Involvement with the European Economic Community: Some Canadian Considerations

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Canada, having invested in the battlefields of Western Europe, carries on as a partner in the North Atlantic Defence Organization and through her recent agreement with the European Economic Community (hereinafter referred to as the E.E.C. or the Community) has now added a further dimension to her involvement with the old Continent.

Canada's contracting partner is not a state but the European Economic Community which, as a regional organization and the world's most powerful trading bloc, has already made a great impact on world trade and is likely to develop its political potential. Through a network of treaties the E.E.C. has built a new pattern of inter-state trade whilst the long arm of its law has secured control not only of its indigenous commercial life but also, in some respects, of the activities of multinational enterprises operating within the geographical limits of the Common Market.

From the Community's point of view the Canadian involvement has to be seen in the context of its own global connections; from the Canadian point of view the involvement is with a new international polity acting in its own capacity which will also affect Canada's trade relations with its constituent parts and, albeit indirectly, with the world. The purpose of this article is to better acquaint Canadians with their new trading partner.

I. THE E.E.C. AS AN AUTONOMOUS ENTITY

1. The E.E.C. and its law

The present European Community represents in a political sense, an unfulfilled dream, the "Grand Design" of Henri IV, King of France (1589-1610) to which Winston Churchill, pleading for a United Europe, alluded in his speech to the Hagne Congress in 1948. In a juristic sense it is founded in the three Communities (Coal and Steel, Euratom and the Economic Community) set up by

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the Treaties of Paris (1951) and Rome (1957) respectively.[1] Of the three, the E.E.C. is an example of a "funotional federation"[1a] and a cornerstone of a West European Union. As a result of the merger of the institutions of these three Communities by the Treaty of Brussels (1965)[1b] we now have a supra-national organization operating in three distinct economic fields but aspiring to the economic and political integration of its members.

The E.E.C. is sometimes described as a federation, sometimes as a confederation, but although it reflects both concepts it fits neither exactly. As a political animal it is without a pedigree; it is a cross-breed of the two concepts but has more pronounced federal than confederal characteristics. Although it is based on a treaty, the Treaty of Rome is more a "constitution" and a law-generating device than an inter-state contract and source of state obligations. The Treaty, "concluded for an unlimited period" (art.240) creates the European Economic Community (art.1) whose task it is to promote, through the instrumentality of a common market and the approximation of the economic policies of the member states, "a harmonious development of [their] economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between [them]".[1c] In other words the object is not a loose association of states, confederation, but political integration through economic integration. In order to achieve this object the member states have set up supranational institutions and, as in the case of a federation, surrendered a portion of their sovereignty to the Community. As a result the institutions have been endowed with executive, legislative and judicial powers and the Community has become an autonomous legal person.

In the opinion of the Community Court of Justice, the Community "constitutes a new legal order in International Law for whose benefit the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only the member states but also their nationals".[2] Although Community

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[1] Treaty establishing the European Economic Community, *Institutions of the European Communities* (1973).

[1a] An expression coined by Harold Laski in an introduction to his *Liberty in the Modern State* (1948), 14 *et seq.*

[1b] Treaty establishing a single Council and a single Commission of the European Communities, O.J. No.152, 13 July 1967, p.2.

[1c] The Treaty of Rome, *supra*, note 1, art.2.

[2] Case 26/62, *Van Gend Loos* v. *Nederlandse Administratie der Belastingen* [1963] C.M.L.R. 105, 129.

law (composed of treaties and legislation derived from the Community Institutions) has a limited field of operation it is all-pervasive in its sphere as it applies not only to the member states and their nationals but also to the member states in their relations with the outside world and to foreigners (more appropriately foreign enterprises) involved in commercial activities within the Community.

Certain provisions of Community law are "directly applicable", that is, capable of creating directly and immediately in the territory of the member states rights and obligations for individuals;[3] other rules are "indirectly applicable", that is, addressed to the member states who, in turn, have to implement them by their own legislative methods. The former resemble federal laws, the latter treaty obligations which proceed from state sovereignty but nevertheless, by virtue of the "self-executing" nature of the Treaty of Rome, leave only the choice of the method of implementation to the member states.

Whilst the power to legislate, albeit under the authority of the Treaty, is the "first and most essential means by which a supranational organisation endeavours to carry out its objective",[4] the supremacy of Community law is an absolutely necessary condition of the efficacy and, indeed, workability of the system. Supremacy is nowhere mentioned in the official texts of Community law but is implicit in the federalist concept of the Community. The principle has been formulated and reiterated by the Community Court in a number of cases[5] and has never been challenged. In the *Walt Wilhelm* case the Court held that:

> ... the E.E.C. Treaty instituted its own legal order, integrated into the legal systems of the member states which has priority before their courts. It would be contrary to the nature of such a system to accept that the member states may take or maintain in force measures liable to compromise the useful effect of the Treaty.[6]

In another case, where the validity of a Community regulation was challenged as incompatible with the German Constitution, the

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[3] Case 57/65, *Ea. Alfons Lütticke GmbH* v. *Hauptzolland Sarrelouis* [1971] C.M.L.R. 674; Case 13/68 *Salgoil S.p.A.* v. *Italian Ministry of Foreign Trade* [1969] C.M.L.R. 181; Case 31/74 *Filippo Galli*, Preliminary Ruling requested by the Pretore di Roma [1975] E.C.R. 1, 70.

[4] P. Guggenheim, *Organisations économiques supranationales, indépendance et neutralité de la Suisse* (1963) 82 (II) Rev. de Droit Suisse 247.

[5] *E.g.*, *Van Gend*, *supra*, note 2; Case 6/64 *Flaminio Costa* v. *ENEL* [1964] C.M.L.R. 425; Case 14/68, *Walt Wilhelm* v. *Bundeskartellamt* [1969] C.M.L.R. 100, 119; Case 11/70, *Internationale Handelsgesellschaft GmbH* v. *Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1972] C.M.L.R. 255.

[6] *Walt Wilhelm*, *ibid.*, 119.

Community Court ruled that "no provisions of municipal law of whatever nature may prevail over Community Law ... lest it be deprived of its character as Community Law and its very legal foundation be endangered".[7] Thus it can be said that the doctrine of supremacy flows from the purpose and function of the Community on the one hand and, on the other, the pooling of sovereignty, resulting from a partial transfer of legislative, executive and judicial powers to the Community Institutions.

2. The Institutions

The Constitution of the E.E.C. appears to have been devised on a federal pattern. As in a state, the direction of the Community is under the control of the political organs: the Assembly, the Council of Ministers and the Commission. The judicial function is vested in the Court of Justice.

The Assembly consists of "representatives of the peoples" of the state members of the Community,[7a] the strength of the representation being weighted according to the size of their respective populations. By article 138(2) of the Treaty of Rome, as amended by article 4 of the Adaptation Decision[8] and article 10 of the *Act of Accession*,[9] the member states are committed to the election of their representatives by "direct and universal suffrage"[10] which, according to the recent understanding, ought to take place simultaneously in all the member states in 1978. It should be noted that the Assembly, though aspiring to the role of a European Parliament has no legislative power but merely exercises political control of the Community and acts as a deliberative and consultative body. In its limited capacity it is nevertheless concerned with the fortunes of the Community and its policies, including the external relations of the Community.

The Council of Ministers is the supreme organ of the Community for it represents the sovereignty of the member states. It consists of the representatives of the governments, each government, in the spirit of equality, sending one delegate to the meetings.[10a] The res-

[7] *Internationale Handelsgesellschaft, supra,* note 5, 283.

[7a] The Treaty of Rome, *supra,* note 1, art.137.

