening, we have a reception and committee dinner planned at the Kennedy Center's rooftop restaurant. All the committees will have designated tables to give members a chance to interact socially. On April 16th our luncheon will feature Abbe Lowell, a well known criminal defense lawyer that will discuss some of his high-profile cases.



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That evening we will dance to the tunes of the Johnny Enquire Band at the Fairmount Hotel. On Friday the 16th, we will hold a committee lunch at the Fairmount Hotel and a reception at the State Department (Secretary Clinton has been invited). Intermixed with these events, are three days of excellent programs, which are too many to mention or even highlight in this short space. Many people have worked very hard on this event and we hope you all make an effort to come and meet your fellow Canada Committee members. Please make an extra effort to come to the following five Canada Committee programs:

- Is There a Future for NAFTA and Other Free Trade Agreements in the New World Economy? A showcase program to be held on April 16 at 10:30 am;
- Legal Tactics and Judicial Cooperation in Cross-Border Insolvencies: The Case of the Squeezed Orange, a showcase program to be held on April 15 at 4:00 pm;
- Product Safety in North America: Significant Implications for Trade in Pharmaceuticals, Food and Consumer Products, a showcase program to be held on April 16 at 8:45 am;
- Global Warming: A Hot Topic in a Cold Economic Climate a showcase program to be held on April 17 at 8:45 am; and
- Between a Rock and a Hard Place: Managing Conflicts Between US National Security Laws & Canadian Privacy Protection Requirements, a showcase program to be held on April 16th at 2 pm.

The deadline for program proposal for the Miami Meeting is February 13th. We hope to have the same high-caliber programs planned for Miami and are seeking ideas from our members.

We are all very excited about our Committee programs and events and hope that you will join us.

Marcy Stras,
Canada Committee Co-Chair



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Events

Event #1



THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN



ABA Section of International Law
Your Gateway to International Practice



ONTARIO BAR ASSOCIATION
A Branch of the CANADIAN BAR ASSOCIATION

U.S. Export Controls vs. Canadian Human Rights and Employment Laws – Conflict or Compatibility?

LUNCHEON

February 13, 2009

Lunch and Registration: Noon EST

Program: 12:30 pm – 2:00 pm EST

LOCATIONS

<p>Step toe & Johnson LLP 1330 Connecticut Avenue, NW Washington, DC 20036</p>	<p>Heenan Blaikie LLP 200 Bay Street, Suite 2600 Royal Bank Plaza, South Tower Toronto, ON M5J 2J4</p>
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This program, sponsored by the CBA (Canadian Bar Association) and OBA (Ontario Bar Association) committees in cooperation with the ABA International Law Section, will be held by videoconference in Washington, DC and in Toronto.

Companies engaging in business in Canada with hardware, software, or technical data controlled by the U.S. Export Administration Regulations (EAR) or International Traffic in Arms Regulations (ITAR) face the challenge of complying with U.S. export controls requirements relating to the sharing of EAR and ITAR-controlled items with non-U.S. persons and with Canadian human rights and employment laws promoting fair and non-discriminatory treatment in the workplace.

This program will discuss the nuts and bolts of the EAR and ITAR as they relate to the hiring and treatment of Canadian employees and the potential conflicts with Canadian human rights and employment laws. Industry speakers and counsel will offer their perspectives on navigating both legal regimes and strategies for addressing these conflicts. Active participation by attendees is encouraged.

Panel:

Meredith Rathbone – Step toe & Johnson LLP

Trevor Lawson - McCarthy Tétrault

Stephen Vaz - Counsel and Global Export Compliance Lead at Accenture

Kathleen Palma – Counsel, International Trade Regulation at General Electric

Moderator:

John Boscardiol - McCarthy Tétrault

This program is brought to you by:

Export Controls and Economic Sanctions Committee – ABA International Law Section
International Procurement Committee – ABA International Law Section
Canada Committee – ABA International Law Section
Ontario Bar Association – International Law Section
Canadian Bar Association - National Section of International Law



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Events

Event #2- Luncheon Seminar

The Canadian Committee of the ABA Section of International Law recently coordinated, with the support of the Canadian Bar Association, a luncheon seminar on the new U.S. administration and U.S.-Canada relations. The lunch was co-sponsored by the law firms of Fasken Martineau DuMoulin and Burns & Levinson.

