DEPARTMENT OF JUSTICE

THE HONORABLE KONRAD VON FINCKENSTEIN AND NORTH AMERICAN ANTITRUST ENFORCEMENT

Address by

R. HEWITT PATE
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Presented at the
2003 Annual Fall Conference on Competition Law
Canadian Bar Association
Ottawa, Canada

October 3, 2003

I. Introduction

Good morning ladies and gentlemen. It is a privilege to participate in this well-established and important conference. Many thanks to my gracious hosts at the Canadian Bar Association, especially Peter Glossop, for organizing the conference and inviting me to talk about issues on the international scene and antitrust developments in the United States. It has also been a great pleasure being here with Gaston Jorre´and I look forward to working with you, Gaston, in your capacity as Acting Commissioner of the Competition Bureau.

Let me open by joining all the others in personally congratulating Konrad von Finckenstein on his appointment to the federal bench. The international antitrust community owes Konrad a great debt for his dedication and commitment to international antitrust and we all will miss Konrad immensely. Some good can come out of losses like these, though, because they provide occasion for reflecting on past accomplishments and for thinking about where we should go in the future. And so this morning, as my title suggests, I want to spend some time reflecting on the U.S. antitrust agencies' very important relationship with Canada, and on Mr. Justice von Finckenstein's great contributions in shaping the mature relationship we enjoy today. This will give me the opportunity to review with you some of Konrad's important work domestically and on the multilateral front. I will close by outlining some of the Antitrust Division's own priorities.

II. A Fond Farewell to Konrad

The relationship that the U.S. and Canadian antitrust agencies enjoy today is a model for how cooperation among antitrust agencies ought to work. Although the two nations have been dealing with each another on antitrust matters since the 1940s, the close and cooperative relationship that exists now is a relatively recent development. Indeed, it has only been for the

past dozen or so years that we have been able to progress away from the limited, conflict-avoidance approach of the early days and toward a more constructive relationship aimed at supporting each other's common antitrust enforcement objectives. And it has been under Konrad's leadership that the seeds of cooperation that were planted in 1990 – when the U.S.-Canada Mutual Legal Assistance Treaty entered into effect – really began to take root.

Konrad, upon becoming head of the Competition Bureau in January 1997, immediately recognized the importance of cartel enforcement to Canadian consumers. Under his leadership, the Canadian Competition Bureau aggressively prosecuted both domestic and international cartels, obtaining over 50 convictions and collecting close to CDN$170 million in fines. The Bureau also revamped its amnesty program in order to increase the detection of cartels and currently is considering possible changes to the Competition Act that would, among other things, modernize the criminal conspiracy provision by removing unnecessary obstacles to successful cartel prosecutions.

In addition, under Konrad's leadership, cooperation between the antitrust enforcement agencies of both countries flourished. This cooperation ranges from the execution of requests under our MLAT to the coordination of investigative activity in matters of joint enforcement interest. Examples of cooperation can be found in investigations in the graphite electrodes, citric acid, lysine, and vitamin industries. An especially fine testament to just how smoothly and effectively cartel cooperation has become can be found in the coordination undertaken last February by the United States, Canada, the European Union, and Japan. For the first time, the antitrust enforcement officials of the four jurisdictions coordinated surprise inspections, interviews, and other investigative activity in an investigation relating to heat stabilizers and

impact modifiers. Without highly effective working relationships among all of those jurisdictions, coordinated action on such a large scale would simply not have been possible.

On civil matters, the Bureau under Konrad's leadership had an impressive enforcement record, which was matched by a number of significant policy initiatives. While he was Commissioner, competition cooperation was formalized with Australia and New Zealand; Chile; Costa Rica; the EU; and Mexico. The Bureau also issued guidelines on abuse of dominance, intellectual property, and bank mergers, and released interpretive guidelines for merging parties on pre-merger notification issues. More recently, Konrad saw to completion the recent amendments to the Competition Act and Competition Tribunal Act that, among other things, allow Canada to enter into sophisticated cooperation agreements that would permit evidence sharing between jurisdictions in non-criminal competition matters.