[8] O.J. 1973, No.L.2, of 1 January 1973.

[9] "Act annexed to the Treaty of Accession" signed on January 22, 1972, *Institutions of the European Community* (1973).

[10] See Draft Convention adopted by the Assembly on January 14, 1975: *Bulletin of the European Communities* (1975) Part 1, 95 *et seq.*

[10a] Treaty of Rome, *supra,* note 1, art.148.

ponsibility for the execution of the objectives laid down by the Treaty falls upon this body and, therefore, the Council legislates, takes the most important decisions and co-ordinates the economic policies of the member states.[10b] However, these powers are exercised in conjunction with the Commission.

The Commission is a truly Community institution. It consists of 13 members chosen for their "general competence and total independence"[10c] by member states unanimously[10d] though, in fact, the commissioners are the political nominees of the member states and the Community bureaucracy. The powers of the Commission can be described as powers of initiative, preparation and decision. It formulates recommendations and opinions on matters with which the Treaty is concerned and participates in the work of the Council and the Assembly. It legislates within its specific functions and exercises executive powers to carry out the tasks entrusted to it by the Council. It can also impose fines upon undertakings which break the rules on competition.[10e] In the field of external relations, as we shall see later, the Commission and the Council act together according to an established pattern.

The function of the Court of Justice is to "ensure observance of the law in the interpretation and application of the Treaty".[10f] Composed of nine Judges and assisted by four Advocates-General chosen from persons of proven independence and qualified to hold the highest judicial offices in their countries[10g] the Court is an internal court of the Community. In this sense it resembles more a federal court than the International Court of Justice at The Hague.

Its jurisdiction, defined by the Treaty,[11] though confined to the administration of Community Law, does not supersede that of the member states. However in some respects the Community Court has exclusive jurisdiction, for example, in actions against member states, and actions against Community institutions. In disputes between the member states arising from the Treaty obligations[11a] and actions in respect of the alleged breaches of the Treaty by the member states,[11b] the member states have agreed not to submit

[10b] *Ibid.*, art.145.
[10c] *Ibid.*, art.157.
[10d] *Ibid.*, art.158.
[10e] *Ibid.*, art.89(2).
[10f] *Ibid.*, art.164.
[10g] *Ibid.*, art.167(1).
[11] *Ibid.*, arts.164, 169, 170, 173, 183.
[11a] *Ibid.*, art.182.
[11b] *Ibid.*, art.170.

their differences to any other method of settlement than that provided by the Treaty.[11c] It follows that recourse to international law, whether by the states[12] or the Court[13] has become somewhat limited. In actions against Community institutions the Court operates very much on the lines of the French Conseil d'Etat upon which it appears to have been modelled and whose remedies it has adopted and developed.[14]

It should be noted that, in the context of the external relations of the Community, the Court had an opportunity of pronouncing upon the respective functions of the Commission and the Council of Ministers[15] and has recently delivered an advisory opinion on the question submitted by the Commission as to whether an international agreement about to be concluded is compatible with the Treaty.[16]

II. THE LEGAL PERSONALITY OF THE E.E.C.

1. The new "Collective"

In the words of a former President of the Community Court, Judge Donner,[17] the member states of the E.E.C. have undertaken their obligations "not simply on a reciprocal basis but primarily towards the new collectivity they set up". The legal personality of the E.E.C. is one of the results of this undertaking. In the terse statement of article 210 of the Treaty that "the Community shall have legal personality" the founder states have created a new international person. This they can do as collective makers of international law.[18]

[11c] *Ibid.*, art.219.

[12] Case 7/61, *Re Quantitative Restrictions on Italian Pork Imports* [1962] C.M.L.R. 39.

[13] Case 8/55, *Federation Charbonnière de Belgique* v. *High Authority* [1956] 2 Recueil 151, 199; Case 21-24/72, *International Fruit Company* v. *Produktschap voor Groenten en Fruit* [1972] Recueil 1219; Case 9/73, *Schlüter* v. *Haptzollamt Lörrach* [1973] E.C.R. 1135; Case 4/73, *Nold* v. *E.C. Commission* [1974] E.C.R. 491; [1974] 2 C.M.L.R. 338; Case 41/74 *Van Duyn* v. *Home Office* [1975] 1 C.M.L.R. 1.

[14] D. Lasok and J.W. Bridge, *Introduction to the Law and Institutions of the European Communities* 2d ed. (1976), 169 *et seq.*

[15] Case 22/70, *Commission* v. *Council* [1971] C.M.L.R. 335.

[16] O.J. 1975, No. C.268 of 22 November 1975.

[17] A.M. Donner, *The Constitutional Powers of the Court of Justice of the European Communities* (1974) 11 C.M.L.Rev. 127, 128.

[18] *Cf. Charter of the United Nations,* arts.104 and 105.

2. Status in the Member States

According to article 211 "in each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be party to legal proceedings". This legal personality "exists in public law by virtue of the powers and functions which belong to the Community".[19] With the extensive legal capacity of the Community go the privileges and immunities of the officers and premises "necessary for the performance of their tasks".[20] Furthermore the assets and revenues of the Community are exempt from taxation;[21] customs duties and restrictions do not apply to goods or publications intended for the official use of the Community and the official communications of the Community are free from censorship and enjoy the privileged treatment customarily accorded to those of diplomatic missions.[22] The members and servants of Community institutions are issued with *laissez-passer* for the purpose of their travels and enjoy immunity from proceedings in respect of acts done in their official capacity.[24] The privileges and immunities are also extended to the diplomatic missions of non-member states accredited to the Community.[25]

3. International status

The hallmark of a person at international law is the capacity to send and receive envoys and to make treaties. The E.E.C. enjoys both these attributes. Article 210 of the Treaty, as we have observed earlier, expressly confers legal personality upon the E.E.C. whilst the treaty making power has been defined in articles 113, 114, 228 and 238. As a result of the former, the E.E.C. has been recognized by the majority of the members of the United Nations Organization (including the Vatican and China) with whom diplomatic relations

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[19] Cases 43, 45 and 48/59, *Von Lachmüller et al.* v. *E.C. Commission* (1959) 6 (II) Recueil 933, 952.

[20] *The Brussels Treaty of Merger* (1965), art.28 and *Protocol on the Privileges and Immunities of the European Communities* annexed thereto, arts.1 and 2.

[21] *Protocol, ibid.*, art.3.

[22] *Ibid.*, arts.4 and 6.

[23] *Ibid.*, art.7.

[24] In Case 5/65, *Sayag* v. *Leduc* [1969] C.M.L.R. 12, the Community Court held that a Euratom official, not being employed as a chauffeur by the Commission was not entitled to immunity in respect of a road traffic accident caused while driving guests of the Commission in his own car.

[25] *Protocol, supra,* note 20, art.17.

have been established. These diplomatic missions are independent of the "normal" relations between states as even the member states have ambassadors to the E.E.C. who, in addition to diplomatic representation, perform a useful function as "Resident Ministers" serving as deputies for Ministers at the Council of Ministers. Canada has had a mission at the E.E.C. since 1968[26] while an E.E.C. mission[27] was established in Ottawa in February 1976 in anticipation of stronger links arising from the present Agreement.

4. E.E.C.'s trade and association agreements

A distinction is made between treaties (whether bilateral or multilateral) involving states and international organizations (art. 228) and agreements establishing an association (art.238). The treaties range from trade agreements to purely technical accommodations such as the recent one with Austria[28] to facilitate the transit of goods. External trade agreements have been concluded with a number of countries all over the world. By the end of 1975 the E.E.C. had become party to "trade agreements" with nine European and two Middle East countries, to "commercial co-operation" agreements with two Asian acountries, to "textile agreements" with eight Asian countries, to "trade agreements in handicraft products" with nine Asian countries, and to trade agreements with four Latin American countries.[29] While these agreements differ in detail (and it is perfectly possible for a country to be party to more than one) they usually provide for preferential reductions in Community tariffs in relation to the countries and commodities involved.