The panel consisted of three knowledgeable observers of Canada - U.S. relationship. They were;

- Governor James Blanchard, former Governor of the State of Michigan
- Mr. Thomas d'Aquino, Chief Executive and President of the Canadian Council of Chief Executives
- Mr. Raymond Chrétien, former Canadian Ambassador to the U.S., was the moderator.

The event held at the Montreal office of Fasken Martineau DuMoulin was sold out. The panelists had a wide ranging discussion on what Canada can expect from the new administration. Issues covered included energy, trade policy, security and the environment. It was the consensus of the panelists that the incoming Obama administration presents a great opportunity to strengthen the bilateral relations between the two countries.

The speakers observed that it would be a mistake for the two nations to get sidelined on the "petty differences" between the two countries such as softwood lumber. They need to look at the big picture and not to over simplify the relationship.



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One of the major challenges for Canada will continue to be getting on the "radar screen" in the U.S. It is of great significance the panelists agreed that President Obama shortly after his inauguration will make a trip to Ottawa to meet with the Prime Minister.

It is important that Canada promotes its contribution to the world and its desire to work with the U.S to develop a comprehensive energy policy. A major issue continues to be the thickening of the borders according to the panel. This issue affects trade, investment and tourism.



The lunch presented a lively discussion on U.S Canada relations under the new Obama administration.

The insight of the panelists should prove most useful in viewing the evolving relationship between the new U.S administration and Canada.





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Event #3 - Judge Invitation



NIAGARA INTERNATIONAL MOOT COURT COMPETITION

The 41st Annual Niagara International Moot Court Competition will be held on February 27-28, 2009 in Toronto, Ontario. Nineteen teams from law schools in Canada and the United States will be participating in this year's competition, representing the governments of Canada and the United States in a hypothetical dispute involving international law, arctic sovereignty, national security, and border searches. (The problem can be viewed at http://www.cusli.org/niagara/documents/2008_2009docs/NIMC_2009_Problem.pdf)

The Canada-United States Law Institute is seeking lawyers to serve as a judge for one or more rounds of the competition. The rounds will be held at the offices of several firms in Toronto throughout the day on Friday, February 27th and on the morning of Saturday, February 28th (see below for precise times and locations).

Judging one round requires a 2½ hour time commitment. Judges sit on three-member panels, and will receive a bench brief in advance of the competition. No prior experience in international law is required.

All judges are also invited to attend the Competition's Opening Reception hosted by Blakes, from 6 - 8 PM on Thursday, February 26th, and to the Awards Dinner at the Sheraton Centre Hotel on February 28th at 6:30PM.

To register, please visit http://www.cusli.org/niagara/moot_judge_form.html. After receiving your information, we will contact you to confirm the time and location of the session you will be presiding over. As this year's competition will require over 100 judge seats to be filled, please share this invitation with any of your colleagues who may also be interested in participating as a judge.



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Contact: niagara2009@case.edu - www.cusli.org/niagara
(216) 368-1798

The preliminary rounds of the competition will be hosted at the offices of the following firms:

Cassels Brock, Fasken Martineau, Gowlings, Lang Michener, McMillan, Torys

Schedule of Preliminary Rounds:

Thursday, February 26, 2009

Opening Reception: 6:00 PM – 8:00 PM, *Blakes, 199 Bay St*

Friday, February 27, 2009

Preliminary Round 1: 9:00 AM – 11:00 AM

Preliminary Round 3: 3:00 PM – 5:00 PM

Preliminary Round 4: 6:00 PM – 8:00 PM

Saturday, February 28, 2009:

Preliminary Round 5: 9:00AM – 11:00 AM

Awards Dinner: 6:30 PM (cocktails)

7:30 PM (dinner), *Sheraton Centre Hotel, 123 Queen St. West*

PARTICIPATING LAW SCHOOLS:

American University Washington College of Law

Case Western Reserve University School of Law

DePaul University College of Law

Georgetown University Law Center

Howard University School of Law

Michigan State University College of Law

Queen's University Faculty of Law

St. Mary's University School of Law

St. Thomas University School of Law



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PARTICIPATING LAW SCHOOLS:

The George Washington University Law School
The John Marshall Law School
University at Buffalo Law School
University of Detroit Mercy School of Law
University of Pittsburgh School of Law
University of the Pacific McGeorge School of Law
University of Western Ontario Faculty of Law
University of Windsor Faculty of Law
Valparaiso University School of Law
Washington University School of Law

Event #4 - Calling All Judges

The International Law Students Association hosts the Philip C. Jessup International Law Moot Court Competition each year. This year the Competition marks its 50th Anniversary. Each year the students start preparing in the fall and work on the brief (memorial) over the holiday/winter break. This year's problem (Compromis) is available at:

<http://www.ilsa.org/jessup/jessup09/compromis.htm>. The regional rounds are the preliminary rounds for the International final rounds that take place in Washington D.C., March 22 - 29, 2009. This year the problem deals with occupation of a former colony declared independent and related matters. The National Regional in Canada and the U. S. Super Regionals are scheduled as follows:

Canada, March 4 - 7, 2009 London, Ontario
Contact: Jamie Dee Larkam; jdlarkham@aol.com

U.S. Super Regionals:

Midwest, February 13 -15, 2009, Chicago, Chicago-Kent College of Law
Contact: Ashley Walker; awalker@ilsa.org

Northeast, February 13 -15, 2009, New York, Shearman & Sterling
Contact: Jeffrey Brooks; jbrooks@aol.com



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Southwest, February 13 -15, 2009, Houston, U. of Houston Law Center

Contact: Antonio Riva Palacio Lavin; arivapa@ilsa.org

Mid-Atlantic, February 20-22, 2009, Washington D.C., GWU Law School

Contact: Rachel Olander; rolander@ilsa.org

Southeast, February 20 – 22, 2009, Miami, U. of Miami School of Law

Contact: Jeffrey Rendin; viceroy.rendin@ilsa.org

Pacific, February 27 – March 1, 2009, Portland, Lewis & Clark Law School

Contact: Asif Sayani, asayani@ilsa.org

If any of these dates or locations are inconvenient and you are available to judge at the final rounds March 22 – 29, 2009 at the Fairmont Hotel in Washington D.C., please visit the following website: <http://www.ilsa.org/judges/>. In years past, I have participated at various moot courts, as a participant, a coordinator and a judge and often find the experience rewarding. It is interesting to see the development of the argument with a panel of judges and to watch the students, for the most part, handily deal with the issues and questions they are peppered with.

Articles Article #1

PRIVACY AT RISK:

CAN YOUR LAPTOP BE SEARCHED AT THE BORDER?

By: Sergio R. Karas, B.A., LL.B.

Sergio R. Karas, is a Certified Specialist in Canadian Citizenship and Immigration Law by the Law Society of Upper Canada. He is current Chair of the Ontario Bar Association Citizenship and Immigration Section, and Past Chair of the International Bar Association Immigration and Nationality Committee. His comments and opinions are personal and do not necessarily reflect the position of any organization.

Lawyers throughout North America are trying to come to grips with the fallout of a decision by the Ninth Circuit Court of Appeals of the United States. The opinion of the Court, which held that computer devices and the data they contain can be thoroughly examined at the border, opened the floodgates to more thorough border crossing searches.



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However, even as the ink on that decision was beginning to dry, another opinion released by a court in the Central District of California, in the same Ninth Circuit, reached the opposite conclusion, adding to the confusion of an otherwise settled doctrine of border searches of persons and their goods.

THE DOCTRINE OF BORDER SEARCHES

The question of whether or not a border search can be fairly intrusive was settled by the United States Supreme Court in *U.S. v. Flores-Montano*^[i], a recent case where the Court held that a thorough border search of a vehicle did not require reasonable suspicion, and that the government's interests in preventing the entry of unwanted persons and effects is at its zenith at an international border.

In that case, at the international border in Southern California, Customs officials seized 37 kg of marijuana from Flores-Montano's vehicle by removing and disassembling the gas tank. Flores-Montano was indicted on federal drug charges, but he tried to suppress the evidence, arguing that such an intrusive search required reasonable suspicion, because it engaged the protection of the Fourth Amendment of the United States Constitution against unreasonable search and seizure. ^[i] 541 U.S. 149 (2004)

The Supreme Court disagreed and held that the search did not require reasonable suspicion. The Court affirmed the principle that a border search of goods was considered "routine" and not "intrusive", and that a balancing act to determine whether a search of a vehicle was so intrusive as to necessitate a warrant or probable cause, was not required. The Court also held that Congress has always granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into the United States. The Court rejected the argument that Flores-Montano had a privacy interest in his fuel tank, and that the disassembly of the tank was an invasion of his privacy. The Court noted that the privacy expectation is less at the border than it is in the interior of the country, and persons crossing a border can reasonably expect to be subjected to searches. While the protection of the Fourth Amendment extends to property as well as privacy, the interference with a motorist's possessory interest in his gas tank was justified by the government's paramount interest in protecting the border.