Konrad's vision, of course, extended well beyond Canada and his relationship with his neighbors to your immediate south. He recognized that multilateral efforts could complement domestic enforcement and bilateral ties. His tireless efforts as chair of the OECD Competition Committee's Working Party No. 3 on International Cooperation (WP3) for the past five years did not go unnoticed. Replacing then-Assistant Attorney General Joel Klein in this position in October 1998, Konrad continued WP3's focus on combating hard-core cartels and did so with great vigor. With Konrad in charge, WP3 performed groundbreaking studies on the harm caused by cartels and the tools available to combat them, including leniency programs. Konrad opened a dialogue on the exchange of confidential investigatory information between enforcement agencies, challenging proponents of very restrictive rules on information sharing to explain why stricter rules should apply in the cartel area than in other areas of law enforcement, such as tax

and securities. On mergers, Konrad presided over important work analyzing cooperation between agencies and studying options for convergence of merger procedures and notification systems, all of which has contributed significantly to parallel work in the International Competition Network (ICN).

In my view, Konrad's crowning achievement multilaterally has been as Chair of the ICN Steering Group. Only two years after its founding, it is appropriate to proclaim ICN a success. The Competition Bureau, the Antitrust Division, the European Commission, and many of our sister agencies created the ICN in order to find solutions to the challenges that globalization poses to antitrust enforcers, with a view toward facilitating procedural and substantive convergence. ICN has attracted the attention, skills, and know-how of over 80 member agencies, and many private practitioners and academics from the U.S., Canada, and other parts of the world. ICN is delving into many of the important antitrust issues of our time, such as competition advocacy, merger review, and capacity building. From guiding principles, to recommended practices, to cross-jurisdictional studies, it has already produced concrete results that benefit member agencies, businesses, and ultimately consumers through improved antitrust enforcement.

All of us who participate in ICN can be proud of ICN's successes. But perhaps more than anyone, ICN's success is attributable to Konrad and his excellent staff at Canada's Competition Bureau. Canada's leadership of the Steering Group and secretariat-type functions were invaluable to the launch of ICN. Through his unwavering dedication, clear vision, and vigorous direction, Konrad has left an indelible impression on ICN and global antitrust convergence.

Konrad also leaves an impressive legacy of ICN leadership. His contributions will be embedded in ICN's work, present and future. Konrad is fond of repeating what seems to be the unofficial motto of the ICN, "all competition, all the time." In its formative stage, Konrad was there whenever there was a need in ICN, an unanswered question, or a vision to create. Simply put, we were fortunate to have "all Konrad, all the time."

III. U.S. Department of Justice Priorities

Let me now turn to the subject of this panel – antitrust developments in my jurisdiction. As you know, I was confirmed by the U.S. Senate in June as head of the Antitrust Division, after spending two years as the Deputy Assistant Attorney General in charge of regulatory matters. I now have the main players of my team in place, including the latest addition – Makan Delrahim – my new Deputy for International, Policy, and Appellate matters. In the short term, we plan to focus on the following areas: strengthening cartel enforcement; continuing to sharpen our coordinated effects analysis in merger review; non-merger enforcement, including achieving greater clarity in the standards governing single-firm conduct and improving the efficiency of non-merger investigations; and pursuing principled international convergence. Starting with criminal cartel enforcement, let me spend a few moments this morning discussing these priorities.

A. Strengthening Cartel Enforcement

Criminal antitrust enforcement has always been a core mission of the Antitrust Division and it will continue to be so under my leadership. Businesses that engage in price fixing, bid rigging, and market allocation are committing a criminal fraud against their customers and inflicting tremendous harm. Cartels are a direct assault on the principles of competition, and

those who participate in them deserve both moral stigma and severe penalties.

Our experience with cartel enforcement demonstrates both that cartel behavior is extremely profitable to those who engage in it and that this type of criminal conduct is very difficult to detect. Frequently, those who engage in cartel behavior go to elaborate lengths to conceal their activities. In order to address this problem, the Division has had great success in combining vigorous criminal prosecution with an amnesty program in order to increase detection. It is only grudgingly that we afford the opportunity for amnesty to cartel participants. The preferred result would be to see the full weight of prosecution fall on all members of a cartel. The experience of the last decade has made clear, however, that without the Division's amnesty program, cartel activity of great significance would simply never come to light. Only when criminal conduct comes to light can prosecution occur. Likewise, only then can consumers obtain redress through restitution pursued by the Division or state attorneys general or through the follow-on process of private, civil damages actions.