The purpose of an association agreement is much wider. It creates a customs union between the Community and the associate state with, in some cases, the provision of financial loans to the associated state and, in others, the extension of other Community benefits. Such agreements have been made with Greece and Turkey with the object of bringing these countries gradually into the Community. (Similar agreements have been made with Malta, Cyprus, Morocco and Tunisia, but without any view to future membership in the Community.)

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[26] At present headed by Mr M. Cadieux.

[27] Headed by Mr C. Heidenreich, previously assistant to the head of the E.E.C. Mission in Washington.

[28] *Regulation on the conclusion of the Agreement between the E.E.C. and the Republic of Austria*, Reg. 1850/75, O.J. 1975, No.L.188/1.

[29] Commission of the European Communities, Information on External Relations, 115/76.

In addition to bilateral agreements there are also multilateral association agreements with groups of countries which are the former colonies of the member states of the Community. These agreements are designed to promote the economic and social development of these countries and to establish economic links giving their exports preferential treatment and bringing them within the European customs union. These groups have been brought into this relationship by conventions signed in African capitals: Yaounde (1964 and 1969), Arusha (1968-9) and Lome (1975). The latter has replaced the Yaounde and Arusha Agreements and extended the benefits of the Treaty to 46 states of the African, Caribbean and Pacific group (ACP) including 21 members of the British Commonwealth.

In addition to relations with non-member states the Community has established links with international organizations, *viz.* the United Nations Organization and the International Labour Office. Moreover the Commission is represented in the Council of Europe; it participates in the work of the Organization for Economic Co-operation and Development and tariff negotiations with the General Agreement on Tariffs and Trade. Discussions have also begun with the Comecon (East European Council for Mutual Economic Co-operation) with the object of finding a common platform for trade and eventually replacing the existing bilateral agreements between the Comecon members and the member states of the E.E.C..[30]

The Treaty provides for different procedures to conclude these arrangements but, while the authority to sign agreements is vested in the Council, the other institutions also play an active role.[31]

Article 228(1) provides that agreements between the Community and one or more states or international organizations shall be negotiated by the Commission and concluded by the Council after consulting the Assembly. Article 238, on the other hand, referring specifically to "association agreements", omits the Commission and states that these agreements shall be concluded by the Council after consulting the Assembly. In practice, however, the Commission is always involved not only as negotiator but, generally, as the institution responsible for the external affairs of the Community.[32] A

[30] Commission of the European Communities, The European Community and East European Countries, 91/75.

[31] See Case 22/70, *Commission* v. *Council* [1971] C.M.L.R. 335 which explains the respective roles of the Commission and Council.

[32] One of the present Commissioners, Sir Christopher Soames, is the "Foreign Minister" of the Community.

certain working order has been established in which the institutions act harmoniously together, the Commission being entrusted with the preparatory work and the technical details, the Council laying down guidelines in substance and procedure, deciding controversial negotiating points and, finally, concluding the agreement. A degree of political control over the international commitments of the Community is in the hands of the Assembly while the Court has power to determine the legality of the agreement. It is important to bear in mind that although these agreements are concluded by the E.E.C. in its autonomous capacity they are binding not only on the E.E.C. institutions but also on the member states of the Community.[32a] In this way, as in a federation, the treaty-making power is exercised by the central authorities but the resulting benefits and burdens are attributed to the members of the collective.

5. Member states' trade agreements

Membership in the Community entails a number of positive and negative obligations. In *Commission* v. *Council*, which was concerned with the treaty-making power of the Community and that of the member states, the Community Court stated that:

> ... by the terms of art.5, the members states are required, on the one hand, to take all appropriate measures to ensure the carrying out of the obligations arising out of the Treaty ... and, on the other, to abstain from any steps likely to jeopardise the attainment of the purposes of the Treaty.[33]

Having decided that the power of concluding agreements with non-member states belongs to the Council, with the Commission performing the functions of a negotiator, the Court pointed out that where the Council and Commission act within the authority given to them by the Treaty the member states have no right of acting individually in such a matter.[34]

It should be borne in mind that this limitation of the treaty-making power of sovereign states merely reflects the division of labour between the Community and its members and operates only within the concept of the Common Market. Thus "within the specific domain of the Community, *i.e.* for everything which relates to the pursuit of the common objectives within the common market the institutions are provided with exclusive authority .... Outside the domain of the Community, the governments of the member states

[32a] Treaty of Rome, *supra*, note 1, art.228(2).

[33] Case 22/70 (1971) C.M.L.R. 335, 355.

[34] *Ibid.* See also Case 1/75, *Re the O.E.C.D. Understanding on a Local Cost Standard* (1976) 1 C.M.L.R. 85.

retain their responsibilities in all sectors of economic policy".[35] This means in effect that the member states are free to enter into treaties with other states but must bear in mind their Community obligations while doing so.[35a] Objectively they do not lack the necessary capacity for the Community has not reached as yet the stage of a federal state which as a rule concentrates the treaty-making power in the hands of the federal government. Rather the member states are subject to a self-imposed restraint.

The object of the Community is to contribute "to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers"[35b] through the instrumentality of a Common Commercial Policy of the Community. However, before such policy can be enforced the trade relations of the member states with the outside world have to be co-ordinated,[35c] such co-ordination being directed towards the acceptance of common principles with regard to "changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation of trade, export policy and measures to protect trade such as those to be taken in case of dumping and subsidies".[35d]

By the end of the transitional period[36] the external tariff around the Community and the tariff agreements shall be controlled completely by the Community.

Practical difficulties, not to mention the reluctance of the member states to surrender to the Community their freedom of action and political influence through external trade, have contributed to the delay in the formulation of a Common Commercial Policy. Thus so far only tariff agreements and agreements with regard to agricultural produce can be said to be firmly governed by a common commercial policy, the former because the Community is a customs union, the latter because the Community has a Common Agricultural Policy. Several other measures have been taken by the Community in order to strengthen the Community position. Thus Regulation 459/68[37] adopted in 1968, very much in line with article VI of the G.A.T.T. and the anti-dumping code devised during the Ken-

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[35] Case 30/59, *Gezamenlijke Steenkolepmijnen in Limburg* v. *High Authority* (1961) 7 Recueil 1, 43-45.

[35a] Treaty of Rome, *supra*, note 1, art.234.

[35b] *Ibid.*, art.110(1).

[35c] *Ibid.*, art.111.

[35d] *Ibid.*, art.113(1).

[36] *I.e.*, 1968 for the original six members and 1977 for the three new members.

[37] *Anti-Dumping Regulation*, Reg.459/68, J.O. 1968, No.L.93/1.

nedy Round, provided for protective measures in respect of what are considered the abnormal practices of exporters to the E.E.C. countries, *i.e.* dumping and export premiums and subsidies.

Liberalization of trade began with agreed lists of products free from restrictions to be adopted by all the member states[38] with the effect that, while the regulatory power of the E.E.C. has increased, the individual member states have lost some of their bargaining counters used in their political and commercial relations with third countries.

Imports are now subject to two regulations, one in respect of trade with non-communist countries[39] and another in respect of state-trading countries.[40] As the lists are by no means complete the member states still enjoy a certain measure of autonomy though both regulations provide that the Council, acting on a proposal from the Commission, may extend the list of products free from import restrictions. Exports to third countries are, in principle, free[41] but there are certain items to which the member states may within their discretion apply restrictions.