Cont'd



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Thus, the government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble and reassemble a vehicle fuel tank. With its opinion in *Flores-Montano*, the Court followed a long line of cases that have interpreted the government's power to conduct border searches in a very expansive manner.

COMPUTER AND DATA SEARCHES CREATE NEW PROBLEMS

Shortly after the Supreme Court decision in *U.S. v. Flores-Montano*^[i], the United States Court of Appeals for the Fourth Circuit was confronted with the novel question of computer and data searches. In *U.S. v. Ickes*^[ii], the Court rejected a defendant's argument that the search of his computer at the border was invalid because it involved "expressive material". In that case, Ickes was attempting to enter the United States from Canada when U.S. Customs agents searched his van. The agents found several illegal items, most notably images of child pornography stored in photo albums and on Ickes's computer. Ickes was charged and convicted of transporting child pornography in violation of federal law. Prior to trial, the district court denied Ickes's motion to suppress the evidence obtained at the border. The Court of Appeals for the Fourth Circuit affirmed the decision that a warrantless search of Ickes's van was permissible, and held that both Congress and the Supreme Court had made it clear that extensive searches at the border are permitted, even if the same search elsewhere would not be. ^[i] *Supra* ^[ii] 393 F. 3d 501(4th Cir. 2005)

The Court refused to undermine the doctrine of border searches by restrictively reading the language of the statute, or by carving out a First Amendment exception. Ickes claimed that the statutory language authorizing U.S. Customs officials was insufficient to cover the search of his computer and disks. The statutory language in 19 U.S.C. § 1581(a) (2000) prescribes that: Any officer of the customs may at any time go on board of a any vessel or vehicle at any place in the United States or within the customs waters, . . . or at any other authorized place . . . and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board. . . .

Ickes argued that, since the statute did not specifically mention electronic equipment, the search was illegal and required a warrant.



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The Court disagreed, and held that, despite Ickes contention to the contrary, the plain language of the statute authorizes expansive border searches. The Court was not persuaded that the transportation of a laptop computer was somehow exempt from the ordinary definition of “cargo” in the statute, and opined that to hold otherwise would undermine the long-standing practice of seizing goods at the border even when the type of good is not specified in the statute. The Court followed the language in *U.S. v. Flores-Montano*^[i] and held that the government’s authority to conduct border searches is broad enough to cover the search of computers and disks.

As a last ditch effort, Ickes argued that the search of his computer was invalid because it involved “expressive material” protected by the First Amendment. In essence, Ickes asked the Court to carve out an exception to the border search doctrine based on the nature of the material. The Court rejected this contention and held: ^[i] *Supra*

“...the ramifications of accepting Ickes’s First Amendment argument would be quite staggering. Ickes suggests that the border search doctrine does not apply when the item being searched is something “expressive.” But this cannot be the case. The border search doctrine is justified by the longstanding right of the sovereign to protect itself. *Flores-Montano*, 124 S. Ct. at 1585, quoting *Ramsey*, 431 U.S. at 616. Particularly in today’s world, national security interest may require uncovering terrorist communications, which are inherently “expressive”. Following Ickes’s logic would create a sanctuary at the border for all expressive material – even for terrorist plans. This would undermine the compelling reasons that lie at the very heart of the border search doctrine. Ickes’s argument, at bottom, proves too much.” (emphasis added)

In rejecting Ickes’s request for protection of computers and data, the Court further held:

“Ickes claims that our ruling is sweeping. He warns that “any person carrying a laptop computer . . . on an international flight would be subject to a search of the files on the computer hard drive.” This prediction seems far-fetched. Customs agents have neither the time nor the resources to search the contents of every computer.”