Our leniency program has been a great success in the United States and a number of jurisdictions, such as Canada and the European Union, have successfully implemented similar programs. Nevertheless, we remain convinced that — because this form of crime is so profitable — substantial cartel activity continues to occur and to remain undetected. For that reason, we think the time has come to consider measures to toughen our cartel-enforcement program.

We have aggressively investigated obstruction of our cartel investigations in order to maintain the integrity of our investigations, and will continue to do so. Unfortunately, in the last few years we have increasingly encountered acts of obstruction in our cartel investigations. In the last three years, we have brought eight cases charging obstruction of justice in connection

with our cartel investigations. Additionally, in other cases we have obtained sentencing enhancements based on acts of obstruction. Most recently, just last week, we brought charges against four executives associated with The Morgan Crucible Company plc of the UK for their acts to obstruct our carbon products investigation. Morgan executives created a written "script" of lies about their meetings with competitors in an attempt to hoodwink us into believing that their price-fixing meetings were legitimate business meetings. They passed on the script to a competitor with instructions that employees at that company also follow the script when questioned by the Division. In addition to tampering with witnesses, Morgan executives went so far as to create a task force to destroy documents relating to their price-fixing activities and instructed an employee of one of its U.S. subsidiaries to destroy incriminating documents. Morgan itself pleaded guilty to obstruction charges and was sentenced to pay the statutory maximum of $500,000 on each obstruction count for a total fine of $1 million. Two of the Morgan executives, one a Dutch national, have agreed to plead guilty to obstruction charges, while two other Morgan executives, Ian Norris, the former CEO of Morgan and a UK national, and Robin Emerson, also a UK national, were indicted for their obstruction. The carbon brush investigation demonstrates the Division's firm resolve to prosecute conduct that interferes with our cartel investigations, regardless of the nationality of the actors involved or where the acts of obstruction took place.

The Division is also exploring various legislative steps that could be taken to strengthen its enforcement capabilities against criminal cartels. First, the Division supports considering whether maximum jail sentences under the Sherman Act should coincide more closely with sentences for other serious white collar crimes. Second, the Division supports reviewing the

Sherman Act ceiling for corporate criminal fines to ensure that Sherman Act fines will be commensurate with the damage caused by these far-reaching and harmful offenses and will constitute an effective deterrent. Third, the Division is considering possible ways to strengthen its current leniency program. By giving immunity from prosecution to the first participant in a cartel who reports it and cooperates with our prosecutors, our leniency program has been our most active generator of criminal investigations in recent years, resulting in the uncovering and successful prosecution of a number of major cartels.

One possible way to strengthen the leniency program, advocated by the Division's career prosecutors, might be to give cartel participants an added inducement to report the cartel to us by limiting the private damage recovery from a leniency applicant to the actual damages it caused if it also cooperates with victimized consumers in their suits to recover damages from the other cartel members. The other cartel members would continue to be jointly and severally liable for the entire amount of treble damages suffered by the victims. We believe this proposal could result in more cartels being uncovered, thereby allowing more victims to recover.

When considering the need for toughening our approach to cartels, please bear in mind that the conduct we are talking about is hard core cartel activity that each and every executive knows is wrongful. In economies based on free and open competition, hard-core cartel activity cannot be justified or excused and should not be tolerated.

B. Sharpening Coordinated Effects Analysis

In the merger area, we have devoted a significant amount of resources to reinvigorating coordinated effects analysis in merger review. This project began under the direction of my predecessor, Charles James. Last year, Charles commissioned a team of lawyers and economists

to engage in an intensive review of the literature, case law, and agency experience regarding coordinated effects. Their comprehensive and thorough analysis took the form of a substantial coordinated effects manual that we have rolled out internally for the benefit of our attorneys and economists.

Our emphasis on improving our coordinated effects analysis has not been limited to the theoretical realm. Over the past few months the Division challenged two mergers on coordinated effects grounds. First, the Division filed suit to block SGL Carbon AG, a German firm, and its U.S. subsidiary, SGL Carbon L.L.C., from acquiring certain assets of Carbide/Graphite Group in a bankruptcy court action.[1] The Division concluded that the merger would facilitate coordination among the three remaining producers of large graphite electrodes sold in the United States. Relevant to the Division's analysis was the history of collusion among graphite electrode producers — in fact, SGL Carbon AG was one of the manufacturers that participated in a conspiracy to fix prices and allocate markets for graphite electrodes worldwide in the 1990s and pleaded guilty in both the United States and Canada. Also significant was the fact that the market structure — which obviously had sustained collusion over a number of years — had not significantly changed. After the bankruptcy court determined that SGL's bid was not the highest and best offer and awarded the assets to a third party, the Division withdrew its complaint.