These regulations are further subject to "a common procedure for the administration of quantitative quota"[42] which governs technical details and provides for consultations between the member states and the Community. However, despite these developments a great deal remains yet to be done in order to harmonize national trade into a Community system.

Bilateral trade agreements, being the rule rather than the exception, have attracted the attention of the Community. Since 1960 the Community has adopted certain measures in order to incorporate into bilateral treaties clauses providing for the revision of these agreements in the light of the emerging commercial policy of the Community, limiting the duration of such agreements and providing a procedure for prior consultation in respect of new agreements and modifications of existing agreements. In 1969 the Council adopted a decision on "the progressive unification of the agreements in the matter of the commercial relations between member states and third

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[38] *Liberalization of Trade,* Council decision, J.O. 1962, No.90, 2353/62.

[39] *Imports Regulations,* Reg.1025/70, J.O. 1970, No.L.124/6; repealed by Reg. 1439/74, J.O. 1974, No.L.159/1.

[40] *Import Regulations,* Reg. 109/70, J.O. 1970, No.L.19/1 extended by Reg. 469/76, O.J. 1976, No.58/1. See also updated version of the Annex to Reg. O.J. vol.18 C. 287/55 of 15 December 1975 and Council Decision on unilateral import arrangements of 29 December 1975, No.75/788; O.J. Vol.18 No.L.3321.

[41] *Exports Regulations,* Reg.2603/69, J.O. 1969, No.L.324/25.

[42] *Quantitative Quota Procedure,* Reg.1023/70, J.O. 1970, No.124/1.

countries and of the negotiations of Community agreements".[43] The decision provided for a procedure of prior information and consultation in respect of the extension of trade agreements with third countries and laid down that, as of January 1, 1970, in principle, trade agreements shall be negotiated by the Community. Such negotiations will be carried out by the Commission on its own initiative or at the request of a member state or a third country. A member state may be authorized to negotiate on its own but is subject to compulsory consultations and the guidelines resulting therefrom.

New members of the Community (Denmark, Eire and the United Kingdom) had to adapt their existing trade commitments to the spirit of article 234(2) of the Treaty of Rome (1957) and article 108 of the Act of Accession (1972), and since accession, apply the principles mentioned above to their trade relations with the outside world.

It is clear from the foregoing that a new pattern of world trade is being developed, influenced by the emergence of the Community. In this process the traditional role of the sovereign state has been displaced by that of the Community acting on behalf of all the member states. It is not surprising, therefore, that Canada's trade negotiations with Western Europe should be channelled through the E.E.C. and not its individual member states.

III. THE 1976 AGREEMENT BETWEEN CANADA AND THE E.E.C.

1. Canada's external trade

Canada's external trade, usually showing a healthy surplus, is predominantly dependent upon the United States. The United States is Canada's most important trading partner taking nearly 70% of Canadian exports and providing almost the same proportion of imports;[44] the E.E.C. comes next and Japan third. In contrast, trade with the United Kingdom and the E.E.C. countries has been in steady decline. In 1938 all Canadian trade with the United Kingdom stood at 31%; it dropped to 17% in 1948, 13% in 1958, 7% in 1968 and 5% in 1974. The corresponding figures for the E.E.C. (including the United Kingdom) were 36%, 22%, 20%, 13% and 11%.

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[43] *Notification of Treaties*, Council Decision, J.O. 1969, No.L.326/39, 69/494.

[44] Commission of the European Communities, Canada and the European Community, 113/76, p.6.

The volume of American investments in Canada was in 1971 five times that of the E.E.C. countries and Canadian investments in the United States four times that in the E.E.C. countries.

Clearly this imbalance is disadvantageous both to Canada and the E.E.C. Whilst Canada may wish to attain greater commercial independence from the United States and, in the process, cannot ignore the growing importance of the E.E.C., to the Community Canada represents not only an opportunity for commercial expansion and investment but also a source of valuable raw materials especially timber, non-ferrous metals (*i.e.* copper, zinc, nickel), uranium and oil. Canada's agricultural resources are of particular value to an over-populated Europe. Therefore trade between Canada and the E.E.C. can develop on a complementary basis, raw and semi-manufactured materials being traded for industrial products, consumer durables and manufactured foodstuffs.

As the industrial E.E.C. countries individually can no longer play a totally independent role in international trade, the E.E.C. as a single entity has become Canada's new trading partner.

2. Preliminaries to the agreement

Despite the Ottawa Agreement of 1932 by which Canada and the United Kingdom enjoyed reciprocal preferences, Canada strongly supported the British application for membership in the E.E.C. This support was also forthcoming during the unfortunate period of British "re-thinking", engineered by party politics and resulting in the so-called "fundamental re-negotiations" and the Referendum of 1975. Clearly, as far as Canada was concerned it was not just a question of the changing pattern of trade with Britain, it was a question of Canada's participation in world trade in general and her involvement with the E.E.C. in particular. In this, the trade relations with the United Kingdom played a certain part. As a result of her membership in the Community, Britain had to discontinue preferences and had to adopt by stages the Common External Tariff of the Community together with the Common Agricultural Policy. This considerably affected her trade with Canada, but since the other member states were in a similar position (especially as regards agricultural produce) Canada's trade with them was also affected.

Prior to British accession, Canada had expressed an interest in the E.E.C. as a possible trading partner and this was reciprocated at the meeting of the Heads of Government of the Six in October 1972 when they welcomed "a constructive dialogue" between Canada and the E.E.C. The contact established, meetings have taken place from

time to time between the Commission and Canadian government officials, members of the European and Canadian Parliaments, Canadian Ministers and the E.E.C. Commissioners, and in March 1975 the Canadian Prime Minister during his European tour "puzzled the Europeans" by his open advocacy of closer links with Europe.[45] In fact they should not have been puzzled by the object of his mission, which was to "seek assurance that Canada's desire to create a contractual link with the European Community ... is well understood and supported by the Governments of the Nine", or by his statement that he did not want Canada's identity to be absorbed in the American melting pot.[46]

During 1975 the Commission exchanged letters with the Canadian Government on the subject of cooperation in the field of environmental control, *i.e.* the protection of the natural environment, the assessment of the risks of pollution and the definition of quality targets for water.

In October 1975 a delegation from the European Parliament met their counterparts in Ottawa and, at the close of their meeting issued a joint *communiqué* embracing the following *desiderata*:

1) A continuous rapport between the two Parliaments;
2) The conclusion of an agreement between the E.E.C. and Canada on trade and economic cooperation;
3) The completion of reciprocal diplomatic representation by installing an E.E.C. mission in Ottawa;
4) Canadian representation at the Rambouillet Conference (December 1975) on monetary cooperation;[47]
5) The unification of Europe whilst preserving the national identities of the member states;
6) The interest in foreign and multi-national investments vital to both Canada and the E.E.C. as well as its member states.

These contacts have undoubtedly tested the idea of a Canadian involvement with the E.E.C. to be formalized by reciprocal diplomatic representation and an appropriate agreement.

3. E.E.C. negotiation mandate

Canada's *aide-mémoire* of 20 April 1974, proposing a "direct contractual link between Canada and the Community" leading to the "development of long-term commercial and economic relations"

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[45] According to *The Times*, March 11, 1975.
[46] *The Times*, March 4, 1975.
[47] In fact, Canada was not represented.

was the first move in the exploratory phase. The Commission in its communication to the Council responded with a suggestion for a "broad Community framework for economic and commercial cooperation ... extending well beyond the field of classical trade policy".[48] The Council gave its blessing to the idea, stressing the traditional ties with Canada and expressing the desire for the further strengthening of these ties.