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The Court held that the search of computers and disks was legal, and refused to carve out a First Amendment protection which would have required a difficult balancing test to determine what material is “expressive” as opposed to illegal contraband.

COURTS EXPAND THE SCOPE OF COMPUTER AND DATA SEARCHES

In *U.S. v. Romm*^[i] the Ninth Circuit Court of Appeals was confronted with a difficult case, which involved the search of data contained in a laptop held by an individual who attempted to enter Canada but was returned to the United States as an inadmissible person due to a previous criminal conviction.

The Court was called upon to decide whether, absent a search warrant or probable cause, the contents of a laptop computer may be searched at an international border. In that case, the search conducted by Customs officials was much more thorough and intrusive, and involved the use of external tools and software.

The defendant, Stuart Romm, connected to the internet from a Las Vegas hotel room and visited websites containing images of child pornography. As he viewed the images online and enlarged them on his screen, his computer automatically saved copies of the images to his “internet cache”. Based on forty images deleted from his internet cache and two images deleted from another part of his hard drive, he was convicted of knowingly receiving and knowingly possessing child pornography, in violation of U.S. law. ^[i] 455 F.3d 990 (9th Cir. July 24, 2006)

Romm had attended a training seminar held by his new employer in Las Vegas, Nevada. When the training seminar ended, he flew from Las Vegas to Kelowna, B.C., on business. However, at the airport in B.C., Canada’s Border Services Agency (CBSA) discovered that Romm had a criminal history and directed him for further questioning. At that time, Romm admitted that he had a criminal record and was currently on probation. The CBSA agent asked Romm to turn on his laptop and briefly examined it, when several child pornography websites appeared in the laptop “internet history”. The CBSA agent asked Romm if he had violated the terms of his probation by visiting those websites, and Romm answered in the affirmative. Romm was placed under detention until he could take the next flight to Seattle, WA. However, at the same time, CBSA agents informed U.S. Customs in Seattle that Romm had been denied entry and probably had illegal images on his computer, a violation of his probation order.



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Upon arrival at the Seattle-Tacoma Airport, Romm was interviewed by agents from the Immigration and Customs Enforcement (ICE). The agents arranged for a preliminary forensic analysis of the laptop hard drive by an expert using complex software tools, which revealed ten images of child pornography stored in the computer. When confronted with the evidence, Romm admitted that he had downloaded the images and breached the terms of his probation. The officers conducted the investigation as a “border search” and never obtained a warrant to examine the data contained in the laptop.

At trial, the U.S. government called three witnesses to testify about the forensic analysis of the hard drive in Romm’s laptop, who described the use of different types of software to recover deleted files. The government also let evidence to show when the images were downloaded, viewed and deleted. Before trial, Romm’s defense counsel moved to suppress the evidence obtained through the border search of his laptop. However, the Court denied that motion. Romm was convicted of possession of child pornography and appealed the convictions.

The most important issue arising out of the facts of this case was the legality of the laptop search. The Ninth Circuit Court of Appeals held that the forensic analysis of Romm’s laptop fell under the “border search” exception to the requirement to obtain a warrant. Under this exception, the government may conduct searches of persons entering the United States without probable cause, reasonable suspicion or a warrant, as previously held in *United States v. Montoya De Hernandez*^[i]. The Court also affirmed that, for the purposes of the Fourth Amendment, an international airport terminal is the “functional equivalent” of a border. Thus, passengers deplaning from an international flight are subject to routine border searches. The Court rejected Romm’s contention that the search was illegal and required a warrant because he never *legally* crossed the U.S.-Canada border, as he had been denied entry to Canada. The Court held that there is no authority for the proposition that a person who fails to obtain legal entry at his destination may freely reenter the United States: to the contrary, he or she may be searched just like any other person crossing the border.



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The Court further held that the border search doctrine is not limited to those cases where the searching officers have reason to suspect that the entrant may be carrying foreign contraband.

Instead, “searches made at the border are reasonable simply by virtue of the fact that they occur at the border”, as the court previously held in *United States v. Flores-Montano*^[ii], quoting *United States v. Ramsey*^[iii]. Thus, the Court held that the routine border search of Romm’s laptop was reasonable and a warrant was not necessary.

^[i] 473 U.S. 531,538, [1985], ^[ii] 541 U.S., 149, 152-53 [2004], ^[iii] 431 U.S., 606, 616 [1977]

PRIVATE AND PERSONAL INFORMATION IN A LAPTOP PROTECTED?