This past summer, the Division successfully obtained a preliminary injunction to block the acquisition of Bemis Corporation's MACtac subsidiary by UPM-Kymmene's Raflatac subsidiary. Raflatac and MACtac, the second and third largest producers of pressure-sensitive labelstock in North America, would have had a combined market share of less than 25 percent.

---

[1] *U.S. v. SGL Carbon AG*, No. 03-521 (W.D. Pa. filed April 15, 2003).

Along with leading producer Avery, however, the firms collectively account for over 70 percent of total sales in North America. The Division concluded that the proposed merger would have facilitated coordination between the merged company and Avery in the markets for bulk paper labelstock and that, post-acquisition, the remaining labelstock producers would have neither the capability nor the incentive to prevent anticompetitive coordination. The court agreed, finding it probable that price competition would diminish if the merger went forward and issued a preliminary injunction barring the parties from consummating the deal.[2]

As we move forward in our merger reviews, we will continue to be vigilant in considering the full range of possible competitive effects of a merger, be they coordinated or unilateral.

C. Non-Merger Enforcement

The Division has also had an ambitious agenda on the non-merger front. In September, the U.S. Court of Appeals for the Second Circuit affirmed an important non-merger, trial victory the Division had in the *VISA/Mastercard* case. In 1998, the Division sued Visa and MasterCard. One of the counts challenged the associations' exclusionary rules, which prohibit the member banks from issuing credit and charge cards on rival networks, particularly the American Express and Discover networks. After a 34-day bench trial, the district court found that the defendants had market power in the network services market and that their exclusionary rules were adopted to ensure that no member bank would gain a "competitive advantage" over other members by issuing American Express or Discover cards, and to weaken American Express and Discover as networks. In addition, the court found that the exclusionary rules caused substantial consumer

[2] *U.S. v. UPM-Kymmene OYJ, et al.*, No. 03-C-2528 (N.D. Ill. July 25, 2003).

harm. Moreover, the court concluded that defendants' proffered "procompetitive" justifications--based largely on Visa's and MasterCard's organization as joint ventures--were unfounded.

The defendants appealed and on September 17, 2003, the court of appeals issued its opinion, agreeing (i) that credit and charge cards are a distinct market from cash, checks, and debit cards, and that the network services market is different from the issuing market; and (ii) that Visa and MasterCard, "jointly and separately, have power within the market for network services." The court concluded that the exclusionary rules "harm competition by 'reducing overall card output and available card features,' as well as by decreasing network services output and stunting price competition." The court particularly noted that the exclusionary rules resulted in American Express's and Discover's "total exclusion . . . from a segment of the market for network services," resulting in "serious[] damage" to competition. The court added that Visa and MasterCard "effectively deny consumers access to products that could be offered only by a network in partnership with individual banks."

Notably, the court of appeals found "unpersuasive" defendants' argument that their exclusionary rules were nothing more than "presumptively legal" vertical restraints on distribution. Unlike an agreement between, say, Coca-Cola and its truckers, the exclusionary rules were more like agreements between Coke, Pepsi, and the other leading soft drink producers to form a consortium that would restrict the consortium's truckers from carrying rivals' soft drinks. "Far from being 'presumptively legal,' such arrangements are exemplars of the type of anticompetitive behavior prohibited by the Sherman Act." Because of the court of appeals's straightforward analysis and conclusions, the *VISA/Mastercard* case is both an important win for

consumers and precedent for the Division.

The Division is also working on bringing greater clarity to the standards governing single-firm conduct. On October 14, the Justice Department will participate as *amicus curiae* in the U.S. Supreme Court case of *Verizon v. Trinko*.[3] The Division, along with the Federal Trade Commission, has filed an amicus brief in that case, arguing that in evaluating single-firm conduct — particularly in the context of claims for the imposition of a duty to assist competitors — an appropriate standard to use is whether the conduct asserted as an antitrust violation would make economic sense but for the elimination or lessening of competition. This test has support in existing case law and is consistent with well-established principles of antitrust jurisprudence. We believe that this test sets forth an objective, transparent, and economically-based framework for assessing single-firm conduct, and it is a standard that the Department has used before as a plaintiff in both the Microsoft and American Airlines cases.