In December 1975 the E.E.C. was almost ready to open negotiations with a view to establishing a treaty framework for commercial and economic cooperation. According to the E.E.C. procedure the negotiation mandate of the Commission had to be adopted by the Council but certain points had to be settled first. One of the preliminary difficulties arose from the reservation on the access to raw materials raised by Denmark, the other was the problem of the contracting party. The Danish objection was overcome by a compromise formula; the parties to the agreement should endeavour to ensure access to resources without discrimination or instability of supplies. The problem of the contracting party was one of principle, *i.e.* whether the agreement was to be concluded by the E.E.C. alone or by the E.E.C. and the member states together. The problem was solved in favour of the Community approach; the agreement should be concluded by the Community in its corporate capacity on the understanding that it should not preclude the conclusion of bilateral agreements between Canada and any of the nine members of the E.E.C. It goes without saying that such bi-lateral agreements must conform to the Community rules and cannot derogate from the agreement.

Two further points were referred to the Committee of the Permanent Representatives of the member states. Some member states felt that the "most favoured nation clause" to be included in the agreement should not imply any tariff discrimination either in favour of a third country (*e.g.*, the United States) or in favour of one member state to the detriment of the others (*e.g.*, in favour of the United Kingdom). The Committee recommended a general clause to satisfy these reservations. Secondly, as regards the scope of non-discriminatory access to raw materials, some member states insisted that Canada should cease discriminatory practices respecting exports of oil products and should, accordingly, grant the E.E.C. equal treatment. The Committee resolved that this was not only a postulate to be included in the negotiations mandate but also a point to be settled by negotiations.

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[48] *Supra*, note 44, 2.

4. **The agreement**

The negotiations went through three phases. In the first phase (11 March, 1975) the negotiators reached a broad consensus on the general aims and structure of the Agreement; in the second phase (24-25 March, 1976) the representatives examined the Draft Agreement and in the third phase (2 June, 1976) the final draft of the Agreement was accepted.

The "Framework Agreement for Economic and Commercial Cooperation" represents a new chapter in the global trade involvement of the E.E.C. Its novelty lies in the fact that it is the first of its kind between industrialized parties. Its scope is broadly traced for it is a "framework" of cooperation. This means two things: that it is "evolutionary" in the sense that further progress will be marked by specialist developments from the broad bases of the Agreement; and that the Agreement will not preclude bilateral treaties between Canada and the E.E.C. countries.

The concept of the "cooperation" envisaged in the Agreement rests on three elements:

1) Economic cooperation as outlined by the statement of common objectives and the means by which these objectives are meant to be achieved;
2) Commercial cooperation reiterating the adherence to G.A.T.T. and opening avenues for the expansion and liberalization of trade;
3) A Joint Cooperation Committee to promote the execution of the Agreement.

The Agreement, set for an unspecified period, may be terminated by either party after five years, subject to a year's notice. It sets no limits on the scope of the cooperation but envisages a pragmatic expansion. In the field of economic cooperation nothing is excluded *a priori*, leaving the parties to extend their involvement as their need and common interest may require. Therefore it opens opportunities for the mutual exploration of industrial potential, the promotion of technical, scientific and technological developments, and the exploitation of supply sources and markets. Consequently one would first expect a surge of activity in the field of exploration and information, then increased investments and individual or joint ventures both in Canada and the E.E.C. countries as well as third countries. In the field of commercial cooperation the parties' adherence to the principles of G.A.T.T., *i.e.* the most favoured nation clause, non-discriminatory expansion and liberalization of trade should provide a new impetus to Canada's trade with Europe.

Perhaps the most interesting feature of the Agreement is the Joint Cooperation Committee. The nature and the potential of the Agreement require appropriate machinery at a sufficiently high level in order to provide direction and stimulus on the one hand and, on the other, to channel ideas and energy to the most promising areas. The concept of a "directed" economy which dominates both the member states and the Common Market is reflected here. However, because the Committee will not be able to cope with every detail it is envisaged that several sub-committees will be formed in order to deal with specific sectorial problems, for example, timber, non-ferrous metals, oil, uranium, scientific collaboration.

The negotiations were completed on June 2, 1976, and the negotiators went back to their respective principals for the final approval of the text. The Agreement was signed on July 6, 1976 and became effective on October 1, 1976. However not all the details were finalized. The vital question of E.E.C. access to Canadian natural resources in exchange for the access of Canadian finished products to the Common Market has proved too difficult to solve in view of the fact that the member states' involvement had to be ascertained. Rather than prolonging the negotiations the parties agreed to proceed to the final text leaving the matter unresolved. It will be dealt with in a supplementary Note which will be appended to the Agreement.

5. The long arm of E.E.C. law

As we have observed earlier the E.E.C. has developed its own system of law which operates in the territories of the member states and claims supremacy over national law. However, the long arm of the E.E.C. law also has an extraterritorial reach as within its field of application it purports to control "European" individuals and enterprises operating outside the Community as well as foreign individuals and enterprises operating within the Community. It follows that Canadian business interests can be affected irrespective and quite independently of the Agreement. Some powerful multinationals have learned this to their cost.

6. E.E.C. competition law

The E.E.C. competition policy is one of the pillars of the Common Market. The Treaty of Rome endeavours to set up a system "ensuring that competition in the common market is not distort-

ed".[48a] The backbone of that system is formed by articles 85 and 86 addressed to "undertakings" generally. Since the rules have been drawn generally the competition area has become a battlefield not only for commercial interests but also for legal wit.

As the term "undertaking" has not been defined in the Treaty one has to assume that it applies to a broad assortment of entities irrespective of their formal legal status as long as they can sue and be sued and as long as they have resources, should a punitive sanction be imposed.

The Community Court explaining the word "undertaking" stated in one case that "an enterprise is constituted by unitary organisation combining personal, material and immaterial elements attached to an autonomous juristic subject and pursuing permanently a definite economic objective".[49] It follows that an undertaking has to be endowed with juristic and economic autonomy and has to be engaged in the production or distribution of goods or services. However its geographical situation or political allegiance is unimportant as it comes under the rules whether it is situated in or controlled from outside the E.E.C.[50] A problem did arise in counection with subsidiaries which, though juristically autonomous, were not economically independent of their parent companies. Thus in *Re Christiani and Nielsen*[51] a Dutch subsidiary wholly owned by its Danish parent-company was held unable to engage in independent commercial activity. Therefore, decided the Commission, the sharing of markets was nothing but a distribution of tasks within a single economic unit. In *Re Kodak*[52] the Commission held that the European subsidiary of an American company, acting on instructions from the parent-company could not have been in competition with the latter. However the relationship between the subsidiary and the parent-company has to be considered and in certain circumstances the activities of the former may, despite its separate legal personality, be imputed to the latter.[53]

Article 85 of the Treaty prohibits 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

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[48a] *Supra*, note 1, art.3(f).

[49] Case 19/61, *Mannesman A.G.* v. *High Authority* (1962) 8 Recueil 675, 705-706.

[50] *Re Grossfilex* (decision of the Commission) (1964) 3 C.M.L.Rev. 257.

[51] Case 69/195 (1969) C.M.L.R. D.36.

[52] Decision of the Commission, Case 70/332 [1970] C.M.L.R. D.19.

[53] Case 48/69, *I.C.I. and others* v. *E.C. Commission* [1972] C.M.L.R. 557.

as their object or effect the prevention, restriction or distortion of competition within the common market.