In a recent ruling released on October 2, 2006, in the Ninth Circuit, the Central District of California appears to have taken a different position from that of the Court of Appeals in *U.S. v. Romm*^[i], attempting to draw a distinction between “personal” and “business” electronic data. In *U.S. v. Arnold*^[ii], that Court held that Customs agents do not have free reign to search files on a laptop computer which may include trade secrets, attorney-client privileged information, and other proprietary business information.

In that case, Michael Arnold arrived at Los Angeles International Airport (“LAX”), following a long flight from the Philippines. Customs and Border Patrol Officers at LAX searched Arnold’s laptop, hard drive, compact discs, and memory stick. Following the search, Arnold was indicted for transportation of child pornography and possession of a computer hard drive and CDs containing images of child pornography. In response to Arnold’s motion to suppress the evidence, the government argued that a border search of information stored in a computer hard drive is not subject to Fourth Amendment protection. Surprisingly, the Court rejected the government’s argument, noting that the issue was “ripe for determination because technological advances permit individuals and businesses to store vast amounts of private, personal and valuable information within a myriad of portable electronic storage devices including laptop computers, personal organizers, CDs, and cellular telephones.” ^[i] *Supra*, ^[ii] F. Supp. 2d --, 2006 WL 2861592 (C.D. Cal. Oct. 2, 2006)



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The Court compared a search of the private information stored on a computer with a strip or body cavity search, recognizing that electronic storage devices were an “extension” of the person, unique in its storage capabilities.

“[w]hile not physically intrusive as in the case of a strip or body cavity search, the search of one’s private and valuable personal information storage device can be just as much, if not more of an intrusion into the dignity and privacy interests of a person. This is because electronic storage devices function as an extension of our own memory. They are capable of storing our thoughts, ranging from the most whimsical to the most profound. Therefore, government intrusions into the mind – specifically those that would cause fear or apprehension in a reasonable person – are no less deserving of Fourth Amendment scrutiny than intrusions that are physical in nature.”

The Court concluded that such a border search must be based, at a minimum, on a reasonable suspicion. The Court also held that, in that case, the search was not caused by a reasonable suspicion that the confidential information stored in the defendant’s computer contained evidence of a crime.

The position of the Court in *U.S. v. Arnold*^[i] seems to be at odds with the expansive interpretation given to border searches by the Ninth Circuit Court of Appeals, in *U.S. v. Romm*^[ii] and by the Supreme Court in *U.S. v. Flores-Montano*^[iii]. ^[i] Supra, ^[ii] Supra, ^[iii] Supra

CONCLUSION:

The decision of the Ninth Circuit Court of Appeals in *U.S. v. Romm*^[i], has sent shockwaves through the legal profession in the United States and Canada, and has raised serious concerns about the limits of border searches conducted without warrants. Interestingly enough, the Ninth Circuit Court of Appeals, based in San Francisco, is generally known for its liberal views, so this decision comes as somewhat of a surprise to legal observers. While Romm deserves no sympathy for his actions, the decision may result in very thorough searches of electronic data at U.S. borders and airports. The decision appears to follow the expansive interpretation given to border searches by the Supreme Court and by the Court of Appeals for the Fourth Circuit.



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The recent decision of the California Central District in *U.S. v. Arnold*^[ii], appears to be somewhat far-fetched and at odds with well-established jurisprudence. ^[i] Supra, ^[ii] Supra

Practitioners must be careful and advise clients concerning the risks involved in international travel, and now, they must add the prospect that the data contained in laptops and electronic devices can be searched without a warrant at a U.S. port of entry.

[1] 541 U.S. 149 (2004), [2] Supra, [3] 393 F. 3d 501(4th Cir. 2005), [4] Supra

[5] 455 F.3d 990 (9th Cir. July 24, 2006), [6] 473 U.S. 531,538, [1985], [7] 541 U.S., 149, 152-53 [2004], [8] 431 U.S., 606, 616 [1977], [9] Supra, [10] F. Supp. 2d --, 2006 WL 2861592 (C.D. Cal. Oct. 2, 2006), [11] Supra, [12] Supra, [13] Supra, [14] Supra, [15] Supra

Article #2

CANADIAN COMPETITION AND FOREIGN INVESTMENT LAW: WHAT TO WATCH FOR IN 2009

Mark Katz and Anita Banicevic

Davies Ward Phillips & Vineberg LLP

"Change" appears to be the prevalent buzzword for our times, including when it comes to Canada's competition and foreign investment laws. Here are the top 5 developments to watch for in the upcoming year.