These cases have been important priorities for the Division, but more generally, I am also determined to improve the efficiency of our non-merger investigations. The Merger Review Process Initiative put in place by my predecessor, Charles James, was a great success in making our merger investigations more transparent, orderly, and efficient, and ultimately, more effective in identifying the issues that are most relevant to the Division's merger review. Merger review is not the only area that could benefit from continued procedural reforms. The pace of civil non-merger investigations - which are not subject to the same stringent timing requirements as mergers - could stand to improve. Over the coming months, I intend to explore ways in which

[3] *Verizon Communications, Inc. v. Law Office of Curtis v. Trinko*, No. 02-682 (U.S. Sup. Ct.) (argument scheduled Oct. 14, 2003).

we might be able to make the civil non-merger investigative process more effective and efficient. We are working on internal guidelines and time tables to ensure that non-merger investigations stay on track and more effectively toward resolution. I also hope to explore what steps we can take in appropriate cases to increase transparency in our decision-making process.

In addition to timelier non-merger investigations, the Division is committed to strengthening its tools for all investigations by being more vigilant in the enforcement of discovery requests. For those members of the bar who have come to think of civil investigative demands (CIDs) as invitations for drawn-out discovery negotiations or that compliance with CIDs is somehow voluntary, please think again. Lawyers who do not comply with CIDs in a timely, professional manner should expect swift enforcement action.

Other issues of particular relevance in the area of non-merger enforcement include discounting by dominant firms and other anti-competitive single-firm conduct. Our Economics Deputy, David Sibley, is overseeing the work of several Division economists who are trying to develop a better understanding and shed some light on the competitive effects of fidelity discounts and other forms of non-linear pricing. We will be announcing in the next few weeks a combined law and economics conference in which we plan to gather interested economists, academics, and members of the bar to discuss these issues. The conference will also address recent economics literature on vertical integration.

D. Maintaining Momentum on a Principled Path Toward Convergence

Let me conclude by spending a few moments talking about international antitrust convergence. Convergence around sound economic antitrust principles and efficient and effective procedures – not convergence for convergence's sake – will remain a top priority at the

Antitrust Division. We will continue to devote significant resources to a wide range of international initiatives bilaterally and multilaterally through our participation in ICN, OECD, and UNCTAD.

Consensus-building efforts – in particular, ICN – present the most promising opportunity to achieve principled and lasting convergence. In my view, there are three reasons why ICN has enjoyed such early success and why it holds so much promise for the future. First, it is a member-driven virtual network of antitrust enforcers organized around diverse working groups that consult regularly and informally. There is no elaborate infrastructure, permanent secretariat, or employees. Though there is, of course, the Canadian Competition Bureau, which has taken the laboring oar on many ICN administrative issues. Agency heads commission and guide the efforts of working groups focused on specific competition law issues. The flexibility and immediacy of ICN's virtual nature is the foundation for its success. We can take great pride in saying that ICN *is* its members.

Second, ICN is 'all-antitrust inclusive' – all jurisdictions with antitrust laws are welcome members and encouraged to add their perspectives and expertise to the ICN's work. Further, we draw upon the insight and skills of non-governmental advisors of all forms; academics, industry groups, private practitioners, and other international organizations.

A third key to the ICN model is its aspirational nature. ICN makes recommended practice proposals and serves as an expertise-sharing network. There are no legal obligations to adopt ICN practices. Rather, we strive for implementation through persuasion and by producing recommendations based upon the best perspectives from public and private sectors. This approach has fostered an environment focused on identifying and sharing the best practices of

antitrust enforcement.

ICN has had quite an introduction onto the international stage. It is a vibrant, functioning network that already is promoting convergence and cooperation among antitrust authorities worldwide. So my main message on this point today is that the Division, the Competition Bureau, and our sister agencies in the ICN are working hard to maintain the positive momentum we currently enjoy on the international front. And, let me repeat it again – we could not have achieved what we have in ICN without Konrad von Finckenstein's unwavering support. Thank you again, Konrad.

IV. Conclusion

Konrad leaves the antitrust community with an impressive legacy. Inspired by his example, we can move forward otimistic that we can achieve sound and principled convergence on standards of antitrust enforcement. I am confident that we will continue to do great things if we continue to work together. Thank you.