The same article lists agreements and practices which in particular are considered to have that effect. These include: price fixing, limiting or controlling production, markets, technical developments or investments, market sharing, applying dissimilar conditions for equivalent transactions with other trading parties and making contracts conditional upon acceptance of supplementary obligations. It follows that any enterprise entering the Common Market must familiarize itself with the activities prohibited by the Treaty and the many precedents which illustrate the operation of the competition rules of the Community.

The prohibited activities must "affect" trade between states in order to constitute an infringement of the law. The word "affect" has been interpreted extensively probably in analogy to "interstate" commerce in the United States. The *Ulm* case[54] explains the positions. There was an exclusive dealing agreement between a German company A and a French company B, whereby B became exclusive dealer for the sale of machinery in France and the French overseas territories. In a dispute between A and B, B argued that the agreement was void under article 85 of the Treaty whilst A asserted the opposite. The Community Court, on a reference from a French court, held that such an agreement must be considered in its economic context and the Court must decide whether it is likely to prevent, restrict or distort competition to a "noticeable extent". Several factors determine the extent of the agreement, *i.e.* the nature and quantity of the product which is the object of the agreement; the position and size of the parties to the agreement in the particular market; the isolated nature of the agreement or its position in a series of similar agreements, and the severity of the clauses which aim at the protection of the exclusive rights involved.[55]

In another leading case[56] the Court held that "the contract ... on the one hand by preventing undertakings other than Consten importing Grundig products into France, and on the other hand by prohibiting Consten from re-exporting those products to other countries of the Common Market, indisputably affects trade between member states".

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[54] Case 56/65, *Technique Minière* v. *Maschinenbau Ulm GmbH* [1966] C.M.L.R. 357.

[55] *Ibid.*

[56] Cases 56 and 58/64, *Etablissements Consten S.A.R.L. et Grundig-Verkaufs-GmbH* v. *Commission de la C.E.E.* [1966] C.M.L.R. 418, 472.

The prohibited activities may be exempted from the rigour of article 85 if they contribute to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit as required by article 85(3).

The practical conclusion with regard to activities caught by article 85(1) and (2) is that they must cease or be suitably amended and, if they can be exempted, the undertaking concerned must apply to the Commission for a declaration that article 85(1) is inapplicable. If in doubt the undertaking ought to apply to the Commission for a "negative clearance". In all these cases the prescribed procedure has to be followed.

While article 85 prohibits certain activities which may affect interstate trade and are likely to distort competition within the Community, article 86 prohibits the abuse of a "dominant position" which has a similar effect. A dominant position (though not defined in the Treaty) means, in effect, a monopoly within a given sector of the economy. Article 86 further enumerates such abuses. The phrase "dominant position" was defined by the Community Court in the *Sirena* case where the Court held that an undertaking is not in a dominant position by the sole fact of being able to prevent

> ... third parties from selling in the territory of a member state products bearing the same trade-mark; moreover, since art.86 requires that this position covers at least a "substantial part" of the common market, it is necessary that it has the power of preventing effective competition within an important part of the market, considering also the possible existence and the position of producers or distributors of similar or substitute products....[57]

According to article 86 "abuse" consists of:

> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, market or technical development to the prejudice of customers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Abuse of the dominant position has to affect trade between the member states of the Community and can be perpetrated by "one or more undertakings".

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[57] Case 40/70, *Sirena s.r.l.* v. *Eda s.r.l.* [1971] C.M.L.R. 260, 275.

7. Determination of and sanctions for infringements

Infringements of articles 85 and 86 may be checked either by the member states or the Commission. Both national and Community law are competent but, since the latter has to be implemented by the member states and will prevail in case of conflict, the member states will apply Community rules if they happen to be more stringent than their own.

The Commission has to deal with alleged infringements either *ex officio* by virtue of its duties under the Treaty[58] or at the instance of interested parties, *i.e.* states, undertakings or individuals. The Commission will use its own machinery of investigation and will reach a decision in accordance with the prescribed procedure.[59] If an infringement has been proved the Commission will make the appropriate decision, make recommendations and apply sanctions as prescribed by the Treaty. The Treaty provides for three different sanctions: nullity of the offending practice, fines and penalties. The Commission may inflict heavy fines upon undertakings guilty of infringements of articles 85 and 86 and also of the supply of false or misleading information or of refusal to submit to an investigation[60] irrespective of whether the undertaking is controlled from within or without the Community. Penalties may be imposed in order to oblige the offender to cease the infringement, supply the information required or submit to any investigation ordered by the Commission.

The decisions of the Commission which impose a pecuniary obligation upon persons other than states are by virtue of article 192(1) of the Treaty subject to an enforcement procedure which is in the hands of the member states. All the decisions of the Commission are subject to judicial review by the Community Court.[61]

8. Enforcement against "foreign" undertakings

"Foreign" undertakings, that is to say entities controlled from outside the Community, have often come to grief with Community law and have, to their cost, learned that they could not rely on the immunity of an "outsider". In this context Community law applies not only to situations in which a "foreign" undertaking is caught

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[58] Art.155 and *Règlement d'application des articles 85 et 86*, Règ.17, J.O. 1962, No.204/62 amended by Règ.59, 118, and 2822, J.O. 1963, No.2696/63 and J.O. 1971, No.L.285.

[59] Règ.17, *ibid.*, art.11.

[60] Règ.17, *ibid.*, art.15.

[61] Treaty of Rome, *supra*, note 1, arts.172, 173(2), 175(3).

together with a Community undertaking but also if neither undertaking happens to have a seat in the territory of any member state as long as their activity has an effect in the Community. Furthermore even an activity which relates exclusively to exports to countries outside the Community by an undertaking (whether Community or "foreign") operating within the Community can become an infringement of the Community competition law if it has repercussions on the competitive structure of the Common Market or, to use the technical term, it "affects trade between member states". Consider the following examples.

At the instigation of the trade organizations of various industries using dye-stuffs the Commission investigated price increases of dye-stuffs allegedly imposed by a common agreement and found that increases affecting some 60 companies both in the E.E.C. and outside. The Commission imposed fines for infringing article 85(1) on several companies including a British Company (I.C.I.) and two Swiss companies who appealed to the Community Court contending *inter alia* that, because they were not based in the E.E.C., the Commission had no jurisdiction. The British company I.C.I. in particular contended that contracts to supply its European subsidiaries were governed by English Law and therefore all these activities, being carried out in the United Kingdom (prior to United Kingdom membership), were not subject to E.E.C. Law.[62] The Court rejected this argument and confirmed the fines.

In his Opinion the Advocate-General cited various national laws and compared the jurisdiction of the E.E.C. (though not a state) to that of states in similar situations and concluded that:

> ... art.85 indisputably gives as the sole criterion the anti-competitive effect in the Common Market, without taking into account either nationality or the locality of the headquarters of the undertakings responsible for the breaches of competition. The same applies to art.86.[63]

He suggested three conditions as criteria for the applicability of E.E.C. law, *viz.* the imposition of direct and immediate restrictions on the Common Market by the agreement or concerted practice; the reasonably foreseeable effect (intentional effect being unnecessary); and the substantial effect produced in the Commuunity.[64]

In *Béguelin Import Co.* v. *G.L. Import Export S.A.*[65] a Belgian company, by an agreement with a Japanese company, became the sole

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[62] Cases 48, 49, 51-57/69, *I.C.I. Ltd and others* v. *E.C. Commission*, [1972] C.M.L.R. 557.

[63] *Ibid.*, 601.

[64] *Ibid.*, 603-4.