1. Who Will be the New Commissioner?

Sheridan Scott, Canada's Commissioner of Competition for the last five years, announced in December 2008 that she would not be staying on in her position for a second term. Ms Scott was replaced on an interim basis by Melanie Aitken, who had been in charge of the Competition Bureau's merger branch. It is expected that the new Commissioner will be appointed in the next several months.



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One of the criticisms of Ms Scott was that the Bureau's enforcement levels declined during her tenure. Our understanding is that the new Commissioner, whoever that may be, will be expected to improve upon this record by investigating more cases and bringing more proceedings. This could tie into developments in the United States, where the Obama administration is also expected to take a more aggressive approach to antitrust enforcement.

2. Will Canada's Merger Review System be Overhauled?

In a report issued in June 2008, the federally-appointed Competition Policy Review Panel ("Panel") recommended that the *Competition Act's* merger review process be amended to align with U.S. merger review procedures under the *Hart-Scott-Rodino Antitrust Improvement Act*. The U.S. process establishes an initial 30-day waiting period during which a notified merger may not be completed while the responsible antitrust agency assesses the likely competitive effects of the proposed transaction. If the agency considers that it needs more time to review the transaction, it may issue a "second request" prior to the expiry of the 30 day period, in which case the transaction may not close until 30 days after the merging parties substantially comply with the "second request".

As a general rule, compliance with "second requests" in the U.S. is a very lengthy and expensive exercise, with no set termination point.

By contrast, Canada has two different waiting periods (14 or 42 days), depending upon the type of notification submitted ("short form" or "long form"). At the same time, the Bureau's substantive review of transactions runs on a different non-statutory timetable, based on the complexity of the transaction. These "service standards" range between 2 weeks (for the least complicated transactions) to over 5 months (for the most complex).

We understand that the Panel's recommendation to amend the *Competition Act's* merger review process is being considered very seriously by the government and the Competition Bureau. While there may be some positives to the U.S. approach (e.g., a single initial waiting period), the prospect of adopting the "second request" process in Canada is of considerable concern, given its very negative track record in the U.S.



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3. Will the Competition Act's Sanctions be Toughened?

During the recent federal election campaign, the Conservative Party promised several far-reaching changes to enhance enforcement of the *Competition Act*, including:

- a new criminal conspiracy offence focussed on "hard core" cartel conduct such as price fixing and bid-rigging, with other types of potentially anti-competitive agreements to be dealt with on a separate non-criminal track;
- new maximum penalties for cartels and bid-rigging of \$25 million in fines and 14 years in prison (up from the current maximum of \$10 million in fines and five years imprisonment);
- new fines for abuse of dominance (up to \$10 million for initial offenders and \$15 million for repeat offenders);
- new penalties for obstructing Competition Bureau investigations (up to \$100,000 on summary conviction and up to 10 years imprisonment for an indictable offence); and increased penalties for deceptive marketing.

The first proposal is likely the most significant, as it would substantially change cartel enforcement in Canada. Currently, a cartel offence only arises in Canada if the government can prove beyond a reasonable doubt that the cartel prevented or lessened competition "unduly" (the one exception is bid-rigging, which is a *per se* offence). The Bureau claims that its poor enforcement record in contested cartel cases is a direct result of the difficulties it encounters in satisfying this undueness element. The Bureau's perspective is not universally accepted among Canada's competition bar and previous efforts to introduce a *per se* cartel offence failed. It now appears, however, that the Conservatives (who were elected to form a minority government in October 2008) are committed to seeing this amendment through.



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4. Will Canada's Foreign Investment Laws be Amended?

The Conservatives also promised to enact very significant reforms to the laws governing foreign investment in Canadian businesses. Among other things, they said that they would:

- amend the *Investment Canada Act* ("ICA") to increase the threshold for foreign investment reviews from the current level of \$312 million in gross asset value to \$1 billion in enterprise value, with the increase to be phased in over four years;
- ensure greater transparency in the ICA process by requiring the responsible Minister to give reasons if an investment is disallowed;
- establish a new national security review mechanism in the ICA to ensure that foreign investments cannot jeopardize Canada's national security;
- work with Canada's trading partners to ensure that foreign investment is a "two-way street" and that Canadian companies also receive increased access to investment opportunities abroad;
- increase the permissible level of foreign investment in domestic airlines from 25 per cent to 49 per cent through bilateral negotiations with Canada's major partners such as Europe and the United States that would also secure increased access to international flight routes and landing rights through Open Skies agreements;
- And revise the Non-Resident Ownership Policy for uranium mining and development provided that Canada is able to negotiate reciprocal benefits with potential investor nations and that any foreign investments in this sector meet the national security test.

Many of these proposals were first made by the Panel in its June 2008 report. The gist of the proposals is that Canada's foreign investment rules should be pared back.

In particular, if adopted, the ICA's application will be restricted to very limited circumstances, principally where "national security" interests may be implicated.



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5. What Impact Will the Current Economic Crisis Have?

All of the potential developments outlined above will be influenced by the overarching issue of what effect the global credit crunch and associated economic downturn will have on the design and implementation of Canadian competition/foreign investment review policy.

For example, will the Canadian government still want to adopt substantial changes to Canadian merger and cartel law in this environment or will it conclude that these amendments should be shelved for the time being? Similarly, will the Bureau actually step up its enforcement levels or will it relax its standards in order to accommodate broader economic concerns beyond the strict application of competition law principles? To date, the Bureau has been silent on these issues, but it will have to face them head on in 2009.

The same questions apply in the foreign investment review area. While the Conservatives are generally in favour of foreign investment, there is also a substantial body of opinion in Canada that is suspicious of – if not hostile to – foreign acquisitions of Canadian businesses. As such, Canada is likely to see even more debate over whether this is the right time to be opening up the country even further to foreign acquisitions – as the Conservatives have proposed – or whether steps should be taken to protect Canadian businesses from foreign takeovers, given the potential they carry for domestic job losses and an outflow of investment.

Article #3

Canada-2008 Year in Review*

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- Introduction
- Canada's Free Trade Agreements and Bilateral Investment Treaties
- Canada – United States Trade Relations
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Foreign Investment Review Coming into Force of the Wage Earner Protectiond Program Act and Certain Amendments to the Bankruptcy and Insolvency Act

*Due to space restrictions we have only included an abbreviated version of the table of contents of the "Canada- 2008 Year in Review" Article. For the full article please visit the Canada Committee website available at;

<http://meetings.abanet.org/webupload/commupload/IC815000/newsletterpubs/CanadaDraftYIR2008.pdf>

NOTICES: Office Opening

Dickinson Wright PLLC recently opened a Toronto office, located at 120 Adelaide Street West, Suite 2107. The office is led by Canadian gaming attorneys **Michael D. Lipton, Q.C.** and **Kevin J. Weber**. Messrs. Lipton and Weber deal in all matters affecting land-based gaming, online gaming, skill gaming and promotional sweepstakes, including constitutional law, regulatory law, corporate criminal law, First Nations law, commercial litigation and contracts. Dickinson Wright is a full-service law firm with 260 attorneys located in Detroit, Bloomfield Hills, Grand Rapids, Ann Arbor, and Lansing, Michigan; Nashville, Tennessee; Washington, D.C.; Toronto; and an associated office in Macau, China. Anyone seeking further information can contact Mr. Lipton, Canadian Law Committee member Mark High in the Firm's Detroit office, or visit; <http://www.dickinsonwright.com/>

COMMITTEE MEMBER SPOTLIGHT

John W. Boscarion (Committee Co-Chair): John is head of McCarthy Tétrault International Trade and Investment Law Group and a partner in the Litigation Group working in Toronto, Canada. He is recognized as a leader in the field of international trade law in numerous legal directories, including *Chambers Global*, *Lexpert*, *Euromoney's Guide to the World's Leading International Trade Lawyers*, and *The Best Lawyers in Canada*. Mr. Boscarion is ranked among the top 25 international trade lawyers in the world by *Expert Guides to the World's Leading Lawyers - Best of the Best 2008*.



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FUN CANADA FACT

The USA has invaded Canada twice- in 1775 and 1812- both times to no avail.