[65] Case 22/71 [1972] C.M.L.R. 81.

distributor for Belgium and France of pocket lighters manufactured by the latter. Later a subsidiary of Béguelin took over the sole distributorship and concluded a new agreement with the Japanese company. In Germany Gebrüder Marbach became the sole distributor of the Japanese lighters. In 1969 Import Export company imported into France a quantity of these lighters via Germany and Gebrüder Marbach. The Béguelin companies brought an action in France against Import Export and Gebrüder Marbach claiming damages for unfair competition and an injuction to prohibit these companies marketing the product in France. The defendants argued that the agreements (of which the Commission received no notification) were void as contrary to article 85 despite the fact that one of the contracting parties was situated outside the E.E.C. The Community Court, on reference from the French commercial court, held that the agreements, to be incompatible with article 85, must be "capable of affecting trade between member states" and have "the object or effect" of interfering with "competition within the Common Market".[65a] The fact that one of the parties was an outsider was immaterial as long as the agreement produced harmful effects within the Common Market.

In the *Franco-Japanese Ballbearings Agreement*[66] case the Commission issued a declaration that an agreement between French and Japanese manufacturers aimed at regulating imports into France from Japan and increasing prices constituted an infringement of article 85(1). The Commission distinguished between measures taken by the Japanese Government in pursuance of trade agreements between the E.E.C. and Japan and agreements or concerted practices between Japanese undertakings and those operating in the E.E.C. The former, being "acts of external commercial policy" are outside article 85; the latter are within article 85 "irrespective of whether or not they are lawful under Japanese law and irrespective of whether or not they are undertaken unilaterally by Japanese enterprises or in concert with European enterprises".[67] In view of the share of the French market by the Japanese, the agreement had as its object "the restriction of competition" and was intended "to neutralize the function of price competition". It was declared illegal.

In the *Franco-Taiwanese Mushroom Packers Agreement* case[68] the Commission ordered five French mushroom packers to terminate

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[65a] *Ibid.*, 95.

[66] 74/634/EEC [1975] 1 C.M.L.R. D.8.

[67] See also *Opinion relating to imports of Japanese products in the Community*, J.O. 1972, No.C.111/13 of 21 octobre 1972.

[68] O.J. 1975, No.L.29/26 of 3 February 1975.

their agreement, the main purpose of which was the partition of the German market between French and Taiwanese packers. Moreover, in view of price fixing to the detriment of German consumers, the Commission imposed fines upon the French parties to the agreement. No fine was imposed upon their Chinese counterpart as they were unaware of the Commission Opinion[69] published in the Official Journal shortly before the agreement was made relating to the extraterritorial effect of Community Law and the extraterritorial jurisdiction of the Commission. The Commission clearly wished to remind private undertakings that they must refrain from attempting to restrict or regulate imports into the E.E.C. by means of agreements which in effect distort competition in the common market.

Equally decisive, though more lenient, was the Commission's approach to a Brazilian exporter of coffee.[70] The Istituto Brasileiro de Café restricted its sale of roasted coffee to France and Italy and prohibited them from exporting the raw coffee it sold to them. It was advised to change its policy of discrimination between competitors in the business and grant them access on equal terms to its European source of supply.

Recently a conflict between the principle of free movement of goods and the protection of industrial property rights (*e.g.*, patents, trade marks) came to a head in the field of competition. The simple question "When are such rights abused?" cannot be answered in simple terms but it is clear that such rights when faced with the rules of competition will not provide absolute protection in the E.E.C.[71] This ought to be borne in mind by undertakings involved with the Common Market irrespective of whether they rely on their industrial property rights for protection of their interests or compete with holders of patent or trade marks. In particular when drafting agreements their legal advisers must consider the position carefully. For example, the Commission rules in reference to an agreement of the Davidson Rubber Company[72] (an American company, two Italian, one French and one German company were involved), that a "non-aggression" clause in a patent and "knowhow" agreement was incompatible with article 85(1). However, an agreement of A. Raymond and Company[73] did not contravene article 85(1) because the

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[69] *Ibid.*

[70] *Bulletin of the European Communities* (1975) Part 12, para.2128.

[71] See *Van Zuylen Frères* v. *Hag* [1974] 2 C.M.L.R. 127 (trade marks).

[72] 72/237/EEC [1972] C.M.L.R. D.52.

[73] 72/238/EEC [1972] C.M.L.R. D.45.

clause did not affect competition in the Common Market. This was an agreement between a French and a Japanese company, all being involved in the manufacture and sale of component parts used in the construction and equipment of motor vehicles. Eventually, the exclusive licensing agreements concluded by the American company and its E.E.C. partners were amended in conformity with the suggestions made by the Commission.

Clearly, when in doubt, protection ought to be sought under article 85(3) but here the legal adviser must be familiar not only with the substantive law of the Community but also the relevant procedures. Above all he ought to realize that exemptions under article 85(3) are available to enterprises from outside the Common Market on the same terms as to Community enterprises. Exemptions from the application of article 85(1) may be obtained but the enterprise must submit to further controls by the Commission; enquiries must be answered and activities monitored. The saga of the Transocean Marine Paint Association, which has so far registered three Commission Decisions and a judgment of the Community Court, provides a good illustration of the ramifications.

In 1959 eighteen producers of marine paints created the Transocean Marine Paint Association so that they could pool their individual knowledge and expertise and produce marine paints of a uniform quality and according to identical formulae, selling them under the same trade mark. By this means they could build up a world sales network. This is particularly important for producers of marine paints because they can only compete effectively if they can provide buyers with paints of identical composition and quality in all ports of a substantial size. Although membership of the Association entailed restrictions on competition between the members themselves this was compensated by the possibility of competition with the big international marine paints producers. Most of the members were established in states outside the Common Market.

The Commission was notified of the agreement in 1962, the notification being accompanied, as is customary, with an application for a negative clearance, *i.e.* a declaration that the agreement was not prohibited by the Treaty. In 1966 the agreement was amended when the Commission informed the Association that certain provisions, involving prohibitions on the export by one member of paints into the territory of another member without the latter's consent, and on manufacturing paints for non-members, were incompatible with article 85.

In 1967, the Commission decided[74] that the agreement fell within the prohibition of article 85 as it prevented members of the Association, especially those established within the Common Market, from carrying on intensive competition with each other. However, the agreement was saved by the exemption under article 85(3) because: 1) membership in the Association allowed an undertaking to provide an effective service for purchasers of marine paints on a global basis without having to create its own distribution network; 2) the agreement benefited the consumer by enlarging the supply of marine paints; 3) the restrictions in the agreement were justified by the objectives they attained and did not go beyond what was needed to attain them; 4) the share of the Association in the market of marine paints within the Common Market was not great enough to threaten the elimination of competition. The exemption was granted from 1966 to 1972 and the prohibition, which applied from 1962 (the date when Regulation 17 came into force) until 1966 when the agreement was amended, was lifted. The Commission's decision was made subject to the submission of an annual report on the Association's activities, productions and sales and on notification to the Commission of any changes in membership, or in the agreement itself, and any arbitral awards made under the agreement.

In 1972 the Association applied for extension of the exemption and a decision was made in 1973.[75] The Commission noted that the total turnover of the Association had since 1967 increased considerably, its share of the market amounting to 5-10%. Nevertheless the conditions for exemption were still fulfilled and exemption was extended to 1978. The Commission decided that some restrictions considered essential in 1967 were no longer justified now that the share of the Association in the market had risen, most of the rise being accountable to a Japanese undertaking. It was discovered that two members of the Association belonged to undertakings already enjoying a strong position in the general paints market. The Commission considered whether such close links might affect the exemption or whether they might necessitate the withdrawal of the members concerned or the removal of the close links in order to guarantee genuine cooperation between the Association and its competitors. As a result it added a further condition to those already applying to the exemption (these now included the requirement that the agreement be amended to remove the provisions which were declared to be no longer justifiable), that the Commission be informed of any links

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[74] Decision 67/454/EEC [1967] C.M.L.R. D.9.
[75] 74/16/EEC [1974] 1 C.M.L.R. D.11.

or financial participation between a member and a non-member undertaking. The Association appealed to the Community Court of Justice against the imposition of this condition and it was declared void by the Court[76] for breach of procedural requirements. The Commission then issued another decision,[77] the condition now affecting links between members of the Association or between a member and any other enterprise in the paint sector as a whole (not just marine paints) where the non-member carries on business directly or indirectly within the Community. The link is now defined as 25% financial participation or shared directors or managers.

Less complex was the case of the agreement between Europair International S.A. and Duro-Dyne Corporation,[78] concerning an American manufacturer of products designed mainly for use in heating and air-conditioning installations, and a European distributor. The latter was granted exclusive general distributorship covering not only the E.E.C. countries but also South Africa and Switzerland. The agreement was capable of affecting trade in the E.E.C. and was of a restrictive character but the parties were able to convince the Commission that the existence of a single exclusive dealer responsible for the import of an extensive range of American products into the whole E.E.C. territory contributed to an "improved distribution of these products within the E.E.C.". Moreover the agreement made the promotion of the product easier, permitting more extensive marketing to be undertaken and ensuring continuity of supplies while rationalizing distribution. Since the agreement related to products complementing and supplementing those of Europair's own manufacture, the latter was in a position to offer a greater selection of heating and air-conditioning components to consumers and so allowed "consumers a fair share of the resulting benefit". Exemption was granted under article 85(3).

The operation of article 86 (abuse of a dominant position) in respect of enterprises based outside the E.E.C. has come up in three leading cases.

Continental Can Company Inc. of New York by a number of takeovers of European companies specializing in various kinds of containers and metal lids for glass jars, concentrated in its hands control of the relevant industry to the extent that competition in the field was in danger of being eliminated. The Commission, in order to prevent this, initiated a procedure against Continental Can and its

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[76] Case 17/74 [1974] 2 C.M.L.R. 459.
[77] 75/649/EEC, O.J. 1975, No.L.280 of 5 November 1975.
[78] 75/74/EEC [1975] 1 C.M.L.R. D.62.

subsidiary Europemballage, set up in Delaware, and ordered these companies to divest themselves of the newly acquired control over certain European companies. The companies applied for annulment of the Commission decision on the ground, *inter alia*, that the Commission was unable to show in which market or markets these companies were supposed to have abused their dominant position. The Court held that "abuse may occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition"[79] but found that the Commission's Decision had not sufficiently explained the facts on which it was based.

In the second case[80] the Commercial Solvents Corporation, a company incorporated in Maryland, having its principal office in New York, had an almost global monopoly of the manufacture of certain drugs used for medical purposes. It acquired control of an Italian company which acted as a reseller of the product in Italy and through this intermediary denied the supply of the product to another Italian company, a customer of the former who was unable to obtain the product on the world market. The disappointed customer complained to the Commission which, having investigated the matter, ordered the American company and its Italian subordinate to supply the required product under the threat of substantial penalties. An appeal was lodged to the Community Court which held that there was in this case an abuse of a dominant position. The Court felt that behind the refusal to supply the product there was a desire to eliminate that user from competition in the manufacture of the drug. The Court saw nothing objectionable in the Commission ordering the offending party to bring the infrigement to an end by selling the necessary supplies to the complainant. It brushed aside the argument that the Commission Order went outside the territory of the E.E.C. and that the supplies in question, being in excess of the E.E.C. needs, reflected the complainant's activities in the world market.

In the third leading case[80a] the Commission decided that an American multinational, incorporated in New York, abused its dominant position in the banana market:

a) by requiring its distributor/ripeners in Benelux, Denmark, Germany and Ireland to refrain from reselling its bananas while still green;

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[79] Case 6/72, *Europemballage Corporation and Continental Can Company Inc.* v. *E.C.Commission* [1973] E.C.R. 215, 244-245.

[80] Cases 6-7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation* v. *Commission of the E.E.C.* [1973] E.C.R. 357; [1973] C.M.L.R. 361; [1974] 1 C.M.L.R. 309.

[80a] *Re The United Brands Co.* (Chiquita Bananas) [1976] C.M.L.R. D.28.

b) by, in respect of its sales of "Chiquita" bananas, charging other trading parties (distributor/ripeners other than the one group it controlled in the member states above) dissimilar prices for equivalent transactions;
c) by imposing unfair prices for the sale of "Chiquita" bananas on its customers in Benelux, Denmark and Germany; and
d) by refusing to supply "Chiquita" bananas to a Danish customer.

The Commission imposed a heavy fine, ordered that these practices cease and imposed a penalty of $1,000 per day while the practices continued.

Within the Common Market the Community rules of competition fall into the category of "directly applicable" rules; they are applied by the Community institutions and by the member states[81] and prevail over more lenient domestic rules. In this respect they may create new "commercial torts"[82] and rights enforceable by private citizens. Should a sanction be applied at both the Community and national level the Commission, in fixing the amount of a fine, ought to take into consideration the sanctions already imposed in respect of the same infringement by the member state. If both infringements are identical the Commission is obliged to set-off the fine imposed by it against the fine imposed by the national authorities. There is no set-off if the infringements, although arising from the same situation, are in essence different in nature or take effect outside the E.E.C. territory. Thus it was held[83] that fines imposed by a United States court could not be set off against fines imposed by the Commission in respect of the same cartel because the offence against the American anti-trust law was different from the offence against the E.E.C. competition law.

CONCLUSION

We can say in conclusion that the E.E.C. competition rules are almost as stringent as the American anti-trust law upon which they have been modelled. They are applied fairly but strictly and their severity does not stop at the territorial frontier of the E.E.C. Although the severity of their application has not reached as yet the

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[81] Case 127/73, *Belgische Radio en Televisie* v. *SABAM* [1974] 2 C.M.L.R. 238, 271.

[82] See English case *Application des Gaz S.A.* v. *Falks Veritas Ltd* [1974] 2 C.M.L.R. 75, 85.

[83] In Case 7/72 *Boehringer Mannheim GmbH* v. *E.C. Commission* [1973] C.M.L.R. 864, 887.

limits of the American practice (which in one case[84] has upset Canadian interests and public opinion and in another,[85] led to an international incident and a modification of the judgment[86]) there is no reason to believe that multi-national undertakings can take shelter behind their non-E.E.C. status.

The E.E.C. is Canada's newest trading partner and despite the doubts expressed by journalists and others as to its necessity, a trading agreement between Canada and the E.E.C. will ensure continuance of mutually beneficial trading relations with the European nations. Previous bilateral trading agreements with individual member states had expired or become obsolete. And the trading situation in Europe had changed significantly; member states have lost their previously unfettered freedom to enter into trading agreements. The economic potential of European trade is enormous but it is vital that Canadian business interests be well-informed of the legal ramifications of European commercial law; they will undoubtedly be affected in the future.

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[84] *U.S.* v. *I.C.I. et al.* 100 F.supp.504 (1951) (S.D.N.Y. 152).

[85] *U.S.* v. *Watchmakers of Switzerland, Information Center Inc.* (1962) Trade Cases (CCH) § 70,600 (S.D.N.Y.).

[86] *U.S.* v. *Watchmakers of Switzerland, Information Center Inc.* (1965) Trade Cases 71, 352.